US 213 Sent by C. Norberg
NYC
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Questionable
if to be included

COMPTEK TELECOMMUNICATIONS, INC., Petitioner, -vs- IVD CORPORATION and AICESA S.A. de C.V., Respondents.

94-CV-0827E(H)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

1995 U.S. Dist. LEXIS 11876

August 1, 1995, Decided
August 1, 1995, FILED
NOTICE: [*1] NOT FOR PUBLICATION

COUNSEL: ATTORNEYS FOR THE PETITIONER: Robert J. Lane, Jr., Esq., Hodgson, Russ, Andrews, Woods & Goodyear, Buffalo, NY.

ATTORNEYS FOR THE RESPONDENT: Henry Weisburg, Esq., Stephen Fishbein, Esq. and Melida Hodgson, Esq., Shearman & Sterling, New York, NY.

JUDGES: John T. Elfvin, U.S.D.J.

OPINIONBY: John T. Elfvin

OPINION: MEMORANDUM and ORDER

Petitioner Comptek Telecommunications, Inc. ("CTI") instituted this proceeding pursuant to the Federal Arbitration Act (9 U.S.C. @ 1 et seq.), the Convention on Recognition and Enforcement of Foreign Arbitration Awards (9 U.S.C. @ 201 et seq.) and the Inter-American Convention on International Commercial Arbitration (9 U.S.C. @ 301 et seq.) seeking to permanently enjoin respondents IVD Corporation ("IVD") and its Mexican corporate subsidiary, Aicesa S.A. de C.V. ("Aicesa"), from invoking any arbitration proceedings against CTI. Before this Court are the motions of CTI, pursuant to FRCvP n1 65(a) and 65(b), to temporarily restrain and/or preliminarily enjoin the respondents from such or, in the alternative and pursuant to FRCvP 56, for summary judgment to permanently enjoin them therefrom, and the respondents' cross-motion [*2] pursuant to FRCvP 56(f) for additional time within which to conduct discovery to oppose CTI's summary judgment motion. CTI's motion seeking temporary or preliminary enjoinder will be denied and respondents' motion will be granted.

----------Footnotes----------

n1 Federal Rules of Civil Procedure.

----------End Footnotes----------

The instant controversy concerns the manufacture and distribution of telecommunications equipment known as "DataMovers." This equipment, manufactured exclusively by CTI, permits wireless communication between computers and is used to link remote automatic teller machines.

In approximately July 1991 Bison Data Corporation ("Bison") came into being and began marketing and distributing DataMovers. On January 22, 1992 Aicesa, IVD and Bison signed an International Distributer's Agreement ("the Agreement") concerning the distribution of DataMovers in Mexico. The Agreement provided that Aicesa was to act as Bison's exclusive distributor and servicer of Data Movers in Mexico, and included the following arbitration clause:

"This Agreement shall [*3] be governed by the laws of the State of New York, U.S.A. Any controversy or claim arising out of, or relating to, this Agreement or any modification or extension thereof, including any claim for damages or rescission, or both, shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ["the Chamber"] by one arbitrator appointed in accordance with the said Rules." Petition, at Exh. A.

CTI was not a signatory to the Agreement.

Subsequently, various disputes arose between the parties concerning the alleged malfunctioning of the DataMovers. Such disputes were not resolved, and the respondents commenced an arbitration October 24, 1994 before the Chamber's Court of Arbitration. The Request for Arbitration set forth eight claims for relief against Bison and CTI, including the failure to provide functioning equipment and software, negligent design and manufacture of the products, and tortious interference with Aicesa's distribution contracts. Although the respondents admitted that CTI was not a signatory to the Agreement, they argued then (as they do now) that CTI, because of its close affiliation with Bison, is the latter's [*4] "alter ego" and thus is subject to the Agreement. Alternatively they argue that CTI is subject to the Agreement because Bison acted as CTI's agent.

On December 6, 1994 CTI attempted to block the arbitration by filing with the Chamber an objection to jurisdiction. The Chamber's counsel overseeing the case ruled that CTI was not subject to arbitration, but such decision was reversed by the International Court of Arbitration and the Chamber ruled that CTI must proceed with the arbitration and that the question of CTI's obligation to arbitrate would be decided by the arbitrator appointed in the case. (As of the April 21, 1995 oral argument on the instant motions the arbitration proceedings had yet to commence.) CTI also sought to stay the arbitration by instituting, on November 15, 1994, the instant proceeding.

The parties do not dispute that this Court (and not the Chamber) must decide whether CTI is subject to arbitration. See Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241, 8 L. Ed. 2d 462, 82 S. Ct. 1318 (1962), overruled on other grounds by Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 26 L. Ed. 2d 199, 90 S. Ct. 1583 (1970) (whether a party is bound [*5] to arbitrate is an issue for the district court to decide based on the arbitration contract entered into by the parties.) At issue then is whether CTI is entitled to have the arbitration proceedings temporarily or preliminarily enjoined until this Court decides whether CTI is subject to arbitration -- i.e., until it decides whether CTI is Bison's alter ego and/or principal.

Preliminary injunctive relief may issue only upon

"a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Jackson Dairy, Inc. v. H.P. Hood & Sons, 596 F.2d 70, 72 (1979).

The standard for a temporary restraining order is largely the same, see Towers Financial Corp. v. Dun & Bradstreet, Inc., 803 F. Supp. 820, 823 (S.D.N.Y. 1992), and the sine qua non of each is a showing of irreparable harm. Buffalo Forge Co. v. AMPCO-Pittsburgh Corp., 638 F.2d 568 (1981).

In the context of a dispute over the arbitrability of a dispute, the United States Court [*6] of Appeals for the Second Circuit has concluded that forcing a party to participate in a potentially unwarranted arbitration "by itself imposes no [irreparable] injury to the resisting party, except perhaps in 'extraordinarily rare' circumstances," and that "the monetary cost of arbitration certainly does not impose such legally recognized irreparable harm." Emery Air Freight Corp. v. Local Union 295, 786 F.2d 93, 100 (2d Cir. 1986).

CTI has failed to suggest any extraordinary, harmful circumstances vis-a-vis its participation in the arbitration and thus has failed to establish that it will suffer irreparable harm if the arbitration proceeds pending this Court's ruling on the merits of the instant dispute. In fact, CTI fails to point to any circumstances that suggest it would be harmed irreparably but instead relies wholly on PaineWebber Inc. v. Hartmann, 921 F.2d 507 (3rd Cir. 1990), which CTI argues stands for the proposition that it is irreparable harm per se to be forced to arbitrate before a district court rules on the question of arbitrability. PaineWebber stands for no such proposition and is inapposite to the instant situation. It holds that it would [*7] be irreparable harm per se if the district court abdicated to an arbitrator the ultimate duty to decide the issue of arbitrability. Id. at 515. Such holding is irrelevant here because, as mentioned above, all agree that the issue of arbitrability must ultimately be decided by this Court. PaineWebber simply did not address the issue at bar -- i.e., whether it is irreparable harm to allow an arbitration to proceed pending the district court's decision re arbitrability. It therefore lends no support to CTI's argument.

CTI also argues half-heartedly that failure to preliminarily enjoin the arbitration would deny to it its right to a jury trial as guaranteed by the Seventh Amendment to the United States Constitution and that denial of a constitutional right is irreparable harm per se. This argument is unpersuasive. Regardless of whether denial of a constitutional right establishes irreparable harm, CTI would suffer no such denial if no preliminary injunction issued. Even though a parallel arbitration proceeding may be ongoing, CTI is not being deprived of the right to have a jury determine, in this Court, whether it was the alter ego and/or principal of Bison and thus [*8] subject to the arbitration and, if a jury or this Court determines that it was not, this Court could stay the arbitration or any action taken therein -- i.e., this Court has the power to trump any action taken or decision made by the Chamber re the issue of arbitrability. (If it is determined here that it is subject to arbitration, the issue would of course be moot because arbitration itself is a creature of contract and does not implicate the right to a trial in court.)

Re CTI's motion for summary judgment and the respondents' FRCvP 56(f) plea for additional time for discovery to meet such motion, this Court concludes, having considered the arguments and documents of the parties, that allowing additional time for discovery under FRCvP 56(f) is appropriate. The rule states:

"Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as [*9] is just."

Courts are to treat pleas made thereunder liberally. See 6 Part 2 J. Moore et al., Moore's Federal Practice P56.24, at 6-797 and 56-00, and cases cited thereat.

In compliance with 56(f), the respondents have detailed the information they seek -- to wit, depositions of a Christopher Head and a John Cummings, in addition to document production -- and its relevance to their opposition to CTI's motion. See Rule 56(f) Affidavit of Stephen Fishbein. Given that the information the respondents seek is within the control of CTI, the request for additional time to conduct discovery will be granted. Thus, the respondent shall have until August 31, 1995 to conduct the above-noted depositions and to discover documents concerning issues pertinent to meeting CTI's motion, after which the respondents must serve and file any papers in opposition to CTI's motion and, after any such, CTI may serve and file any reply papers and oral arguments will be heard.

Accordingly, it is hereby ORDERED that CTI's motion for a temporary restraining order and/or preliminary injunction is denied, that CTI's motion for summary judgment is held in abeyance until the respondents' papers [*10] shall have (not later than September 15, 1995) been served upon CTI and filed, that CTI may have until September 25, 1995 to serve and file any reply papers and that oral arguments shall be heard in Part III of this Court on September 29, 1995 at 3:00 p.m. (or as soon thereafter as counsel may be heard).

DATED: Buffalo, N.Y.

August 1, 1995

John T. Elfvin

U.S.D.J.

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Accordingly, it is hereby *ORDERED* that CTI's motion for a temporary restraining order and/or preliminary injunction is denied, that CTI's motion for summary judgment is held in abeyance until the respondents' papers shall have (not later than September 15, 1995) been served upon CTI and filed, that CTI may have until September 25, 1995 to serve and file any reply papers and that oral arguments shall be heard in Part III of this Court on September 29, 1995 at 3:00 p.m. (or as soon thereafter as counsel may be heard).

DATED: Buffalo, N.Y.

August 1, 1995

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U.S.D.J.