AA = business
AC = consulting
SC = umbrella

18 March 1998

> ANDERSEN CONSULTING BUSINESS UNIT MEMBER FIRMS, Petitioners, - AGAINST - ANDERSEN WORLDWIDE SOCIETE COOPERATIVE, PAGE 733 1998 U.S. Dist. LEXIS 3252, * Respondent, and ARTHUR ANDERSON LLP, Intervenor-Respondent.

98 Civ. 1030 (JGK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1998 U.S. Dist. LEXIS 3252

March 16, 1998, Decided March 18, 1998, Filed

DISPOSITION: [*1] Petitioners' motion to compel arbitration denied, and the petitioners' request for a preliminary injunction in aid of arbitration denied.

CORE TERMS: arbitration, notice, partner, preliminary injunction, arbitrate, motion to compel arbitration, irreparable harm, arbitrator, issuance, arbitral, arthur andersen, order compelling arbitration, likelihood of success, managing partner, recommendation, termination, decidedly, breached, prerequisite, hardships, temporary restraining order, infrastructure, declaration, arbitrated, compel arbitration, issues relating, requesting, tipping, injunctive relief, organizational

COUNSEL: For petitioners: Barry R. Ostrager, Esq., Peter C. Thomas, Esq., Robert H. Smit, Esq., Simpson Thacher & Bartlett, New York, NY. For respondent: Sheldon Raab, Esq., John Sullivan, Esq., Gregg Weiner, Esq., Fried Frank Harris Shriver & Jacobson, New York, NY. For intervenor-respondent: James Quinn, Esq., Mindy Spector, Esq., Weil, Gotshal & Manges LLP, New York, NY.

JUDGES: John G. Koeltl, United States District Judge.

OPINIONBY: John G. Koeltl

OPINION: OPINION AND ORDER JOHN G. KOELTL, District Judge: This action arises out of a bitter internecine dispute between the Andersen Consulting and Arthur Andersen business units' member firms, who together comprise the Andersen Worldwide Societe Cooperative ("SC"). On December 17, 1997, petitioners Andersen Consulting ("AC") business unit member firms (the "petitioners") commenced an arbitration proceeding before the International Chamber of Commerce (the "ICC") against respondent SC and Arthur Andersen ("AA") business unit member firms in which they seek to separate themselves from the SC [*2] and to obtain $ 400 million in damages from the SC and the AA member PAGE 734 1998 U.S. Dist. LEXIS 3252, *2 firms. n1 In response to the initiation of the ICC proceeding, the governing body of the SC, the Board of Partners, passed a resolution on February 12, 1998 (the "Resolution") which purports to establish a committee to determine the measures the SC should take to protect the SC and the AA member firms in relation to the ICC arbitration. The Resolution also states that it is in the interest of the SC, the AA member firms, and the Andersen Worldwide Organization to take all necessary and appropriate measures including, if appropriate, giving notice to AC member firms that they had breached their agreements with the SC and subjecting them to termination if the breaches were not cured. On February 13, 1998, the AC member firms filed this action together with an order to show cause seeking a temporary restraining order ("TRO") and a preliminary injunction to prevent the SC from taking any action to implement the Resolution. Following argument held that day, the Court denied the petitioners' request for a temporary restraining order, but set a hearing date of February 20, 1998 on the application for a preliminary injunction. [*3] Thereafter, on February 18, 1998, the petitioners filed a motion for an order compelling arbitration. Having heard argument on the pending application for a preliminary injunction and the motion to compel arbitration and having reviewed the evidence submitted by the parties, pursuant to Federal Rule of Civil Procedure 52(a) the Court makes the following Findings of Fact and reaches the following Conclusions of Law. ----------Footnotes----------

-- n1 The Court granted Arthur Anderson LLP's oral motion to intervene which it

made at the argument on the petitioners' application for a temporary restraining order. See infra at Findings of Fact, P 12. Arthur Andersen LLP is the United States based AA business unit member firm and is one of the worldwide AA business unit member firms. ----------End Footnotes---------- FINDINGS OF FACT: 1. The Andersen Worldwide organization provides, tax, audit, and consulting services to its clients through over 150 member firms with over 2,700 partners located around the world. The current Andersen Worldwide organizational structure [*4] was created in 1989. Although each Andersen member firm is an independent legal entity, the member firms are divided between one of two business units depending upon the services they provide to their clients. Those member firms offering tax and audit services are part of the Arthur Andersen business unit, and those member firms offering consulting services are part of the Andersen Consulting business unit. The Andersen Consulting business unit member firms are the petitioners in this case. Intervenor-respondent Arthur Andersen LLP is the Arthur Andersen business unit member firm located in the United States. 2. Respondent Andersen Worldwide Societe Cooperative ("SC") serves as the umbrella administrative organization that coordinates the activities of the AA and AC business units and their various member firms. The SC is a cooperative company organized under Title XXIX of the Swiss Federal Code of Obligations and is domiciled in Meyrin, Switzerland. (Andersen Worldwide Societe Cooperative Articles ("Articles"), Article I.) Each member firm has a contract with the SC called a Member Firm Interfirm Agreement ("MFIA") which controls that member firm's relationship with the SC and [*5] other member firms. (Grafton Aff. P 3.) PAGE 735 1998 U.S. Dist. LEXIS 3252, *5 3. The governance structure of the SC is set forth in the Articles and Bylaws of the SC. (See SC Articles, Ex. A to Grafton Aff.; SC Bylaws, attached as Ex. D to Ostrager Aff.) Control of the SC is divided between the "Meeting of the partners," the "Board of Partners" (the "Board") and the Administrative Council. The "Meeting of the partners" is the general assembly of the SC partners and has various powers including the ability to elect or remove members of the Board and the Administrative Council, to elect or remove partners, and to amend the Articles and Bylaws. (Article 10.) The Board includes twenty-four partners, of whom fifteen are chosen by the AA member firms and nine are selected by the AC member firms. The chief executive of Andersen Worldwide Societe Cooperative, the managing partner of the AA business unit, and the managing partner of the AC business unit are also members of the Board. (Grafton Aff. P 6.) Thus, the AA member firm partners comprise a majority of the Board. The Board may receive and act upon recommendations of the Administrative Council with respect to planning, organizational and financial issues, may recommend [*6] to the partners for their approval various actions including the election or removal of partners, and may appoint special committees. (See Article 16.) The three-member Administrative Council consists of the Chief Executive and two other individuals. The Administrative Council is the executive body responsible for managing the affairs of the SC and is vested with the authority to decide all matters not delegated to the partners in general or to the Board. (See Articles 17-18.) 4. Article 33 of the SC Articles requires that all disputes "arising out of or in connection with" the Articles and Bylaws of the SC shall be resolved through arbitration by a single arbitrator in Geneva, Switzerland pursuant to the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC"). (Article 33.) The standard member firm interfirm agreement contains a similar provision requiring arbitration of all disputes "arising out of or in connection with" the member firm interfirm agreement. (Standard MFIA P 22, attached as Ex. B to Ostrager Aff. ("Standard MFIA")) However, the parties in this case dispute whether each member firm is a party to a MFIA with this standard [*7] arbitration provision. The respondents contend that some MFIAs

require that all disputes be arbitrated pursuant to the Swiss Intercantonal Arbitration Convention, rather than the Rules of Conciliation and Arbitration of the ICC. (See Raab Aff. In Opp'n to Order Compelling Arbitration P 4.) The petitioners argue that in 1991 and 1994, all member firms ratified changes to their MFIAs adopting the ICC as the arbitral forum. 5. The standard MFIA establishes procedures for termination of the agreement. If either the member firm or the SC believes that the other party has breached the MFIA, the aggrieved party "shall give notice to the other party to that effect, specifying with particularity the nature of the alleged breach or default." (Standard MFIA P 14.2(F).) If the alleged breach is not cured or resolved within sixty days after the receipt of the notice of breach, the complainant may terminate the agreement so long as the notice of the termination is given within three months following the expiration of the sixty day period. (Id.) Moreover, the sixty day period can be extended by mutual agreement. (Id.) 6. On December 17, 1997, the AC member firms filed a request [*8] for arbitration in the ICC, naming the SC and all AA member firms as respondents. (See Request for Arbitration, attached as Ex. A. to Ostrager Aff. ("Request for Arbitration")). The AC member firms allege that the AA member firms have breached their material obligations to AC under the MFIAs by engaging in and developing a

 consulting practice that is in competition with AC's practice. The AC member firms further contend that the SC has breached its material obligations under the MFIAs by failing to implement the policies of cooperation and compatibility among the member firms of both business units. In the arbitration, the AC member firms seek various forms of relief, including a declaration that the AA member firms and the SC are in breach of their material obligations under the MFIAs, a declaration that the AC member firms are excused from any further obligations under their MFIAs as a result of the inequitable conduct of the AA member firms and the SC, and damages in the amount of $ 400 million. In the alternative, the AC member firms seek a declaration that they are excused from any further obligations under their MFIAs because of "fundamental and irreconcilable differences" [*9] as a result of the conduct of the AA member firms and the SC. (Request for Arbitration at 49.) The AC member firms did not provide any prior notice to the SC or the AA member firms that they intended to file a request for arbitration or that they considered the SC or the AA member firms in breach of their MFIAs. 7. On February 11 and 12, 1998, the Board of Partners of the SC met in Palo Alto, California. On February 11, 1998, the SC's acting chief executive, W. Robert Grafton, cautioned the Board that, according to the SC's Swiss counsel, all elected members of the Board and the two business unit heads had a "disabling conflict of interest with the SC in that their member firms are party to the arbitration." (Grafton Aff. P 9b.) 8. On February 12, 1998, the Board adopted certain "Recitals and Resolutions" (the "Resolution") proposed by Jim Wadia, the managing partner of the AA business unit and an ex officio member of the Board of Partners. The Resolution contained a series of "whereas" clauses followed by four "resolved" clauses. In the "whereas" section, the Resolution refers to the pending arbitration request and alleges that the "allegations asserted [in the arbitration] [*10] by the Claimant Member Firms to support their claim are manifestly false and misleading." The Resolution further states that the arbitration request was the product of a secret and long-developing plan by the AC member firms to avoid their obligations under the MFIAs and to injure the SC through an orchestrated publicity campaign. (See Resolution at 1-3, attached as Ex. D to Quinn Aff.) 9. The Resolution contains four resolutions. First, the Board resolved that "all necessary and appropriate measures be taken . . . to protect the interests of [the SC] and the Respondent Member Firms, including if appropriate under the circumstances the giving of notice to each

individual Claimant Member Firm in accordance with paragraph 14 of their [MFIAs] to the effect that the Claimant Member Firms have breached such agreements, thereby entitling [the SC] and/or the Respondent Member Firms, if such breaches are not cured, to terminate the [MFIAs] of the Claimant Member Firms. . . ." Second, the Board directed that the appropriate Board members and officers of the SC take all necessary or appropriate actions to effectuate the first "resolved" clause, and "to seek to facilitate the [*11] negotiation of a resolution acceptable to all parties of the matters in dispute between the parties." The third provision directs the appropriate Board members and officers of the SC to take such action as may be prudent to protect the SC "against any misconduct by the Claimant Member Firms." Finally, the fourth resolution creates an "AWO Protection Committee," a special Board committee (consisting of non-AC partners) authorized "to determine the measures [the SC] should take to protect the interests of [the SC] and the Respondent Member Firms . . . including any negotiations with the Claimant Member Firms, and also to review and make recommendations on all matters PAGE 737

1998 U.S. Dist. LEXIS 3252, *11 relating thereto to be acted upon by the Board . . . ." 10. The Resolution was approved by a majority of the Board. All 16 AA partners on the Board, including the fifteen elected partners and Wadia, the AA business unit managing partner, voted for its adoption. (Andrews Aff. P 7.) However, the ten AC partners on the Board, including the nine elected partners and George Shaheen, the AC business unit managing partner, opposed the adoption of the Resolution. (Kelly Letter at 1, attached as Ex. B to Grafton Aff.) W. [*12] Robert Grafton, the acting chief executive of the SC, also opposed the Resolution. (Grafton Aff. P 9c.) 11. Grafton told the Board that he opposed the Resolution based on the partners' conflict of interest and because he believed that "insofar as the resolutions authorized action by an 'AWO Protection Committee,' they exceeded the oversight authority of the Board of Partners." (Grafton Aff. P 9c.) Grafton has also informed the SC partners that he will decline to serve on the AWO Protection Committee if asked and has stated in this litigation that he will view any advice or directives from the committee solely as a recommendation to the SC's management. (Grafton Aff. P 10; Grafton Dep. at. 41-42, attached as Ex. H to Ostrager Reply Aff.) 12. On February 13, 1998, the AC member firms brought by order to show cause an application for a temporary restraining order and preliminary injunction in aid of arbitration to bar the SC's Board from implementing any provision of the Resolution. After hearing argument, the Court denied the application for a TRO, finding that the petitioners had failed to show that they would suffer irreparable harm and that they had not shown a sufficient [*13] likelihood of success on the merits or that the balance of equities tipped decidedly in their favor. (February 13, 1998 Tr. at 33-34.) The Court established an accelerated briefing schedule and granted the petitioners' request for limited expedited discovery. (Tr. at 39, 43.) In addition, the Court granted Arthur Andersen LLP's application to intervene. (Tr. at 43-44.) 13. On February 18, 1998, after the Order to Show Cause seeking a TRO was filed, the petitioners filed a motion to compel the arbitration of the propriety of the Resolution. However, to date, no party has refused to arbitrate that issue, although some of the AA business unit member firms have asserted that under their particular MFIAs, the ICC is not the appropriate arbitral forum for disputes concerning them. The AA business unit member firms will shortly be filing any jurisdictional objection they might have with the ICC. (Letter of James W. Quinn, Esq. dated February 24, 1998 at 2). In any event, the respondents both agree that arbitration before the ICC or in accordance with the Swiss Intercantonal Arbitration Convention is appropriate to resolve the propriety of the Resolution. 14. In further support of [*14] their application for a preliminary injunction, the AC member firms submitted an affidavit from Michael

G. McGrath, the Chief Financial Officer of the AC Business Unit. McGrath alleges that without the SC the AC member firms have no legal organizational structure. (McGrath Aff. P 3.) He contends that the SC handles all borrowing for the member firms and maintains financial records, payroll, and employee and health benefits. (Id.) McGrath also states that AC shares computer operations, a worldwide tax structure, and training facilities with AA. Without an injunction, McGrath believes that AC must "create a complete infrastructure to support the functions the SC presently provides" so that AC can remain operational. (Id. at P 5.) In McGrath's opinion, PAGE 738 1998 U.S. Dist. LEXIS 3252, *14 this infrastructure could not be completed within 60-90 days without "enormous chaos, disruption, and dislocation." In an additional affidavit submitted after argument, John T. Kelly, a partner in the AC business unit, stated that "as soon as the resolution was passed, [AC] began creating the complex infrastructure needed to replace the administrative and other services provided by the SC." (Kelly Aff. P 4.) This effort is very [*15] expensive to AC in terms of money and time. (Kelly Aff. P 6.) 15. At a hearing held on the preliminary injunction and motion to compel arbitration, counsel for the petitioners limited the scope of preliminary injunctive relief sought from that previously requested. Instead of barring the SC from taking any action with respect to the Resolution, the petitioners now seek solely to prevent the SC from giving notices of breach or termination to any AC business unit member firms at the direction of the "AWO Protection Committee." (Ostrager Second Supplemental Reply Aff. P2.) 16. On February 22, 1998, the petitioners submitted the issues arising from the adoption of the Resolution to the arbitration pending before the ICC. (Ex. B to Ostrager Second Supplemental Reply Aff. at 1.) The petitioners have also requested that the ICC expedite the process of appointing the arbitrator. (Ex. A to Ostrager Second Supplemental Reply Aff. at 1.) CONCLUSIONS OF LAW: JURISDICTION: 1. The petitioners' claims fall under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "Convention") and therefore are "deemed to arise under [*16] the laws and treaties of the United States." 9 U.S.C. @ 203. Specifically, petitioners' belated motion to compel arbitration falls under Article II paragraph 3 of the Convention, which provides that "the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." See 9 U.S.C. @ 201 ("The [Convention] shall be enforced in United States courts in accordance with this chapter."); see also 9 U.S.C. @ 206 ("A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement . . . .") 2. This Court also has subject matter jurisdiction to entertain an application for preliminary injunctive relief in aid of arbitration. See Borden, Inc. v. Meiji Milk Products Co., Ltd., 919 F.2d 822, 826 (2d Cir. 1990) ("We hold that entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to @ [*17] 206."), cert. denied, 500 U.S. 953, 114 L. Ed. 2d 712, 111 S. Ct. 2259 (1991). n2 - - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - - n2 Although the respondents argue that this Court lacks jurisdiction because the preliminary injunction in aid of arbitration was sought prior to the filing of the motion to compel, it would make no sense for the Court to dismiss the request for a preliminary injunction only for the petitioners to refile it now that the motion to compel arbitration has been filed. In any event, for the PAGE 739 1998 U.S. Dist. LEXIS 3252, *17 reasons stated below, the request for a preliminary injunction is denied. - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - - - THE MOTION TO COMPEL ARBITRATION: 3. The petitioners move to

compel the SC to arbitrate in the pending ICC arbitration "all of the claims, allegations, and disputes concerning Petitioners' filing of their Request for Arbitration dated December 17, 1997, . . . that are described in, and the subject matter of, the [Resolution] including, without limitation, all claims of wrongdoing arising out of the commencement of [the ICC Arbitration]." Notice of Motion [*18] for an Order Compelling Arbitration dated February 18, 1998, at 2. The petitioners have also filed an addendum to their ICC arbitration request in which they ask the ICC for a declaration that the petitioners' decision to file the arbitration was in accordance with their MFIAs and that by passing the February 12, 1998 Resolution, the Board violated their MFIAs. 4. The respondents contend, and the petitioners agree, that a prerequisite for the issuance of an order compelling arbitration is the rejection of a demand to arbitrate by the respondents. See 9 U.S.C. @ 4 ("A party aggrieved by the alleged . . . refusal of another to arbitrate . . . may petition any United States district court . . . for an order directing that such arbitration proceed . . . ." (emphasis added)) The petitioners argue that the Resolution, with its implied threat of notice of breach, is a de facto refusal to arbitrate. The respondents respond that prior to the filing of this lawsuit, no demand for arbitration of the Resolution was made, and, in any event, both the SC and Arthur Andersen LLP have agreed to arbitrate the issues regarding the propriety of the Resolution. With respect to whether a demand [*19] for arbitration is a prerequisite to suit, in Daye Nonferrous Metals Co. v. Trafigura Beheer B.V., 1997 U.S. Dist. LEXIS 9661, No. 96 Civ. 9740, 1997 WL 375680, at *8-*9 (S.D.N.Y. July 7, 1997), Judge Sweet determined that under 9 U.S.C. @ 206 and the Convention, "there exists no requirement that a party obtain a specific status before a court can compel arbitration." Since 9 U.S.C. @ 4 (requiring that a party requesting an order to compel arbitration be "aggrieved") and the Convention are in conflict, Judge Sweet found that the Convention governs and no demand is required. See id.; see also 9 U.S.C. @ 208 ("Chapter 1 [the Federal Arbitration Act] applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention as ratified by the United States.") In any event, the Court need not decide in this case whether a demand to arbitrate is a prerequisite to an order compelling arbitration because other considerations require the denial of the motion to compel arbitration. 5. 9 U.S.C. @ 206 states that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement [*20] at any place therein provided for, whether that place is within or without the United States." This language is permissive and affords the Court discretion in determining whether to grant a motion to compel arbitration. See, e.g., Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1242 (S.D.N.Y. 1992) (noting permissive language of @ 206), appeal dismissed, 984 F.2d 58 (2d Cir. 1993). 6. The petitioners argue that the Court should compel the SC to arbitrate all issues relating to the Resolution pursuant to the arbitration provision contained in the Articles of the SC, which establishes the ICC as the arbitral PAGE 740
1998 U.S. Dist. LEXIS 3252, *20 forum. In response, SC contends that this motion is an attempt to circumvent the current jurisdictional dispute pending before the ICC as to which arbitral forum is appropriate given the different choices set forth in various member firm MFIAs. 7. Under the circumstances of this case, the Court declines to order that the SC arbitrate all issues relating to the Resolution before the ICC. First, there is no reason to compel the SC to arbitrate the issues relating to the Resolution because it has never refused to do so and asserts that any dispute over [*21] those issues must be submitted to arbitration. Indeed, there is no evidence that any party has refused to arbitrate those issues. Second, the SC correctly argues that it should not be compelled by this Court to arbitrate the validity of the Resolution in the pending ICC arbitration, because, while it is prepared

to litigate that issue in an ICC arbitration, the jurisdictional issue of whether the ICC arbitration is the proper forum is itself subject to resolution before the ICC. The ICC should decide whether these issues are properly litigated in the pending ICC arbitration, in another ICC arbitration, or in another forum under the Swiss Intercantonal Arbitration Convention. The ICC has the ability to make that decision in the current proceeding where the SC and all AC and AA member firms will be represented. The SC should not be subjected to the possibility of any conflicting decisions by this Court and the ICC, particularly since all the AA member firms are not represented before this Court and because no party has disputed that these issues should be subject to arbitration. Hence, the propriety of the Resolution will be arbitrated at the appropriate time following a decision of [*22] the ICC on the jurisdictional question without this Court's intervention. The motion to compel arbitration of these issues in the pending ICC arbitration is denied.

THE APPLICATION FOR A PRELIMINARY INJUNCTION: 8. The petitioners seek a preliminary injunction in aid of arbitration to enjoin the SC from issuing notices of breach to AC member firms in conjunction with the Resolution until an arbitrator is appointed. To prevail on its motion for a preliminary injunction, the party requesting such relief must show: (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. Blum v. Schlegel, 18 F.3d 1005, 1010 (2d Cir. 1994) (quoting Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979); see also Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co. of New York, Inc., 749 F.2d 124, 125-126 (2d Cir. 1984); Itar-Tass Russian News Agency v. Russian Kurier, Inc., 886 F. Supp. 1120, 1123 (S.D.N.Y. 1995); [*23] Alvenus Shipping Co., Ltd. v. Delta Petroleum (U.S.A.) Ltd., 876 F. Supp. 482, 487 (S.D.N.Y. 1994) (granting preliminary injunction in aid of arbitration pursuant to Borden); Circus Prods., Inc. v. Rosgoscirc, 1993 U.S. Dist. LEXIS 13984, No. 93 Civ. 1304, 1993 WL 403993, at *2 (S.D.N.Y. Oct. 5, 1993); Litho Prestige, Div. of Unimedia Group, Inc. v. News Am. Publishing, Inc., 652 F. Supp. 804, 807 (S.D.N.Y. 1986). 9. "[A] showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990) (citations and PAGE 741 1998 U.S. Dist. LEXIS 3252, *23 internal quotation marks omitted). The plaintiff must establish "'an injury that is neither remote nor speculative, but actual and imminent.'" Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989) (quoting Consolidated Brands, Inc. v. Mondi, 638 F. Supp. 152, 155 (E.D.N.Y. 1986). 10. The petitioners argue that the mere threat of notice of breach, despite the required sixty day cure period, forces them to create an entirely new legal, financial, and administrative structure to replace the SC since, should such notices be issued, [*24] sixty days will not provide enough time to complete this task. The purpose of this threat, the petitioners argue, is to prevent them from exercising their contractual rights under the MFIAs to pursue resolution of their grievances with the SC and the AA business unit member firms through arbitration. 11. The petitioners' attempt to show irreparable harm fails for several reasons. First, as the petitioners concede, the MFIAs explicitly provide for a sixty day "cure" period following the issuance of a notice of breach before which a member firm may be terminated. No notice of breach has been issued to any of the AC member firms, nor did the Resolution itself constitute such notice. (Wadia Mem., attached as Ex. J. to Quinn Aff.) Wadia testified at his deposition that the AWO Protection Committee which had been established by the Resolution had yet to meet, that no committee chair had been selected, and that no schedule of meetings had been established. (Wadia Dep. at 34-35,

attached as Ex. B to Ostrager Supplemental Reply Aff.) Further, even if the AWO Protection Committee is constituted, conducts an investigation, and directs the issuance of notices of breach, Grafton has declared [*25] his intent to treat any such directive as a recommendation. (Grafton Dep. at 41-42, attached as Ex. H to Ostrager Reply Aff.) Thus, at this stage, the issuance of notices of breach to any AC member firms is at best speculative and certainly cannot be characterized as imminent. If the AWO Protection Committee ever convenes and recommends notices of breach, and if the SC takes any action on those recommendations, then those AC member firms to whom such notices are sent will still have the opportunity to seek relief, most appropriately in an arbitral forum where all parties have agreed to air their disputes. 12. Second, all parties agree that the questions as to whether the Resolution was a proper exercise of the Board's power and whether any future issuance of a notice of breach is proper can and should be decided through arbitration pursuant to the Articles of the SC and the MFIAs governing the parties' relationship. The respondents have not refused to arbitrate, although some AA member firms have questioned which arbitral forum is appropriate based on individual MFIAs. Thus, there can be no irreparable harm here requiring an injunction in aid of arbitration when the propriety [*26] of all alleged obstacles created by the respondents to prevent the arbitration are themselves arbitrable. Indeed, injunctive relief is available in an ICC arbitration. 13. Finally, the petitioners cannot show that they will suffer irreparable harm should notices of breach be issued by the AWO Protection Committee. Although the petitioners contend that it was only after the Resolution was passed that they began to create the infrastructure needed to survive without the SC, those claims are not persuasive. The indisputable fact is that the petitioners initiated what they realized could be as short as a six-month arbitration process in December 1997 with the intention of severing their relationship with the SC and the AA member firms. The petitioners understood at that time that they would have to set up their own administrative structure if they separated

themselves from Andersen Worldwide, and they were obviously prepared to do that. Indeed, there is evidence that the AC member firms had been creating their own independent structure prior to December 1997. (See Eibl Aff. PP 3-7.) The petitioners certainly understood the ramifications of their December 1997 request to be excused [*27] from their obligations under their MFIAs. Nor is it significant that the petitioners believed the arbitrator would have set a lengthy schedule for accomplishing a severance, since there is no guarantee that the arbitrator would have agreed with the petitioners on this point. Thus, it makes no sense to consider the mere threat of termination irreparable harm. The petitioners are complaining about the threat of the very result that they expressly desire in the arbitration and which they have sought to bring about. 14. In addition to failing to show imminent irreparable harm, the petitioners cannot show either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in their favor. With respect to the required showing of a likelihood of success on the merits, the petitioners cannot show that the Resolution interferes with their ability to arbitrate their claims against the SC and the AA member firms before the ICC or elsewhere. Initially, regardless of the intent of the Board in passing the Resolution, the Resolution simply cannot attempt to decide the issues [*28] pending before the arbitrator as the petitioners claim since the arbitrator is free to disregard the Resolution, and, now that the petitioners have requested that the issue of the Resolution be arbitrated, and the respondents have agreed that the issue is subject to arbitration, the propriety of the Resolution will itself be resolved by arbitration. It makes no sense to say that the Resolution has interfered with the ICC arbitration when the propriety of the

Resolution will in fact be arbitrated. Further, the petitioners have not shown any likelihood of demonstrating that the creation of the AWO Protection Committee has interfered with their pursuit of the ICC arbitration. Wadia testified at his deposition that the AWO Protection Committee would take no action to determine the position of the SC in the arbitration. (Wadia Dep. at 72, attached as Ex. B to Ostrager Supplemental Reply Aff.) Finally, as discussed above, no action has been taken in furtherance of the purported threat of the Board to issue notices of breach and it is apparent from the papers that the petitioners have in no sense been "chilled" from exercising their right to arbitration. Thus, the petitioners have failed [*29] to show any likelihood of success on their contention in this litigation that the Resolution prevents them from arbitrating their claims, nor have they shown sufficiently serious questions going to the merits of their claims to make them a fair ground for litigation. 15. Finally, the petitioners have not shown a balance of hardships tipping decidedly in their favor. While the petitioners claim that the very threat of notices of breach causes substantial harm to the member firms, the AC member firms have themselves demanded that the SC send notices of breach to all of the AA member firms, and have warned the SC that the failure of the SC to comply with that demand would be a breach of the SC's ethical, fiduciary and contractual duties to the AC member firms. (Kelly letter, attached as Ex. B to Grafton Aff.) Rather than relying on arbitration, the petitioners have engaged in extra-arbitral self-help, despite their claim that such threats themselves cause serious harm. It cannot be said that the balance of hardships in this internal struggle -- which should be resolves peaceably in arbitration -- tips decidedly in favor of the petitioners. CONCLUSION PAGE 743 1998 U.S. Dist. LEXIS 3252, *29 For the foregoing reasons, [*30] the petitioners' motion to compel arbitration is denied, and the petitioners' request for a preliminary injunction in aid of arbitration is also denied. SO ORDERED. Dated: New York, New York March 16, 1998 John G. Koeltl United States District Judge