SMOOTHLINE LTD and GREATSINO ELECTRONIC LTD, Plaintiffs, -v- NORTH AMERICAN FOREIGN TRADING CORP., Defendant. IN RE APPLICATION OF SMOOTHLINE AND GREAT SINO ELECTRONIC LTD

00 CIV. 2798 (DLC), M 19-375

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2000 U.S. Dist. LEXIS 10225

July 21, 2000, Decided

July 24, 2000, Filed

DISPOSITION:
[*1] Smoothline's petition to compel discovery denied without prejudice to
Smoothline's submitting revised request. NAFT's cross-petition to compel arbitration denied.

COUNSEL:
For Plaintiffs: James L. Brochin, Nora A. Henke, GAGE & PAVLIS, New York, NY.

For Defendant: Richard H. Dolan, Jeffrey M. Eilender, SCHLAM STONE & DOLAN, New York, NY.

JUDGES:
DENISE COTE, United States District Judge.

OPINIONBY:
DENISE COTE

OPINION:

OPINION & ORDER

DENISE COTE, District Judge:

Plaintiffs Smoothline Ltd ("Smoothline") and Greatsino Electronic Ltd ("Greatsino") have petitioned this Court pursuant to 28 U.S.C. @ 1782 to compel
discovery in connection with proceedings in Liechtenstein. In opposition to

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this
petition, defendant North American Foreign Trading Corporation ("NAFT") argues
that the Liechtenstein dispute is required to be submitted to arbitration in New
York, and moves to compel arbitration. For the reasons stated below, NAFT's
motion to compel arbitration is denied and Smoothline's petition for discovery
is denied without prejudice to the submission of a revised request.

BACKGROUND

NAFT is a New York corporation that is the principal supplier of
BellSouth-brand [*2] telephones and other consumer telecommunications devices
to BellSouth Corporation. Smoothline is a Hong Kong corporation that was one of
NAFT's principal manufacturers during the period at issue; Greatsino is an
entity related to Smoothline that manufactured some of the telephones supplied
to NAFT. The

March 1993 Agreement

In March 1993, in connection with certain sub-contracting arrangements
Smoothline entered into with Welback Holdings Ltd. ("Welback") and its
subsidiary, P.N. Electronics, Ltd. ("P.N. Electronics"), Smoothline and NAFT
entered into an Agreement and Guaranty (the "Agreement") pursuant to which NAFT
agreed to open letters of credit directly to P.N. Electronics. The purpose of
the Agreement is set forth in the last of four recitals, which reads, "WHEREAS,
the parties wish to record their understandings as to the terms and conditions
on which NAFT will open letter [sic] of credit to the order of a subsidiary of
[Welback]."

In the recitals, the Agreement makes reference to the existing agreements
between Smoothline and NAFT:

WHEREAS, Manufacturer [Smoothline] and NAFT have heretofore entered into
various agreements whereunder Manufacturer has agreed [*3] to manufacture
certain telephone equipment and electronic goods for NAFT; and

WHEREAS, Manufacturer has requested NAFT to open letters of credit directly

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to the order of P.N. Electronics, Ltd., a subsidiary of Manufacturer's Supplier
[Welback], in order to assist Manufacturer in complying with its obligations
under the agreements between NAFT and Manufacturer; . . . .

Moreover, NAFT's obligations under the Agreement are made subject to the performance of Smoothline's existing obligations to NAFT, some of which are enumerated in paragraphs one and two of the Agreement. Paragraph one provides in relevant part:

If Manufacturer and Supplier fully and completely perform their obligations to
NAFT under the terms of NAFT's agreements with Manufacturer, including particularly but without limitation, (a) Manufacturer's obligation to produce
and deliver the highest quality electronic and telecommunications equipment;
(b) Manufacturer's obligation to meet all production and delivery schedules; and
(c) Manufacturer's obligation to repair or replace, at no cost to NAFT, any defective goods returned by NAFT to Manufacturer, then NAFT agrees to open additional letters of credit [*4] to the order of Supplier, or a subsidiary of
Supplier, in such amounts as the parties shall hereinafter fix by sebsequent
[sic] agreement.

Welback and its subsidiaries also expressly agree to be bound by those obligations.

Section 6 of the Agreement contains an arbitration clause:

The resolution of any dispute between the parties with respect to the subject
matter of this Agreement and Guarantee shall be settled by arbitration before
the American Arbitration Association in New York, New York, applying the law of
New York without regard to conflicts of law principles.

(Emphasis supplied). Section 6 also provides: "This Agreement sets forth the entire understanding between the parties with respect to its subject matter, and
merges and extinguishes all prior agreement [sic], understandings or discussions
with respect thereto." (Emphasis supplied).

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The Present Dispute

The present dispute relates not to telephones manufactured by Welback or P.N. Electronics, but rather to telephones manufactured directly by Smoothline and Greatsino. NAFT alleges that Smoothline has breached its obligations to repair or replace defective equipment returned by [*5] customers. NAFT demanded arbitration of that dispute before the American Arbitration Association in New York.

In response, Smoothline and Greatsino initiated mediation in Liechtenstein against NAFT and F.H.A. Handelsanstalt ("FHA"), a Liechtenstein bank that opened letters of credit in connection with the shipment of the telephones at issue. The mediation proceedings are a prerequisite to filing suit in Liechtenstein. Smoothline claims that NAFT breached an agreement to contribute to manufacturing costs, and also seeks a declaratory judgment regarding the contractual obligations among the parties.

The Discovery Sought by Smoothline

Smoothline seeks discovery in connection with the Liechtenstein proceedings. Smoothline provides little specific information, however, regarding the discovery it seeks, or its connection with Smoothline's claims. Smoothline seeks to take the depositions of NAFT, NAFT principals Maurice Lowinger and Andy Lowinger, and NAFT representatives Robert Schweitzer and Jim Zerka. Smoothline also seeks documents from those persons, as well as from a series of entities Smoothline claims are closely related to NAFT: Unisonic Products Corp. ("Unisonic"), U. [*6] S. Electronics, Inc. ("U.S. Electronics"), New York Bell Corporation ("Bell"); and Baldwin-Gordon Enterprises ("B-G").

While Smoothline does not provide any detail regarding the documents it seeks, NAFT provides a copy of Smoothline's document request. Smoothline seeks the following:

1. All audited financial statements for the years 1990-1999 with respect to [NAFT].

2. All documents reflecting any communication between NAFT and [FHA]

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relating
to the opening of Letters of Credit.

3. All bank statements, checks, drafts, wire transfer requests, vouchers, agreements or other documents relating to financial dealings between NAFT, [Unisonic], [U.S. Electronics], [Bell], or [B-G] and [Smoothline], [Greatsino]
and FHA, for the period 1990-1999.

4. All United States Income Tax Returns for NAFT, Unisonic, U.S. Electronics,
Inc., Bell and B-G for the period 1990-1999.

5. All documents relating to purchase orders issued by NAFT, Unisonic, U.S.
Electronic Inc., Bell and B-G to Smoothline or Greatsino for the period 1990-1999.

6. All sales ledgers, or other similar documents, of NAFT, Unisonic, U.S. Electronics, Inc., Bell, and B-G for the period 1990-1999.

7. All purchase [*7] ledgers, or other similar documents, of NAFT, Unisonic,
U.S. Electronics, Inc., Bell and B-G for the period 1990-1999.

Smoothline states that this evidence "bear[s] directly on (a) the corporate,
trading and financial relationships between and among the parties to the Liechtenstein action, including but not limited to relationships evidencing ownership and control; and (b) the parties' courses of dealing and trading practices which are very much at issue in the Liechtenstein action."

DISCUSSION

I. Motion to Compel Arbitration

This Court has subject matter over this action pursuant to the Convention on
the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9
U.S.C. @@ 201-208. n1 The Convention requires contracting states such as the
United States,

to recognize an agreement in writing under which the parties undertake to submit
to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or

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not, concerning a subject matter capable of settlement by arbitration.

Convention, Art. II(1), reprinted at 9 U.S.C. @ 201 [*8] note.

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n1 The Second Circuit has held that

any commercial arbitral agreement, unless it is between two United States
citizens, involves property located in the United States, and has no
reasonable
relationship with one or more foreign states, falls under the Convention.

Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 19
(2d
Cir. 1997) (quoting Jain v. de Mere, 51 F.3d 686, 689 (7th Cir. 1995)).
Here,
the Agreement contains an agreement to arbitrate all disputes that arise
out of
a commercial contractual relationship. According to the Agreement, all
disputes
are to be arbitrated in New York and are subject to United States law.
Smoothline and Greatsino are foreign corporations with their principal
places of
business outside of the United States. The Agreement is, therefore,
governed by
the Convention.

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The Convention is enforced in United States courts in accordance with the
Federal Arbitration Act (the "FAA"), 9 U.S.C. @@ 1 [*9] -14 (1988). See
Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 843 n.3. (2d Cir. 1987);
9
U.S.C. @ 208. The FAA "was enacted to promote the enforcement of privately
entered agreements to arbitrate," and manifests a strong federal policy
favoring arbitration. Chelsea Square Textiles, Inc. v. Bombay Dyeing and
Manufacturing Company, Ltd., 189 F.3d 289, 294 (2d Cir. 1999). Section 2 of
the
FAA provides that "an agreement in writing to submit to arbitration an
existing
controversy . . . shall be valid, irrevocable, and enforceable, save upon
such
grounds as exist at law or in equity for the revocation of any contract." 9
U.S.C. @ 2.

It is well established that "any doubts about the scope of arbitrable

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issues
should be resolved in favor of arbitration." Chelsea Square Textiles, 189 F.3d
at 294 (quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,
460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)). Moreover, this presumption "applies with special force in the field of international commerce,"
which is governed by the Convention. David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd, 923 F.2d 245, 248 (2d Cir. 1991) [*10] (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631, 87
L. Ed. 2d 444, 105 S. Ct. 3346 (1985)).

Here, however, the Court concludes that the Agreement is clear, and that the
present dispute is not arbitrable thereunder. The scope of the arbitration clause is limited to the "subject matter" of the Agreement. That subject matter
is NAFT's provision of letters of credit to Smoothline's suppliers. Although the
Agreement makes reference to the underlying agreements between NAFT and Smoothline, and makes Smoothline's performance of those obligations a condition
precedent to NAFT's performance under the Agreement, it evidences no intent to
incorporate those agreements. The Agreement is not the source of NAFT and Smoothline's independent obligations to perform the obligations underlying their
relationship. Where the Agreement itself is clear, the strong presumption in
favor of arbitration does not require the distortion of the Agreement that NAFT
advocates. n2

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n2 Nor can NAFT cobble an agreement to arbitrate from the Letters of Credit
issued by Barclays Bank for the benefit of Smoothline. The Letter of Credit submitted by NAFT states: "We [Barclays Bank] are informed that any dispute arising out of any transaction of this letter of credit will be settled through
the American Arbitration Association in New York City or the Supreme Court of
New York, at NAFT's option." This statement of the bank's understanding of a
separate agreement cannot in itself give rise to an obligation to

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arbitrate. See
North American Foreign Trading Corp. v. P.T. Kodeco Electronics, 236 A.D.2d 324,
654 N.Y.S.2d 136, 137 (1st Dept. 1997) ("jurisdiction cannot be based on the
purported forum selection clause reflected in the letters of credit, which
refers only to the bank's understanding of a term of the separate, independent,
and undocumented commercial agreement sued on herein." Nor does Smoothline's
accompanying certification that "Smoothline Ltd. also guarantees . . .
everything which is written on this [letter of credit]" create of that provision
an affirmative obligation to arbitrate.

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[*11]

II. Petition under 28 U.S.C. @ 1782

Because the parties are not required to submit the present dispute to
arbitration, the Court considers Smoothline's petition for discovery relating to
the adjudication of that dispute in Liechtenstein. Under 28 U.S.C. @ 1782,
subject to any applicable privilege,

the district court of the district in which a person resides or is found may
order him to give his testimony or statement or to produce a document or other
thing for use in a proceeding in a foreign or international tribunal . . . . The
order may be made . . . upon the application of any interested person . . . .

28 U.S.C. @ 1782(a). Smoothline must show that three statutory elements are
met: (1) that NAFT resides or is found in the Southern District of New York; (2)
that the information sought is for use in a proceeding before a foreign
tribunal; and (3) that Smoothline is an interested person in the dispute. See
Euromepa, S.A. v. R. Esmerian, Inc., 154 F.3d 24, 27 (2d Cir. 1998) ("Euromepa
II"). Once the statutory requirements are met, the court may exercise its
discretion [*12] in granting, denying or modifying the request. See id. at 28.

A. Statutory Factors

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NAFT does not dispute that the first and third statutory requirements are met, but contends that the material is not for use in connection with a proceeding before a foreign tribunal. That factor requires that the foreign proceeding be adjudicative in nature. See Euromepa II, 154 F.3d at 27. Moreover,
while the proceeding need not be "pending," it must be "imminent" – that is,
"very likely to occur and very soon to occur" – rather than merely "within reasonable contemplation." In re Request for International Judicial Assistance
(Letter Rogatory) for the Federal Republic of Brazil, 936 F.2d 702, 703 (2d Cir.
1991). NAFT argues that at the time of the briefing of this petition, Smoothline
had only initiated mediation proceedings, in which NAFT was not obligated to
appear. In order to initiate litigation, Smoothline would have had to file a
complaint by May 10, 2000.

The Court concludes that the initiation of the mediation proceedings is sufficient to meet this statutory requirement. The initiation of mediation involved the filing of a complaint [*13] with the Liechtenstein tribunal, and
was a prerequisite to the initiation of a lawsuit with that court. Even if the
mediation proceedings do not constitute "proceedings" for purposes of Section
1782, they at least signify that adjudicative proceedings are "imminent."

Moreover, as discussed below, Smoothline will be required to submit a revised
request before the Court will compel discovery. Consequently, if Smoothline has
failed to pursue litigation in Liechtenstein, NAFT will have an opportunity to
object to the revised request on that basis.

B. Discretionary Considerations

NAFT also argues that even if the Court deems the statutory requirements met,
it should exercise its discretion to deny Smoothline's application because the
material sought by Smoothline would not be discoverable in Liechtenstein. NAFT
also argues that Smoothline's request is oppressive, burdensome, and not calculated to lead to the discovery of admissible evidence.

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The Second Circuit has made clear that the material sought by a discovery request under Section 1782 need not be discoverable under the laws governing the foreign proceeding. See Euromepa II, 154 F.3d at 28. The Circuit has [*14] also warned that a district court should not entertain a "battle-by-affidavit of international legal experts" in order to determine how a foreign tribunal would treat certain evidence or discovery requests. In re Application of Euromepa S.A., 51 F.3d 1095, 1099 (2d Cir. 1995) ("Euromepa I").

The "twin aims" of Section 1782, namely "'providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts,'" counsel in favor of permitting discovery. Euromepa II, 154 F.3d at 28 (quoting Malev Hungarian Airlines v. United Technologies International, Inc., 964 F.2d 97, 100 (2d Cir. 1991)). These twin policy goals are to be broadly construed: "Absent specific directions to the contrary from a foreign forum, the statute's underlying policy should generally prompt district courts to provide some form of discovery assistance." Euromepa I, 51 F.3d at 1102.

Indeed, it is preferable to tailor the discovery order so as to lessen its burden than to deny an overly broad request outright. See In re Application for an Order Permitting Metallgesellschaft AG to Take Discovery, 121 F.3d 77, 80 (2d Cir. 1997); [*15] In re Application of David Esses for Assistance Before a Foreign Tribunal, 101 F.3d 873, 876 (2d Cir. 1996); Euromepa I, 51 F.3d at 1101; Malev Hungarian Airlines v. United Technologies International, Inc., 964 F.2d 97, 102 (2d Cir. 1991). The court, however, may deny a discovery request that it suspects is a "'fishing expedition' or a vehicle for harassment." In re Metallgesellschaft, 121 F.3d at 79 (quoting In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988)).

NAFT submits a declaration from Dr. Markus Kolzoff, a Liechtenstein

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attorney, stating that extensive pretrial discovery, including the taking of depositions, is not available under Liechtenstein law. Kolzoff also states that it will seek to have the Liechtenstein court dismiss any complaint for lack of jurisdiction. Smoothline, for its part, submits a declaration from Dr. Andreas Schurti, also a Liechtenstein attorney. Schurti acknowledges that Smoothline would be unable to compel the discovery sought here under Liechtenstein law, but states that any evidence obtained could be [*16] considered by the Liechtenstein court. Schurti also states that the Liechtenstein court may decide the issue of jurisdiction only after the presentation of evidence on the merits.

The Court concludes that Smoothline is entitled to seek discovery from NAFT under Section 1782 at this time. The discovery Smoothline seeks here, however, is grossly excessive. It is nearly limitless in its scope – there is not a single request that is limited to transactions between NAFT and Smoothline. Moreover, Smoothline has not shown with any specificity how the documents it seeks might relate to its claims against NAFT. Finally, it is notable that NAFT, not Smoothline, presented the Court with the substance of Smoothline's document requests. In sum, the Court concludes that the discovery requests as fashioned by Smoothline are unduly burdensome, and are more indicative of a "fishing expedition" than of a reasonably tailored request for documents relevant to any legitimate dispute. Accordingly, the Court denies Smoothline's petition to compel discovery, without prejudice to Smoothline's submitting a more narrowly-tailored request.

CONCLUSION

For the reasons stated, Smoothline's petition to [*17] compel discovery is denied without prejudice to Smoothline's submitting a revised request. Any revised request shall include an updated description of the status of the Liechtenstein proceedings, and the general relevance of the discovery sought to the claims therein. NAFT's cross-petition to compel arbitration is denied.

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SO ORDERED:

Dated: New York, New York

July 21, 2000

DENISE COTE

United States District Judge

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