UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEDON GmbH and DEDON Inc.,

Plaintiffs,

-against-

JANUS et CIE,

Defendant.

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10 Civ. 04541 (CM)

DECISION AND ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISS THE COMPLAINT OR IN THE ALTERNATIVE TO STAY THIS MATTER PENDING ARBITRATION IN LONDON, ENGLAND, AND DEFERRING DECISION ON PLATINFIFF'S MOTION FOR A PRELIMINARY INJUNCTION PENDING A TRIAL ON THE ISSUE OF SUBJECT MATTER JURISDICTION

McMahon, J.:

INTRODUCTION

This case presents the court with a law school examination question.

For many years, Plaintiffs Dedon GmbH and Dedon Inc. (collectively, "Dedon" or "Plaintiff") have distributed their high end outdoor furniture through a well-recognized United States distributor, Defendant Janus et Cie (Janus). Throughout that period, Janus has apparently been Dedon's only U.S. distributor. Janus insists that it has the exclusive right to distribute Dedon's products through the end of 2011, pursuant to a written exclusive distribution agreement (the "Distribution Agreement") that is (admittedly) unsigned. Dedon is equally adamant that the parties never entered into an exclusive agreement, although they negotiated and even exchanged drafts of such an agreement.

Dedon now wishes to distribute its wares directly to retailers. But representatives of Janus have sent letters to several of Dedon's potential sales representatives (one of whom is located in

New York), asserting that only Janus can sell Dedon furniture and threatening them with legal action if they sell any products on behalf of Dedon prior to the end of 2011.

This all seems the perfectly straightforward makings of a lawsuit.

Unfortunately, it is anything but.

The Distribution Agreement to which the parties either have (Janus) or have not (Dedon) agreed provides that all disputes "arising out of on in conjunction with this agreement (including without limitations, any question regarding its existence, validity or termination)" are to be arbitrated in London before the International Chamber of Commerce. In May of this year, Janus commenced an arbitration before the ICC in London. Some weeks later, on June 9, Dedon filed the instant lawsuit, which asserts claims for (1) a declaration that no Distribution Agreement (and, hence, no agreement to arbitrate in London) exists; and (2) tortious interference with Dedon's prospective business relations with United States customers. Dedon's complaint was not accompanied by any motion seeking to enjoin the ICC arbitration, which is hardly surprising, since this court's writ does not run to England. However, Janus is a United States company that, while headquartered in California, does a substantial amount of business in New York, and I understand at least one of the allegedly tortious letters sent by Janus' counsel was to an individual located in New York. Assuming other statutory, jurisdictional and venue prerequisites were met, this court might well be able to enjoin Janus from proceeding with that overseas arbitration. However, Dedon did not seek that form of relief, either. In fact, it sought no relief at all in this court for well over a month – and it has sought no emergency relief at all.

Dedon has, however, been busy in London. Pursuant to ICC Rule 6(2), Dedon asked that body to determine that there was no *prima facie* basis to believe that the parties had agreed to arbitrate any disputes in London. Regrettably (from Dedon's perspective), the ICC

Administrator is *prima facie* satisfied that an arbitration agreement under the Rules may exist. The ICC also required Dedon to file an answer in the arbitration – which it did, protesting all the while that the tribunal lacked jurisdiction over the dispute because no exclusive distributorship agreement, and hence no agreement to arbitrate, existed.

Dedon has never asked an English court to stay the ICC arbitration; the Court has no idea whether it would be possible for Dedon to do so under the laws of that country. It has, however, indicated that it will take up the issue of arbitrability in an English court if the ICC arbitration panel decides against it on the question of arbitrability.

In mid-July the parties made simultaneous motions in this court. Dedon asked for a preliminary injunction against further tortious interference with its potential U.S. contractors. And Janus moved to compel Dedon to arbitrate – which strikes this court as a strange request, because Dedon *is* arbitrating, albeit always without prejudice to its right to come to a court of competent jurisdiction for a ruling on the issues in suit – and to dismiss this case on the ground that the court lacks jurisdiction to hear it. In the alternative, Janus suggests that this court stay its hand and await a decision on the issue of arbitrability in the pending London arbitration.

Before these motions (neither of which was made on an emergent basis) were fully briefed, the ICC issued the aforementioned *prima facie* ruling; shortly after oral argument, it began constituting the arbitral panel – whose first task, of course, will be to take up the question of its jurisdiction to act.

Meanwhile, this court must decide whether it (1) can, or (2) should decide the issue of arbitrability. Because arbitrability cannot be determined without concluding whether the parties entered into the Distribution Agreement, deciding that procedural issue effectively determines the merits of one of Dedon's pleaded claims (the one for declaratory judgment) both in this court

and in the pending arbitration. The court's decision must be made against the backdrop of a Federal Arbitration Act that strongly encourages arbitration – but only where the parties have agreed to arbitrate – and a decision of the United States Supreme Court that requires a United States court to determine, in situations like this one, whether the parties have made such an agreement.

Background

Dedon GmbH is a designer and manufacturer of outdoor furniture with headquarters in Luneburg, Germany. Dedon Inc., a wholly owned subsidiary of Dedon GmbH, is responsible for the marketing and sale of Dedon's products in the United States. Janus is a designer, distributor, and marketer of outdoor furniture headquartered in California.

In 2002, Janus began distributing Dedon products in the United States. From 2002 until April 2006, the commercial relationship between the parties was governed by a set of "general terms and conditions of sale" ("Terms and Conditions") that were printed on the paper invoices that Dedon provided Janus in connection with each individual shipment. (Compl. ¶ 19). The invoice terms and conditions specified: "The confirmation of an order and these Terms and Conditions shall constitute the entire understanding and agreement (the Contract) between the Buyer and the Seller." (See Compl. Ex. A at 3.3). Nothing in the invoice terms and conditions provided for any form of exclusive distributorship arrangement between the parties. (Id.)

The Terms and Conditions contain a clause calling for arbitration in Hamburg, Germany of disputes relating to that particular invoiced transaction ("contracts to which these International Terms and Conditions apply"). Although Janus invokes that provision in the Terms and Conditions as an alternative ground for relief, I conclude that the arbitration clause in the Terms

and Conditions applies only to the individual shipment for which the particular invoice issued, and so has nothing to do with the issue here in suit. Accordingly, I shall not mention it again.[1]

From August 2004 until April 2006, the parties negotiated over the terms of an agreement that would give Janus exclusive U.S. distribution rights for Dedon products through the year 2011. They met several times and exchanged a number of draft proposals for a new contract to govern their commercial relationship.

In its complaint and supporting affidavits, Dedon asserts that there was never a meeting of the minds, so the parties never entered into any such exclusive distribution agreement. Conversely, in its Request for Arbitration submitted to the ICC – which was attached as an exhibit to the complaint – Janus claims that in April 2006 the Parties' negotiations resulted in a new formalized written agreement (the "Distribution Agreement"). Janus does not contend that this document was ever signed; however, it claims that the agreement came into being because, from and after April 2006, the parties performed in accordance with its terms. (Decl. of James E. Berger ("Berger Decl." Ex A.).[2] Whether or not any formal agreement was concluded, it appears that Janus may have been Dedon's only U.S. distributor throughout the last four years – and that on at least once occasion it was advertised as Dedon's "exclusive distributor." However, the evidence also suggests that throughout the entire term of their relationship – even as recently as this year – every shipment of furniture into the United States was accompanied by an invoice containing the Terms and Conditions that pronounce those terms to be the entire contract between the two companies.

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[1] To the extent that Janus attempts to rely on the Terms and Conditions as an alternative source of an agreement by Dedon to arbitrate, the court notes that the Terms and Conditions call for arbitration in Hamburg – not London – and so cannot possibly be applicable to the instant dispute.

[2] The parties do not contest the substance of the Distribution Agreement; the point of contentions is whether the agreement even came into being. Although both parties acknowledge that there were different drafts of the agreement, the same version of the agreement is attached to both the Declaration of Jeffrey K. Lamb on behalf of Dedon and the Declaration of James E. Berger on behalf of Janus. Since the parties have relied on the exact same version of the document, the Court cites to the copy attached to the Berger Declaration for convenience.

The Arbitration Provision

The drafts of the Distribution Agreement contain arbitration provisions. In particular Section 16(1) of the version of the Distribution Agreement that Janus insists has governed the parties' relations since April 2006 provides as follows:

> Any dispute between the parties hereto arising out of or in conjunction with this agreement (including, without limitation, any question regarding its existence, validity or termination) shall be referred to and finally resolved by arbitration … [with] an arbitration panel consisting of three arbitrators … and shall be decided pursuant to Rules of Conciliation and the Arbitration of the International Chamber of Commerce ("the Rules") as in force from time to time which Rules ….

(Berger Decl., ¶ 3 & Ex. A., at 12, Distribution Agreement at § 16(1).).

If the parties did enter into an exclusive distribution agreement, then any and all disputes arising thereunder – including specifically questions regarding the existence and validity of that agreement – must be arbitrated in London. Conversely, if the parties never entered into an enforceable agreement, then they did not agree to London arbitration of any issue – "including, without limitation, any question regarding [the] existence, validity or termination" of the Distribution Agreement. (Berger Decl., ¶ 3 & Ex. A., at 12, Distribution Agreement at § 16(1).).

It bears noting that the Distribution Agreement either is or was to be (depending on whose side one is on) governed by the law of England and Wales. (Berger Decl., ¶ 3 & Ex. A., at 12, Distribution Agreement at § 16(4).).

The Instant Dispute

On April 28, 2010, Dedon sent to Janus a letter announcing that it planned to begin direct sales in the United States shortly, and that from and after July15, 2010, Dedon would consider the parties' business relationship to be over.

On May 18, 2010, Janus commenced the proceeding that is currently pending in front of the ICC. In its arbitral petition, Janus alleged that the Distribution Agreement was the operative contract governing the parties' relationship, that is was to continue in force until December 31, 2011, and that Dedon's April 28, 2010 letter terminating that Agreement constituted a breach of contract. Janus asked for an award from the ICC (a) declaring that the Distribution Agreement remains in full force and effect until December 31, 2011; (b) requiring that Dedon pay Janus a "termination fee" as proscribed by Section 14 of the Distribution Agreement in the amount of $11,729,432.25 which was calculated based on the average amount of "the [Janus'] discounts for purchases of the contractual product" (Decl. of Jeffrey K. Lamb ("Lamb Decl.") Ex. L., at §§ 3.4, 4.3); and (c) requiring that Dedon pay Janus damages resulting from any direct sales that Dedon might make in the United States prior to December 31, 2011.

On June 9, 2010, Dedon filed the instant complaint. The first cause of action seeks a judgment declaring that no Distribution Agreement exists, and that, as a result, Dedon may immediately begin direct sales of its products in the United States. In its second cause of action, Dedon alleges that Janus has tortiously interfered with Dedon's prospective contract and business relationships, based on letters that Janus' counsel sent to two individuals who were negotiating with Dedon to become that company's United States sales representatives. The letters asserted that Janus was the exclusive United States distributor of Dedon products, and that any attempt to act as a Dedon sales representative in the United States would constitute intentional interference with Janus' purported exclusive distribution agreement with Dedon. (Decl. of Jan Van Der Hagen ("Van Der Hagen Decl.") Ex. F.) The letters demanded the parties cease and desist any sales activities on behalf of Dedon and that they "preserve and retain any and all information" that related in any way to Dedon or Janus in case of any potential future

legal action. (Id.) Dedon contends in its complaint that these letters amount to tortious interference with its prospective business relationships, and that Janus' only motive for sending the letters was a malicious desire to prevent Dedon from entering the United States marketplace. (Compl. ¶ 19).

Although Dedon refers, in its complaint, to the ICC proceedings as having been commenced "improper[ly] and unlawful[ly]," it does not seek any specific relief (such as an injunction) directed toward the ongoing ICC arbitration. (Id.)

Arbitration Before the ICC

Article 6(2) of the ICC Rules states, in pertinent part, that if a party challenges the validity of an arbitration agreement, the ICC, at the request of the party, can make a determination of whether it is "*prima facie* satisfied that an arbitration agreement under the Rules may exist." (ICC Rules Article 6(2)). On June 23, 2010, Dedon asked that the ICC "decide that it is not prima facie satisfied that an arbitration agreement exists between the parties and hence to notify the parties that the arbitration cannot proceed." (Def Mot. to Compel Arb. Ex. B). In support of its request for a determination by the ICC that no arbitration agreement existed, Dedon asserted – just as it did in its complaint and motion papers before this court – that Janus and Dedon never executed the Distribution Agreement that contained the London ICC Arbitration Agreement. Dedon asserted that its Article 6(2) request was "without prejudice to its ability to ask any court having jurisdiction to determine whether or not there is a binding arbitration agreement." (Id.).

Because Dedon was challenging the very existence of a valid arbitration agreement, Dedon also asked that its time to answer Janus' petition be stayed until after the ICC made the Article 6(2) ruling.

On June 25, 2010, the ICC denied Dedon's request for an extension and affirmed that it would make a determination whether it was *prima facie* satisfied regarding the existence of an arbitration agreement. On June 28, so as not to put itself in danger of default, Dedon filed its answer to Janus' request for arbitration. (Dedon Op. to Mot. To Compel Arb., at 19). In its answer, Dedon repeated its contention that the Distribution Agreement at the heart of Janus' arbitration petition was never executed by the parties. Dedon further stated (in the manner of arbitral pleadings) that if the ICC were *prima facie* satisfied that an arbitration agreement between the parties existed, it would seek a more definitive ruling on jurisdiction once the arbitration panel was constituted. As with its Article 6(2) request, Dedon stated that the filing of an answer was "without prejudice" to its contention that there was no valid arbitration agreement between the parties and that "a constituted Tribunal [would] lack[] substantive jurisdiction." (Def Mot. to Compel Arb. Ex. B).

On July 30, 2010, the ICC concluded that it was prima facie satisfied that an arbitration agreement existed between the parties. It has since begun constituting the arbitration panel.

Motions Before the Court

On July 16, 2010, both parties filed motions in this action.

Plaintiff (Dedon) moved for a preliminary injunction against Janus' continuing interference with its ability to contract with potential U.S. sales representatives.

Defendant (Janus) moved for an order compelling arbitration and dismissing the instant complaint, or in the alternative staying this action a determination of arbitrability by the ICC Panel.

Discussion

Janus' Motion to Compel Arbitration and Dismiss the Complaint is Denied

Relying on the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958), 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention"), enforced in the United States through Chapter Two of the Federal Arbitration Act ("FAA"), 9 U.S.C. §201 *et seq.*, Janus argues that this Court lacks jurisdiction to hear this claim, because the dispute has already been submitted to arbitration before the ICC.

The provision of the New York Convention on which Janus relies for this argument is Article II, Section 3. It provides, in pertinent part:

> The court of a Contracting State, when seized of an action in a matter in respect to 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.

New York Convention, Art. II. §3.

The gravamen of Janus' argument is that because Dedon's complaint seeks judicial resolution of the same issues that are the subject of the ICC arbitration, the Court must refer the parties to arbitration. But its argument is completely circular and utterly illogical. In fact, the text of the provision that Janus cites gives the lie to its contention. Only "in a matter in respect to which the parties have made an agreement" to arbitrate is a court required to refer the parties to arbitration under the New York Convention. Here Dedon specifically and emphatically denies that it ever entered into an agreement to arbitrate disputes with Janus in London. Under both the Convention and United States arbitration law, this court cannot compel Dedon to arbitrate without first concluding that it has made a valid and binding arbitration agreement with Janus, and that any such agreement is not null and void, inoperative or capable of being performed.

In other words, this court is bound by the New York Convention to send Dedon to arbitration only if Dedon agreed to arbitrate. The fact that Janus has already commenced an arbitration is of no moment; neither is the fact that Dedon, with full reservation of its right to proceed in court, has contested the ICC's jurisdiction in that proceeding.

A federal court confronted with a contested motion to compel arbitration must decide he "threshold issue" of whether the parties made an agreement to arbitrate. As recently as last Term, the United States Supreme Court held:

> A court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute ….to satisfy itself that such an agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have a court enforce.

Granite Rock Co. v. Int'l Brhd. Of Teamsters, -- U.S. --. 130 S. Ct. 2847 at 2856, 177 L. Ed. 2d 567 (June 24, 2010). When a court is faced with a motion to compel arbitration pursuant to the New York Convention, such as Janus' motion, "the presumption that the court should decide arbitrability questions also applies." Telenor Mobile Communications AS v. Storms LLC, 584 F.3d 396, 406 (2d Cir. 2009). The Supreme Court has made it crystal clear that whenever a party contests the existence or the enforceability of an arbitration agreement, the court must resolve the disagreement. Granite Rock, supra, 130 S. Ct. at 2858.

If Dedon were arguing that an arbitration agreement that it had entered into was void, voidable or illegal when formed, the matter would be for the arbitrators to determine. Buckeye Check Cashing, Inc., v. Cardegna, 546 U.S. 440, 444 n.1 (2006). As the Eleventh Circuit explained in Chastain v. Robinson-Humphrey Co., Inc.:

> Under normal circumstances, an arbitration provision within a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration.

> The calculus changes when it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration.

957 F. 2d 851, 854 (11th Cir. 1992). But here it is undisputed that Dedon did not sign the Distribution Agreement, and it does not agree with Janus' contention that the Agreement otherwise came into being. Therefore, there is no way around it: this court not only has clear jurisdiction to decide the issue of whether an agreement to arbitrate was ever made, but it is required to decide that issue – unless Dedon has somehow waived its right to seek judicial resolution of the matter.

Janus argues that Dedon has already submitted the issue of arbitrability to the ICC, so the court lacks jurisdiction to hear it. That is manifestly incorrect. What Janus is really arguing is that Dedon has waived its right to object to having the ICC decide the arbitrability issue by submitting its request for a *prima facie* determination to the Tribunal pursuant to Article 6(2) of the ICC Rules. This argument lacks merit as a matter of fact.[3]

If a party participates in arbitration proceedings without making a timely objection to the submission of the dispute to arbitration, that party may be found to have waived its right to object to the arbitration. Were the rule otherwise, a party could participate in an arbitration, with the assurance that it could challenge an unfavorable award on the ground that it had never agreed to arbitrate. Halley Optical Corp. v. Jagar Int'l Marketing Corp., 752 F.Supp. 638, (S.D.N.Y. 1990). However, Dedon has repeatedly objected to the submission of this dispute to arbitration. It objected in its answer to the petition before the ICC; it objected when it filed this lawsuit. Even its filing of an Article 6(2) request constitutes an objection to arbitration, and to make the point even clearer, Dedon inserted a reservation of its right to go to court to have the issue of contract

[3] Janus' contention that the submission of the Article 6(2) request was itself an "agreement" to arbitrate the issue of contract formation is simply nonsense. Dedon did not "agree" with Janus to arbitrate the issue of arbitrability; it has emphatically insisted at all times that only a court could decide that issue.

formation resolved judicially into that request. From its first submission to the ICC to its last, Dedon has indicated that it believes there is no agreement to arbitrate, and has reserved its right to have that issue resolved in a court of law. On this record, there can be no question of waiver.

The United States Supreme Court has spoken to this issue as well. In First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) – in which the high court ruled that a party could not be compelled to arbitrate absent clear and unmistakable evidence of an agreement to do so – the justices also held that arguing the issue of arbitrability to an arbitrator is not, without more, clear and unmistakable evidence of an agreement to arbitrate. First Options, supra., 514 U.S. at 946. Here, where Dedon has clearly and unambiguously said, over and over, that it is *not* willing to arbitrate, First Options compels me to reject Janus' argument and deny its motion.

Janus relies almost exclusively on a recent case from one of my colleagues, In Re Arbitration Between Halcot Navigation Ltd. P'ship and Stolt-Nielsen Transp. Group, BV, 491 F. Supp. 2d 413 (S.D.N.Y. 2007). But the facts in Halcot are entirely at odds with the facts before me. In that case, the district court found "clear and unmistakable evidence" of a waiver of arbitrability because the plaintiff voluntarily submitted a letter asking that the arbitration panel determine the arbitrability of the dispute with only a general reservation of rights in the arbitration – and without seeking an immediate judicial determination of the question. Only after receiving an unfavorable ruling on the issue of arbitrability from the panel did plaintiff (Halcot) come to court and argue that the issue of arbitrability was reserved for judicial resolution – thereby creating, in the words of my distinguished colleague, "a win-win outcome for itself, as a means of having it both ways: allowing the arbitrability issue to proceed to adjudication by the

arbitrators and accepting the result if favorable to the plaintiff, or rejecting it if unfavorable and litigating the matter in court." Id. at 419. .

Here, Dedon filed this action for declaratory relief before it submitted its request pursuant to Article 6(2). Furthermore, at all times before the ICC, Dedon has protested that it made no agreement to arbitrate and has objected to the arbitrability of the dispute. The fact that Dedon is not willing to complicate its position further by running the risk that an award will be entered against it on default does not mean that it has waived its right to seek a judicial declaration of arbitrability.

I am not at all sure that Halcot is correct in view of First Options, but the matter need not detain me long, because the facts here take this case outside the logic of Halcot and place it squarely within the holding of First Options.

Accordingly, Janus' motion to compel Dedon to arbitrate and to dismiss this action is denied, albeit without prejudice to renewal.

Janus' Alternative Ground for Relief - Stay of Proceedings in Favor of Arbitration - Is Denied

In the alternative, Janus asks this court to stay its hand and not determine the issue of arbitrability, but rather to await the decision of the ICC panel, which is already seized of the issue. That application, too, is denied.

Comity and the purposes of the New York Convention suggest that this court exercise caution when rendering any decision that might impact parallel proceedings before the ICC or contradict a finding by an ICC tribunal.

Comity is an "important and omnipresent factor" in parallel litigation and "assumes even more significance in international proceedings." GE v. Deutz AG, 270 F.3d 144, 159-60 (3d Cir.

2001). It is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation...." Id. at 160 (quoting Hilton v. Guyot, 159 U.S. 113, 143, 16 S.Ct 139, 40 L.Ed. 95 (1895)). "The primary reason for giving effect to the rulings of foreign tribunals is that such recognition factors international cooperation and encourages reciprocity. Thus, comity promotes predictability and stability in legal expectations, two critical components of successful international commercial enterprises." Id.

As enacted through the FAA, the primary purpose of the New York Convention is to efficiently recognize and enforce commercial arbitration agreements in international contracts while unifying the standards by which these agreements are observed. See China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp., 334 F.3d 274, 283 (3d Cir. 2003) (quoting Scherk v. Alberto-Culver Co., 417 U.S.506, 520 N. 15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). In its brief, Janus relies heavily on the existence of a parallel proceeding to argue in favor of a stay.

In this case there is a proceeding pending before the ICC in London. It is prior in time to the instant action, but not by much – a matter of three weeks. By its own rules, the ICC has jurisdiction to determine its own jurisdiction (much as this court does). (See ICC Rules, Article 6.). Furthermore, under the ICC rules and the New York Convention, the courts with primary jurisdiction over United Kingdom ICC proceedings are courts of the United Kingdom, not courts in the United States. As the parties acknowledged during oral arguments, a challenge to any jurisdictional determination by the London ICC must be brought in English courts, not here. (See 10/1 Tr., at 6, 23.). Dedon has not yet explained why it did not seek a stay of arbitration from a court of primary jurisdiction in England.

The court is deeply concerned about the possibility of inconsistent rulings over whether an agreement to arbitrate exists, so one forum probably ought to defer to the other. My concern is particularly acute because, in addition to being a court of only secondary jurisdiction vis-a-vis the ICC, this forum appears to have little connection to the instant dispute. Both parties do substantial business in New York, but no party to this controversy is located here, and Dedon's choice of forum appears to rest on the slender thread of a single allegedly tortious letter's being sent to a single New York recipient. Dedon's principal cause of action here is a bare request for declaratory relief; its New York common law claim (for tortious interference with prospective commercial advantage) not only depends on the fate of the declaratory judgment claim but is on its face of dubious merit.

However, neither party has seriously briefed the issue of a stay as a matter of comity – Janus makes misplaced arguments about the New York Convention that presume an agreement to arbitrate exists, while Dedon simply asks the court to deny the stay and does not mention comity at all – and the court's own (admittedly brief) research has not yet turned up a case that is squarely on point.

As concerned as I am about inconsistent results, however, I am even more concerned about abdicating this court's undoubted responsibility to decide the question of arbitrability. No less an authority than the United States Supreme Court has ruled, again and again, that where some evidence supports the proposition that no agreement to arbitrate exists, this question is not to be submitted to arbitrators. Staying this action in favor of allowing the ICC to determine arbitrability would contravene that controlling authority – something I do not believe I am at liberty to do, especially if the ICC panel's determination (and that of any English court to which any challenge to the validity of the ICC's award might be taken) will have preclusive effect in

this court (another matter the parties have not bothered to address). I would feel otherwise if either side had suggested that this court lacked jurisdiction over the matter, or even that venue was not appropriately chosen – but no such arguments have been made.

Furthermore, I have before me a motion for a preliminary injunction against further interference with Dedon's ability to enter into the business relationships needs in order to distribute its products in the United States directly. I cannot decide that motion without first addressing the issue of arbitrability, because if Dedon did agree to arbitrate disputes relating to a purported exclusive distributorship in London, then I have no jurisdiction over the tortious interference claim, either. The purported arbitration agreement provides for arbitration of all disputes "arising out of or in conjunction with" Janus' exclusive distributorship; a claim for tortious interference with Dedon's ability to sign on replacements for Janus surely qualifies as a dispute "in conjunction with" the distributorship agreement. While the court entertains serious doubt about the viability of Dedon's second cause of action as a matter of law, I cannot address the merits until I decide whether the parties made an agreement to arbitrate.

On balance, I will deny the motion for a stay pending arbitration of what is ultimately a non-arbitrable issue: the existence of an agreement to arbitrate.

For these reasons, Janus' motion is denied in its entirety – albeit with leave to renew in the event the court determines that the parties made an agreement to arbitrate.

Arbitrability Cannot Be Determined on the Present Limited Record

In view of the foregoing, one would expect the court to turn immediately to the issue of whether Dedon has agreed to arbitrate – which is to say, whether Dedon and Janus actually concluded the Distribution Agreement. Regrettably, any such discussion would be premature.

Courts perform a "very limited inquiry" in determining the enforceability of arbitration clauses found in international commercial agreements. Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co., 767 F.2d 1140, 1144 (5th Cir. 1985); Ledee v. Ceramiche Ragno, 684 F.2d 184, 186 (1st Cir. 1982). However, when "the making of the agreement to arbitrate is placed in issue … the court must set the issue for trial," as long as "the party putting the agreement to arbitrate in issue … present[s] 'some evidence' in support of its claim." Sphere Drank Ins., Ltd. v. Clarendon Nat'l Ins. Co., 263 F.3d 26 (2d Cir. 2001). Dedon has certainly provided the necessary scintilla of evidence – it has submitted the very form of Distribution Agreement that was given to the ICC to establish the existence of an arbitrable dispute, and that document is not signed. Furthermore, Dedon has submitted evidence that the agreement was never signed, a fact which Janus concedes but nonetheless argues is not dispositive in this case. Dedon also offers extensive evidence about the negotiations, and about the parties' dealings from and after 2006, that tend to support its contention that the only agreements made by the two companies were agreements to buy and sell on a shipment by shipment basis.

Janus counters with evidence that it served as Dedon's exclusive U.S. distributor – and on at least one occasion was advertised as such in a Dedon print advertisement – for the last four years. Janus also notes that, in 2009, it filed a lawsuit in a California state court against a former Janus employee alleging, *inter alia,* that the employee was interfering with the Janus/Dedon relationship (which Janus couched with reference to the Distribution Agreement) by acting as an independent sales representative for Dedon. Ultimately, after discussions between Dedon, Janus and the former employee, Janus discontinued the legal action without prejudice, and the two companies continued their commercial dealings as before. Janus' argument that the Distribution Agreement came into being notwithstanding a lack of signature rests on this evidence.

The competing evidence raises disputed issues of fact that cannot be resolved short of a trial on the issue of contract formation.

Furthermore, there may be choice of law issues to consider before the contract formation question can be answered. As previously noted, the Distribution Agreement (which Janus claims controls the parties' dealings) is to be construed pursuant to the laws of England and Wales; whether that particular contract has validly come into being may well depend on the law of a foreign jurisdiction. Unfortunately, Janus has not complied with the procedures for proving foreign law to the court. See Fed. R. Civ. P. 44.1. Dedon never signed the Distribution Agreement and will no doubt contest the applicability of foreign law to the issue of contract formation; however, it has not provided the court with any considered argument on the point. In fact, no one has suggested what law would apply to the issue of contract formation. At first blush, given the dispute's apparent lack of contact with New York, it is hard to see why New York contract law should control: Dedon is a German company and Janus is a California corporation with its principal place of business on the other side of the continent and the two companies market Dedon furniture all over the United States. The fact that both companies do business in New York is hardly dispositive. I have no idea where a "locus of operative facts" test would lead because no one has briefed the matter.

I thus conclude that the court must hold a hearing with witnesses and argument in order to decide whether this court has subject matter jurisdiction over Dedon's second cause of action.

The hearing will be conducted in accordance with the court's Individual Rules for Non-Jury Trials. The parties should confer and come up with a schedule for any expedited discovery that may be required (it ought not be extensive), as well as procedures for dealing with the choice of law issue (which may be considerably more complicated than resolving the disputed issues of

fact). We will conference this case on October 27, 2010 at 10:00 A.M. to see if we can work out a schedule that would be acceptable to all parties.

Conclusion

For the foregoing reasons, Janus' pending motion to compel arbitration and dismiss the instant proceeding (Docket # 17) is denied. Dedon's motion for a preliminary injunction on its Second Cause of Action (Docket # 13) is stayed pending a determination on the issue of subject matter jurisdiction. If the court lacks subject matter jurisdiction, the complaint will be dismissed. If it does not, we will discuss how to handle the resolution of the second cause of action.

The Clerk of the Court is directed to remove the motions at Docket # 17 from the court's calendar of open motions.

Dated: October 19, 2010

U.S.D.J.

BY ECF TO ALL COUNSEL