UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DEDON GmbH and DEDON Inc.,

Plaintiffs,

-against-

10 Civ. 04541 (CM)

JANUS et CIE,

Defendant.

DECISION AND ORDER REJECTING THE CONTENTION THAT THE SECOND CIRCUIT'S DECISION IN *KAHN-LUCAS* IS DETERMINATIVE OF THE EXISTENCE OF AN AGREEMENT TO ARBITRATE AND SETTING THE CASE FOR A MARCH 14 TRIAL

McMahon, J.:

Before the Court is the question of whether the Second Circuit's holding in Kahn Lucas Lancaster, Inc. v. Lark International Ltd., 186 F.3d 210, 218 (2d Cir. 1999), *partially abrogated on other grounds by* Sarhank Group v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005), obviates the need for the Court to hold a trial on the limited issue of whether the parties made an agreement to arbitrate. Dedon argues that Kahn precludes this Court from finding that an enforceable agreement to arbitrate exists, which makes a trial on the existence of the agreement unnecessary. Since, however, there is a distinction between the existence of a contract and its enforceability – and since this Court's ability to adjudicate Dedon's claim for tortious interference with prospective business relations depends on whether the parties agreed to arbitrate that claim – Kahn does not obviate the need for the trial on the issue of contract formation.

Background

Familiarity with the underlying facts – which are set forth in detail in this Court's decision dated October 19, 2010 Dedon v. Janus, 2010 WL 422709, (S.D.N.Y. Oct. 19, 2010) and in the opinion of the Second Circuit Dedon v. Janus, 2011 WL 31868 (2d Cir. Jan. 6, 2011) – is presumed. The Court will not repeat the underlying facts here.

In the October 19, 2010 Decision and Order (the "Order"), this Court disposed of two motions: Janus' motion to compel arbitration and dismiss the instant proceeding, and Dedon's motion for a preliminary injunction preventing Janus from interfering with Dedon's contractual relationship with third party distributors of Dedon's products.

The Court denied Janus' motion to compel arbitration. I concluded that I could not compel arbitration in this case without first determining whether such an agreement to arbitrate actually existed, and that there were disputed issues of fact concerning the existence of the agreement. However, Janus' motion to compel was denied without prejudice to renewal in the event that the Court found, after a trial, that an agreement to arbitrate existed.

Because of the dispute over the existence of an agreement to arbitrate, the Court stayed Dedon's motion for a preliminary injunction. As the purported arbitration clause on which Janus relied was a broad arbitration clause, the Court concluded that, "..... if Dedon did agree to arbitrate disputes relating to a purported exclusive distributorship in London, then [the Court] [would] have no jurisdiction over the tortious interference claim either." Dedon, 2010 WL 4227309 at *10. If, however, the parties did not make an agreement to arbitrate, then this Court has jurisdiction to consider whether Janus's efforts to prevent third parties from becoming Dedon distributors rose to the level of tortious interference with Dedon's prospective business relationships.

Janus appealed the denial of the motion to compel arbitration to the Second Circuit, which affirmed this Court's decision in its entirety.

In the Court of Appeals, Dedon argued that this Court did not go far enough when it denied Janus' motion to compel arbitration without prejudice. Relying on the Second Circuit's holding in Kahn Lucas Lancaster, Inc. v. Lark International Ltd., 186 F.3d 210, 218 (2d Cir. 1999), *partially abrogated on other grounds by* Sarhank, 404 F.3d 657, 660 n.2, Dedon asserted that this Court should have denied the motion to compel with prejudice, because the contract containing the arbitration provision was never signed and so was unenforceable. However, as the Second Circuit acknowledged in its decision, Dedon's argument based on Kahn was not raised in this Court. The Circuit did not express any opinion regarding the applicability of Kahn to the issue of whether an agreement to arbitrate existed. Rather, the Second Circuit stated that the parties would have the opportunity to argue the applicability of Kahn to this case at the trial on the existence of the contract.

Following the expedited issuance of the mandate by the Second Circuit, this Court, at Dedon's suggestion, asked the parties to submit letter briefs outlining their arguments regarding the applicability of Kahn to the issue of the existence of a contract in this case which was set for trial. Dedon argues that the Second Circuit's ruling in Kahn precludes the finding of any agreement to arbitrate; Janus says not so.

Kahn Lucas

In Kahn Lucas Lancaster, Inc. v. Lark International Ltd., the Second Circuit held that "in order to be enforceable under the [New York] Convention, both an arbitral clause in a contract and an arbitration agreement must be signed by the parties or contained in an exchange of letters or telegrams." 186 F.3d 210, 217 (2d Cir. 1999), *partially abrogated on other grounds by* Sarhank, 404 F.3d at 660 n.2. The plaintiff in Kahn, a New York corporation, sued the defendant, a Hong Kong corporation, for claims including breach of contract. 186 F.3d at 213. Jurisdiction was initially predicated on diversity. Id. at 213-214. The district court held that it did not have personal jurisdiction over the defendant. Id. However, the court allowed the plaintiff to amend its pleading, concluding that the court would have personal jurisdiction over the defendant if presented with an application to compel arbitration. Id.

Duly prodded, the plaintiff in Kahn converted its complaint into a motion to compel the defendant to arbitrate their dispute in accordance with certain arbitration clauses printed on the reverse of two purchase orders sent by the plaintiff to the defendant. Id. The district court granted the plaintiff's motion. Id. at 214. The court noted that subject matter jurisdiction was conferred exclusively by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "New York Convention"), which is enforceable under Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208. The court made clear that diversity was lacking. Id.

Defendant appealed, and the Second Circuit reversed. It concluded that the district court lacked subject matter jurisdiction to entertain a petition to compel arbitration under the New York Convention, because there was "no 'agreement in writing' sufficient to bring [the] dispute within the scope of the Convention." Kahn, 186 F.3d at 218-219. The New York Convention defines "agreement in writing" as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." New York Convention, art. II(2). After analyzing the language and construction of the New York Convention, the Second Circuit concluded that "the modifying phrase 'signed by the parties ... applies to both 'an arbitral clause in a contract' and 'an arbitration agreement.'" Kahn, 186 F.3d at 218. The Circuit found that a court's power to enforce an arbitration agreement, through a motion to compel arbitration based on the New York Convention, extended only to agreements that were either (1) signed by the parties, or (2) that constitute "an exchange of letters or telegrams." Id. at 218.

In Sarhank Group v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005), the Second Circuit partially abrogated Kahn Lucas. It held that questions about whether an alleged arbitration agreement satisfied the New York Convention's requirements were properly "merits questions, not subject matter jurisdiction questions." Id. at 660. The appellants in Sarhank argued that, under Kahn Lucas, the district court below had lacked subject matter jurisdiction to enforce a

foreign arbitration award because there was "no 'agreement in writing' sufficient to bring [the] dispute within the scope of the Convention." Id. (citations and quotations omitted). The Second Circuit held that Kahn Lucas should not be read as viewing the "written agreement" requirement as jurisdictional. Id. at 660 n.2. However, Kahn Lucas' holding precluding enforcement of an unsigned arbitration agreement pursuant to the New York Convention survives Sarhank and remains good law.

Application of Kahn to This Case

As Janus notes in its letter brief, there is no application to compel arbitration under the New York Convention pending before the Court. Although Janus is free to renew its motion to compel arbitration, it has not yet chosen to do so; indeed, it has plainly stated that it "does not intend to make any further applications under the New York Convention before this Court." (Def. Ltr. Brf. at 1.) That is understandable, for if Janus were to renew its motion to compel arbitration, Kahn Lucas would require this Court to deny the motion with prejudice, since there is no dispute that there is neither a signed agreement containing an arbitration clause nor any exchange of letters or telegrams between the parties.[1]

Dedon and Janus disagree whether Kahn has any relevance to the issues in this case going forward. Dedon argues that "Kahn controls the issue of whether the parties entered into an agreement requiring arbitration" and that under Kahn "no such agreement exists." (Pl. Brf. at 1.) But Dedon is wrong. Kahn says nothing at all about whether an arbitration agreement exists; it holds only that an agreement to arbitrate must be signed to be enforceable under the New York Convention, which has as its limited purpose the establishment of criteria for conferring authority on United States courts to compel arbitration (and enforce awards) under international arbitration agreements. See, e.g., Ghassabian v. Hematian, No. 08 Civ. 440 (SAS), 2008 WL 3982885, at *2 (S.D.N.Y. Aug. 27, 2008). Kahn does not hold that no arbitration agreement can come into being absent a signature, and that is the issue I have to decide before I can address Dedon's tortious interference claim and its preliminary injunction motion.

Taking note of the Convention's purpose and the purpose and dictates of the FAA, another court in this District has held that a finding of unenforceability pursuant to the New York Convention does not mean that no agreement to arbitrate exists:

> Finally it does not follow that because a court lacks authority to compel arbitration under either Chapter 1 or Chapter 2 of the FAA, the arbitration clause in an otherwise valid agreement is necessarily void for all purposes .... The

[1] Plainly, if Dedon had called this Court's attention to Kahn Lucas the first time this matter was here, I would have denied the motion to compel with prejudice. Dedon did not do so, however, and as with many other litigation decisions that were discussed in this Court's earlier opinion, the consequences are significant.

> unenforceability of an arbitration clause in a federal court does not mean that the agreement cannot be given effect in the designated foreign state[.]

Dapuzzo v. Globalvest Mgm't Co., 263 F. Supp.2d 714, 740 (S.D.N.Y. 2005) ; see also Weizmann Inst. V. Neschis, 421 F. Supp. 2d 654, 674 (S.D.N.Y. 2005) ("The Convention does not appear to preempt all other law governing the recognition of foreign arbitral awards or to bar the recognition of awards not falling under the Convention…"). So while the alleged arbitration agreement in this case (if such an agreement exists) cannot be enforced by this Court because it (admittedly) does not meet the criteria of the New York Convention, it is possible that the parties concluded a valid and binding agreement to arbitrate under whatever contract law governs their dealings (what law that is has not yet been decided). If I conclude that Dedon and Janus have entered into such an agreement, then I lack jurisdiction to decide Dedon's tortious interference claim (or to grant its motion for a preliminary injunction). And if I decide otherwise, then I have no choice but to entertain that claim – even if I am powerless to stay the arbitration that is presently pending before the ICC in London.

I remain puzzled about why this Court has been placed in this position. As I noted in my original opinion, only a court in England can stay the arbitration that is pending in England. That said, I must decide whether to proceed with the tortious interference claim, and I cannot do that until I decide whether the parties agreed to arbitrate that dispute. Therefore, we will proceed with the expedited trial of that issue.

Since I set and then abandoned the original trial schedule, my own calendar has become considerably more congested. Therefore, the parties are advised that the trial of this matter will be held on March 14, 2011. As the issue of jurisdiction is for the Court to determine, it will be a bench trial. The parties' attention is called to my Individual Rules for Bench Trials. All discovery is expedited and must be completed by March 1, 2001 (which means all deadlines are expedited from the deadlines established by the Federal Rules of Civil Procedure). Basically, I expect each side to turn over to the other whatever evidence it intends to introduce at trial relating to contract formation, including a list of witnesses (who should be few in number). I am limiting depositions to two per side. I am sorry, but the trial date cannot be changed to accommodate the schedule of anyone, so if there are foreign witnesses who do not wish to come to the United States to testify, and who will not give depositions voluntarily, we will simply have to dispense with their testimony altogether – there is no time for Hague Convention service.

This constitutes the decision and order of the Court.

Dated: February 8, 2011

U.S.D.J.

BY ECF TO ALL COUNSEL