UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STEPHENS	:	
	:	
v.	:	**No. 3:01cv2267 (JBA)**
	:	
TES FRANCHISING ET AL.	:	

Ruling on Defendants' Motion to Stay Litigation and Compel Arbitration [Doc. #22]

Plaintiff filed this diversity action alleging fraud and fraudulent misrepresentation, negligent misrepresentation, and violations of the Connecticut Unfair Trade Practices Act and Florida Franchise Act, in defendants' sale of a franchise to plaintiff. Defendants have moved to stay the case and compel arbitration of plaintiff's claims pursuant to an arbitration clause in the franchise agreement. For the reasons set out below, defendants' motion is denied.

I. Factual Background

The agreement entered into between plaintiff and the defendants has two distinct provisions bearing upon dispute resolution. Section XX, entitled "Arbitration," provides that:

> All disputes and claims relating to this Agreement, the rights and obligations of the parties hereto, or any claims or causes of action relating to the performance of wither party, and/or the purchase of franchise goods by Consultant Franchisee [plaintiffs] will be settled by arbitration . . . .

¶ 20.01. The one noted exception in this section (XX) provides

that "[n]otwithstanding the foregoing, the arbitrator will have no jurisdiction over disputes relating to the ownership, validity, or registration of any mark, trade secret or copyright of Franchisor . . . . " ¶ 20.03. It is undisputed that this case does not relate to trademark, trade secret or copyright disputes.

Two sections later, however, in the "Miscellaneous" section (XXII) of the agreement, the following provision appears:

> Except to the extent governed by United States trademark laws, this franchise agreement is to be construed and interpreted in accordance with the laws of the State of Connecticut. Consultant Franchisee and Franchisor hereby agree to submit any disputes between them to the jurisdiction and venue of a court of competent jurisdiction in the State of Connecticut, New Haven County.

Agreement, ¶ 22.01(a). Another portion of the agreement provides that "[t]he titles and subtitles of the various articles and paragraphs of this Agreement are inserted for convenience and shall not be deemed to affect the meaning or provide guidance as to the construction of any of the terms of this Agreement. ¶ 22.01(b). Thus, the section titles of "Arbitration" and "Miscellaneous" are of no assistance in resolving the issue of whether there exists an enforceable agreement between the parties to arbitrate claims.

Plaintiff contends that the agreement is inherently ambiguous because on one hand, the arbitration clause explicitly provides that all disputes are subject to arbitration, but

several paragraphs later, a clause in the Miscellaneous section states that the parties agree to submit their disputes to the courts. Plaintiff argues that this ambiguity should be construed against the drafter of the agreement (the defendants),[1] and thus it is plaintiff's choice whether to arbitrate or litigate in a court of competent jurisdiction in New Haven County, Connecticut, and it has elected to proceed in U.S. District Court.

Defendants contend that the agreement is not ambiguous, and clearly compels arbitration. They argue that the clause in 22.01(a) applies only to those issues that cannot be arbitrated under the express arbitration provision; that is, only to intellectual property disputes, which are specifically excepted by ¶ 22.03 of the agreement. Under defendants' reading, ¶ 22.01(a) is a residual clause. The arbitration clause is read and applied first, and then, if a particular dispute cannot be arbitrated, that dispute must be submitted to a court of competent jurisdiction.

II. Analysis

Plaintiff is a resident of Florida and defendants are all residents of Connecticut. Because the franchise agreements

[1]The Court's May 8, 2002 Scheduling Order [Doc. #21] instructed that "[a]ny party requesting an evidentiary hearing shall set forth the basis therefor at the time briefing is filed." Inasmuch as no request for an evidentiary hearing was received, the Court deems undisputed plaintiff's allegation that defendants drafted the franchise agreement.

covered financial exchanges between residents of different states, contrary to defendants' view that Connecticut statutory provisions apply relative to the enforceability of arbitration agreements under Connecticut law, this agreement is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., as the agreement is a "contract evidencing a transaction involving commerce," 9 U.S.C. § 2. See Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 273-277 (1995) (the words "involving commerce" in 9 U.S.C. § 2 signal Congress's intent to regulate to the full extent of its commerce power); accord Guinness-Harp Corp. v. Jos. Schlitz Brewing Co., 613 F.2d 468, 472 (2d Cir. 1980) ("Federal law applies to enforcement of a duty to arbitrate, whenever interstate commerce is involved.") (citations omitted).

Under the FAA, "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . 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. Determination of whether the parties' agreement contains a "written provision . . . to settle by arbitration," is governed by state law. Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 45-46 (2d Cir. 1993) ("we apply state law in determining whether the parties have agreed to arbitrate") (citing Perry v. Thomas, 482 U.S. 483,

492 n.9 (1987)). Here, the Agreement provides that Connecticut law will govern construction of its terms. See Agreement, ¶ 22.01(a) ("Except to the extent governed by United States trademark laws, this franchise agreement is to be construed and interpreted in accordance with the laws of the State of Connecticut.").[2]

When applying state law to determine whether there is a valid arbitration agreement, courts apply state law principles that govern the formation of contracts generally. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943-944 (1995). Under Connecticut law, ambiguous terms of a contract must be construed against the drafter. Hartford Elec. Applicators of Thermalux, Inc. v. Alden, 169 Conn. 177, 182 (1975) (citing Ravitch v. Stollman Poultry Farms, Inc., 165 Conn. 135 (1973)). A provision in a contract is ambiguous when it is reasonably susceptible to more than one reading. Metropolitan Life Ins. Co. v. Aetna Cas. and Sur. Co., 255 Conn. 295, 305 (2001) (citation omitted). Any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception

[2]While parties can agree to "submit the arbitrability question itself to arbitration," First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995), "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so," id at 944 (quoting AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)). Here, there is no contention that such a clear and unmistakable statement exists, and thus the initial question of whether the parties agreed to arbitrate at all is for the Court to determine.

of the terms; a court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. HLO Land Ownership Associates Ltd. Partnership v. City of Hartford, 248 Conn. 350, 157 (1999) (citations and quotations omitted).

Here, ambiguity is evident on the face of the document as Section XX (entitled "Arbitration") provides that all disputes (with the exception of trademark issues) must be decided by arbitration, but ¶ 22.01(a) expressly provides that the parties "agree to submit any dispute between them to the jurisdiction and venue of a court of competent jurisdiction" (emphasis added). The latter provision contains no limitation or explanation indicating that it is applicable only to trademark disputes or otherwise subject to the arbitration provisions of Section XX; instead, it plainly provides that "any dispute" is to be decided by a court of competent jurisdiction. The two competing provisions do not reference each other at all. Further, ¶ 22.01(a) is in a different section from the arbitration provisions generally, and not in or near the section exempting intellectual property disputes from arbitration. It is a provision set apart from the remainder of the dispute resolution provisions. In short, what the arbitration provision expressly provides is taken away several pages later by the separate provision that all disputes be submitted to a court of competent jurisdiction.

While, as defendants urge, the contract can be read as

mandating arbitration of all disputes other than intellectual property disputes, plaintiff's construction of the Agreement is also reasonable. Since the existence of two reasonable readings is the essence of ambiguity, and under Connecticut law ambiguous terms are to be construed against the drafter, plaintiff's construction must be allowed.

Although the FAA evidences a strong presumption in favor of arbitration as to the scope of arbitrable issues, that policy only comes into play after it is determined that the contracting parties have an enforceable arbitration clause. Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 847 (2d Cir. 1987) ("[Once] a determination has been made that parties have entered into binding and enforceable agreements to arbitrate their disputes . . . questions regarding the scope of the arbitration provision must be addressed '[w]ith a healthy regard for the federal policy favoring arbitration[.]'") (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). However, a party cannot be forced into arbitration absent an agreement to arbitrate, General Motors Corp. v. Pamela Equities Corp., 146 F.3d 242, 247 (5th Cir. 1998) (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)), and when deciding whether a party has agreed to arbitrate a dispute, "the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently." First Options,

514 U.S. at 943.

Similarly, under Connecticut law, the presumption favoring arbitration is applicable only where there is an agreement to arbitrate. See Conn. Gen. Stat. § 52-408 ("An agreement . . . to settle by arbitration any controversy . . . shall be valid, irrevocable and enforceable, except when there exists sufficient cause at law or in equity for the avoidance of written contracts generally."). Thus, the policy favoring arbitration under both federal and state law is not implicated here because the existence of an agreement to arbitrate has not been established.

III. Conclusion

Accordingly, for the reasons set out above, defendants' motion to compel arbitration [Doc. #22] is DENIED.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 10th day of July, 2002.