

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ADMART AG, HELLER WERKSTAFF )  
GESMBH, ANDRE HELLER and )  
STEFAN SEIGNER, )  
 )  
Plaintiffs, )  
 )  
v. ) Civ. No. 95-410-SLR  
 )  
STEPHAN and MARY BIRCH )  
FOUNDATION, INC., )  
 )  
Defendant. )

**MEMORANDUM ORDER**

At Wilmington this 29th day of January, 2004, having considered the parties' cross motions and the various responses thereto;

IT IS ORDERED that:

1. Plaintiffs' motion to correct a clerical mistake (D.I. 35) is denied as moot. The court notes in this regard, however, that when a case remains inactive for a year or more, it is standard practice to close the case administratively.

2. The parties' cross-motions to grant the petition to confirm the arbitral award (D.I. 35) and to adjourn the petition to confirm the arbitral award (D.I. 44) are to be finally resolved after April 1, 2004, for the reasons that follow:

a. **Background.** This dispute arises out of a transaction whereby defendant, the Stephen and Mary Birch Foundation, Inc. ("the Foundation"), agreed to purchase certain artwork (the "artwork") from plaintiffs Admart AG, Heller Werkstatt GesmbH, Andre Heller and Stefan Seigner (collectively "Admart") for six million dollars. Having paid Admart three million dollars of the purchase price, the Foundation requested permission to view, inventory or otherwise check on the condition of the artwork before the remainder of the purchase price was paid. When Admart declined to permit such, the Foundation sought in October 1991 to resolve the matter by initiating an arbitration proceeding in Zurich, Switzerland.

b. On December 15, 1994, the three-arbitrator panel entered an award (the "Award") in favor of Admart (the defendants therein) which provided, in relevant part, that:

2. The counterclaim is admitted in the following manner:

a. Claimant is ordered to pay Defendant Admart AG within 30 days from the receipt of the Award USD 2,000,000.- plus interest at 4.5% p.a. non-compound from 1 January 1992 to the date of the Award and at 6.5% p.a. non-compound from the date of the Award, **simultaneously with Defendants**

- **releasing to Claimant the containers as per Annex 1 containing the "Luna Luna" objects, in their present state** at their present location in Vienna,
- releasing to Claimant the Artists' Declarations as per Annex 2 in Vienna,

- releasing to Claimant the technical documentation ("passports") for "Luna Luna" in Vienna.

b. Claimant is ordered to pay Defendant Admart AG after termination of the on site construction, and the project is completely set up, but not later than within 8 months from the receipt of the Award USD 1,000,000.- plus interest at 4.5% p.a. non-compound from 1 April 1992 to the date of the Award and at 6.5% p.a. non-compound from the date of the Award.

3. After 35 days from the date of receipt of the Award, Defendants Admart AG and/or Heller Werkstatt GesmbH **are authorized to deposit** the items described in No. 2 a. above, at Claimant's risk and expense, with a third party storage company in the Vienna area.

Upon such deposit, the payment as per No. 2 a. above becomes due and payable immediately and unconditionally.

(D.I. 45 at 6) (emphasis added) The Swiss Supreme Court rejected the Foundation's appeal in 1996.

c. Despite the adverse ruling, the Foundation has not paid the amount of the Award on the grounds that Admart has not complied "with the **requirement** that they transfer the Artwork to a third party for the Foundation's benefit." (D.I. 45 at 6) (emphasis added) Admart admits that it has not released the artwork, arguing that they are not required to do so absent payment for the artwork as ordered in the Award. Admart also argues that they were not "required" to deposit the artwork with a third party, but were "authorized" to do so; therefore, the Foundation, and not Admart, is the party in violation of the Award. Although the parties have engaged in protracted

settlement negotiations, the matter remains unresolved. The Foundation initiated a second arbitration in July 1999 to compel Admart to deliver the artwork. To date, however, the second arbitral panel has not determined whether it has jurisdiction to hear the dispute. Admart has brought the instant motion to confirm the 1994 foreign arbitral award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "Convention"), which is governed in the United States by 9 U.S.C. § 201 et seq. The Foundation has moved to "adjourn" or stay the action pursuant to 9 U.S.C. § 207.

d. **Standard of review.** Article V of the Convention provides in relevant part that

[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

9 U.S.C. § 201.

e. One of the basic purposes of the Convention "was to liberalize procedures for enforcing foreign arbitral awards" because "[e]xtensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings." Parsons & Whittemore Overseas Co., 508 F.2d 969, 973, 977 (3d Cir. 1974). Therefore, the above defense is to be construed

narrowly. National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 816 (D. Del. 1990).

f. Article VI of the Convention provides that:

[i]f an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

9 U.S.C. § 207. For the most part, adjournment of the enforcement of foreign arbitral awards under § 207 has been authorized during the pendency of appeals to the courts. See e.g., Spier v. Calzaturificio Tecnica S.P.A., 663 F. Supp. 871 (S.D.N.Y. 1987); Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948 (S.D. Ohio 1981). The Foundation has cited authority, however, which more generally states that "Article VI applies when a court is asked to enforce an award while there is pending another action to vacate the award in the country in which the award was rendered." Spector v. Torenberg, 852 F. Supp. 201, 204 n.2 (S.D.N.Y. 1994).

g. **Analysis.** The court agrees with Admart that the Award does not give the Foundation the benefit of viewing its purchase before paying for it. While this court disagrees with that decision, it does not sit in review of that decision; neither does it view the Award as against public policy.

However, the court is reluctant to simply rubber-stamp the Award as written, given the passage of time and the conduct of the parties. Therefore, in order to bring this dispute to final closure consistent with the Award, the court will require the following: (1) on or before April 1, 2004, counsel for the Foundation shall submit an affidavit to this court confirming that the required monies have been deposited in an interest-bearing account for the benefit of Admart; and (2) on or before April 1, 2004, counsel for Admart shall submit an affidavit to this court confirming the location and condition of the artwork. Failure of the Foundation to timely deposit the monies will result in this court confirming the arbitral award against it. Failure of Admart to timely comply will result in the adjournment of its petition to confirm the arbitral award until further order of the court. Failure of both parties to comply with this order will result in dismissal of the case.

Sue L. Robinson  
United States District Court