

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SANDVIK AB,)
)
 Plaintiff,)
)
 v.) Civil Action No. 99-486-RRM(SLR)
)
 ADVENT INTERNATIONAL CORP.,)
 et al.,)
)
 Defendants.)
)
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 SANDVIK AB,)
)
 Plaintiff,)
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 v.) Civil Action No. 02-143-SLR
)
 ADVENT INTERNATIONAL CORP.,)
 et al.,)
)
 Defendants.)

MEMORANDUM ORDER

At Wilmington this 22nd day of May, 2002, having reviewed the papers submitted in connection with the various pending motions and having heard oral argument on the same;¹

IT IS ORDERED that plaintiff's motion for a finding of contempt (D.I. 96, C.A. No. 99-486-RRM(SLR)) is denied for the reasons that follow:

1. In February 1999, plaintiff and defendants entered into a Joint Venture Agreement ("JVA"). Through the JVA, a new

¹The court has jurisdiction over these actions pursuant to 28 U.S.C. § 1331 and 9 U.S.C. § 203.

joint venture company was to be formed by plaintiff and defendants to purchase three of plaintiff's subsidiaries, with plaintiff maintaining a minority stake in such. In April 1999, plaintiff was informed that defendants did not intend to honor the JVA. Defendants asserted that the individual who executed the JVA on their behalf did not have the authority to bind them.² Plaintiff thereafter filed suit against defendants, bringing claims for breach of contract, fraud, reckless misrepresentation, and negligent misrepresentation. Although denying that they were bound by the JVA, defendants responded to the complaint by moving to compel arbitration under the arbitration clause of the JVA. Recognizing that "under both the [Convention on the Recognition and Enforcement of Foreign Arbitral Awards] and the [Federal Arbitration Act] a court must decide whether an agreement to arbitrate exists before it may order arbitration," Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 107 (3d Cir. 2000), the United States Court of Appeals for the Third Circuit concluded that the question of whether "Huep's signature bound Advent" had to be determined before the district court could order arbitration. Id.

²The signatory, Ralf Huep, identified himself on the JVA as "an attorney-in-fact without power-of-attorney."

2. The parties pursued discovery on the issue of whether Mr. Huep's signature bound defendants. On the eve of trial, the parties executed the following stipulation:

IT IS HEREBY STIPULATED AND AGREED by and between Plaintiff Sandvik AB, on the one hand, and Defendants Advent International Corporation, Global Private Equity III L.P., Global Private Equity III-A L.P., Global Private Equity III-B L.P., Advent PGGM global L.P., Advent Partners GPAE-III L.P., Advent Partners (NA) GPE-III L.P., Advent Euro-Italian Direct Investment Program L.P., Advent European Co-Investment Program L.P. and Advent Partners L.P. (collectively the "Advent Funds" and with Advent International Corporation, the "Advent Parties"), on the other hand that:

(a) Ralf Huep's signature served to bind the Advent Funds to the Joint Venture Agreement dated February 16, 1999 (the "JVA");

(b) the Advent Parties shall not in any judicial or arbitral forum: (i) re-adjudicate the question whether Ralf Huep's signature served to bind the Advent Parties to the JVA; and/or (ii) raise any defense based on the nature of Ralf Huep's representation of the Advent Funds in relation to the JVA or the manner in which Ralf Huep signed the JVA; and/or (iii) contend that the Advent Parties and Sandvik did not make or form the JVA. In entering into this stipulation, the Advent Parties are expressly preserving their right to present to an arbitral forum all other claims or defenses including, without limitation, claims or defenses that would, under U.S. common law principles, be characterized as grounds to rescind, avoid or terminate the JVA. The Advent Parties are also expressly preserving their right to present to an arbitral forum defenses or claims based on the nature of Ralf Huep's representation of the Advent Funds and/or

International Sorting Systems Holding B.V. in relation to the Share Purchase Agreement dated February 16, 1999 (the "SPA"), or based on the manner in which Ralf Huep signed the SPA;

(c) this matter shall, for all other purposes, be referred to arbitration in accordance with the terms of the JVA.

(D.I. 16, Ex. A) Based on this stipulation, so ordered by the court on December 4, 2000, the parties' dispute was sent to arbitration.

3. The current dispute centers around the language used by defendants in their "statement of claim" submitted in the arbitration proceeding. Defendants have denominated their arbitral claims as follows: (1) "The transaction should be annulled on grounds of fraud or error"; and (2) "If not annulled on the grounds of fraud or error, the JVA must be declared to have automatically terminated pursuant to JVA Article 13.2. Consequently, Sandvik's claim that the Advent Funds allegedly breached the JVA must be rejected." (D.I. 16, Ex. B) Among the facts asserted in connection with these claims are the following:

54. In view of this situation, the parties decided – as explained below – that Mr. Huep, who, in any event, had no power of attorney enabling him to sign for the Advent Funds, could not bind the Advent Funds to the JVA or (on the Advent Funds' behalf) bind ISSH to the SPA. Instead, the parties agreed that he would execute the agreement in the capacity of a *Vertreter ohne Vertretungsmacht*, or an "agent without authority" under German law.

55. After the Deutsche Bank letter arrived and Mr. Huep had spoken to Messrs. Walker, Sheldon and Tadler, Mr. Huep and Mr. Kirchner consulted on what should be done. It was clear that the Sandvik negotiators had hoped that agreements would be signed that day. It was also clear that the Advent Funds were not in a position to execute binding transactional documents.

56. Mr. Kirchner then suggested to Mr. Huep that he sign the JVA as a *Vertreter ohne Vertretungsmacht* for the Advent Funds, and that he sign the SPA as a *Vertreter ohne Vertretungsmacht* for ISSH, the joint venture company. That would enable the Sandvik executives to return with signed agreements (as Mr. Sunnermalm and the Board expected) and would enable the Advent Funds to avoid closing the transaction in the event that Deutsche Bank, after conducting its additional due diligence, declined to provide financing to ISSH. This change in the form of signature was acceptable to Messrs. Walker, Tadler and Sheldon.

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73. As a result and as explained above, although the penultimate draft of the JVA recited that someone was signing for each Advent Fund pursuant to a power of attorney, each such recitation was changed in the final version of the JVA so that Ralf Huep of Advent GmbH was designated as signing on behalf of each of the Advent Funds as an "attorney-in-fact without power-of-attorney."

74. Similarly, the parties deviated from the manner of signing the SPA. According to JVA Article 13.1, both Sandvik and the Advent Funds were supposed to execute the SPA "on behalf of the Company 'in the process of formation,'" that is, on behalf of ISSH. This was not done. Instead, Sandvik signed for itself and neither party (neither Sandvik nor the Advent Funds) signed on behalf of ISSH. Only Ralph Huep signed the

SPA on behalf of ISSH – as an “attorney-in-fact without power-of-attorney (*Vertreter ohne Vertretungsmacht*).” Thus, neither party signed for ISSH – only Mr. Huep as a *Vertreter ohne Vertretungsmacht*.

75. After the London meetings, Mr. Severin immediately sent the JVA and the SPA, as signed by Mr. Huep, to his outside counsel, Ulrich von Schoenfeld. Mr. von Schoenfeld, however, simply placed the JVA and the SPA in his file **without reviewing them**. He did not take them out to review until after Advent announced an intention not to ratify in mid-April 1999 when Mr. Severin called him to ask him to examine the agreements. Had Mr. von Schoenfeld reviewed the JVA and the SPA when they first arrived at his offices, he would have noticed the form of Mr. Huep’s signature and would have corrected Mr. Severin’s mistaken impression (assuming that Mr. Severin ever had such a mistaken impression) that Mr. Huep was authorized to sign the SPA for ISSH. Like any competent German attorney, Mr. von Schoenfeld knows what *Vertreter ohne Vertretungsmacht* means. Annexed as Exhibit A-23 to the Appendix is Mr. von Schoenfeld’s affidavit on the legal meaning of *Vertreter ohne Vertretungsmacht*. Sandvik filed this affidavit in the U.S. legal proceedings. It is in substantial agreement with the affidavit of Prof. Kuebler as to the meaning of *Vertreter ohne Vertretungsmacht*.

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107. Further, as will be detailed below, this entire dispute could have – and should have – been avoided had Sandvik’s counsel (assuming the truthfulness of his statements) taken the most rudimentary steps to understand the meaning of *Vertreter ohne Vertretungsmacht* before he advised his client to accept Mr. Huep’s signature in that form. If Sandvik’s counsel had done this, he would have understood that, by signing as a *Vertreter ohne Vertretungsmacht*, Mr. Huep was

not binding his principal to any agreement. Instead, he would have known that the Advent Funds could only be bound if they subsequently ratified Mr. Huep's signature.

108. Mr. Severin's duty of inquiry could have been satisfied in a number of ways. He could have asked more questions of Mr. Kirchner. He could have asked one of Sandvik's outside counsel what the term meant, or inquired of his boss, the in-house general counsel, Malcolm Falkman, who had previously insisted on a power of attorney for Global Private Equity III in connection with the Letter of Intent. Indeed, he could have turned to one of the people on his own team and asked him. Svante Lindholm is a lawyer by training and had spent part of his tenure at Sandvik in its legal department. Ulf Ahman, who was also present for Sandvik at the London meetings, speaks German. When asked at his deposition to translate literally the phrase *Vertreter ohne Vertretungsmacht*, he translated it as "a salesman without right to sell, or representative without right to represent." Deposition of Ulf Ahman, p. 147. This excerpt from Mr. Ahman's deposition transcript is submitted as Exhibit A-46 to the Appendix.

109. This entire dispute also would have been avoided had Sandvik's outside counsel, Mr. von Schoenfeld, reviewed the executed JVA and SPA when they were first sent to him by his own client within days after February 16th, rather than – as he testified at his deposition – simply filing them away. See excerpt from Dr. von Schoenfeld's deposition transcript submitted as Exhibit A-47 to the Appendix. He knew the meaning and effect of *Vertreter ohne Vertretungsmacht*. See Exhibit A-21 to the Appendix.

110. Sandvik is a large corporation doing business throughout the world. It was represented by outside as well as in-house

counsel. Sandvik's failure to fulfill its duty to inquire as to the meaning of *Vertreter ohne Vertretungsmacht* must be imputed to it. Mr. Huep and Mr. Kirchner fully disclosed the facts. Indeed, Mr. Kirchner redrafted the agreements to disclose explicitly the nature of Mr. Huep's authority.

(D.I. 16, Ex. B, ¶¶ 54-56, 73-75, 107-110) (emphasis in original)
Referring to the above language, plaintiff argues that defendants are reneging on the December 2000 stipulation and order.

4. Defendants deny that they are retrying the issue of a binding signature. According to defendants, the language identified by plaintiff does not constitute anything other than facts, an essential part of the story. Defendants point to evidence in the record indicating that the arbitrators are well aware of the stipulation and of defendants' agreement formalized therein. (D.I. 16, Ex. B at ¶ 76)

5. Based on the record and on the recognition that the same evidence can be used to support multiple claims, the court finds that defendants do not appear to be claiming in the arbitration proceeding that Mr. Huep's signature was not binding. Therefore, the extraordinary remedy of contempt is not appropriately entered against defendants on the record.

IT IS FURTHER ORDERED that defendants' motion for dismissal of C.A. No. 02-143-SLR (D.I. 15) is granted in part and denied in part. Plaintiff's motion for summary judgment (D.I. 20) filed in that same case is denied.

1. Plaintiff instituted suit against defendants "to enforce this Court's resolution" in the prior litigation, C.A. No. 99-486-RRM(SLR). Specifically, plaintiff alleges that defendants are attempting to have the arbitrators reverse the finding of the Third Circuit in Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 (3d Cir. 2000), that the issue of contract formation was properly resolved through litigation in this court. In support of its allegation, plaintiff points to the following language in defendants' statement of claim submitted in the arbitration proceeding:

Further, Sandvik breached its obligation to arbitrate the dispute by commencing a lawsuit in the United States, rather than submitting to an NAI arbitration panel as it had agreed to do in the JVA. Thus, the Advent Funds are entitled to be reimbursed for the fees expended in defending the U.S. litigation.

(D. I. 16, Ex. B. at ¶ 212) Plaintiff also asserts that defendants are attempting in arbitration to reopen the issue of whether Mr. Huep signed the JVA with binding effect. In support of this assertion, plaintiff points to the same language as it did in connection with its motion for a finding of contempt.

2. For the reasons stated above in connection with the contempt motion, and recognizing that once arbitration has commenced the court should play no role in that proceeding, the court grants defendants' motion to dismiss the suit in part. The court has determined from the papers submitted in the arbitration

proceeding that defendants do not appear to be relitigating the issue of whether Mr. Huet's signature was binding. Therefore, defendants' motion to dismiss is granted in this regard.

3. Defendants' motion to dismiss is denied with respect to the remaining issue of whether defendants' attempt to sanction plaintiff for litigation in this court is in dereliction of this court's resolution of C.A. No. 99-486-RRM(SLR). The issue of jurisdiction raised by such a claim is of sufficient concern to the court that it will stay the action pending resolution of same by the arbitration panel.

4. Plaintiff's motion for summary judgment is denied.

Sue L. Robinson
United States District Judge