> HUBEI PROVINCIAL GARMENTS IMP. & EXP. (GROUP) CORPORATION,
> Plaintiff, -against- RUGGED ACTIVE WEAR, INC. a/k/a R.A.W.
> RUGGED ACTIVE WEAR, ROSBRO SPORTSWEAR CO. INC., and MICHAEL
> ROSENBERG, Defendants.
>
> 97 Civ. 7564 (SAS)
>
> UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
> NEW YORK
>
> 1998 U.S. Dist. LEXIS 12304
>
> August 7, 1998, Decided
>
> August 11, 1998, Filed
>
> DISPOSITION:
> [*1] Defendants' motion to compel arbitration and to stay proceedings in
> Court
> granted as to R.A.W. and Rosenberg and denied as to Rosbro.
>
> CORE TERMS: arbitration, compel arbitration, discovery, counterclaim,
> motion to compel arbitration, arbitration agreement, arbitrate,
> Arbitration Rules, stay proceedings, arbitrable, documentary evidence,
> mediation, deadline, breach of contract, unnecessary delay,
> misrepresentation,
> invoking, waived, interrogatory, depositions, claimant, inference of
> prejudice,
> right to arbitration, information obtained, pending arbitration,
> sufficient evidence, opposing party, prejudiced, nonmovant, inferred
>
> COUNSEL:
> For Hubei Provincial Garments Imp. & Exp. (Group) Corporation, Plaintiff:
> Paul
> E. Summit, Esq., Andrew T. Solomon, Esq., Sullivan & Worcester LLP, New
> York,
> New York.
>
> For Rugged Active Wear, Inc. a/k/a R.A.W. Rugged Active Wear, Rosbro
> Sportswear
> Co. Inc., Michael Rosenberg, Defendants: Charles Wertman, Esq., New York,
> New

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>
> York.
>
> JUDGES:
> Shira A. Scheindlin, U.S.D.J.
>
> OPINIONBY:
> Shira A. Scheindlin
>
> OPINION:
>
> OPINION AND ORDER
>
> SHIRA A. SCHEINDLIN, U.S.D.J.:
>
> Defendants Rugged Active Wear, Inc. a/k/a R.A.W. Rugged Activewear ("R.A.W."), Rosbro Sportswear Co. Inc. ("Rosbro") and Michael Rosenberg ("Rosenberg") move to compel arbitration of Plaintiff Hubei Provincial Garments Imp. & Exp. (Group) Corporation's ("Hubei") claims for breach of contract, fraud and misrepresentation, and to stay this litigation pending arbitration of these claims in China pursuant to Article II (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. @ 201 and Section 3 of the Federal Arbitration Act, 9 U.S.C. @@ 1-16. Plaintiff opposes [*2] Defendants' motion and argues that Defendants have waived the right to compel arbitration due to their unnecessary delay in demanding arbitration and the prejudice that Plaintiff would now suffer if arbitration is required.
>
> I. Procedural Background
>
> R.A.W. and Rosbro are New York corporations that buy goods from foreign manufacturers for resale. See Affirmation of Charles Wertman, Defendant's Attorney ("Wertman Aff.") at PP 3-5. Rosenberg is the president of R.A.W. See id. Hubei is a Chinese corporation that manufactures and sells clothing. See id. at P 2. From September 1995 to December 1995, R.A.W. and Hubei entered into three sales contracts ("Contracts"), pursuant to which Hubei agreed to

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> manufacture boys' outerwear for a fixed price. See Wertman Aff., Ex. A at
> PP 8,
> 12; Wert. Aff., Ex. B at PP 8, 12. In pertinent part, each Contract reads
> as
> follows:
>
> All disputes in connection with this Contract or the execution there of
> [sic]
> shall be settled by negotiation. In case no settlement can be reached, the
> case
> in dispute shall then be submitted for arbitration to Foreign Trade
> Arbitration
> Commission of China Council for The Promotion of International [*3] Trade
> in
> Beijing in accordance with the provisional rules of procedure of The
> Foriegn
> [sic] Trade Arbitration Commission of The China Council for The Promotion
> of
> International Traed [sic]. The decision by the commission shall be
> accepted as
> final and binding upon both parties.
>
> Wertman Aff., Ex. D.
>
> The parties agree that the following rules ("Arbitration Rules") would
> govern
> the arbitration of Hubei's claims in the China International Economic
> Trade
> Arbitration Commission (the successor to the Foreign Trade Arbitration
> Commission of the China Council for the Promotion of International Trade).
> See
> Affirmation of Paul E. Summit, Plaintiff's Attorney ("Summit Aff.") at P
> 13;
> Reply Affirmation of Charles Wertman, Defendant's Attorney ("Wertman Reply
>
> PAGE 617
>
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>
> Aff.") at PP 11-13. Article 14 of the Arbitration Rules requires the
> claimant to
> specify its claim and "the facts and evidence on which [the] claim is
> based," as
> well as to submit "the relevant documentary evidence on which the . . .
> claim is
> based." Summit Aff., Ex. A at 3. Under Article 17 the respondent must also
> submit "relevant documentary evidence" and its defense after receiving a
> copy
> of claimant's submissions. [*4] Id. And Article 18 requires the
> respondent to

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> set forth in any counterclaims "his specific claim, detailed grounds upon
> which
> his counterclaim is lodged, and facts and evidence on which his
> counterclaims is
> based, and attach to his counterclaim the relevant documentary evidence."
> Id. at
> 3-4.
>
> On October 10, 1997, Hubei filed a Complaint asserting claims of breach
> of
> contract against R.A.W. and fraud and misrepresentation against all
> Defendants.
> See Wertman Aff. at P 6 and Ex. A; Summit Aff. at P 2. On December 5,
> 1997, all
> Defendants denied liability and R.A.W. raised six counterclaims for breach
> of a
> series of contracts entered into from December 1, 1995 through March 1996.
> See
> Wertman Aff., Ex. B.
>
> On January 12, 1997, this Court entered a scheduling order, which
> established
> the following deadlines: production of documents by March 13, 1998;
> completion
> of discovery by July 1, 1998; submission of a joint pre-trial order by
> July 29,
> 1998. See Wertman Aff. at P 9; Plaintiff's Memorandum of Law ("Pl.'s
> Mem.") at
> 3; Affirmation of Andrew T. Solomon, Plaintiff's Attorney ("Solomon
> Aff."), Ex.
> D. Pursuant to this Court's Rules, "counsel must be prepared to proceed to
> [*5]
> trial on forty-eight (48) hours' telephone notice once the Pretrial Order
> has
> been filed." Rule 7(a). Plaintiff produced over one thousand documents
> that
> "relate to" its claims and responded to interrogatories. See Summit Aff.
> at P
> 12; Wertman Reply Aff., Ex. A. Both parties noticed depositions, although
> none
> were taken. See Solomon Aff. at PP 9-10. Defendants produced some of the
> documents requested by Hubei, but failed to respond to interrogatory
> requests.
> See Solomon Aff. at P 9. Although Hubei denies Defendants' assertion that
> discovery is not complete, it is clear that the parties intended to
> request an
> extension until Defendants engaged new attorneys and notified Hubei in
> mid-June
> of their motion to compel arbitration. Solomon Aff., Exs. A-C, F at 13-15;

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> Wertman Aff. at P 10, 19. The discovery deadline has expired. See Solomon
> Aff.
> at P 2.
>
> The parties also engaged in a court-ordered mediation effort, pursuant
> to
> which Hubei submitted a ten-page mediation brief setting forth its
> arguments in
> support of its claims and its defenses to R.A.W.'s counterclaims. n1 See
> Summit
> Aff. at P 16; Pl.'s Mem. at 4; Wertman Reply Aff. at P 13. Hubei served
> its
> First Amended [*6] Complaint on June 26, 1998, alleging breach of
> contract
> against R.A.W., breach of guarantee against Rosbro, and fraud and
> misrepresentation against all Defendants, but withdrew it by stipulation
> dated
> August 4, 1994. See Wertman Aff. at P 11; Solomon Aff. at P 8; Docket
> Report at
> 3. Hubei estimates that it has expended $ 38,000 in legal fees. See Summit
> Aff.
> at P 8.
>
> - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - -
> - - -
>
> n1 R.A.W. withdrew its counterclaims by stipulation dated August 4,
> 1998. See
> Docket Report at 3.
>
> - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - -
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> On July 17, 1998, Defendants served their motion to compel arbitration.
> See
> Summit Aff. at P 9.
>
> II. Arbitrability of Plaintiff's Claims
>
> Federal policy strongly favors arbitration as an alternative means of
> dispute
> resolution. See Rush v. Oppenheimer, 779 F.2d 885, 887 (2d Cir. 1985). The
> presumption of arbitrability applies even more strongly than usual in the
> context of international business transactions. See Threlkeld & Co. v.
> Metallgesellschaft Limited (London), 923 F.2d 245, 248 (2d Cir. 1991). In

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> determining whether [*7] a dispute is arbitrable, a court must decide (1)
> whether the parties agreed to arbitrate, and if so, (2) whether the scope
> of
> that agreement encompasses the asserted claims. See Deloitte Noraudit A/S
> v.
> Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1063 (2d Cir. 1993). The
> parties
> agree that Hubei's claims against R.A.W. and Rosenberg are arbitrable
> pursuant
> to the arbitration clause contained in the Contracts. See Pl.'s Mem. at
> 16;
> Defendant's Reply Memorandum of Law ("Def.'s Reply) at 18-19. Hubei,
> however,
> denies that its claim against Rosbro is within the scope of the
> arbitration
> agreement. See Pl.'s Mem. at 17; Defendant's Memorandum of Law ("Def.'s
> Mem.")
> at 10.
>
> Despite the preference for arbitration, "a party cannot be required to
> submit
> to arbitration any dispute which he has not agreed so to submit." Deloitte
> Noraudit A/S, 9 F.3d at 1063-64 (quoting United Steelworkers v. Warrior
> and Gulf
> Navigation Co., 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347
> (1960)). An
> arbitration agreement cannot be expanded to reach "parties that were not
> intended by the original contract." Thomson-CSF, S.A. v. American
> Arbitration
> Assoc., 64 F.3d 773, 776 (2d Cir. [*8] 1995). Because Rosbro was not a
> party
> to any of the Contracts at issue, it was not a party to the arbitration
> agreement. The Second Circuit recognizes five exceptions based on contract
> and
> agency principles where arbitration agreements apply to non-signatories:
> (1)
> incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing
> or
> alter-ego; and (5) estoppel. See id.; see also Usina Costa Pinto S.A.
> Acucar E
> Alcool v. Louis Dreyfus Sugar Co., 933 F. Supp. 1170, 1178 (S.D.N.Y. 1996)
> (nonsignatory entitled to enforce arbitration agreement under estoppel
> theory).
> Defendants present no evidence suggesting that Rosbro falls within the
> scope of
> any of these exceptions. Accordingly, Rosbro cannot compel Hubei to
> arbitrate
> its claims.
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> II. Waiver of Right to Compel Arbitration
>
> A waiver of arbitration "is not to be lightly inferred." Carcich v. Rederi
> A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968). Therefore, "mere delay in seeking
> arbitration, absent prejudice to the opposing party, does not constitute
> waiver." Com-Tech Assocs. v. Computer Assocs. Int'l, 938 F.2d 1574, 1576 (2d
> Cir. 1991). However, a party does waive its right to compel arbitration when it
> engages [*9] in protracted litigation that prejudices the opposing party. See
> Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991). Prejudice, in this context,
> means "the inherent unfairness--in terms of delay, expense, or damage to a
> party's legal position--that occurs when the party's opponent forces it to
> litigate an issue and later seeks to arbitrate that same issue." Doctor's
> Assocs. v. Distajo, 107 F.3d 126, 134 (2d Cir. 1997). The expense and delay
> inherent in litigation does not, without more, constitute sufficient evidence of
> prejudice to justify a finding of waiver. Leadertex, Inc. v. Morganton Dyeing &
> Finishing Corp., 67 F.3d 20, 26 (2d Cir. 1995); see also PPG Industries, Inc. v.
>
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>
> Webster Auto Parts Inc., 128 F.3d 103, 107 (2d Cir. 1997). On the other hand,
> waiver has been found where a party "engaged in extensive pre-trial discovery
> and forced its adversary to respond to substantive motions, delayed invoking
> arbitration rights by filing multiple appeals and substantive motions while an
> adversary incurred unnecessary delays and expenses, and engaged in discovery
> procedures not available in arbitration." PPG Industries, 128 F.3d at 107
> (internal citations omitted). [*10] In determining whether a party has waived
> its right to arbitration, the following factors should be considered: "(1) the
> time elapsed from the commencement of litigation to the request for arbitration,
> (2) the amount of litigation (including any substantive motions and discovery),

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> and (3) proof of prejudice." Id. at 107-08.
>
> A. Time Elapsed from Commencement of Litigation
>
> Hubei filed its Complaint on October 10, 1997, and Defendants filed their
> motion to compel arbitration on July 17, 1998. Thus, a little more than nine
> months elapsed between the time Hubei asserted arbitrable claims and Defendants
> moved to compel arbitration. A nine-month delay alone is insufficient to warrant
> finding a waiver of arbitration. See PPG Industries, 128 F.3d at 108 (five month
> delay not enough to find waiver); Rush, 779 F.2d at 887 (eight month delay
> insufficient by itself to constitute waiver of right to arbitrate). However, an
> intent to waive may be found when a motion to compel arbitration is made shortly
> before trial. Here, the belated filing of the motion to compel arbitration
> occurred at "the eleventh hour." Leadertex, 67 F.3d at 26. The deadline for
> submitting a joint pretrial [*11] order was July 29; the case would have been
> considered trial-ready by July 31. Therefore, Defendants' conduct indicated an
> intent to litigate that was inconsistent with the right to compel arbitration.
> See id. (raising issue of arbitration on eve of trial implies intent to forfeit
> right to compel arbitration).
>
> B. Amount of Litigation
>
> Before filing their motion to compel arbitration, Defendants took advantage
> of the litigation tools provided by the Federal Rules of Civil Procedure. Hubei
> turned over more than 1,000 documents relating to its claims and provided
> limited responses to interrogatories. During the three weeks preceding the
> discovery deadline, Defendants refused to comply with discovery requests and
> instead notified Hubei of their intent to move to compel arbitration.
>
> C. Prejudice
>
> No matter how badly Defendants conducted themselves, however, "waiver of the
> right to compel arbitration due to participation in litigation may be

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> found only
> when prejudice to the other party is demonstrated." Rush, 779 F.2d at 887;
> see
> also Leadertex, 67 F.3d at 26. Sufficient prejudice may be inferred when a
> party
> avails itself of the liberal federal discovery procedures [*12] not
> available
> in arbitration. See Zwitserse Maatschappij Van Levensverzekering En
> Lijfrente v.
> ABN Int'l Capital Markets Corp., 996 F.2d 1478, 1480 (2d Cir. 1993)
> (movant's
> participation in discovery-type process sufficiently prejudiced nonmovant
> to
> infer waiver); Liggett & Myers Inc. v. Bloomfield, 380 F. Supp. 1044,
> 1047-48
> (S.D.N.Y. 1974) (benefits obtained from pretrial discovery process would
> not
> have been available in arbitration and sufficiently prejudiced nonmovant
> to
> constitute waiver). While Hubei claims that the information obtained by
> Defendants through discovery would not have been available in arbitration,
> the
> Arbitration Rules require the submission of "the relevant documentary
> evidence"
>
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>
> and defenses to claims, not just the documents sufficient to prove a
> claim. See
> Summit Aff. at P 14. Furthermore, Defendants did not obtain any new
> information
> through Hubei's June 4 interrogatory responses. The names of witnesses
> provided
> by Hubei were already known to Defendants, since Defendants noticed their
> depositions on January 19, 1998. See Wertman Reply Aff., Ex. A; Pl.'s Mem.
> at
> 11; Solomon Aff. at P 10. The agreed prices cited by Hubei were also known
> to
> Defendants, [*13] who had possession of the relevant Contracts. See
> Wertman
> Reply Aff. at P 15 and Ex. A. No depositions were taken. Hubei has not
> shown
> that Defendants obtained any information through the discovery process
> that
> would have been unavailable in arbitration. n2
>
> ----------Footnotes----------
> ---

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>
> n2 Hubei also alleges that "Defendants obtained a roadmap to Hubei's
> case"
> that demonstrated the strengths in Hubei's case and the weaknesses in
> Defendants' counterclaims when they participated in the court-ordered
> mediation
> program. The Arbitration Rules require, however, that a claimant set forth
> the
> basis of its claim. See Solomon Aff., Ex. A at 3. Hubei has not shown that
> it
> provided any more information than that required by the Arbitration Rules
> or
> that it would not have submitted the same memorandum in a mediation
> session with
> Defendant Rosbro.
>
> ----------End Footnotes----------
> ---
>
> Nor has Hubei demonstrated that it incurred any unnecessary delay or
> expense
> that would justify an inference of prejudice. See Cotton v. Slone, 4 F.3d
> 176,
> 179 (2d Cir. 1993) (sufficient prejudice [*14] to infer waiver can be
> found
> when a party "delays invoking arbitration rights while the adversary
> incurs
> unnecessary delay or expense") (citing Kramer, 943 F.2d at 179). No
> distinction
> is made, if any exists, between information obtained by Defendants
> relevant to
> claims against Rosbro and that relevant to claims against R.A.W. and
> Rosenberg.
> Because the claims against Rosbro are not arbitrable and "must go to trial
> in
> any event," the delay and expenses incurred in the pretrial process are
> not
> unnecessary. See Carcich, 389 F.2d at 696 (defendant suffered no prejudice
> from
> third party-defendant's delay in invoking right to arbitration where
> plaintiff's
> direct claims must remain in the trial court). Hubei has not claimed that
> it
> "would have proceeded differently in the total litigation." Id.
>
> In sum, Hubei has failed to set forth sufficient evidence to justify an
> inference of prejudice. In the absence of such proof, R.A.W. and Rosenberg
> cannot be found to have waived their right to compel arbitration.
>

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> III. Stay of Proceedings
>
> "Under Section 3 of the FAA, 9 U.S.C. @ 3, a district court 'must stay
> proceedings if satisfied that the parties have agreed in writing [*15] to
> arbitrate an issue or issues underlying the district court proceeding.'"
> WorldCrisa Corp. v. Armstrong, 129 F.3d 71, 74 (2d Cir. 1997) (quoting
> McMahan
> Securities Co. L.P. v. Forum Capital Markets L.P., 35 F.3d 82, 85 (2d Cir.
> 1994)). Thus, Rosbro and Rosenberg are entitled to a stay under Section 3
> pending arbitration.
>
> A nonparty to an arbitration agreement is not entitled to a stay of
> proceedings under Section 3. Citrus Marketing Board of Israel v. J.
> Lauritzen
> A/S, 943 F.2d 220, 224-25 (2d Cir. 1991); Nederlandse
>
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>
> Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co., 339 F.2d 440, 441 (2d
> Cir.
> 1964). However, a district court has the inherent power to stay
> proceedings.
> Nederlandse, 339 F.2d at 441 ("'The power to stay proceedings is
> incidental to
> the power inherent in every court to control the disposition of the causes
> on
> its docket with economy of time and effort for itself, for counsel, and
> for
> litigants.'") (quoting Landis v. North American Co., 299 U.S. 248, 254-55,
> 81 L.
> Ed. 153, 57 S. Ct. 163 (1936)); see also WorldCrisa Corp., 129 F.3d at 76.
> Defendants seeking a stay bear the burden of demonstrating "that they have
> not
> taken nor will take any steps [*16] to hamper the progress of the
> arbitration
> proceeding, that the arbitration may be expected to conclude within a
> reasonable
> time, and that such delay as will occur will not work undue hardship."
> Nederlandse, 339 F.2d at 442; see also WorldCrisa Corp., 129 F.3d at 75;
> Citrus
> Marketing Board, 943 F.2d at 225; Societe Nationale Pour La Recherche,
> Etc. v.
> General Tire and Rubber Co., 430 F. Supp. 1332, 1334 (S.D.N.Y. 1977);
> Lawson
> Fabrics, Inc. v. Akzona, Inc., 355 F. Supp. 1146, 1151 (S.D.N.Y.), aff'd,
> 486
> F.2d 1394 (2d Cir. 1973). Because Defendants do not even attempt to meet
> the

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> burden imposed on them to demonstrate that a stay is warranted, the
> proceedings
> against Rosbro will not be stayed.
>
> IV. Conclusion
>
> For the foregoing reasons, Defendants' motion to compel arbitration and
> to
> stay proceedings in this Court is granted as to R.A.W. and Rosenberg, and
> denied
> as to Rosbro. A conference is scheduled for August 14, at 4:30 P.M.
>
> SO ORDERED.
>
> Shira A. Scheindlin
>
> U.S.D.J.
>
> Date: New York, New York
>
> August 7, 1998
>
>

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