

CISG-online 387	
Jurisdiction	USA
Tribunal	U.S. District Court for the Eastern District of Louisiana
Date of the decision	17 May 1999
Case no./docket no.	CIV. A. 99-0380
Case name	<i>Medical Marketing Int'l, Inc. v. Internazionale Medico Scientifica, S.r.l.</i>

Order and Reasons

Duval, District J.

Before the court is an Application for Order Conforming Arbitral Award and Entry of Judgment, filed by plaintiff, Medical Marketing International, Inc. («MMI»). Having considered the memoranda of plaintiff, and the memorandum in opposition filed by defendant, Internazionale Medico Scientifica, S.r.l. («IMS»), the court grants the motion.

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Factual Background

Plaintiff MMI is a Louisiana marketing corporation with its principal place of business in Baton Rouge, Louisiana. Defendant IMS is an Italian corporation that manufactures radiology materials with its principal place of business in Bologna, Italy. On January 25, 1993, MMI and IMS entered into a Business Licensing Agreement in which IMS granted exclusive sales rights for Giotto Mammography H.F. Units to MMI.

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In 1996, the Food and Drug Administration («FDA») seized the equipment for noncompliance with administrative procedures, and a dispute arose over who bore the obligation of ensuring that the Giotto equipment complied with the United States Governmental Safety Regulations, specifically the Good Manufacturing Practices (GMP) for Medical Device Regulations. MMI formally demanded mediation on October 28, 1996, pursuant to Article 13 of the agreement. Mediation was unsuccessful, and the parties entered into arbitration, also pursuant to Article 13, whereby each party chose one arbitrator and a third was agreed upon by both.

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An arbitration hearing was held on July 13–15, July 28, and November 17, 1998. The hearing was formally closed on November 30, 1998. The arbitrators rendered their decision on December 21, 1998, awarding MMI damages in the amount of \$ 357,009.00 and legal interest on that amount from October 28, 1996. The arbitration apportioned 75% of the \$ 83,640.45 cost of arbitration to MMI, and the other 25% to IMS. IMS moved for reconsideration on December 30, 1998, and this request was denied by the arbitrators on January 7, 1999.

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Plaintiff now moves for an order from this court confirming the arbitral award and entering judgment in favor of the plaintiff under 9 U.S.C. § 9.

Jurisdiction

The Federal Arbitration Act («FAA») allows parties to an arbitration suit to apply to the «United States court in and for the district within which such award was made» for enforcement of the award. 9 U.S.C. § 9. As the arbitration in this case was held in New Orleans, Louisiana, this court has jurisdiction over petitioner's Application under 9 U.S.C. § 9. This court also has diversity jurisdiction over the case, as the amount in controversy exceeds \$ 75,000 and the parties are a Louisiana corporation and an Italian corporation.

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Analysis

The scope of this court's review of an arbitration award is «among the narrowest known to law.» *Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co.*, 119 F.3d 847, 849 (10th Cir.1997). The FAA outlines specific situations in which an arbitration decision may be overruled: (1) if the award was procured by corruption, fraud or undue means; (2) if there is evidence of partiality or corruption among the arbitrators; (3) if the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) if the arbitrators exceeded their powers. Instances in which the arbitrators «exceed their powers» may include violations of public policy or awards based on a «manifest disregard of the law.» See *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S.Ct. 2177, 2183 (1983), *Walcha v. Swan*, 346 U.S. 427, 436–37, 74 S.Ct. 182, 187–88 (1953), overruled on other grounds, 490 U.S. 477, 109 S.Ct. 1917 (1989).

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IMS has alleged that the arbitrators' decision violates public policy of the international global market and that the arbitrators exhibited «manifest disregard of international sales law.» Specifically, IMS argues that the arbitrators misapplied the United Nations Convention on Contracts for the International Sales of Goods, commonly referred to as CISG, and that they refused to follow a German Supreme Court Case interpreting CISG.

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MMI does not dispute that CISG applies to the case at hand. Under CISG, the finder of fact has a duty to regard the «international character» of the convention and to promote uniformity in its application. CISG Article 7. The Convention also provides that in an international contract for goods, goods conform to the contract if they are fit for the purpose for which goods of the same description would ordinarily be used or are fit for any particular purpose expressly or impliedly made known to the seller and relied upon by the buyer. CISG Article 35(2). To avoid a contract based on the non-conformity of goods, the buyer must allege and prove that the seller's breach was «fundamental» in nature. CISG Article 49. A breach is fundamental when it results in such detriment to the party that he or she is substantially deprived of what he or she is entitled to expect under the contract, unless the party in breach did not foresee such a result. CISG Article 25.

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At the arbitration, IMS argued that MMI was not entitled to avoid its contract with IMS based on non-conformity under Article 49, because IMS's breach was not «fundamental.»

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IMS argued that CISG did not require that it furnish MMI with equipment that complied with the United States GMP regulations. To support this proposition, IMS cited a German Supreme Court case, which held that under CISG Article 35, a seller is generally not obligated to supply goods that conform to public laws and regulations enforced at the buyer's place of business. *Entscheidungen des Bundersgerichtshofs in Zivilsachen (BGHZ)* 129, 75 (1995). In that case, the court held that this general rule carries with it exceptions in three limited circumstances: (1) if the public laws and regulations of the buyer's state are identical to those enforced in the seller's state; (2) if the buyer informed the seller about those regulations; or (3) if due to «special circumstances,» such as the existence of a seller's branch office in the buyer's state, the seller knew or should have known about the regulations at issue.

The arbitration panel decided that under the third exception, the general rule did not apply to this case. The arbitrators held that IMS was, or should have been, aware of the GMP regulations prior to entering into the 1993 agreement, and explained their reasoning at length. IMS now argues that the arbitration panel refused to apply CISG and the law as articulated by the German Supreme Court. It is clear from the arbitrators' written findings, however, that they carefully considered that decision and found that this case fit the exception and not the rule as articulated in that decision. The arbitrators' decision was neither contrary to public policy nor in manifest disregard of international sales law. This court therefore finds that the arbitration panel did not «exceed its powers» in violation of the FAA.

Accordingly,

IT IS ORDERED that the Application for Order Conforming Arbitral Award is hereby GRANTED.

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