

FILED

OCT 22 2019

**CIRCUIT COURT
WAUKESHA COUNTY, WI**

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

AMS STEAM PRODUCTS, LLC,

Plaintiff,

Case No. 19CV1398

v.

MATTHEW WHITAKER,

MIURA AMERICA CO., LTD

Defendants,

and

FLUID HANDLING, INC.,

Defendant/Counterclaimant/Third-Party Plaintiff,

v.

AMS STEAM PRODUCTS, LLC,

Counterclaim Defendant and

JACK DANIELS, JIM MANTHEI AND CHRISTOPHER RICE,

Third-Party Defendants.

DECISION AND ORDER

¶1. The issue presented by the current motions is the Court’s authority to decide whether an arbitration agreement applies to a particular dispute pending before it. Because the Court concludes that the parties to a valid arbitration agreement have contracted to delegate the

arbitrability issue to an arbitrator, the Court concludes that it has no authority to determine whether the plaintiff's claims are subject to the arbitration agreement, and therefore grants the motion to stay pending arbitration.

¶2. The underlying facts, at least for purposes of addressing the pending motions, are relatively straightforward. Plaintiff AMS Steam Products, LLC ("AMS") sold and distributed boilers for defendant Miura America Co., Ltd ("Miura") and had for many years. In July 2017, defendant Matthew Whitaker quit his job with AMS and took a job with AMS's competitor, Fluid Handling, Inc. ("FHI"). Miura then took steps to terminate its relationship with AMS and begin a distribution relationship with FHI.

¶3. AMS objected to Mr. Whitaker's move to a competitor, and to Miura's efforts to end its dealings with AMS and start a relationship with Mr. Whitaker's new employer FHI.

¶4. Miura, AMS, AMS's corporate parent Hot Water Products, Inc. ("HWP"), FHI, and Mr. Whitaker agreed to mediate their disputes, and did so in Milwaukee on January 4, 2018. The parties reached agreements in principle at the mediation, and then signed three agreements on Friday, January 19, 2018, to resolve their disputes. In particular, they signed a settlement agreement that resolved several disputes between the parties and set forth general procedures for future transactions ("Settlement Agreement"). The Settlement Agreement itself specifically contemplated two other agreements: First, it provided that Miura and AMS will sign a Representative Agreement in a specified form; and (2) that Miura and FHI will sign a Representative Agreement in a specified form.

¶5. Section 14 of Miura's Representative Agreement with AMS, signed the same day as the Settlement Agreement, provides as follows:

14. Arbitration

Any controversy, cause of action or claim arising out of or relating to the matters in this Agreement, the parties' relationship, the parties' interactions with each other and any goods or services sold by any party ("Dispute") shall be finally settled by binding arbitration under the then-current Commercial Arbitration Rules of the American Arbitration Association ("AAA") before a single arbitrator in Atlanta, Georgia, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction located in Fulton County, Georgia. The parties hereto shall use their best efforts prior to initiating arbitration to settle any Dispute by negotiating with each other in good faith, and any such matter that is not resolved by good faith negotiation by the parties shall be first submitted to mediation administered by the AAA's Commercial Mediation Procedures.

Any Dispute still unresolved by Mediation must be filed for arbitration within the applicable statute of limitations, and neither filing nor serving a lawsuit in violation of this agreement to arbitrate will stop the applicable statute of limitations from continuing to run. The Federal Arbitration Act applies to this Agreement and to any arbitration conducted under it. The arbitrator has the authority to rule on his or her own jurisdiction and the arbitrability of the Dispute, including any objections with respect to the existence, scope or validity of this Agreement. The award shall include brief findings of fact and conclusions of law. The award shall be kept strictly confidential and shall not, except for filings regarding its judicial enforcement, be disclosed to anyone not a witness, attorney, or party representative. This agreement mutually binds and benefits the parties hereto as well as their authorized successors, parents, subsidiaries, affiliates, representatives and agents, and all of their managers, members, officers, directors, shareholders, partners, owners and employees.

¶6. Attachment F to that Representative Agreement states “[t]his Agreement is being executed contemporaneously with a Settlement Agreement among the parties hereto and other parties. The parties agree that each agreement contains the entire agreement among the parties regarding the subject matter of the agreement.”

¶7. Shortly after the Settlement Agreement and the Representative Agreement between Miura and AMS were signed, disputes again arose involving the respective rights and duties of Miura, AMS and FHI under Miura’s system to register construction projects. The disputes were resolved in the Projects Dispute Settlement Agreement dated March 29, 2018. The

Projects Dispute Settlement Agreement was an amendment to the Settlement Agreement. It provided that, “[t]his Agreement is the whole agreement among the parties and supersedes all other agreements and understandings regarding the subject matter hereof. As amended hereby, the Settlement Agreement remains in force.” It is undisputed that the parties did not intend the Projects Dispute Settlement Agreement to supersede the Representative Agreement.

¶8. On August 6, 2019, AMS sued FHI, Matthew Whitaker and Miura in this Court and, based on the allegations in the Complaint, it was assigned to the commercial court docket. AMS alleged that FHI breached the Settlement Agreement and damaged AMS when FHI registered for a project after AMS had already done so and refused to cease and desist from activity on the project. AMS also alleged that Miura damaged AMS when it approved a registration for FHI on the project when AMS was already approved and did not require FHI to assign the purchase order to AMS.

¶9. On September 9, 2019, Miura filed a motion to stay or dismiss all the claims filed by AMS pending arbitration, as well as a motion to hold in abeyance the deadline to file responsive pleadings until the motion for stay pending arbitration is decided.

¶10. The parties briefed the motions and a hearing on them was held on October 14, 2019. The Court informed the parties how it intended to decide the motions, but welcomed any supplemental briefing on the scope of the requested stay. The Court promised a written decision and order addressing the motions and the basis for the Court’s decisions.

DISCUSSION

¶11. Miura contends that a stay of the case is warranted because any dispute between AMS and Miura must be arbitrated pursuant to the arbitration provision in the Representative Agreement. Miura initially notes the broad presumption favoring arbitration under both Federal

and Wisconsin law and that the Court must bear this in mind in addressing the motions. Miura then cites the expansive language of the arbitration provision—that is, that it relates not only to disputes over the Representative Agreement, but “[a]ny controversy, cause of action or claim arising out of or related to . . . the parties’ relationship [and] the parties’ interactions with each other and any goods or services sold by any party. . . .” Miura argues further that the parties agreed in the arbitration provision to delegate to the arbitrator the “authority to rule on his or her own jurisdiction and the arbitrability of the Dispute. . . .”

¶12. AMS, on the other hand, contends that the claims raised in the Complaint relate to breaches of the Settlement Agreement, and not the Representative Agreement. AMS highlights Attachment F to the Representative Agreement which states “[t]his Agreement is being executed contemporaneously with a Settlement Agreement among the parties hereto and other parties. The parties agree that each agreement contains the entire agreement among the parties regarding the subject matter of the agreement.” AMS argues that merger clauses in both agreements were intended, and must be applied, to keep the agreements separate. AMS contends that it never agreed to arbitrate disputes associated with the Settlement Agreement, as that agreement had other parties who are not parties to an agreement to arbitrate.

¶13. The parties cite a host of cases, but the Court relies principally upon just one—*Henry Schein, Inc. v. Archer & White Sales, Inc.*, ___ U.S. ___, 139 S. Ct. 524 (January 8, 2019). In that recent case, the Supreme Court addressed the authority of a court to assess the arbitrability of a dispute when the parties delegate the arbitrability question to the arbitrator. There, the United States Court of Appeals for the Fifth Circuit affirmed a district court decision finding that the motion to compel arbitration was “wholly groundless” based upon a reading of the arbitration provision and the particular dispute.

¶14. In a unanimous decision, the Supreme Court disagreed and vacated the order. The Supreme Court noted that the Federal Arbitration Act (“FAA”), 9 U.S.C. sec. 1, *et seq.*, makes arbitration a matter of contract, and courts must enforce arbitration agreements according to their terms. This applies not only to agreements to have an arbitrator decide the merits of a particular dispute, but also “‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular dispute.” *Id.* at 529 (quoting *Rent-a-Center West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010)). The Supreme Court held that the “wholly groundless” exception created by courts for the purpose of blocking frivolous attempts to transfer disputes from the court system to arbitration is not found in the FAA and is inconsistent with it.

¶15. According to the Supreme Court, when faced with an issue involving arbitration, a court’s task is clear: “To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.” *Id.* (citation omitted).

¶16. Therefore, in the light of *Henry Schein*, a court faced with a motion to compel arbitration or a motion to stay or dismiss litigation in favor of arbitration must answer two straightforward questions. The first question the court must answer is whether a valid arbitration agreement exists between the parties. If the answer is “no,” neither compelling arbitration nor staying or dismissing litigation pending arbitration is warranted.

¶17. If the answer is “yes,” the court must ask a second question—Does the parties’ arbitration agreement delegate the arbitrability issue to an arbitrator? If the answer to that question is “yes,” then the analysis stops and the court must enforce the parties’ agreement by

compelling arbitration or staying or dismissing the case pending arbitration. Arguments regarding the scope and applicability of the arbitration agreement should be presented to and decided by the arbitrator in accordance with the parties' agreement, and the court has no authority to weigh in on the merits of those arguments. If, and only if, the answer to the second question is "no" does the court apply the presumptions in favor of arbitration and review the scope of the arbitration agreement and the pending dispute to determine for itself whether arbitration must be compelled or litigation stayed or dismissed pending arbitration.

¶18. Addressing these questions in the present case, it is undisputed, and the Court finds, that there is a valid arbitration agreement between AMS and Miura. AMS would change the question and the Court's task by urging the Court to determine whether a valid arbitration agreement exists *that covers the dispute at issue*. But that qualifier changes the question entirely and puts the Court in the position of determining the arbitrability of the specific claims and disputes, something it has no power or responsibility to determine if, in fact, the parties contractually delegated that function to an arbitrator. Like they did here.

¶19. The Court finds that the parties here delegated to the arbitrator the power to decide "gateway" questions of arbitrability. It is interesting to note that in *Henry Schein*, the Supreme Court remanded the case to the Court of Appeals to determine whether the parties clearly and unmistakably agreed to arbitrate arbitrability based upon the fact that the parties agreed to be bound by the arbitration rules of the American Arbitration Association ("AAA"). Because those rules provide arbitrators the power to resolve arbitrability questions, the adoption of the rules, by itself, might support a finding that the parties agreed to arbitrate arbitrability.

¶20. In the present case, not only does the parties' arbitration agreement adopt the AAA rules, but it includes specific language clearly and unmistakably delegating the issue of

arbitrability to an arbitrator. The agreement provides: “The arbitrator has the authority to rule on his or her own jurisdiction and the arbitrability of the Dispute, including any objections with respect to the existence, scope or validity of this Agreement.”

¶21. Having answered both of the questions in the affirmative, the Court’s task is generally completed and Miura is entitled to relief. The only remaining issue is the type and scope of the relief Miura gets. Miura seeks a stay and alternatively an order dismissing the case. In support of its requested stay, Miura cites to the Wisconsin Arbitration Act (“WAA”), Wis. Stat. § 788.01 *et seq.*, and specifically § 788.02, which provides:

If any suit or proceeding be brought upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

¶22. Our Supreme Court recently addressed the provisions of the WAA and the “tight control” on what a circuit court may do when faced with a motion for relief under the WAA. *L.G. v. Aurora Residential Alts., Inc.*, 2019 WI 79, ¶¶ 15-17, 387 Wis. 2d 724.

¶23. In support of its request to dismiss the case, Miura cites several federal cases dismissing for lack of subject matter jurisdiction claims falling under a valid arbitration agreement. Miura suggests that it is well accepted that federal cases interpreting the FAA are persuasive in interpreting the WAA.

¶24. Federal courts, however, are courts of limited jurisdiction, and this Court is a court of general jurisdiction. WIS. CONST. art. VII, § 8. This Court has jurisdiction, both subject matter and personal, to address the dispute. Because of the arbitration agreement, however, it lacks competency to do so—that is, the power to exercise jurisdiction and adjudicate a case. *See*,

e.g., *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶¶ 9-14, 273 Wis. 2d 76 (discussing the difference between jurisdiction and competency). Here, the court's authority to act within its jurisdiction is statutorily circumscribed by the FAA and the WAA. Clearly a party may waive or forfeit his or her contractual right to arbitrate and thereby lose the statutory authority to restrict a circuit court from exercising its jurisdiction. *See Meyer v. Classified Ins. Corp.*, 179 Wis. 2d 386, 392-95, 507 N.W.2d 149 (Ct. App. 1993); *J.J. Andrews, Inc. v. Midland*, 164 Wis. 2d 215, 223-24, 474 N.W.2d 756 (Ct. App. 1991).

¶25. Which brings us back to the WAA and the requested relief. The WAA contemplates by its express terms a stay of the action, not a dismissal. That is the relief authorized by the statute, and thus the relief to which Miura is entitled. A stay is particularly appropriate here in that the arbitrator may conclude that the dispute is not subject to the parties' arbitration agreement, and such a decision would confirm this Court competency to adjudicate the dispute. Accordingly, the Court grants the motion to stay and rejects the alternative request for dismissal.

¶26. Finally, the Court must address the scope of the stay, both as to the claims against Miura as well as the pending claims against the other defendants not parties to an arbitration agreement with AMS. All of the parties acknowledge that the Court has inherent authority, in the exercise of its discretion, to control its docket and stay part or the entirety of the matter pending a final arbitration award.

¶27. The Court of Appeals in *J.J. Andrews v. Midland* and the language of § 788.02 both make clear that the requested stay applies to the *trial* of the claims pending against Miura, and not necessarily other aspects of the litigation with Miura, including discovery. 164 Wis. 2d at 223-24. In considering the scope of the requested stay, the Court considers the generally

accepted purpose and advantages of arbitration. The Court of Appeals has stated that “[t]he purpose of arbitration is to obtain a speedy, inexpensive and final resolution of disputes, and thereby avoid the expense and delay of a protracted court battle.” *Diversified Management Servs., Inc. v. Slotten*, 119 Wis. 2d 441, 449, 351 N.W.2d 176, 180-81 (Ct. App. 1984).

¶28. One feature reducing expense is the fact that discovery in arbitration tends to be limited compared to that available in litigation. In addition, arbitration generally results in a final award sooner than a jury or court trial can be scheduled and completed. The final award in arbitration is, for all intents and purposes, final with no prospect for challenge on appeal.

¶29. Detractors of arbitration can point to many of these same features as central problems with arbitration. Because discovery is limited, crucial evidence may not be presented to and considered by the arbitrator in rendering a final award. Timely disposition of a dispute is beneficial, but not at the expense of due process and a fair preparation and presentation of the matters in dispute. And while finality is no doubt desirable, the lack of appellate rights leaves parties at the mercy of the arbitrator’s findings of fact and conclusions of law, which in many cases need not be stated or explained in a final award.

¶30. Considering the foregoing, the Court finds that permitting the litigation between AMS and Miura to proceed in this forum up until dispositive motion, trial or an arbitration award would frustrate the intention of the parties. Miura would be forced to proceed with discovery in this litigation, along with its attendant expense, while simultaneously arbitrating in accordance with the rules it anticipated controlling any disputes with AMS. Accordingly, the Court grants a stay of all litigation between AMS and Miura (and not just the trial of such claims) pending arbitration.

¶31. As *L.G. v. Aurora Residential* teaches, that concludes the special proceeding initiated by Miura and makes this aspect of the decision and order a final judgment for purposes of appeal. 2019 WI 79, ¶¶ 25-26.

¶32. Miura and FHI request that the Court exercise its discretion further and stay the entirety of the case—even those claims pending against co-defendants who are not parties to the arbitration agreement. They contend that the nature of the dispute subject to arbitration implicates all of the matters pending before the Court such that the arbitration award will likely resolve the disputed issues pending against the other defendants. Permitting AMS to proceed in litigation would potentially prejudice Miura and subject it to conflicting interpretations of Miura’s registration policy.

¶33. AMS, on the other hand, argues that it has no arbitration agreement with the other defendants and that it should not be denied its constitutional right to use this state’s judicial system for the resolution of its disputes with the other defendants while it arbitrates with Miura. *See McAdams v. Marquette Univ.*, 2018 WI 88, ¶ 23, 383 Wis. 2d 358, 914 N.W.2d 708. In fact, AMS’s position is more limited—at a minimum, it should be permitted to take and preserve evidence in this forum while memories are fresh. It also contends that certain discovery may only be had in this case, and may not be available in arbitration. A stay of a trial or dispositive motion may be appropriate, AMS contends, but the Court can cross that bridge later, after presented with updates on the progress of the arbitration proceedings.

¶34. The Court previously noted the features of arbitration in considering the rights for which AMS and Miura bargained in its agreement. With respect to the Representative Agreement with Miura, AMS and Miura bargained for arbitration, presumably believing that the advantages of arbitration in that relationship outweighed its potential disadvantages. The

Settlement Agreement with the other defendants, however, does not provide for arbitration, and as a result, AMS retained its right to use the courts of this state to resolve any disputes with those parties not subject to the arbitration agreement. That right entails the right to pursue discovery available in this forum, the right to have facts decided by a jury or a court, and the right to appellate review of any circuit court judgment.

¶35. The Court is persuaded by AMS's position and the arguments supporting discovery in this forum. In addition to the reasons outlined by AMS, the Court is concerned with AMS potentially fighting the arbitration with limited discovery—figuratively with “one hand tied behind its back”—and then potentially having Miura and FHI file some adverse award in this Court, as they promise to do, to preclude AMS's claims against the other defendants. Discovery in this forum is appropriate and will permit AMS to protect its claims against the other defendants.

¶36. For the foregoing reasons, Miura's motion to stay the litigation against it is GRANTED, and its motion to stay any responsive pleading is DENIED as moot. This is a final judgment for purposes of appeal.

¶37. The request of the Defendants to stay the entirety of the proceedings pending a final arbitration award is DENIED.

Dated this 22nd day of October, 2019.

BY THE COURT:
/s/ Michael J. Aprahamian
Circuit Court Judge