

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division**

O’SULLIVAN FILMS, INC.)	
)	
Plaintiff,)	
)	
v.)	
)	
PRECISION ROLL GRINDERS, INC.)	Civil Action No. 5:09CV00062
)	
Defendant / Third-Party Plaintiff,)	
)	
v.)	
)	
WALZEN IRLE GmbH)	
)	
Third-Party Defendant.)	
)	

**MEMORANDUM IN SUPPORT OF WALZEN IRLE GMBH’S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, TO STAY THIRD-PARTY COMPLAINT**

Third-Party Defendant WALZEN IRLE GmbH (hereinafter “Walzen”), by counsel, files this Memorandum in Support of its Motion to Dismiss the Third-Party Complaint without prejudice or, in the alternative, to stay the third-party action, pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6), based on the arbitration agreement between Third-Party Plaintiff and Third-Party Defendant. In support thereof, Walzen states as follows:

BACKGROUND

Third-Party Plaintiff Precision Roll Grinders (“Precision”) alleges it contracted with Walzen, a German corporation, on September 30, 2003, “in which Precision and Walzen agreed that Precision ‘shall buy and sell exclusively the Products directly from [Walzen] Irle.’” (Third-Party Compl. ¶ 5.) In exchange, Walzen allegedly agreed to appoint Precision as its “exclusive Distributor for the sale of the Products within the territory.” (Third-Party Compl. ¶ 5.) In

conjunction with this agreement, Walzen sold Precision two calendar rolls that are the subject of the Complaint and Third-Party Complaint. (Third-Party Compl. ¶¶ 6-7.) On or about May 17, 2005, according to the pleadings, Plaintiff O’Sullivan Films and Defendant Precision negotiated for Precision to sell these two calendar rolls to O’Sullivan. (Third-Party Compl. ¶ 6; Compl. ¶ 7.)

Plaintiff filed suit on July 30, 2009, against Defendant Precision, alleging breach of contract for failing to deliver merchantable goods that met the Plaintiff’s specifications. (Third-Party Compl. ¶¶ 8-12; Compl. ¶ 20-24.) The Complaint seeks incidental and consequential damages. (Compl.) Approximately six months later, on February 3, 2010, Third-Party Plaintiff Precision served Walzen with the Third-Party Complaint.

The Third-Party Complaint seeks indemnification and contribution pursuant to the agreement between Precision and Walzen, which is attached as an Exhibit to, and incorporated into, the Third-Party Complaint. (Third-Party Compl.) This agreement clearly applies to the dispute herein since that agreement covers the distribution and sale of goods. By reason of the existence of this agreement, which includes a binding provision to arbitrate disputes of the type asserted in the Third-Party Complaint, Walzen asks this Honorable Court to dismiss the Third-Party Complaint for lack subject matter jurisdiction over the causes of action framed in the Third-Party Complaint or, in the alternative, to stay the third party action.

ARGUMENT

The Third-Party Plaintiff Precision recites the existence and applicability of the Distributor Agreement between the parties. (*See, i.e.*, Third-Party Compl. ¶¶ 4, 5, 7, 11, and 17, and Exhibit A.) Precision, in fact, substantially predicates its right to recover from Walzen upon this agreement, which was attached to and became a part of the Third-Party Complaint as if

specifically pled in all its particulars. Article XII (2) of the Distributor Agreement specifically provides for arbitration of disputes between the parties in the following terms:

Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the rules of the International Arbitration Rules of International Centre for Dispute Resolution of the American Arbitration Association. The arbitration shall be held in New York City and the arbitration proceedings shall be conducted in the English language.

Since there is a contract between Precision and Walzen evidencing a transaction in interstate commerce and an arbitration agreement concerning the dispute which is the subject of the Third-Party Complaint, the issue raised by this motion is governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

Under the Act, the district court is *required* to compel arbitration when a valid arbitration agreement exists and the issues at hand fall within the purview of that agreement. 9 U.S.C. § 3. *See, i.e., United States v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir. 2001). Further, since Congress' intent was to establish a policy favoring arbitration, courts have held that "any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration." *M/A-COM, Inc. v. Seoul Commtech Co.*, 2008 U.S. Dist. LEXIS 8723, 10-14 (W.D. Va. Feb. 6, 2008). Thus, it is error for a court to refuse to stay the proceedings for purposes of arbitration of the underlying dispute. *See, i.e., Austin v. Tricord Homes*, 55 Va. Cir. 198, 199 (Spotsylvania 2001) (considering and applying the Virginia Uniform Arbitration Act and the Federal Arbitration Act), (citing *Piland Corp. v. League Construction*, 238 Va. 187 (1989)). The Act requires a stay be entered, but, if all of the issues at hand are arbitrable, the proper remedy is dismissal. *M/A-COM*, 2008 U.S. Dist. LEXIS 8723 (dismissing the matter given that all claims fell within the arbitration agreement) (citing *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d

707, 709-10 (4th Cir. 2001) (ordering the lower court to stay proceedings on the arbitrable claim, and permitting the lower court in its discretion to also stay the non-arbitrable claim)).

The operative provisions of the Act support dismissal of the Third-Party Complaint by virtue of the contracting disputants' clear intention to provide for arbitration in lieu of court proceedings. All purported claims, causes of action and remedies sought in the Third-Party Complaint constitute disputes within the meaning of the arbitration provision which are subject to being "settled by arbitration." Specifically, the contract requires arbitration of "any dispute, controversy or claim arising out of or relating to [the] Agreement..." The present dispute is one that clearly relates to the agreement between Precision and Walzen since Precision claims Walzen breached the contract by failing to provide Calendar Roll 4 in accordance with O'Sullivan's specifications and free of manufacturing defects. (Third Party Compl. ¶¶ 10-12.)

The arbitration provision of the agreement is binding upon Precision since it agreed to arbitrate the disputes that are the subject of the Third-Party Complaint. Precision cannot now be permitted to pursue such claims in this Court, which lacks subject matter jurisdiction over the third-party claims because of the enforceable agreement between the parties. As such, pursuant to the Federal Arbitration Act, Walzen now seeks dismissal of the Third-Party Complaint.

CONCLUSION

WHEREFORE, upon the grounds above assigned and those in addition which may be urged upon hearing hereof, the Third-Party Defendant WALZEN IRLE GmbH by counsel, respectfully moves this Honorable Court to dismiss the Third-Party Complaint against it and for its costs in this behalf expended.

WALZEN IRLE GmbH
By Counsel

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP

/s/ Thomas L. Appler

Thomas L. Appler, VSB No. 06346
Kathryn Grace, VSB No. 71213
8444 Westpark Drive, Suite 510
McLean, Virginia 22102
703.245.9300; 703.245.9301 (Facsimile)
Thomas.Appler@wilsonelser.com
Kathryn.Grace@wilsonelser.com
Counsel for Walzen Irlle GmbH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of March, 2010, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send notification of such filing (NEF) to the following:

Jeffrey R. Schmieler, Esquire
Lisa N. Walters, Esquire
SAUNDERS & SCHMIELER, P.C.
8737 Colesville Road, Suite L-201
Silver Spring, Maryland 20910
301.588.7717
301.588.5073 (Facsimile)
SchmielerJ@sslawfirm.com
Attorney for Defendant / Third-Party Plaintiff, Precision Roll Grinders, Inc.

Kevin M. Rose, Esquire
BotkinRose, PLC
3210 Peoples Drive
Harrisonburg, Virginia 22801
Attorney for Plaintiff

Steven L. Smith, Esquire
LAW OFFICE OF STEVEN L. SMITH, P.C.
404 Harvard Avenue
Swarthmore, Pennsylvania 19081
Attorney for Plaintiff

/s/ Thomas L. Appler
Thomas L. Appler, VSB No. 06346
Kathryn Grace, VSB No. 71213
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
8444 Westpark Drive, Suite 510
McLean, Virginia 22102
703.245.9300
703.245.9301 (Facsimile)
Thomas.Appler@wilsonelser.com
Kathryn.Grace@wilsonelser.com
Counsel for Walzen Irle GmbH