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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

*Electronically Filed*

CRAIG WARD, GLENN CLAUSEN and )  
ULTIMATE SCREENS, INC. )

Plaintiffs, )

vs. )

PHANTOM SCREENS )  
MANUFACTURING (INT'L), LTD., )

Defendant. )

Civil Action No. 04-03916 (WGB)

*Oral Argument Requested*

**BRIEF OF PHANTOM MFG. (INTL.) LTD. IN SUPPORT  
OF MOTION TO VACATE STAY AND CONFIRM ARBITRATION AWARDS**

Defendant, Phantom Mfg. (Int'l) Ltd. (incorrectly named in the Complaint as “Phantom Screens Manufacturing (Int'l), Ltd.”)(“Phantom”) brings this motion to vacate the stay of this action and to confirm arbitration awards made in an arbitration proceeding conducted in Vancouver, British Columbia.

**FACTS**

Plaintiffs Craig Ward, Glen Clausen and Ultimate Screens, Inc. (collectively the “New Jersey Plaintiffs”) together with Steven Karstendiek, Pat Whitman and Pro-Fasteners, Inc. (collectively the “Illinois Plaintiffs”) commenced this action in August, 2004 (Nicoll Declaration Exhibit A).

After various proceedings, the complaint of the Illinois Plaintiffs was dismissed without prejudice (Nicoll Declaration Exhibit B).

On November 22, 2004, Phantom commenced an action against the New Jersey Plaintiffs and the Illinois Plaintiffs in the Supreme Court of British Columbia to recover amounts past due on account (the "British Columbia Action")(Nicoll Declaration Exhibit C).

Notwithstanding the dismissal of the Illinois Plaintiffs' Complaint and the pendency of the British Columbia Action, the parties agreed to the arbitration of all claims of all parties in the original complaint (including the Illinois Plaintiffs) and the claims in the British Columbia Action in Vancouver, British Columbia pursuant to the rules of the Commercial Arbitration Act of British Columbia (the "Commercial Arbitration Act"). The parties also agreed that this action and the British Columbia Action would be stayed pending such arbitration. This agreement is reflected in a Consent Order dated December 8, 2004. (Nicoll Declaration Exhibit D).

On December 9, 2004, this Court ordered that the Clerk administratively terminate this action without prejudice to the right of the parties to reopen the proceeding for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation (Nicoll Declaration Exhibit E).

Pursuant to the Consent Order, the claims of the parties were arbitrated in Vancouver, British Columbia. On August 4, 2006, the sole Arbitrator, Kenneth Glasner, Q.C., rendered an Award finding, *inter alia*, (a) that there is no legitimate claim for monies due and owing by Phantom to Ultimate, (b) that Ultimate, Ward and Clausen (mistakenly spelled "Klausen") owe Phantom the amount of \$156,439.99 (U.S. Funds) as of May 31, 2005, (c) that Phantom is entitled to interest thereon at the rate of 1% per month and (d) that Phantom is entitled to recover its costs (Nicoll Declaration Exhibit F).

After further proceedings in the arbitration, on October 6, 2006, the Arbitrator rendered an Award Dealing With Costs finding, *inter alia*, that Ultimate, Ward and Clausen (mistakenly spelled “Klausen”) jointly and severally owe Phantom the amount of \$182,670.95 for the costs and disbursements incurred by Phantom in the arbitration and the arbitrator’s fees, disbursements and taxes (Nicoll Declaration Exhibit G). In the Arbitration, Ultimate, Ward and Clausen asserted a Counterclaim (Nicoll Declaration Exhibit H). On April 2, 2007 the Arbitrator rendered an Award dismissing the Counterclaim and awarding Phantom additional costs in the amount of (928.10 (Nicoll Declaration Exhibit I).

Section 14 of the Commercial Arbitration Act provides: “The award of the arbitrator is final and binding on all parties to the award.” Phantom now moves to vacate the stay, reopen this action and confirm the arbitration awards.

## **ARGUMENT**

### **I**

#### **The Stay Should be Vacated and The Action Reopened**

The December 9, 2004 Order allowed the parties to reopen for good cause for any purpose required to obtain a final determination of the litigation. Confirmation of the arbitration awards and the entry of judgment thereon will result in the final determination of the litigation as contemplated by the Order. Such confirmation and final determination are, therefore, “good cause” for reopening.

### **II**

#### **The Awards Should be Confirmed**

Confirmation of the arbitration awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958. 21 U.S.T. 2517 (the

“Convention”). In 1970, the United States acceded to the treaty and enacted Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 *et. seq.*, in order to implement the Convention. Canada acceded to the Convention on May 12, 1986.

The Supreme Court described the goal of the Convention and the principal purpose underlying American adoption and implementation of it was to “encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.” *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

The Convention applies only to foreign entities and does not apply to “an agreement or award arising out of such a relationship which is entirely between citizens of the United States.”

9 U.S.C. § 202. This section provides:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Here, there is no question that the arbitration and awards involved a foreign entity and arose out of a commercial legal relationship. Phantom is a Canadian company and Ultimate, Ward and Clausen are New Jersey residents (Verified Complaint and Exhibit A thereto). The legal relationship arises out of the Regional Distribution Agreement (Verified Complaint, Exhibit A) which is considered commercial in nature. Thus, the Awards fall under the Convention.

Section 207 of Title 9 states:

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an

order confirming the award as against any other party to the arbitration. The Court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

As the Third Circuit put it in *Admart AG v. Stephen and Mary Birch Foundation*, 457 F.3d 302, 307 (3d Cir. 2006), “[u]nder the Convention, a district court’s role is limited – it must confirm the award unless one of the grounds for refusal specified in the Convention applies to the underlying award [citation omitted].” These defenses are strictly applied and are viewed narrowly *Id.* at 308 citing *China Minmetals Materials Import & Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 283 (3d Cir. 2003).

Additionally, because the awards were rendered in Canada, Article V provides the exclusive grounds to deny confirmation. *Admart AG*, 457 F.3d at 308; *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998). Because none of the Article V grounds apply in this case, the Awards should be confirmed and judgment entered thereon for the amounts awarded, including interest and dismissing plaintiffs’ amended complaint with prejudice.

### **CONCLUSION**

For the reasons stated in the foregoing, the stay of proceedings should be vacated and the case reopened. Upon reopening the arbitral awards should be confirmed and judgment entered thereon and plaintiff’s counterclaim should be dismissed with prejudice.

Dated: April 13, 2007

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