UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DISCOUNT TROPHY & CO., INC., Plaintiff,	:	
v.	:	Civil No. 3:03cv2167 (MRK)
PLASTIC DRESS-UP CO., Defendant.	:	

MEMORANDUM OF DECISION

This dispute arises from defendant Plastic Dress-up Co.'s ("PDU") refusal to renew an April 1, 2001 Authorized Distributorship Agreement (the "Agreement"), under which plaintiff Discount Trophy & Co., Inc. ("DTC") sells and distributes award products (including trophy parts and components) manufactured and sold by PDU. DTC claims that PDU has violated the Connecticut Franchise Act, Conn. Gen. Stat. § 42-133e ("CFA") and the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a ("CUTPA") by failing, among other things, to renew the Agreement, which will expire by its terms on March 31, 2004.

The Agreement contains an arbitration provision, and PDU seeks to enforce the parties' arbitration agreement under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), by moving for a stay so that the parties may proceed to arbitrate their dispute. *See* Defendant's Motion to Stay in Favor of Arbitration [doc. #10] ("Def.'s Mot. to Stay in Favor of Arbitration"). DTC counters that the arbitration clause is unenforceable with regard to DTC's CFA and CUTPA claims and alternatively, that even if the parties must arbitrate the merits of their underlying dispute, this Court nevertheless should retain jurisdiction to entertain DTC's motion for a

preliminary injunction to prevent termination of the Agreement pending arbitration.

Having considered the parties' initial briefs and declarations both in support of and in opposition to a stay,[1] the arguments of the parties before the Court on February 4, 2004, and the parties' post-argument supplemental briefs,[2] the Court GRANTS IN PART the Motion to Stay in Favor of Arbitration [doc. # 10]. The parties are ordered to arbitrate their dispute in accordance with the terms of their arbitration agreement. However, the Court concludes that it has both the power and duty to adjudicate DTC's motion for preliminary injunction, and the Court will proceed to do so in accordance with a schedule previously issued. *See* Scheduling Order [doc. # 22].

I.

Several provisions of the Agreement are relevant to the issues raised on the motion to stay. Central among them is ¶ 8.04, which provides that "all disputes arising out of or related to this Agreement shall be settled by arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ["AAA"], which arbitration shall be binding upon both parties . . . " *See* Decl. of Dennis M. Funk, [doc. #13], Ex. A, ¶ 8.04 . The

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[1] *See* Memorandum of Law in Support of Motion to Stay in Favor of Arbitration [doc. # 11]; Declaration of Dennis M. Funk in Support of Motion to Stay in Favor of Arbitration [doc. # 13]; Declaration of Thomas F. Clauss, Jr. in Support of Motion to Stay in Favor of Arbitration [doc. # 12]; Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Stay in Favor of Arbitration [doc. # 19] ("Pl.'s Mem. in Opp. to Def. Mot. to Stay in Favor of Arbitration"); Reply Memorandum in Further Support of Motion to Stay in Favor of Arbitration [doc. # 20] ("Reply Mem. in Further Sup. of Mot. to Stay in Favor of Arbitration"); Declaration of Dennis M. Funk in Support of Reply Memorandum [doc. # 21].

[2] *See* Supplemental Memorandum in Further Support of Motion to Stay in Favor of Arbitration [doc. # 23]; Plaintiff's Supplemental Memorandum of Law in Opposition to Defendant's Motion to Stay in Favor of Arbitration [doc. # 24].

parties designated Los Angeles as the venue for any arbitration held under the Agreement. *Id.*, ¶ 8.06. In addition to the arbitration clause, the Agreement contains an entirely separate provision specifying the governing law. Paragraph 8.05 states that "all questions concerning the validity, interpretation or performance of any of its terms or provisions, or of any rights or obligations of the parties hereof, shall be governed by and resolved in accordance with the laws of the State of California including, without limitation, statutes of limitations." *Id.*, ¶ 8.05. Yet another clause of the Agreement states that "[i]f any provision of this Agreement is found to be invalid by any court or arbitrator, the invalidity of such a provision shall not affect the validity of the remaining provisions." *Id.,* ¶ 8.18.

Relying principally on the Connecticut Superior Court's decision in *Wyatt Energy, Inc. v. Motiva Enterprises, LLC*, 2002 Conn. Super. LEXIS 3186 (Sep. 27, 2002), DTC asserts that the arbitration clause in the parties' Agreement is unenforceable because the Agreement's "'choice-of-forum and choice-of-law clauses . . . operate . . . in tandem to deprive [DTC] of Connecticut statutory remedies that were enacted to effectuate important public policies of the State of Connecticut.'" Pl.'s Mem. in Opp. to Def's Mot. to Stay in Favor of Arbitration at 2 (quoting *Wyatt Energy*, 2002 Conn. Super. LEXIS 3186 at *20-21).

DTC's argument is reasonably complex and proceeds as follows. DTC contends that a California arbitrator will not be able to consider its CFA claim because of the California choice-of-law provision in the Agreement, which DTC believes precludes any resort to the CFA. Such a result, DTC is quick to add, would violate Connecticut's public policy, which prohibits any contractual waiver of the rights provided by the CFA. Moreover, DTC argues, DTC has no alternative franchise law claim under California law because California's franchise statute

requires payment of a franchise fee and the parties agree that none was paid in this case. *See* Agreement, ¶ 8.20. And, DTC claims, it would also be deprived of its unfair trade practices claim because its CUTPA claim "is inextricably intertwined with its non-arbitrable Franchise Act claims," and "neither California Unfair Practices Act, Cal. Bus. & Prof. Code §§ 17000-17101, nor California's broader unfair competition law, *id.* §§ 17200-17210, provide protection equivalent to CUTPA." Pl's Mem. in Opp. to Def.'s Mot. to Stay in Favor of Arbitration, at 8. Thus, DTC concludes, the net effect of requiring it to arbitrate in California under the terms of the Agreement would be to deprive DTC of all of the claims and remedies it currently asserts, a result that DTC argues is contrary to both Connecticut public policy and the FAA since it would deprive DTC of any "meaningful relief."[3]

The Court disagrees with most of the premises underlying DTC's reasoning.

A.

Since the Agreement at issue in this matter is between a California and a Connecticut corporation and it involves interstate commerce, there is no question that the FAA governs the present dispute. 9 U.S.C. § 1; *see, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111-12 (2001); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-81 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967). The Court, therefore, rejects DTC's suggestion that PDU's motion to stay should be determined under Connecticut law. *See* Pl.'s Mem. in Opp. to Def's Mot. to Stay in Favor of Arbitration, at 10-11.

[3] At oral argument, DTC declined to concede that its CFA and CUPTA claims were the *only* claims it might have (or even assert) against PDU, and in particular, DTC would not rule out the possibility that it might have a claim against PDU under California law.

The FAA provides that written agreements to arbitrate "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As the Supreme Court has repeatedly emphasized, "The liberal federal policy favoring arbitration agreements, manifested by this provision and the act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements; the Act simply creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate . . . [The] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, a concern which requires that we rigorously enforce agreements to arbitrate." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (internal quotations and citations omitted); *see Allied-Bruce Terminix Cos.*, 513 U.S. at 265. The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *see WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 75 (2d Cir. 1997).

Accordingly, under the FAA, when faced with an arbitration agreement the role of courts is generally limited to determining two issues: i) whether a valid agreement or obligation to arbitrate exists; and ii) whether one party to the agreement has failed, neglected or refused to arbitrate. *See The Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 120 (2d Cir. 2003); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996). In addition, courts may need to decide certain other so-called "gateway matters" such as "whether a concededly binding arbitration clause applies to a certain type of controversy," *Green Tree Fin. Corp v. Bazzle*, 123

S. Ct. 2402, 2407 (2003), unless the parties have "clearly and unmistakably provided otherwise" in their arbitration agreement. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002) (quoting *AT&T Techs., Inc, v. Communications Workers*, 475 U.S. 643, 649 (1986); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Here, there is no real debate about whether the parties' dispute regarding the renewal of their contract falls within the scope of the Agreement's arbitration clause.[4] The arbitration provision in the parties' Agreement is the paradigmatic, broadly worded arbitration clause. It provides for arbitration of "all disputes arising out of or related to this Agreement." *See* Agreement ¶ 8.02. The Second Circuit has time and again held that this is "'precisely the kind of broad arbitration clause that justifies a presumption of arbitrability." *Mehler v. The Terminix Int'l Co.*, 205 F.3d 44, 49 (2d Cir. 2000) (quoting *Oldroyd v. Elmira Sav. Bank*, 134 F.3d 72, 76 (1998)); *see Bell*, 293 F.3d at 568; *Louis Dreyfus Negoce, S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 224 (2d Cir. 2001). Certainly, the allegations of the Complaint, which concern the continuation of the parties' contractual relationship, "touch matters" covered by the

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[4] Relying on *The Shaw Group*, 322 F.3d at 121, PDU argues that the parties' arbitration clause evidences a clear and unmistakable intent to leave questions about the scope of the parties' arbitration clause to the arbitrator. *See* Reply Mem. in Further Sup. of Mot. to Stay in Favor of Arbitration, at 14-16. In *The Shaw Group*, the Second Circuit held that an agreement to arbitrate "'all disputes'" concerning or arising out of the parties' agreement and to adhere to the rules of an arbitral tribunal that permitted arbitrators to decide issues of arbitrability, "clearly and unmistakably evidence[d] the parties' intent to arbitrate questions of arbitrability." *The Shaw Group*, 322 F.3d at 125 (citing with approval *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989). Here, too, the parties' arbitration is broadly worded and Rule R-7(a) of the AAA's Commercial Rules authorize the arbitrator to decide issues relating to the scope of the arbitration agreement. *See* Commercial Arbitration Rules of the American Arbitration Ass'n, http://www.adr.org. Therefore, if there were a dispute regarding the scope of the parties' arbitration agreement, *The Shaw Group* suggests that the dispute should be tendered to the arbitrator in the first instance. *See also Bell v. Cendant Corp.*, 293 F.2d 563, 568 (2d Cir. 2002).

Agreement, *see Mehler*, 205 F.3d at 50, and that is all that is required to conclude that the parties agreed to arbitrate their present dispute. *See, e.g., Louis Dreyfus*, 252 F.3d at 225-26; *WorldCrisa*, 129 F.3d at 75; *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987).[5]

The only remaining question is whether the arbitration provision is valid and enforceable. The Court concludes that it is. At the outset, it is important to bear in mind that DTC's arguments regarding the validity of the arbitration clause are grounded not in the arbitration provision itself but rather in the entirely separate choice-of-law clause, which specifies application of California law. The arbitration clause is utterly silent on the substantive law the arbitrator will apply in resolving the parties' dispute. All the arbitration clause provides is that the parties will arbitrate their dispute in accordance with AAA rules, rather than litigate it in the courts, a right to arbitrate that Congress has expressly protected in the FAA. The Supreme Court has often emphasized that by agreeing to arbitrate disputes, as DTC and PDU did here, parties do not relinquish their substantive rights under statutes or laws; they merely designate an arbitral, rather than a judicial, forum for resolution of their respective claims. *See Gilmer v.*

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[5] That DTC asserts state statutory claims does not alter this conclusion. The FAA deprives states of the authority to preclude arbitration of state statutory claims. *See, e.g., Circuit City*, 532 U.S. at 112 (FAA "pre-emp[ts] state laws hostile to arbitration"); *Allied-Bruce Terminix*, 513 U.S. at 281 (same); *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (same). Moreover, and in any event, there is no indication that the Connecticut General Assembly sought to preclude arbitration of CFA and CUTPA claims. To the contrary, state and federal courts have recognized that franchise law and CUTPA claims are fully arbitrable. *See, e.g., id.* at 15-16 (statutory franchise claims arbitrable); *Mehler*, 205 F.3d at 49-50 (CUTPA claims arbitrable); *Doctor's Assoc., Inc. v. Stuart*, 85 F.3d 975, 985 (1996) (franchisee's claims arbitrable); *McMahan Sec. Co. L.P. v. Forum Capital Markets L.P.*, 35 F.3d 82, 85-86 (2d Cir. 1994) (CUTPA and unfair competition claims arbitrable); *Neary v. Prudential Ins. Co.*, 1997 WL 114789, at *4 (D. Conn. Feb. 24, 1997) (CUTPA claims arbitrable); *Success Cntrs., Inc. v. Huntington Learning Ctrs., Inc.*, 223 Conn. 761, 765 (1992) (CUTPA claims arbitrable).

Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); *see also Mitsubishi Motors*, 473 U.S. at 628.

Thus, DTC's arguments about the interpretation and validity of the parties' choice of California law – whether that provision does in fact prevent the arbitrator from considering DTC's CFA claim; whether such a result is against Connecticut's public policy; and if so, whether DTC will be deprived of all meaningful relief – are all arguments and questions that do not implicate the arbitration provision at all. Certainly, the mere fact that DTC's arguments regarding the interpretation and legality of the parties' choice-of-law provision will be decided as an initial matter by an arbitrator, rather than a judge, does not render the arbitration clause itself unenforceable. No doubt, as DTC argues, the arbitrator is bound (at least in the first instance) to apply California law in accordance with the Agreement's choice-of-law provision. But that would be just as true of a court. A court is no more free than an arbitrator to ignore the terms of the parties' contract. *See Howsam*, 537 U.S. at 593; *Tallmadge Bros., Inc. v. Iroquois Gas Transmission Syst., LP.*, 252 Conn. 479, 498 (2000); *Ersa Grae Corp. v. Fluor Corp.*, 1 Cal. App. 4th 613, 623 (1991). Simply put, there is no reason why DTC cannot present its arguments regarding the choice-of-law clause – its interpretation, application and legality – directly to the arbitrator. And that is precisely what the parties' arbitration clause requires. The mere fact that an arbitrator (or even a judge) must, under the terms of the parties' contract, turn to California law in the first instance does not mean, as DTC contends, that the arbitrator will necessarily disallow DTC's CFA claim, or its dependent CUTPA claim. The arbitrator is required to consider California's choice of law rules, as well as its substantive law, and those choice of law rules may (as discussed below) require application of Connecticut law. *See Nedlloyd Lines B.V.*

v. Superior Court of San Mateo County, 3 Cal. 4th 459, 464-66 (1992). Moreover, if, as DTC argues, it is illegal and against public policy to waive the protections of the CFA and if the choice-of-law provision is construed to be such a waiver, the provision may be unenforceable. *See id.* Here, the parties' Agreement expressly states that "if any provision of this Agreement is found to invalid by any court *or arbitrator*, the invalidity of such provision shall not affect the validity of the remaining provisions hereof." *See* Agreement, ¶ 8.18 (emphasis added). Thus, the Agreement contemplates that an arbitrator might decide that a provision of the Agreement is invalid, though that decision would not affect any other portion of the Agreement, including, of course, the arbitration clause itself.

Finally, there is no reason to believe that *only* a court, and not an arbitrator, would accept DTC's legal arguments concerning the choice-of-law provision. *See Advanced Micro Devices, Inc. v. Intel Corp*, 9 Cal. 4th 362, 384 (1994) (the "relief that could legally have been ordered by a trial court or jury is also within the normal authority of a contractual arbitrator"). Arbitrators may not disregard applicable law. To be sure, the standard for reviewing of errors of law committed by arbitrators differs from that which applies to courts. *Compare Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir. 2003) ("We review *de novo* a district court's application of the judicially created doctrine of 'manifest disregard of the law.'") *with GMS Group, LLC v. Benderson*, 326 F.3d 75, 81 (2d Cir. 2003) ("The showing required to avoid summary confirmation of an arbitration award is high.") (internal citation omitted). But that is what the parties bargained for when they contracted to arbitrate their disputes, rather than litigate them. *See, e.g., Keating*, 465 U.S. at 7; *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). This well-known difference in the standard of review is not a reason to ignore the

parties' agreement to arbitrate. *See Gilmer*, 500 U.S. at 32, n.4 ("although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute" at issue) (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987)).

At argument, DTC suggested that an arbitrator would likely be much less willing to invalidate a contractual choice-of-law clause than a court. However, DTC's argument reflects a hostility to arbitration that the Supreme Court has repeatedly admonished courts is not a valid reason for refusing to enforce the parties' arbitration agreement. As the Supreme Court emphasized in *Gilmer,* "Such generalized attacks on arbitration ' rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" *Gilmer*, 500 U.S. at 29 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 481 (1989); *see Sherk,* 417 U.S. at 510-11 (Congress enacted the FAA to "revers[e] centuries of judicial hostility to arbitration agreements").

B.

Therefore, in accordance with the parties' arbitration agreement and the FAA, it is the arbitrator who should decide in the first instance whether DTC's claims under the CFA and CUTPA are viable. How that issue will be resolved by the arbitrator is less than clear at this point, despite DTC's protestations to the contrary. The arbitrator may choose at the outset to consider whether the parties' relationship is even a franchise under Connecticut law (PDU says it is not) and/or whether, as PDU argues, it nonetheless had good cause for not renewing the

Agreement. *See, e.g., Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169 (2d Cir. 1995) (discussing the requirements of the CFA). Of course, if the arbitrator concluded that the parties' relationship was not a franchise or that PDU had good cause, then it would not be necessary to determine whether the choice-of-law provision contravened Connecticut public policy.

Even if the arbitrator turned first to the issue of applicable law, it is not clear that DTC will be unable to assert a claim under the CFA or CUTPA. Both California and Connecticut have adopted the provisions of § 187 of the Restatement (Second) of Conflict of Laws. *Compare Nedlloyd Lines B.V.*, 3 Cal. 4th at 464 *with Elgar v. Elgar*, 238 Conn. 839, 848 (1996). Under § 187, the law of the state chosen by the parties to govern their contractual rights will be applied unless the chosen state lacks a substantial relationship to the parties or transaction, or application of the law of the chosen state would be "contrary to a fundamental policy" of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which would be the state of applicable law absent the parties' choice-of-law provision. RESTATEMENT (SECOND) CONFLICT OF LAW § 187 (1971). Thus, under California's conflicts of law principles – which the arbitrator is required to apply under the choice-of-law provision of the parties' Agreement – the arbitrator may well conclude that he or she should apply Connecticut substantive law, and in particular its franchise law, in resolving the parties' dispute. *See James Ford Inc. v. Ford Dealer Computer Serv., Inc.*, 56 Fed. Appx. 324, 325 (9th Cir. 2003) (upholding arbitrator's decision to apply California law rather than the parties' choice of Michigan law).[6]

[6] There may be other reasons why the arbitrator may choose to apply the CFA. For example, if the arbitrator concludes that DTC's rights under the CFA cannot be waived as a matter of public policy and statutory provision and that the parties' choice-of-law provision

Because of the uncertainty regarding how the arbitrator will resolve DTC's arguments regarding the choice-of-law clause, this case is analogous to *Pacificare Health Sys., Inc. v. Book*, 123 S. Ct. 1531 (2003) and *Vimar Sequeros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).[7] In each of those cases, a party contesting an arbitration provision urged the Supreme Court not to enforce the provision because of a concern that arbitrators might deny relief to which the party claimed it was entitled under federal law. In *Pacificare*, the plaintiffs argued that a prohibition on the award of punitive damages in the parties' arbitration agreement conflicted with the treble damages provision of RICO[8] and thus rendered the arbitration clause itself unenforceable. Reminiscent of DTC's arguments in this case, plaintiffs in *Pacificare* argued that without the ability to recover treble damages, they would be denied "meaningful relief." *Pacificare*, 123 S. Ct. at 1533. In *Vimar*, an insurer sought to avoid arbitration of a shipper's claim on the ground that the Japanese arbitrators called for in the parties' arbitration agreement would likely follow Japanese law and refuse to apply the provisions of the Carriage of Goods by Sea Act, 46 U.S.C. App. § 1300 *et seq.* ("COGSA"). *Vimar*, 515 U.S. at 539.

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effectuates such a waiver, the arbitrator may decide that he or she cannot or should not enforce that waiver. Also, DTC may argue that the choice-of-law provision is unconscionable, an argument that DTC did not rule out at oral argument. *See, e.g., Armendariz v. Found. Health Psychcare Serv., Inc.*, 24 Cal. 4th 83, 113-14 (2000). By reciting DTC's potential arguments in this opinion the Court does not mean to intimate any view as to the merits of those arguments; that is for the arbitrator to decide.

[7] Arguably, the present case is a stronger case for enforcing the arbitration clause than either *Pacificare* or *Vimar*. In both *Pacificare* and in *Vimar*, the arbitration clause itself contained provisions that the party challenging the clause believed were illegal or against public policy. Here, by contrast, the allegedly offensive provision (the choice-of-law clause) is not a part of the arbitration provision. Thus, the arbitration clause can be enforced independent of the choice-of-law provision, particularly in light of the severability clause of the Agreement.

[8] *See* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c).

Yet, in each case, notwithstanding the plaintiffs' insistence that the arbitration agreement violated federal statutes (unlike in this case, where only state statutes are implicated), the Supreme Court held that the arbitration clause was, at least initially, enforceable and that the parties should make their arguments in the first instance to the arbitrators. As the Supreme Court stated in *Pacificare*, its decision in *Vimar* "supplies the analytical framework" for cases such as this, and *Vimar* "instructs that [courts] should not on the basis of 'mere speculation' that an arbitrator might interpret . . . ambiguous agreements in a manner that casts their enforceability into doubt, take upon [themselves] the authority to decide the antecedent question of how the ambiguity is to be resolved." 123 S. Ct. at 1535-36.[9] Indeed, in *Vimar* the Court expressly held that choice-of-law questions similar to those presented by DTC "must be decided in the first instance by the arbitrator." *Id.* at 539-41. And in a statement that applies with equal force to this case, the Supreme Court explained:

> At this interlocutory stage, it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result . . . Mere speculation that the foreign arbitrators *might* apply Japanese law which, depending on the proper construction of COGSA, *might* reduce respondent's legal obligations . . . did not provide an adequate basis upon which to declare the relevant arbitration agreement unenforceable.

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[9] The holding in *Pacificare* is also consistent with the Supreme Court's decision in *Bazzle*, 123 S. Ct. at 2407, in which the Court refused to invalidate an arbitration agreement on the basis of speculation about the costs of arbitration and the plaintiff's ability to bear those costs. *Pacificare* also explained that "the preliminary question whether the remedial limitations at issue here prohibit an award of RICO treble damages is not a question of arbitrability," as the Court has used that phrase and therefore it is not an appropriate issue for a court in the first instance. *Pacificare*, 123 S. Ct. at 1536, n.2; *see Howsam*, 537 U.S. at 83 ("the phrase 'question of arbitrability' has a . . . limited scope").

515 U.S. at 541 (emphasis added).[10]

As in *Pacificare* and *Vimar*, whatever the merits of DTC's arguments regarding the validity of the choice-of-law clause, they must be presented in the first instance to the arbitrator. Any other result would be contrary to the parties promise to arbitrate and to the FAA.

C.

Because this Court believes that the Supreme Court's decisions in *Pacificare* and *Vimar* provide the relevant analytical framework for deciding the issue raised by the stay motion, there is no need to explain at length why the Court declines DTC's invitation to follow the Superior Court's decision in *Wyatt*. In *Wyatt*, the court refused to compel the plaintiff to arbitrate its statutory claims under Connecticut's Antitrust Act and CUTPA. The arbitration clause in that case required the arbitrator to apply the substantive law of Texas, "excluding the conflicts provisions of such law." 2002 Conn. Super. LEXIS 3186, at *5. Citing the Second Circuit's decision in *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993), the court refused to enforce the arbitration clause because Texas law did not provide the plaintiff with a remedy for the conduct at issue and therefore enforcing the clause (including its choice-of-law provision) would deprive the plaintiff of its Connecticut statutory remedies in violation of Connecticut's public policy. *Wyatt*, 2002 Conn. Super. LEXIS 3186, at *20-21.

It is not at all clear to the Court that *Wyatt* correctly applied either the FAA or *Roby*, or

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[10] While DTC argues that the contractual provisions in *Pacificare* and *Vimar* were unclear, and that the choice-of-law clause in this case is clear, that is not the point of these decisions. Instead, each decision recognizes that when it is unclear whether the arbitrator will rule in a way that (in those cases) would be contrary to federal law, the FAA requires the Court to enforce the arbitration clause, and leave that decision in the first instance to the arbitrator. DTC also points out that *Vimar* involved international arbitration, but again that fact was not decisive, as the Court underscored in its ruling in *Pacificare*, which involved a domestic arbitration.

that it is consistent with *Pacificare* and *Vimar*, neither of which *Wyatt* cited. Indeed, it appears that *Wyatt* may be based upon state law, rather than the FAA, which this Court has already concluded governs this action. *Wyatt* did quote portions of the Second Circuit's decision in *Roby*, but in that case, the Second Circuit *rejected* arguments similar to those proffered by DTC in this case. And, the Second Circuit did so in language that causes the Court considerable doubt about the holding in *Wyatt*. As the Second Circuit stated:

> It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of *his country's* tort law or *his country's* statutory law or *his country's* property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction.

996 F.2d at 1360 (emphasis in the original). Accordingly, the Second Circuit "refuse[d] to allow a party's solemn promise to [arbitrate to] be defeated by artful pleading," a result that accords with this Court's decision to grant PDU's motion to stay. *Id.*

Wyatt also is distinguishable from the instant case for several reasons. First, in *Wyatt*, the offending choice-of-law provision was included in the arbitration clause itself. Here, by contrast, the choice-of-law provision is in a separate section from the arbitration clause and the Agreement contains a severability provision. As a consequence, even if the choice-of-law provision were unenforceable, the arbitration provision in this case would remain unaffected and fully enforceable. Second, the choice-of-law provision in *Wyatt* precluded resort to Texas' conflicts of law principles, and therefore arguably prevented the arbitrator from applying Connecticut law via Texas' conflicts of law rules. Here, by contrast, the choice-of-law provision allows the arbitrator to utilize California's conflicts of laws rules, including Restatement § 187. Unlike *Wyatt*,

therefore, the arbitrator in this case is not necessarily barred from applying Connecticut law to this dispute.

Accordingly, this Court is not persuaded that *Wyatt* requires a different result in this case. For the reasons previously stated, the Court will grant PDU's motion for a stay,[11] and enforce the parties' "solemn promise" to arbitrate their disputes, including issues relating to the interpretation, application and validity of the Agreement's choice of law provision.

III.

Even though this case will be stayed pending the parties' arbitration, the Second Circuit has made it clear in a series of decisions that the Court has both the power and duty to entertain a motion for a preliminary injunction pending the results in the arbitration. And this is true even though, as is the case here, the parties are entitled under the rules of the arbitral tribunal they have chosen to seek *pendente lite* relief directly from the arbitrator.[12]

The seminal Second Circuit decision on this issue is *Roso-Lino Beverage Distrib., Inc v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984). There, the Court stated that "[t]he fact that a dispute is to be arbitrated . . . does not absolve the court of its obligation to consider the merits of a requested preliminary injunction; the proper course is to determine whether the dispute is a 'a proper case' for an injunction." *Id.* at 125 (quoting *Erving v. Virginia Squires Basketball*

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[11] The Second Circuit has made it abundantly clear that in order to further the "liberal federal policy favoring arbitration agreements," a district court should ordinarily grant a stay when it decides that a dispute must be arbitrated, rather than dismissing the action and thereby triggering appeal rights and the delay attendant to such appeals. *See Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002) (quoting *Ermenegildo Zegna Corp v. Segna*, 133 F.3d 177, 180 (2d Cir. 1998)).

[12] Rule R-33 of the AAA's Commercial Arbitration Rules authorizes the arbitrator authority to grant injunctive relief.

Club, 468 F.2d 1064, 1067 (2d Cir. 1972). The Second Circuit reexamined *Roso-Lino* in *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith*, 910 F.2d 1049 (2d Cir. 1990) and "decline[d] to retreat" from it. *Id.* at 1053. As the Court stated, "in our view, the pro-arbitration policies reflected in . . . Supreme Court decisions are furthered, not weakened, by a rule permitting a district court to preserve the meaningfulness of the arbitration through a preliminary injunction." *Id.*

More recently, in *American Express Fin. Advisors, Inc. v. Thorley*, 147 F.3d 229 (2d Cir. 1998), the Second Circuit answered this question: "Must a district court faced with a request for a preliminary injunction in a case whose underlying merits will ultimately be settled in arbitration, consider the merits of the injunction, or may it leave the question of temporary relief, like the ultimate resolution of the case, to the arbitrator?" *Id.* at 229. The district court had declined to consider a request for an injunction because the parties "could just as quickly obtain the same temporary equitable relief from the arbitrator as from a court." *Id.* at 230.

The Second Circuit reversed, holding that "the *Roso-Lino* rule" "does not admit of the exception that the district court made in this case." *Id.* at 231. As the Court believed it had previously made clear in *Blumenthal*, "the expectation of speedy arbitration does not absolve the district court of its responsibility to decide requests for preliminary injunctions on their merits . . . Nor is this duty affected by the pro-arbitration policy manifested in the FAA." *Id.* Indeed, the Court stated, temporary injunctions often foster rather than contradict the policy favoring arbitration. This is because "[i]n many instances, it is by freezing the status quo that the meaningfulness of arbitration is best protected . . . For if events proceed unenjoined, the subject matter of arbitration may be irretrievably altered before an arbitral decision can be reached." *Id.*

Accordingly, this Court has both the power and duty to entertain DTC's motion for a preliminary injunction. The stay granted by this decision is, therefore, subject to this Court's determination of DTC's request for injunctive relief pending the arbitration.

IV.

For the foregoing reasons, Defendant's Motion for a Stay in Favor of Arbitration [doc. #10] is GRANTED IN PART.

IT IS SO ORDERED,

/s/ Mark R. Kravitz
U.S.D.J.

Dated at New Haven, Connecticut: February 19, 2004.