IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRO TECH CORP.,	:	
STEFAN BRODIE and	:	
DON BRODIE,	:	CIVIL ACTION
Plaintiffs,	:	
	:	No. 00-2160
v.	:	
	:	
EUROPEAN BANK FOR	:	
RECONSTRUCTION AND	:	
DEVELOPMENT, and, OVERSEAS	:	
PRIVATE INVESTMENT	:	
CORPORATION,	:	
Defendants.	:	

GREEN, S.J. **NOVEMBER _____, 2000**

MEMORANDUM-ORDER

Presently before the Court is Defendant European Bank for Reconstruction and Development's Motion to Dismiss Plaintiffs' Complaint, Plaintiffs' Response, and the respective parties' additional replies. For the following reasons, Defendant's motion will be granted pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, and Plaintiffs' Complaint against this Defendant will be dismissed with prejudice.

I. Factual and Procedural Background

This case principally arises out of a dispute over an investment which Plaintiffs made in a Romanian corporation, but the deeper issue relates to the international community's efforts to rebuild Eastern Europe following the fall of communism, and the role of an international organization in encouraging the development of a market-based economy in these new sectors.[1]

[1] All facts have been taken from Plaintiffs' Complaint, unless noted otherwise.

To capitalize on unprecedented opportunity occasioned by the opening of new markets in Eastern Europe, Plaintiffs, in 1991, initiated discussions through one of their subsidiaries, Purolite[2], with Viromet, S.A. ("Viromet"). Viromet is a Romanian, state-owned joint stock company located in Victoria, Romania. The discussions between Purolite and Viromet were geared towards establishing an organization to manufacture ion exchange materials at a complex in Romania. Early on in the negotiations, it became clear that Viromet would not have the necessary cash required to make its own capital investments. In an effort to proceed with the planned organization, the parties, in 1992, sought outside financial participation, finding it in the European Bank for Reconstruction and Development ("EBRD").

The EBRD was established in 1990, shortly after the fall of the Berlin Wall. The goal of the EBRD was "to foster, through the financing of specific investments, the transition toward open market-oriented economies and to promote private and entrepreneurial initiatives in the countries of Central and Eastern Europe and the Commonwealth of Independent States that are committed to and applying the principles of multiparty democracy, pluralism and market economics." See **The EBRD's Memorandum in Support of the Motion to Dismiss** at 4. Currently, there are 59 member nations which support the EBRD, including the United States. In order to effectuate the EBRD's multi-national mandate, the member-nations agreed that the EBRD should be vested with immunity in the member nations.

When approached by Purolite and Viromet, the EBRD agreed to invest significant monies

[2] Purolite International Limited ("Purolite") is a private limited liability company formed under the laws of England and Wales, with its principal location in Wales, United Kingdom, and is controlled by Plaintiffs. Purolite is not a party to this action, but its identity is important to explain the relationships involved in this transaction.

in the proposed organization, which came to be called Virolite. When the EBRD insisted on and was granted additional rights by the parties, it became necessary to change the form of the proposed company from a limited liability company to a joint stock company. To comply with the technical requisites of Romanian law, additional shareholders were needed. It was at this point that Plaintiffs were induced to invest in the joint venture. An aggregate sum of $1.8 million in cash was invested by the Plaintiffs in order to complete the transaction which added Bro-Tech, Stephan Brodie and Don Brodie to the joint venture, and the transformed joint stock company was formed in 1994.

Plaintiffs further allege that all parties knew that their investments in Romania were highly speculative, due to the turbulent nature of the emerging market-economies. With their worst fears being realized, Romania's economic landscape faltered, and Virolite was pushed to the brink of insolvency. At this point, the various parties jostled to protect their investments. In 1999, the Plaintiffs attempted to re-finance the venture, trying to keep the organization solvent, with the hope that a further infusion of capital would enable the company to continue in expectation that economic conditions would change. The Plaintiffs allege that the EBRD, with the assistance of the Overseas Private Investment Corporation ("OPIC"),[3] thwarted their efforts to re-finance the burdensome loans. Due to their refusal to re-finance, the condition of Virolite continued to worsen, and Virolite edged closer to the brink of bankruptcy. In fact, both the EBRD and the OPIC initiated insolvency procedures against Virolite in Romania.

[3] The OPIC is a corporation organized under the laws of the United States, as an agency of the United States. The OPIC was called in by the EBRD to finance part of the transaction forming Virolite. The Plaintiffs do not have any direct contractual relationship with the OPIC. Since this motion deals exclusively with this Court's jurisdiction over the EBRD, a further explanation of the OPIC's role is not necessary.

The Plaintiffs feel that the EBRD is a joint venturer with them, and that the EBRD has breached duties of care and loyalty in refusing to re-finance, and in prosecuting an insolvency action against Virolite. The EBRD counters that its role is that of a lender, and that their actions are consistent both with the agreements at issue and their responsibility to protect the money which was invested in the name of international stability.

Unable to amicably resolve their differences, the instant action was instituted. Plaintiffs filed their Complaint in the Court of Common Pleas of Montgomery County, Pennsylvania, on April 6, 2000. On or about April 26, 2000, the OPIC filed a timely notice of removal to this Court, pursuant to 28 U.S.C. § 1446(b). This action was removable pursuant to 28 U.S.C. § 1442 because the OPIC is an agency of the United States.

The Plaintiffs' six count Complaint against the EBRD and the OPIC was based on several legal theories. Counts I-IV were levied solely against the EBRD, while Count V was levied against both the EBRD and the OPIC, and Count VI was levied solely against the OPIC. Count I alleged breach of joint venturer's fiduciary duty; Count II alleged fraudulent misrepresentation and concealment; Count III alleged negligent misrepresentation and concealment; Count IV, tortious interference; Count V, alleged conspiracy against the EBRD and the OPIC; and, Count VI alleged aiding and abetting solely against the OPIC.

The EBRD filed a Motion to Dismiss for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.[4] The Plaintiffs filed a response, each

[4] In addition to the subject matter jurisdiction arguments posited by EBRD, the Defendant also argued: lack of personal jurisdiction; improper venue; and, insufficiency of process. Finally, in the event the Complaint was not dismissed, the EBRD asked that Plaintiffs be required to file a more definite statement. Because I have decided that Plaintiffs' action against the EBRD must be dismissed under immunity and arbitration grounds, I need not

party filed additional replies, and the Court held oral argument for further explication and discussion of the sundry issues.

II. Discussion

It is well-established that "federal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). Questions of immunity are jurisdictional in nature. See F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994). It is the Plaintiffs' burden to prove subject matter jurisdiction. See Gibbs v. Buck, 307 U.S. 66, 72 (1939); Mortensen v. First Federal Savings & Loan Ass'n., 549 F.2d 884 (3d Cir. 1977). It should be noted, too, that a review of the Court's subject matter jurisdiction under Rule 12(b)(1) is significantly different than a review under either Rule 12(b)(6) or Rule 56. In a Rule 12(b)(1) motion such as the one at bar, Defendant questions the existence of subject matter jurisdiction in fact, and there is, therefore, no presumptive truthfulness attached to the Plaintiffs' allegations. See Mortensen, 549 F.2d at 891. "Accordingly, unlike a Rule 12(b)(6) motion, consideration of a Rule 12(b)(1) jurisdiction-type motion need not be limited; conflicting written and oral evidence may be considered and a court may 'decide for itself the factual issues which determine jurisdiction.'" Biase v. Kaplan, 852 F. Supp. 268, 277 (D.N.J. 1994) (*quoting* Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.), cert. denied, 454 U.S. 897, (1981)).

The EBRD forwards two arguments aimed at divesting this court of subject matter jurisdiction in this matter. First, the EBRD argues that they have sovereign immunity from this litigation. In the alternative, the EBRD argues that this case should be dismissed, and the matter referred to arbitration in accordance with the arbitration clauses in the parties' agreements.

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consider the other arguments.

A. Immunity

The EBRD feels that they are protected by sovereign immunity, which was given to them in consideration of their particular mission: to participate in the establishment of democratic, market-oriented systems in the former Soviet Union and related Eastern-bloc countries. See **The EBRD's Memorandum in Support of the Motion to Dismiss** at 5. The EBRD was established by a multilateral, multi-national treaty; among the signatories are many "Western" democracies, including the United States. See **The EBRD's Memorandum in Support of the Motion to Dismiss** at 5. To allow the EBRD to complete their mission, the signatories agreed to give the EBRD a certain level of immunity. Precisely, the EBRD explains that their immunity arises out of the "Agreement Establishing the European Bank for Reconstruction and Development" (which established the EBRD), the International Organizations Immunities Act ("IOIA"), and the Executive Order which qualified the EBRD as an "international organization" as that term is recognized under the IOIA; read together, the EBRD believes it has been granted sovereign immunity. See **The EBRD's Memorandum in Support of the Motion to Dismiss** at 6.

The IOIA, 22 U.S.C. §§ 286 et seq., created in 1945, sought to codify the immunity given to certain "international organizations." The IOIA was fashioned after the policies used to recognize immunity of foreign sovereigns. In order to come under the protection of the IOIA, an international organization had to be recognized by the President of the United States through an "appropriate Executive Order as being entitled to enjoy the privileges, exemptions, and immunities provided in [the IOIA]." 22 U.S.C. § 288. The EBRD was vested with this protection by operation of Executive Order 12,766. See 56 Fed. Reg. 28,463 § 1 (June 18, 1991).

The policies with regards to foreign sovereigns were codified, in 1976, in the Foreign

Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602, et seq.; the basic problem is that the amount of immunity given to sovereigns has changed since 1945, and so the language in the IOIA is, resultingly, unclear. The changes in immunity for foreign sovereigns raises the question as to whether the changes are therefore incorporated into the IOIA. An examination of the language at issue serves to clarify the problem.

"The key phrase at issue in this case is the 'same immunity . . . as is enjoyed by foreign governments.' 22 U.S.C. § 288a(b)." Atkinson v. Inter-American Development Bank, 156 F.3d 1335, 1340 (D.C. Cir. 1998). This language appears in the IOIA, and can be interpreted two very different ways: Congress either meant to give "international organizations" the same amount of sovereign immunity that foreign nations had in 1945 -- which was absolute immunity -- or, Congress wanted "international organizations" to enjoy the same level of immunity that foreign nations had at any given time; so, if, at any point, Congress instituted a policy of "qualified immunity" for foreign nations, that same policy would translate into a commensurate diminution in immunity for "international organizations." While sovereigns had absolute immunity prior to 1945, this has changed, to the point that, under the FSIA enacted in 1976, a foreign sovereigns' immunity is reviewed under the "restrictive theory" of international sovereign immunity, which requires a case by case analysis of the facts to determine if sovereign immunity should apply. See Atkinson, 145 F.3d at 1340.

The Court of Appeals for the District of Columbia held that the IOIA intended to vest international organizations with absolute immunity. See Atkinson, 145 F.3d at 1341. This holding was based on the determination that Congress has provided a mechanism for the alteration, over time, of immunity for international organizations: "the President retains authority

to modify, condition, limit, and even revoke the otherwise absolute immunity of a designated organization." Atkinson, 145 F.3d at 1341 (*citing* 22 U.S.C. § 288). I adopt the reasoning of the D.C. Circuit, and find that the EBRD is entitled to absolute immunity under the IOIA, contingent on any waiver of that immunity by the EBRD. Having concluded that the EBRD is entitled to absolute immunity, I must now determine if the EBRD has waived this immunity.

B. Waiver

There are two issues regarding the possible waiver of immunity by the EBRD. First, it must be determined whether the EBRD waived immunity by operation of Article 46 of the Agreement Establishing the European Bank for Reconstruction and Development ("the EBRD Agreement"). Second, it must be decided whether the existence of arbitration clauses in the EBRD's agreements with the Plaintiffs waived immunity, and, if so, to what extent.

1. Article 46 of the EBRD Agreement.

Article 46 of the EBRD Agreement recites the "position of the Bank with regard to judicial process." European Bank for Reconstruction and Development: Agreement Establishing, May 29, 1990, 29 I.L.M. 1077, 1098.[5] It is clear that Article 46 is a limited waiver of the EBRD's absolute immunity; the issue at hand is the breadth of the waiver. In pertinent

[5] Article 46 reads:

> Actions may be brought against the Bank only in a court of competent jurisdiction in the territory of a country in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

European Bank for Reconstruction and Development: Agreement Establishing, May 29, 1990, 29 I.L.M. 1077, 1098.

part, the language in Article 46 is the exact same language which the court in Atkinson reviewed while discerning the extent of the waiver for the bank in that case. See Atkinson, 156 F.3d at 1337-38. As in the case at bar, the plaintiff in Atkinson argued that this waiver was to be read broadly, while the defendant-bank argued for a more limited interpretation. The Atkinson court, following its own precedent, held that the waiver was to be read narrowly, and applied the "corresponding benefit" test in concluding that the bank did not waive immunity from garnishment proceedings brought by the ex-wife of an employee. See Atkinson, 156 F.3d at 1338-39.

The "corresponding benefit" test used by the court states that "[s]ince the purpose of the immunities accorded international organizations is to enable the organizations to fulfill their functions, applying the same rationale in reverse, it is likely that most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization's goals." See Atkinson, 156 F.3d at 1338. Agreeing with the reasoning employed by that court, I will adopt the "corresponding benefit" test, and apply it to the case at bar.

If the EBRD did not waive immunity to some extent, it would not be able to function on a daily basis. The EBRD "would be unable to purchase office equipment or supplies on anything other than a cash basis. . . . Such a restriction would unreasonably hobble its ability to perform the ordinary activities of a financial institution operating in the commercial marketplace." Atkinson, 156 F.3d at 1338 (citing Mendaro v. World Bank, 717 F.2d 610, 618). In order to attract investors around the world, the EBRD must provide some sort of security to them, protecting the investors from unreasonable and arbitrary action by the EBRD. If the EBRD could

induce participation in any venture, and then act with impropriety towards the investors without any repercussions, then it is unlikely that any commercial establishment would wish to interact with them. Instead, it is clear that the EBRD must waive immunity to some extent for transactions such as the one sub judice. The "corresponding benefit" which the EBRD receives from waiving immunity is their ability to function in the international, commercial marketplace. I therefore find that the EBRD does have a "corresponding benefit" from the waiver of their immunity, and that they have waived absolute immunity in this case. However, though the EBRD has waived their absolute immunity, it may be a limited waiver if there are controlling arbitration agreements.

2. Arbitration clauses.

There is a "liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983). This is clearly manifested in the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("the FAA"). The goal of the FAA is to "guarantee the enforcement of private contractual arrangements." Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, 473 U.S. 614, 625. "The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute[,] . . . by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Mitsubishi, 473 U.S. at 626 (citations omitted). "The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hospital, 460 U.S. at 24-25. "If all the claims involved in action are

arbitrable, a court may dismiss the action instead of staying it." Seus v. John Nuveen & Co., 146 F.3d 175, 179 (3d Cir. 1998).

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, reprinted following 9 U.S.C.A. §§ 201-208 ("the Convention"), was adopted by the United States through the FAA. See Rhone Mediterranee Compagnia v. Lauro, 712 F.2d 50, 52 (3d Cir. 1983). "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . falls under the Convention." See Rhone Mediterranee Compagnia, 712 F.2d at 52 (quoting 9 U.S.C. § 202). An international agreement will be enforced if the following four-part test is satisfied:

1: Is there an agreement in writing to arbitrate the subject of the dispute?
2: Does the agreement provide for arbitration in the territory of a signatory of the convention?
3: Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial?
4: Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relationship with one or more foreign states?

See Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 959 (10th Cir. 1992) (citing Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982)).

In the instant matter, the EBRD provides two of the agreements at issue.[6] Both of the agreements have a clause which mandates that any "dispute, controversy, or claim arising out of,

[6] The first agreement provided by the EBRD is the Amended and Restated Cooperation Agreement for Virolite Functional Polymers S.A. ("Amended Agreement"). See **Reply Brief of the EBRD**, Ex. I. The second agreement provided is the Transformation Contract for the Transformation of Purolite International Polimeri Functionali SRL into a Joint Stock Company Called Virolite Functional Polymers S.A. ("Transformation Contract"). See **Reply Brief of the EBRD**, Ex. J.

or relating to, this Agreement, or the breach, termination, or invalidity hereof, shall be referred to and finally resolved in" arbitration. See **Reply Brief of the EBRD**, Ex. I at 26; Ex. J at 12. Each agreement calls for the arbitration to be held in London, England; England is a signatory to the Convention. See 9 U.S.C. § 201.[7] The agreements at issue both arise out of a commercial relationship. And, finally, the EBRD is not an American citizen.

Thus, I conclude that the arbitration clauses are subject to the Convention and the FAA. The only inquiry left is whether to dismiss Plaintiffs' entire Complaint against EBRD, or stay the action pending the resolution of all arbitrable claims. See Seus, 146 F.3d at 179. The Plaintiffs argue that, since there are multiple contracts at issue, it cannot be determined which contract and arbitration clause will govern their dispute. Further, Plaintiffs contend that, even if the arbitration clauses do apply, they have stated claims that lie outside of the perimeters of any contract, and cannot be expected to arbitrate those claims which are not explicitly related to the contract. Finally, Plaintiffs argue that since the OPIC is a Defendant in this litigation, and since the OPIC is not a party to any arbitration agreement, it is improper to dismiss the Plaintiffs Complaint.

None of Plaintiffs' arguments are persuasive. First, each arbitration clause clearly and unambiguously recites that arbitration is mandatory for any dispute or claim arising out of or

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[7] Though both arbitration clauses mandate hearings in London, England, they do not both mandate the use of the same law which would control the arbitration. The Amended Agreement requires that the laws of England and Wales govern. See **Reply Brief of the EBRD**, Ex. I at 26. But, the Transformation Contract states that the laws of Romania shall govern. See **Reply Brief of the EBRD**, Ex. J at 13. However, it is not relevant which law governs, nor even which arbitration clause. All that is required is that the arbitration be conducted in the territory of a signatory to the Convention. That requirement is met in both arbitration clauses, since both call for arbitration in London England.

related to the agreement, including all breaches. It is not the duty of the Court to determine which arbitration procedure Plaintiffs should prosecute their claims under; that is a tactical and personal decision they must make. What is clear is that either clause fully covers any dispute that the parties may have. The intent of the parties is clear, and it would be improper for the Court to abrogate the contractual wishes and duties of the parties. Therefore, I find that, regardless of the multiplicity of arbitration clauses, Plaintiffs's claims are covered under their agreements, and must proceed in accordance thereto.

Second, Plaintiffs' contention that they have stated claims outside the parameters of the contract, and which would make those claims unsuitable for arbitration, is incorrect. Though Plaintiffs attempt to artfully plead in their papers, and argue at hearing, that they are seeking redress for "extra-contractual" transgressions of the EBRD, it is clear that all of their allegations "arise out of" or "relate to" the contracts they have with the EBRD. It is impossible to view any of Plaintiffs' claims except as they relate to the contractual relationship with the EBRD. Though Plaintiffs' believe that claims such as "breach of a joint venturer's duty", "fraudulent misrepresentation" and "concealment" fall outside of their contracts with the EBRD, it is clear that none of the claims could stand without the initial acceptance that a valid contract exists. And, as has been shown, the contracts at issue call for arbitration of any disputes which arise out of or relate to the contracts. Therefore, I find that all of Plaintiffs' claims against the EBRD are related to or arise out of their contracts with the EBRD, and are covered by the arbitration clauses found therein.

Finally, Plaintiffs argue that arbitrations are unsuitable to settle a dispute if one of the parties is not subject to the arbitrations. However, though inconvenient, it is the law. "[I]t

occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 20 (1983) (holding that, under the Federal Arbitration Act, "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement"). Therefore, Plaintiffs' argument must fail.

III. Conclusion

I conclude that the EBRD has absolute immunity, but has waived that immunity in their dealings with the Plaintiffs. I further conclude that EBRD's waiver is limited, and that the EBRD has only waived its immunity with respect to the resolution of disputes through arbitration. Finally, I conclude that all of Plaintiffs's claims are controlled by the arbitration clauses in their agreements with the EBRD. Because all of the Plaintiffs' claims are controlled by the arbitration clauses, this Court does not have subject matter jurisdiction over this dispute. For the reasons articulated above, Plaintiffs' claims in their Complaint against the EBRD will be dismissed, with prejudice, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. An appropriate order follows: