IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IMO INDUSTRIES INC., a Delaware corporation, Plaintiff, v. SIEMENS DEMAG DELAVAL TURBOMACHINERY, INC., a Delaware corporation, Defendant. MANNESMANN CORPORATION, f/k/a Mannesmann Capital Corporation, a Delaware corporation; DEMAG DELAVAL TURBOMACHINERY CORPORATION, a Delaware corporation; SIEMENS WESTINGHOUSE POWER CORPORATION, a Delaware corporation; and SIEMENS CORPORATION, a Delaware corporation, Intervenors-Plaintiffs, v. IMO INDUSTRIES INC., a Delaware corporation and IMO INDUSTRIES INTERNATIONAL, INC., a Delaware corporation, Respondents-Defendants.	)	Civil Action No. 20142

MEMORANDUM OPINION

Submitted: April 26, 2005
Decided: May 4, 2005

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CHANDLER, Chancellor

Before the Court are competing motions for summary judgment. The first motion for summary judgment was filed by defendant Siemens Demag Delaval Turbomachinery, Inc. ("SDDTI"), together with intervenors-plaintiffs Mannesmann Corporation, formerly known as Mannesmann Capital Corporation ("Mannesmann"), Demag Delaval Turbomachinery Corporation ("DDTC"), Siemens Westinghouse Power Corporation ("SWPC") and Siemens Corporation (collectively, the "Movants") in September 2003. Briefing on that motion was not completed until January 6, 2005. Following briefing on Movants' motion and the filing of amended pleadings, Imo Industries Inc. ("Imo") and Imo Industries International, Inc. moved for summary judgment on February 4, 2005. For the reasons set forth herein, the motions are granted in part and denied in part.

I.

On November 4, 1994, Imo agreed to sell certain of its assets to Mannesmann. That agreement was memorialized in the Asset Purchase Agreement (the "Agreement").[1] The asset sale transaction closed on January 17, 1995.[2] Mannesmann did not purchase the assets itself, but pursuant to

[1] Ex. A to Movants' Opening Br. In Supp. of Their Mot. For Summ. J.
[2] *See* Closing Memorandum, Ex. 2 to Answering Br. of Imo Indus. Inc. & Imo. Indus. Int'l Inc. to Movants' Mot. For Summ. J.

the express terms of the Agreement,[3] Mannesmann assigned its right to purchase and take title to the Imo assets to its subsidiary, DDTC.[4] Pursuant to that assignment, Imo, Mannesmann and DDTC entered into an Access and Support Agreement ("A&S Agreement") on January 17, 1995.[5] Both the Agreement and the A&S Agreement specify that they shall be governed by and construed in accordance with the laws of the State of New York.[6] The A&S Agreement specifically states that it "supersedes any and all previous agreements and understandings between the parties hereto," which includes the Agreement entered into two months before.[7]

The sale of assets was carefully structured because products formerly manufactured by Imo had contained asbestos. By 1994, Imo was involved

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[3] *See* Agreement, § 15.10.

[4] *See* Assignment And Assumption, Ex. 5 to Answering Br. of Imo Indus. Inc. & Imo. Indus. Int'l Inc. to Movants' Mot. For Summ. J.

[5] *See* Access and Support Agreement, Ex. 6 to Answering Br. of Imo Indus. Inc. & Imo. Indus. Int'l Inc. to Movants' Mot. For Summ. J. *See also* Agreement, § 3.3(r).

[6] Agreement, § 15.4; A&S Agreement, § 9.

[7] A&S Agreement, § 13. The full text of Section 13 states:

> This Agreement and the Asset Purchase Agreement contains, and is intended as, a complete statement of all of the terms and the arrangements between the parties hereto with respect to the matters provided for herein, and supersedes any and all previous agreements and understandings between the parties hereto with respect to those matters. This [A&S] Agreement shall not be interpreted in any way as a limitation on the provisions of Section 12.4 of the Asset Purchase Agreement.

As a matter of standard contractual interpretation, because the parties specifically excluded Section 12.4 of the Agreement from the merger clause contained in Section 13 of the A&S Agreement, the only logical manner in which to interpret Section 13 is to conclude that the A&S Agreement may operate to supersede any provision of the Agreement other than Section 12.4.

in asbestos litigation relating to those products and assets even though they had ceased manufacturing and selling products containing asbestos in the mid-1980's. Since purchasing those assets, neither DDTC nor SDDTI have manufactured or sold products containing asbestos.[8] The Agreement specified that Imo would indemnify Mannesmann for liabilities relating to these suits.[9]

Gradually, Mannesmann or its affiliates began to be named as defendants in litigation stemming from the asbestos-containing products sold by Imo. In accordance with the Agreement, Mannesmann tendered these claims to Imo for defense and indemnification. In August or September 2000, Mannesmann began having DDTC tender its own claims for indemnification directly to Imo.[10] Imo did not object to this arrangement.[11]

In April 2001, DDTC sold the assets it had acquired from Imo to Wesgen, Inc. (which is now known as SDDTI).[12] Upon learning that DDTC no longer owned the assets, beginning on April 4, 2002, Imo began to deny DDTC's indemnification requests. This suit was brought in order to clarify

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[8] Aff. of Gary A. Buelow, ¶ 15.
[9] *See* Agreement, § 1.4, Article XIII.
[10] Aff. of Gary A. Buelow, ¶¶ 8-10; Aff. of Thomas M. O'Brien, ¶ 5.
[11] *Id.*
[12] *See* Wesgen Asset Purchase Agreement, Ex. B to Movants' Opening Br. In Supp. of Their Mot. For Summ. J. This Agreement is to be interpreted under Florida law. *See* § 11.2.

the contractual rights and responsibilities of the parties given the above sequence of events.

II.

Court of Chancery Rule 56(c) permits summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[13] When the Court is faced with cross-motions for summary judgment the same standard must be applied to each of the parties' motions and the mere existence of cross-motions does not necessarily indicate that summary judgment is appropriate for one of the parties, but, if as in this instance, the parties have "not presented argument that there is an issue of fact material to the disposition of either motion," the Court may therefore deem the motions as "the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[14]

III.

The parties have prayed for declaratory relief. Neither has argued that declaratory judgment is inappropriate, and I conclude that the requirements

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[13] CT. CH. R. 56(c).
[14] CT. CH. R. 56(h).

for a declaratory judgment are met in this case.[15] Imo desires a declaration that Mannesmann and DDTC breached the Agreement and A&S Agreement when DDTC sold the Imo assets to SDDTI without Imo's prior written consent. Imo also seeks a declaration that it is not required to defend and indemnify the defendant or any of the intervenors-plaintiffs against asbestos-related claims stemming from the Imo assets. SDDTI and the intervenors-plaintiffs seek the exact opposite declaration—that Imo must indemnify SDDTI and intervenors-plaintiffs for those claims. SDDTI and the intervenors-plaintiffs also seek injunctive relief prohibiting Imo from denying indemnification for claims submitted by the defendant and intervenors-plaintiffs.

In accordance with New York law, "[t]he best evidence of what parties to a written agreement intend is what they say in their writing."[16] When a writing is clear and complete, it "should generally be enforced according to [its] terms."[17] In such an instance, the Court may properly

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[15] To exercise declaratory judgment jurisdiction there must be an actual controversy: (1) involving the rights or other legal relations of the party seeking declaratory relief; (2) in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) between parties whose interests are real and adverse; and (4) the issue involved in the controversy must be ripe for judicial determination. *Gannett Co. v. Bd. of Managers of the Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003).

[16] *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002).

[17] *W.W.W. Assocs. v. Giancontieri*, 566 N.E.2d 639 (N.Y. 1990); *Wallace v. 600 Partners Co.*, 658 N.E.2d 715, 717 (N.Y. 1995).

enforce the contract on its terms on a motion for summary judgment.[18] Both parties agree that the contract itself is clear and unambiguous, and the Court concurs, making summary judgment an appropriate procedural vehicle for disposition of this case.[19]

IV.

Much of the parties' briefing was directed to the issue of whether Wesgen (now SDDTI) is or was an "affiliate" of DDTC within the meaning of the Agreement, which defines "affiliate" by reference to SEC Rule 12b-2.[20] More specifically, because Rule 12b-2 itself is clear on its face, the parties' disagreement surrounds the temporal aspects of "affiliate" and whether SDDTI, which is now an affiliate of Mannesmann, can properly be construed as an "affiliate" under the Agreement because SDDTI was not affiliated with Mannesmann in 1995.

In order to rule on the pending motions, however, I need not reach that question. Section 15.10 of the Agreement states:

> No assignment of this Agreement or of any rights or obligations hereunder may be made by any party (by operation of Law or otherwise) without the prior written consent of each of the other parties hereto, which consent may be withheld or granted by such parties in its sole discretion; provided, however, the

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[18] *Tantleff v. Truscelli*, 110 A.D.2d 240, 244 (N.Y. App. Div. 1985), *aff'd*, 505 N.E.2d 623 (N.Y. 1987).
[19] Compl. ¶ 4; Movants' Opening Br. In Supp. of Their Mot. For Summ. J. at 13.
[20] 17 C.F.R. §240.12b-2.

> Purchaser may assign to one or more of its Affiliates the right to purchase and take title to any or all of the Assets or the Joint Venture Interest without the prior written consent of the Seller; provided, further, that no such assignment by the Purchaser shall release the Purchaser of any of its obligations hereunder. Any attempted assignment without required consents shall be void.

The A&S Agreement contains a similar provision at Section 10:

> No assignment of this Agreement or of any rights or obligations hereunder may be made by any party (by operation of law or otherwise) without the prior written consent of the other party hereto, which consent may be withheld or granted by such party in its sole discretion. Any attempted assignment without required consents shall be void. In the event [DDTC] and/or [Mannesmann] proposes to sell all [sic] substantially all of the Assets [sold under the Agreement] at any time subsequent to the date hereof, [DDTC] or [Mannesmann] shall provide the Seller with sixty (60) days' prior written notice of such sale whereupon the Seller shall have the right, at its option and expense, upon written notice to [DDTC] within such 60-day period, to make copies of any Asbestos or Legal Proceeding's Data within sixty (60) days after the date of the Seller's notice to [DDTC], and the provisions of this Section 10 shall continue to be binding upon [DDTC] and the Purchaser; provided, however, that such sale shall not be consummated without the prior written consent of the Seller. (emphasis in original)

By virtue of Section 13 of the A&S Agreement, which provides that the A&S Agreement "supercedes any and all previous agreements and understandings between the parties hereto with respect to those matters [covered by the A&S Agreement]," Section 10 of that document either largely or entirely supplanted Section 15.10 of the Agreement. In sharp contrast to Section 15.10 of the Agreement, Section 10 of the A&S

Agreement is clear on its face that it does not permit an assignment to an affiliate of Mannesmann without the consent of Imo. Therefore, neither Mannesmann nor DDTC had the ability to sell or otherwise assign the assets acquired from Imo to SDDTI without Imo's express written consent, which Imo could withhold in its sole discretion.

Alternatively, even if Section 15.10 of the Agreement were not supplanted by Section 10 of the A&S Agreement, the plain language of Section 15.10 indicates that a permissible assignment by Mannesmann could only occur *before the closing* of the transaction contemplated by that agreement. An assignment is a transfer of a contractual *right to performance by the obligor* from the assignor to the assignee.[21] The relevant part of Section 15.10 states, "the Purchaser may assign to one or more of its Affiliates the right to purchase and take title to any or all of the Assets…." This language, on its face, and construed together in context with the Agreement, the A&S Agreement, and the Assignment and Assumption, can only have one interpretation—that the Purchaser [assignor] could assign to one or more of its Affiliates [assignee] *at that time* the right to purchase and take title to any or all of the Assets *from Imo* [the obligor], a right which clearly could not survive the closing of the transaction.

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[21] E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 11.3 (2d ed. 1998).

It necessarily follows that under either interpretation the transfer of the assets from DDTC to Wesgen in 2001 was necessarily a breach of the A&S Agreement. It is important to note that the sale of the assets from DDTC to Wesgen was not in violation of the portion of Section 10 which prohibited assignment of the A&S Agreement or any rights or obligations created in the A&S Agreement, but rather was a breach of the latter portion of Section 10 which contained a restraint on the alienation of the Imo assets without Imo's approval. As such, cases cited by Imo such as *Empire Discount Corp. v. William E. Bouley Co.*,[22] are inapposite, except to the extent that DDTC purported to assign rights it had pursuant to the A&S Agreement, such as for indemnification, to Wesgen. Purported assignments of those rights would be and are void (but the rights themselves are not void). To that extent, Imo's motion for summary judgment is granted because DDTC and Mannesmann did breach the A&S Agreement by transferring those assets to Wesgen without Imo's consent.

Now I turn to the issue of the appropriate remedy for that breach, which bears upon the ultimate question to which both parties seek a resolution. Imo argues (and, indeed, has acted in accordance with its argument since April 4, 2002) that because the assets were sold to Wesgen

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[22] 5 Misc.2d 228, 229 (N.Y. Sup. Ct. 1957).

without its consent, Imo no longer has an obligation to indemnify Mannesmann, DDTC or SDDTI with respect to new claims brought on the Imo assets.[23] SDDTI argues that it is entitled to indemnification under the Agreement as a third-party beneficiary thereto and, together with the intervenors-plaintiffs, seeks an injunction to that effect.

Preliminarily, it bears noting that nothing in the plain language of either the Agreement or the A&S Agreement indicates that a sale of assets (or assignment) in violation of Section 10 of the A&S Agreement or Section 15.10 of the Agreement will result in an expiration of Imo's indemnification obligations to Mannesmann and DDTC. The provisions are wholly separate and independent. Therefore, in order for Imo's indemnification obligations to cease, Mannesmann and DDTC's breach would have to be material such that Imo was relieved of its obligations to perform under the Agreement.

Under New York law, "for a breach of a contract to be material, it must go to the root of the agreement between the parties,"[24] or "defeat[] the

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[23] According to the representations of counsel at oral argument, Imo has continued to defend claims that were tendered before the assets were sold to Wesgen, and the Movants have continued to permit Imo access to records and personnel pursuant to the A&S Agreement.

[24] *Frank Felix Assoc., Ltd. v. Austin Grugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997) (citations and internal quotations omitted); *see also Certain Underwriters at Lloyd's of London v. McDermott Int'l Inc.*, 2002 WL 22023, at *4 (E.D. La. 2002) ("breach must go to the root of the agreement.") (interpreting New York law) (citations and internal quotations omitted); *Zim Israel Navigation Co., Ltd. v. Indonesian Exports Dec. Corp.*,

object of the parties in making the contract and deprive the injured party of the benefit that it justifiably expected."[25] By selling Imo's assets to a related corporation, neither DDTC nor Mannesmann have deprived Imo of "the benefit that it justifiably expected" from the Agreement. Mannesmann or DDTC paid Imo for the assets in 1995. Imo received the benefit that it justifiably expected at that time.[26] Through the A&S Agreement, Imo is still receiving bargained-for benefits from Mannesmann and DDTC. Mannesmann and DDTC's breach, therefore, was not material, and Imo is not thereby relieved of its indemnity obligations under the Agreement.[27]

One of those obligations is to indemnify Mannesmann for "Damages" arising from the "Retained Liabilities." "Retained Liabilities is defined in § 1.4(c)(iii) of the Agreement as including "All Liabilities in respect of Asbestos Claims or Pending Asbestos Claims." "Damages" is defined in § 15.1 of the Agreement as including:

1993 WL 88223, at *2 (S.D.N.Y. 1993) ("Whether a breach is … material is an alternate formulation of the question of whether a breach 'goes to the essence' of the contract.").

[25] *ESPN, Inc. v. Office of Comm'r of Baseball*, 76 F. Supp. 2d 416, 421 (S.D.N.Y. 1999) (citations and internal quotations omitted).

[26] On the other hand, the benefit that Mannesmann and DDTC justifiably expected was two-fold—the assets themselves, and the future indemnification for liabilities created by Imo's past manufacture and sale of products which contained asbestos.

[27] At oral argument, counsel for Imo argued that because the provisions in the Agreement and A&S Agreement were bargained for and included in the final contract, they must be material to Imo. The fallacy of this argument is obvious, as it would make almost every breach of a contract material, and that is why the relevant test for materiality under New York law is whether the root of the agreement between the parties has been affected.

> all claims, suits, actions, judgements [sic], losses, injuries, damages, fines, penalties, costs, expenses and liabilities (including reasonable attorneys' fees, consultants' fees, professionals fees' [sic] and expenses incident to the foregoing), including without limitation, environmental damages, response costs…, remediation expenses, disbursements and court costs *whether incurred by a party to this Agreement (or one of its Affiliates) or a third party claiming against the Purchaser* (including reasonable attorneys', consultants' and other professionals' fees and expenses incident to the foregoing). (emphasis added)

The Agreement is clear and unambiguous on its face that Imo contemplated in 1994 that it might be called upon to indemnify Mannesmann for costs and damages incurred as a result of defending asbestos cases arising from Imo's products *even if* those costs and damages were not incurred in the first instance by Mannesmann itself, or even one of its affiliates. Again, here it is irrelevant whether SDDTI is an affiliate of Mannesmann, because even if SDDTI is not an affiliate, it is a "third party claiming against [Mannesmann]." It is also irrelevant whether Mannesmann or DDTC continued to own those assets. When DDTC sold the assets to Wesgen, the agreement those parties executed requires DDTC to indemnify Wesgen for liabilities relating to the Imo assets.[28] In the end, therefore, Imo will still be paying to defend and indemnify SDDTI for suits stemming from

[28] Wesgen Asset Purchase Agreement, Ex. B to Movants' Opening Br. In Supp. of Their Mot. For Summ. J. Article I, §§ 2.2, 2.3, 10.1.

Imo's asbestos liabilities. SDDTI will incur the cost or expense, receive indemnification from DDTC, and DDTC (undisputedly an Affiliate of Mannesmann within the meaning of the Agreement), will then obtain indemnification from Imo.

The A&S Agreement requires Mannesmann and DDTC to maintain certain records, provide Imo with access to those records, and cooperate with Imo in litigation.[29] The A&S Agreement further provides that should Mannesmann and DDTC fail to comply with those obligations, DDTC is required to indemnify Imo for its losses resulting from non-compliance with those terms of the A&S Agreement, essentially negating Imo's obligation to indemnify. Those obligations are still in effect even though DDTC no longer owns the assets, and will continue indefinitely unless terminated by mutual written agreement of Imo, Mannesmann and DDTC in accordance with § 6 of the A&S Agreement.[30] For this reason, Imo cannot in good faith claim that it has suffered damages as a result of SDDTI's purchase of the Imo assets, as it still retains the same rights pursuant to the Agreement and A&S Agreement that it did before DDTC sold the assets to Wesgen.

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[29] A&S Agreement, §§ 1-3.

[30] Movants' counsel at oral argument recognized that DDTC and Mannesmann are still bound by the terms of the A&S Agreement, notwithstanding that the relevant assets are now owned by SDDTI.

The final remaining issue is the validity of the sale to Wesgen of the Imo assets. Section 10 of the A&S Agreement would seem to prevent the sale from actually occurring. Section 2.1(h) of the DDTC-Wesgen Asset Purchase Agreement indicates that those parties contemplated that it might not be possible to consummate the transaction. For more than four years, however, both DDTC and Wesgen have been operating under the impression that Wesgen owns the Imo assets. Imo has not asked that the April 2001 sale from DDTC to Wesgen be rescinded, and I see no reason to require or even consider requiring rescission after so many years in the absence of any harm to Imo.

V.

For the foregoing reasons, I grant defendant's and intervenors-plaintiffs' motion for a declaration that Imo is required to indemnify Mannesmann and DDTC pursuant to the terms of the Agreement and A&S Agreement. On the other hand, I deny defendant's and intervenors-plaintiffs' motion, and grant Imo's counter-motion, with respect to SDDTI. Imo is not contractually obligated to indemnify SDDTI directly, and is not enjoined from denying indemnification requests made by SDDTI. In any event, the end result of this decision is that Imo will hold Mannesmann and

DDTC harmless for SDDTI's asbestos liabilities relating to the Imo assets. The motions are granted in part and denied in part.

IT IS SO ORDERED.