UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NEXTEER AUTOMOTIVE CORPORATION,

Plaintiff,

v.

CASE NO. 13-CV-15189
HON. GEORGE CARAM STEEH

KOREA DELPHI AUTOMOTIVE SYSTEMS CORPORATION (now known as) ERAE AUTOMOTIVE SYSTEMS,

Defendant.
______________________________________/

SEALED MEMORANDUM OPINION AND ORDER

I. Introduction

This breach of contract and misappropriation of trade secret case arises out of defendant Korea Delphi Automotive Systems Corporation's ("KDAC"), now known as erae Automotive Systems Co. Ltd. ("erae") (lowercase in title), alleged piracy of a halfshaft joint, known as a TriGlide joint, owned by plaintiff Nexteer Automotive Corp. ("Nexteer"). The halfshaft joint is used in automotive steering systems. Per the parties' contracts, the matter was arbitrated in Singapore. On December 28, 2016, the sole arbitrator, Dr.

Wolfgang Peter of Switzerland, issued his final award, which is subject to a protective order and was filed under seal. The arbitrator found that KDAC's competing premium joint, the KPJ, was manufactured using Nexteer's proprietary information in violation of the parties' 2006 and 2011 agreements. As a result of this finding, the arbitrator awarded plaintiff Nexteer Automotive Corp. ("Nexteer") $5,876,666 consisting of (1) $3,328,760 as disgorgement for past sales of defendant's KPJ halfshaft, with an additional $218,861 in pre-judgment interest, (2) $2,103,572 for Nexteer's legal fees, (3) $220,492 for Nexteer's arbitration costs, and (4) $4,981 in Nexteer's fees for administrative secretary's services. Dr. Peter also awarded Nexteer a royalty of 4.5% on all sales of the KPJ halfshafts and future sales of any premium joint product derivative of KPJ after November 30, 2015.

Now before the court is Nexteer's motion to confirm the arbitration award and KDAC's motion to stay confirmation pending review proceedings pending in Singapore. In reaching its decision here, the court has carefully considered the lengthy and well stated oral arguments presented by counsel at the hearing of these matters, the well drafted written submissions of the parties, and voluminous exhibits including the 91-page arbitral opinion.

In its motion to stay confirmation of the arbitral award, KDAC argues that the arbitrator exceeded his authority by ordering the royalty payment on future sales of any premium joint product derivative of KPJ, as the "derivative" language was outside the scope of Nexteer's claim, is vague and will subject KDAC to endless litigation over whether its products are "derivative" of its KPJ halfshaft. On March 28, 2017, KDAC filed its application to set aside the arbitration award in Singapore. (Doc. 56). That application was in the form of an originating summons. In that summons, KDAC argues the arbitration award should be set aside for four reasons: (1) KDAC was unable to present its case; (2) the arbitration award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; (3) the arbitral procedure was not in accordance with the agreement of the parties; and (4) a breach of the rules of natural justice. (Doc. 56-2).

KDAC also relies on the sealed affidavit of its managing director and head of the legal department, Manbok Jin, with accompanying exhibits totaling 1,382 pages, to explain its position in the review proceedings pending in Singapore's High Court. (Doc. 57). Primarily, KDAC's argument in the Singapore reviewing court is that the issue of a royalty based on the sale of a "derivative" halfshaft was not argued in the pre-hearing briefs or at the evidentiary hearing, but was discussed for the first time in the post-hearing briefs to KDAC's prejudice. *Id.* KDAC claims this amounts to a breach of the rules of natural justice and amounts to a dispute not within the scope of submission to the arbitration. KDAC also complains that the arbitration was not in accord with the parties' agreement because the arbitrator issued one award when four separate arbitrations regarding four separate supply agreements were pending.

Nexteer argues that granting the stay and delaying Nexteer's ability to recover the monetary award, royalty and derivative royalty award will result in irreparable prejudice to Nexteer because (1) it will allow KDAC to continue competing with Nexteer in the marketplace, (2) will undermine Nexteer's market share and business opportunities, (3) will erode the status and pricing of Nexteer's technology, (4) will impair Nexteer's reputation as a leading manufacturer of premium halfshafts, and (5) will allow KDAC to dissipate its assets and to restructure its halfshaft portfolio to try to avoid its royalty obligations. If this court decides to stay this matter pending KDAC's review proceedings in Singapore, Nexteer requests that KDAC be required to post a $50,000,000 bond as security.

For the reasons set forth below, KDAC's motion to stay shall be GRANTED IN PART so that the arbitral award of the 4.5% royalty on future sales of any premium joint product derivative of KPJ from November 30, 2015 shall not be confirmed at this time pending the ongoing Singapore proceedings, and shall be DENIED IN PART in that the monetary award in the amount of $5,876,666 and the 4.5% royalty on all sales of the KPJ halfshaft shall be confirmed at this time. For the same reasons, Nexteer's motion to confirm the arbitral award shall be GRANTED as to the monetary award for disgorgement of past sales of the KPJ halfshaft, legal fees, arbitration costs, and costs of the administrative secretary's services, and shall be GRANTED IN PART as to the 4.5% royalty for all future sales of the KPJ halfshafts, but shall be DENIED IN PART as to the 4.5% royalty award for the sales of any premium joint product derivative of KPJ from November 30, 2015. As a condition of the stay, KDAC will be required to post an adequate security.

II. Factual Background

KDAC, now erae, is a tier one (direct) supplier to automotive manufacturers and is in the business of designing and manufacturing halfshafts and related components. Nexteer is a steering supplier which markets and sells halfshafts to original equipment manufacturers ("OEMs") in the United States. Nexteer owns halfshaft technology known as TriGlide. A halfshaft is an element of the axle, and a halfshaft joint transfers power from the engine to the wheels through a bend in the shaft. TriGlide is a joint that is incorporated into a front-wheel drive halfshaft to control noise, vibration, and handling. The parties entered into Exclusive Manufacturing & Supply Agreements by which KDAC promised to manufacture and sell TriGlide products exclusively for Nexteer and prohibiting it from selling similar or derivative products. As part of their contracts, the parties agreed to mandatory arbitration of any disputes in Singapore.

Their mandatory arbitration agreement provided that the decision of the arbitrator would be "final and binding" and would "not be subject to any appeal" as follows:

6.11 <u>Arbitration</u>

(a) Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("Rules") for the time being in force. The Tribunal shall consist of one (1) Arbitrator to be appointed in accordance with the Rules. The language of the arbitration shall be in English.

(b) *[Nexteer] and KDAC acknowledge and confirm that the arbitration award shall be final and binding upon all parties, shall not be subject to any appeal,* and shall deal with the question of costs of

> arbitration and all matters related thereto. Judgment upon the arbitration award may be entered in any court having jurisdiction over the party against whom enforcement is sought or such party's property. The foregoing, however, shall not preclude the parties from applying for any preliminary or injunctive remedies available under applicable laws for any purpose, including, but not limited to, securing the subsequent enforcement of an arbitration award.

(Doc. 50, Ex. B at ¶ 6.11) (emphasis added).

In considering the pending motions, KDAC argues that this matter has been pending for nearly four years, that any delay can be attributed to Nexteer, and thus, there is no urgency to the pending motions and the court should grant the stay they request. Because the timing of the arbitration proceeding, and whether either side is to blame for the delay, is of some importance in deciding the pending motions, a brief summary of that time line is set forth below.

On June 1, 2013, Nexteer initiated arbitration proceedings before the SIAC alleging that KDAC sold pirated products, namely its KPJ halfshaft, to Nexteer's own customers and prospective customers in violation of the parties' agreements. The claim was based on the 2011 supply agreement. Nexteer's motion to have the arbitration decided in an expedited fashion was denied. KDAC argues that Nexteer delayed adjudication of the arbitration by disputing the jurisdiction of the arbitrator to decide its counterclaim, and by filing three independent arbitration claims arising from the 2006 contracts, which were later consolidated. (Doc. 50, Ex. A at ¶¶ 24-30). Nexteer, on the other hand, contends that the hearing date was extended to accommodate KDAC's challenge to assignment of the 2006 agreements.

On December 6, 2013, Nexteer brought an action for injunctive relief against KDAC in Oakland County Circuit Court, which KDAC removed here. (Doc. 1). Nexteer filed a motion for preliminary injunctive relief on December 24, 2013, which this court denied. (Doc. 7). The evidentiary hearing in the arbitration proceeding was originally set for March 16, 2015. KDAC points out that Nexteer's counsel sent the arbitrator a letter dated February 19, 2014, asking for the hearing date to be scheduled as early as feasible after July 20, 2015. (Doc. 48-3 PageID 2366). Whatever the reason for the delay, the evidentiary hearing was rescheduled for August 24, 2015 and began on that date. The arbitration hearing lasted for one full week and was completed on August 28, 2015. Fourteen witnesses testified at the arbitration hearing. The parties submitted briefs amounting to more than 1,525 pages, 26 witness statements and expert reports totaling 1,019 pages, and 702 other fact and legal exhibits totaling more than 1,525 pages.

The date for post-hearing briefing was set for December 15, 2015. (Doc. 48-4 at PageID 2373). Nexteer agreed to that date, and the arbitrator advised the parties that it could take some time for him to render his decision. *Id.* Post-briefing submissions were finally completed by March 4, 2016. (Doc. 50, Ex. A at ¶¶ 70-74). The arbitrator issued the Award on December 28, 2016. (Doc. 50, Ex. A). Nexteer filed its motion here to confirm the arbitration award on January 17, 2016. (Doc. 42).

The arbitration award was set forth in a thorough 91-page opinion. (Doc. 50, Ex. A). The arbitrator found that KDAC used Nexteer's halfshaft technology in its production of its KPJ in violation of the parties' agreements. (Doc. 50, Ex. A at ¶ 230). The arbitrator ordered disgorgement of lost profits for the premium joint halfshaft assembly, with the prejudgment interest (approximately $3.55 million); royalty of 4.5 % on sales of the KPJ halfshafts and future sales of any premium joint product derivative of KPJ after November 30, 2015; and payment of 80% of Nexteer's legal, arbitration and fees for administrative secretary's services (approximately $2.33 million). *Id.* at ¶ 336.

III. Defendant KDAC's Motion to Stay

The first matter before the court is KDAC's motion to stay the arbitration award. KDAC argues that the matter should be stayed because of nullification procedures taking place in a Singapore court which are expected to be complete in five to seven months. Nexteer argues that no stay should enter because (1) KDAC agreed not to appeal the arbitrator's decision; (2) this court can confirm the arbitration award even if the Singapore court sets it aside; (3) consideration of the *Europcar* factors and weighing the objectives of arbitration against interests of comity in respecting ongoing foreign proceedings, tips the scales in favor of confirming the arbitration award without further delay. Each argument is addressed below.

A. The Parties' Agreement not to Appeal the Arbitrator's Decision

The parties agree that the New York Convention, ("Convention") 9 U.S.C. §§ 201-08, governs this matter as it provides for the enforcement of arbitration agreements and the confirmation of foreign arbitral awards.[1] KDAC

[1] The "New York Convention" is the shorthand term for the multilateral treaty known more formally as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N. Treaty Ser. 38 (1958), implemented as an amendment to the Federal Arbitration Act ("FAA") at 9 U.S.C. §§ 201-08.

requests to stay this enforcement action based on Article VI of the New York Convention which states:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e) [of the country in which, or under the law of which, that award was made], the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

(Doc. 48-2 at PageID 2360). Two parts of the above-quoted provision are important here. First, a stay is discretionary, not mandatory. Second, if the court is to grant a stay, the court may require the party in whose favor the stay is granted to post a sufficient security.

Before addressing whether KDAC has forfeited any right to seek to nullify the arbitrator's decision in Singapore courts or here, the court must first consider the impact of the waiver. First, the parties' contractual agreements plainly state that the arbitration award "shall be final and binding upon all parties" and "shall not be subject to any appeal." (Doc. 50, Ex. B § 6.11(b)). Second, the arbitral rules of the SIAC in effect at the time of the arbitration, to which the parties agreed to be bound, *id.* § 6.11(b), specifically provide that the arbitration award is "final and binding," and that the parties "irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made." SIAC Rule 32.11 (2013).

Although the Convention authorizes the court to stay enforcement of arbitral decisions when foreign proceedings challenging the arbitral decision are pending, Nexteer argues such a stay would be inappropriate here where the parties agreed to be bound by the arbitrator's decision, and waived their right to any appeal. KDAC argues that Singapore courts should decide the waiver issue. Nexteer, on the other hand, argues that Michigan law controls the question, and this court should decide the issue. The parties agreement provides:

> 6.10 Governing Law.
>
> This Agreement is to be construed according to the laws of Michigan, US excluding the provisions of the United Nations Convention on Contracts for the International Sale of Goods and any choice of law provisions that require application of any other law.

(Doc. 50, Ex. B at ¶ 6.10). Although the contracts call for the application of Michigan law, this choice of law provision is a matter of substantive not procedural law. The parties agreed to the procedural law of the Singapore International Arbitration Centre ("SIAC"). (Doc. 50, Article 6.11(a))

Article V of the Convention provides seven instances where a court can refuse to enforce an arbitral award. KDAC relies on one of those exceptions, namely Article V(1)(e), for the proposition that this court must stay this action pending the review procedures ongoing in Singapore. Specifically, Article V(1)(e) provides that the court may refuse to recognize and enforce an arbitral award when:

> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

In *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 848 (6th Cir. 1996), the Sixth Circuit held that the language of Article V(1)(e) of the Convention which provides "the competent authority of the country under the law of which, [the] award was made" "refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law of contract which was applied in the case." *Id.* at 848 (internal quotation marks and citation omitted). The Sixth Circuit further explained that a motion to set aside a foreign arbitral award "may be heard only in the courts of the country where the arbitration occurred or in the courts of any country whose *procedural* law was specifically invoked in the contract calling for arbitration of contractual disputes." *Id.* at 849.

Based on this clear precedent, in this case, it is only the country of Singapore where the arbitration took place and whose procedural rules governed the arbitration, which has the authority to set aside an arbitral award under Article V(1)(e). Under the Convention, "the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). The Convention contemplates that a motion to set aside an arbitral award is to be made in the state in which, or under the law of which, the award is rendered and "is to be governed by domestic law of the rendering state." *Id.* "Under the New York Convention, an agreement specifying the place of the arbitration creates a presumption that the procedural law of that place applies to the arbitration." *Karah Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 291 (5th Cir. 2004).

KDAC points out that a review of an international arbitration award in Singapore is governed by the International Arbitration Act ("IAA"), which provides for very narrow review of arbitral decisions. The grounds for such a review under the IAA are very narrow and only apply in two instances: (1) where a breach of the rules of natural justice occurred to the prejudice of one of the parties; or (2) where an award is in violation of public policy. KDAC argues these grounds for review under the IAA are *in pari materia* of the grounds set forth in Article V of the New York Convention. Thus, the Singapore court where the petition to set aside the arbitral award is pending will decide in the first instance whether KDAC waived its right to judicial review of the arbitral decision.

There are two parts to the question of whether the waiver provision in the parties' contracts precludes KDAC from challenging the arbitral award. First, the issue is whether KDAC can pursue nullification proceedings in Singapore courts. Second, the issue is whether the waiver provision precludes KDAC from challenging confirmation of the award in this court. As to the first question, KDAC is correct that Singapore courts must decide in the first instance whether KDAC waived its right to seek review of the arbitral award in Singapore courts. This is true because Article V(1)(e) of the New York Convention contemplates that the state in which the arbitral decision is made is free to set aside or modify an award in accordance with its own domestic arbitral law. *Toys "R" Us*, 126 F.3d at 23. As to the second question, the contractual waiver does not preclude KDAC from arguing that the award should not be confirmed here under any one of the seven defenses recognized by Article V of the Convention.

Under controlling Sixth Circuit precedent, the parties' agreement not to appeal the arbitrators' decision does not, standing alone, preclude all subsequent review. In *M & C Corp.*, the Sixth Circuit was presented with similar contractual language and arbitral rules and was asked to determine if the court had jurisdiction to review the arbitrator's award. 87 F.3d at 847. Specifically, the parties agreed that Michigan law controlled, and the parties agreed that any ruling by the arbitrator was "finally settled." *Id.* at 846. Notably similar to the SIAC rule at issue here, the arbitral rules in that case, which were governed by the International Chamber of Commerce ("ICC"), provided that "[t]he arbitral award shall be final" and the parties are deemed "to have waived their right to any form of appeal insofar as such waiver can validly be made." *Id.* at 847.

Despite this contractual language and arbitral rule, the Sixth Circuit found that not all judicial review would be foreclosed, recognizing that some limited judicial review would still exist, and identified fraud, procedural irregularities, or exertion of improper influences upon arbitrators as possible areas of review. *Id.* The Sixth Circuit also held that the defenses to awards outlined by the New York Convention would remain available to parties who were unsuccessful in arbitration proceedings. *Id.*

Nexteer's attempts to distinguish the Sixth Circuit's decision in *M & C Corp.* because the arbitral rules in that case used the word "appeal" and not the word "review," are not persuasive. In *M & C Corp.*, the arbitral rule was quite broad, foreclosing "any form of appeal," and yet the Sixth Circuit found this was insufficient to preclude all judicial review. Also, the Sixth Circuit was unequivocal that the parties could not waive the defenses to enforcement set forth in the New York Convention. *Id.* In conclusion, in light of the Sixth Circuit's decision in *M & C Corp.*, the court does not find that KDAC waived its right to bring nullification proceedings in Singapore or its right to challenge the arbitral award here under the seven defenses set forth in Article V of the Convention.

B. Whether this Court Can Confirm the Arbitration Award Even If the Singapore Court Sets it Aside

Nexteer argues that KDAC is unlikely to prevail in its challenge to the arbitrator's decision pending in a Singapore court, and that even if KDAC has a viable defense there, this court may immediately enforce the arbitrator's decision here. The New York Convention Article VI, which governs enforcement of the arbitration agreement here, authorizes this court to stay an enforcement action pending resolution of the petition anticipated in Article V(1)(e). While a stay is not mandatory, the court deems a limited stay appropriate here where the issue of whether KDAC was denied due process with respect to the derivative royalty award is pending in the Singapore courts. KDAC points out that a review of an international arbitration award in Singapore is governed by the IAA. KDAC argues these grounds for review under the IAA are *in pari materia* of the grounds set forth in Article V of the New York Convention. Nexteer, on the other hand, argues that neither basis is contained in Article V(1)(a)-(d) of the Convention and thus, the court can confirm the arbitration award even if the Singapore court sets it aside.

Nexteer relies on several cases for the proposition that an enforcement court has discretion to enforce an arbitration award even where the court in the arbitral seat has vacated the award. *See Ingaseosas Int'l Co. v. Aconcagua Investing Ltd.*, 479 F. App'x 955, 963 n.16 (11th Cir. 2012) (collecting cases); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 369 (5th Cir. 2003) ("As an enforcement jurisdiction, our courts have discretion under the Convention to enforce an award despite annulment in another country, and have exercised that discretion in the past."). There is a split of authority on this point, and some other courts have held to the contrary. *Ingaseosas*, 479 F. App'x at 964 n.16. Neither side has directed the court to any Sixth Circuit authority on this issue. Without resolving this question, the court deems it appropriate to defer to the Singapore courts in the first instance as to the matter of the derivative royalty award. Such deference now does not preclude this court from later exercising any discretion it may have to enforce the arbitral award despite an annulment by a Singapore court.

A guiding principle in reaching this decision is the relative merit of the matter pending before the reviewing court. In the Singapore reviewing court, KDAC argues that it was prejudiced because it was "ambushed" by Nexteer's request in post-hearing submissions for damages to include a royalty payment based on any premium joint product derivative of the KPJ halfshaft. KDAC also argues the derivative royalty provision violates the objectives of arbitration as it is a vague standard, which rather than providing a clear award, will necessarily spawn further litigation over the complicated question of whether any new premium joints that it develops are derivative of the KPJ.

Although Nexteer's argument that this court may enforce the arbitration award even if the Singapore courts set it aside is supported by persuasive albeit non-binding authority, the court views the question as premature at this juncture. The court deems it prudent to await a decision from the Singapore courts before deciding whether or not to confirm that portion of the award governing the derivative royalty. KDAC is correct that the arguments it has made in the Singapore High Court parallel defenses available under Article V of the Convention. Also, once the Singapore courts have rendered their decisions, this court will be in a better position to assess whether any annulment was based on the defenses available under Article V of the Convention, and thus, should be enforced. In reaching its conclusion here, and as set forth in more detail below, the court defers to the Singapore courts with respect to the derivative royalty provision of the award only. Because KDAC has not leveled a serious challenge to the non-derivative royalty provisions of the arbitral award, the court does not deem it necessary to stay enforcement of that portion of the award.

C. *Europcar* Factors Weigh in Favor of Denying Stay

In determining whether to grant a stay, the parties agree that this court should be guided by the Second Circuit's opinion in *Europcar Italia, S.p.A. v.*

Maiellano Tours, Inc., 156 F.3d 310 (2d Cir. 1998). The Second Circuit has set forth six factors for the court to consider in deciding whether or not to stay an arbitration award pending ongoing proceedings in a foreign court:

> (1) the general objectives of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;
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> (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;
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> (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;
>
> (4) the characteristics of the foreign proceedings;
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> (5) a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Article VI of the Convention, the party seeking enforcement may receive "suitable security" and that, under Article V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country . . . and
>
> (6) any other circumstances that could tend to shift the balance in favor of or against adjournment.

Id. at 317–18. Both sides agree that the above *Europcar* factors should inform this court's analysis of whether or not to grant the stay requested by KDAC.

1. Arbitration Objectives & Status of Foreign Proceedings

First, the court considers the objectives of arbitration, the status of the foreign proceedings, and the estimated time for those proceedings to be resolved. These considerations are the most important ones in the court's analysis. The objectives of arbitration are meant to streamline disputes, and allow for the expeditious resolution of controversies free from the risk of protracted and expensive litigation in the courts. KDAC relies on *Europcar's* admonition that "where a parallel proceeding is ongoing in the originating country and there is a possibility that the award will be set aside, a district court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings." 156 F.3d at 317.

KDAC argues that the stay is necessary to avoid inconsistent and conflicting outcomes and to avoid wasting judicial resources. In considering this argument, the court has considered the relative merit of the proceedings pending in Singapore to set aside the arbitral award. KDAC has twice informed the court of the contents of its petition to set aside the arbitration award. First, KDAC has submitted a copy of an "Originating Summons" filed in the High Court of the Republic of Singapore. That summons asserts in a very cursory fashion the reasons that the arbitration award should be set aside: (1) KDAC was unable to present its case; (2) the arbitration award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitrations; (3) the arbitral procedure was not in accordance with the agreement of the parties; and (4) a breach of the rules of natural justice.

Second, KDAC relies on the 55-page affidavit of Manbok Jin, the managing director and head of KDAC's legal department, which outlines KDAC's arguments in support of setting aside the arbitral award in greater detail. Jin summarizes four grounds for setting aside the award: (1) the dispute was not within the scope of submission to the arbitration because the issue of the derivative royalty was not properly presented, (2) the decision amounts to a breach of the rules of natural justice because KDAC has been deprived of the right to be heard on the KPJ derivative royalty, (3) the arbitral procedure was not in accordance with the parties' agreement because the arbitrator consolidated four arbitrations involving four contracts and issued only one award, and (4) the agreement is not enforceable in Michigan because the award governing the derivative royalty is indefinite, vague and ambiguous, and violates public policies of the State of Michigan and the United States.

With the exception of the complaint that the arbitrator improperly issued one award rather than four separate awards arising from the four supply agreements, the remainder of KDAC's arguments are all focused on the derivative royalty provision of the award. The objection that the arbitrator improperly issued one award, rather than four awards, lacks merit as set forth below. Thus, there is no reason to delay enforcement of the arbitration award as to the portion of the award that does not pertain to the derivative royalty provision.

There is no dispute that the parties agreed to a single procedural timetable and agreed to have one arbitral hearing. KDAC also concedes that the arbitrator did make specific references to the separate agreements in his award, but argues that it would prefer more detailed references to the specific agreements and four separate awards. Having reviewed the arbitral award and its detailed and specific references to the separate agreements, it appears extremely unlikely that KDAC will prevail on this argument in the Singapore courts which narrowly limits review of arbitral awards pursuant to the IAA. Where it is unlikely that Singapore courts will set aside the arbitral award concerning the disgorgement for past sales of KDAC's KPJ halfshaft and the related amounts ordered for Nexteer's legal fees, arbitration costs, and fees for services by the administrative secretary, as well as the 4.5% royalty on the sale of the KPJ halfshafts, there is no reason to delay enforcement of that portion of the arbitral award. This court yields to the ongoing Singapore proceedings only to the extent that it is possible that those proceedings will vacate or set aside the arbitral award.

The court next considers the status of the foreign proceedings and the estimated time for those proceedings to be resolved. KDAC argues the review in the Singapore courts could be concluded in as little as five to seven months. KDAC further argues that without the stay, the court risks the possibility that the arbitral award will be set aside by Singapore courts, thus raising complicated issues of refund here. Nexteer responds that after initial review in the Singapore High Court, a party has a right to appellate review in the Singapore Court of Appeal, which could stretch the proceedings to 14-19 months. Because those proceedings began in late March, 2017, by Nexteer's estimations, they should be concluded by October, 2018.

Considering that this matter has already been pending for more than four years, allowing this matter to conclude in the next year and a half is not such a significant delay that this court should not yield in interests of comity to a decision by the Singapore courts as it relates to the derivative royalty.

Although Nexteer argues it is prejudiced because KDAC is continuing to compete with it in the marketplace, thus allegedly eroding Nexteer's status, reputation and the pricing of its technology, that alleged prejudice is overborne by the imposition of a suitable security. Although Nexteer has expressed concerns that KDAC could dissipate its assets and restructure its halfshaft portfolio to try to avoid its royalty obligations, those concerns are ameliorated by requiring KDAC to post bond.

In sum, because KDAC's arguments to the Singapore High Court in favor of setting aside the arbitral award focus almost exclusively on the derivative royalty award, the interests of judicial economy and comity warrant granting the stay as to that portion of the award only. Where it is unlikely that the remainder of the award will be set aside, there is no reason to delay confirmation of that portion of the arbitral award. Confirming that portion of the award promotes the objectives of arbitration, namely the efficient resolution of disputes and the avoidance of protracted and expensive litigation.

2. Comparison Between the Levels of Scrutiny

The court next considers whether the arbitral award will receive greater scrutiny in the Singapore proceedings under a less deferential standard of review. If so, this factor weighs in favor of granting the stay. Nexteer posits that this court can hear any objection to confirmation of the arbitration award and need not defer to Singapore courts. KDAC, on the other hand, argues that this matter should be decided by Singapore courts as that is the seat of the arbitration, and its review petition will be governed by the Singapore IAA. KDAC also argues that Singapore courts are equally deferential to arbitration awards as American courts. In addition, KDAC argues that this court should stay this matter since it is possible that the Singapore court will set aside the arbitration award. Given that the level of review of the arbitral award is similar here as in the Singapore proceedings, this factor is fairly neutral.

3. Characteristics of Foreign Proceedings

The court's consideration of the foreign proceeding must focus on four sub-factors: "(I) whether they were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute."

Europcar, 156 F.3d at 318. Review of these subfactors support a partial stay only.

First, KDAC instituted the foreign proceedings to set aside the award. Thus, this factor weighs in favor of immediate enforcement. Because there is no serious meritorious challenge to the disgorgement for past sales of the KPJ halfshafts, this factor only supports a partial stay of the arbitral award as to the derivative royalty award. Second, KDAC initiated the foreign proceedings two months after Nexteer sought to confirm the arbitration award here. While on its face KDAC's delay supports immediate enforcement of the arbitral award, given the complexity of this matter, the fact that KDAC filed its petition to set aside the award shortly after Nexteer filed its motion to confirm the award is of little moment. Principles of international comity still prevail, and this court should yield to the Singapore court's review of KDAC's petition to set aside the arbitration award to the extent that it is possible that the Singapore High Court will set aside the derivative royalty provision.

Third, the foreign proceedings were brought by KDAC and not by the party who commenced enforcement proceedings before this court. This factor also favors Nexteer and justifies the imposition of a partial stay. Fourth, although KDAC did not commence the review proceedings in Singapore until the filing deadline, given the complexity of the matter, KDAC is not to be faulted for failing to initiate set aside proceedings sooner. For all of these reasons, consideration of the four characteristics of the foreign proceeding suggest that a partial stay is warranted.

4. Balance of Possible Hardships

The arbitrator found that KDAC has pirated Nexteer's proprietary halfshaft joint in violation of the parties' contracts and ordered KDAC to pay Nexteer millions of dollars in lost profits, royalties on future sales of the KPJ halfshafts, royalties on any premium joint product derivative of KPJ, and attorney's fees, arbitration costs, and pre-judgment interest. Nexteer claims that KDAC is continuing to use its pirated part to bid for OEM business, in direct competition with Nexteer diluting the value of Nexteer's technology in the marketplace and impairing Nexteer's market share and business opportunities. Because the award is confidential, Nexteer is limited in what it can tell buyers. Nexteer also believes that (1) KDAC may be dissipating assets and shifting its halfshaft sales to avoid the reach of the royalty provision, and (2) KDAC is contemplating entering into a joint venture or otherwise submitting to a change in ownership.

KDAC responds that KDAC has more than adequate resources to pay the award. KDAC argues the balance of the hardships favor it because of its right to seek review of the award in the Singapore courts. KDAC blames Nexteer for elongating the arbitration proceedings and argues that there is no indication that Nexteer will face financial hardship if the stay is granted.

Considering the arguments of counsel, the court determines that the hardships can be best balanced by a partial stay subject to the posting by KDAC of suitable security, and a partial confirmation of the award as set forth below. Also, the court is persuaded by Nexteer that the arbitral award should not remain confidential, but shall afford KDAC an opportunity to further brief that issue prior to unsealing this opinion and order.

D. Bond

Should the court grant the stay, Nexteer seeks a bond in the amount of $50 million. Nexteer has not adequately explained how it has arrived at this substantial sum. KDAC opposes posting bond on the grounds that it has sufficient means to pay the award if it is ultimately confirmed, and the proceedings in the Singapore court may obviate the need for any award. In opposing Nexteer's request for bond, KDAC represented to the court that the royalty amounts of sales of the KPJ halfshaft and derivative royalty are approximately $692,929 in 2017. (Doc. 55, Ex. 1, Yeo Aff., ¶ 13). In the petition to the Singapore court, KDAC represents that the same royalty provision yields almost $3,000,000 in royalties in 2018, and a total $13,679,413 in royalty payments over the next four years. (Doc. 57, Manbok Jin Aff. ¶ 96). According to Manbok Jin, the large increase in 2018 is due to a meaningful contract with Fiat Chrysler starting in 2018. (Doc. 66 at ¶ 6).

Manbok Jin's estimates relate to the royalty amounts based on sales of the KPJ halfshaft, not the derivative royalty. Although the court does not have estimates of the derivative royalty amount before it, in his affidavit, Manbok Jin states that KDAC expects to have a new premium joint on the market as soon as 2018, that joint will replace all of the sales of the KPJ, and will be priced the same as the KPJ. (Doc. 57 at ¶ 100). It is possible this new premium joint would be considered derivative of the KPJ. Accordingly, the court's analysis of the appropriate bond is informed by estimates of the royalty for sales of the KPJ.

The New York Convention provides for imposition of a suitable security as a condition of granting a stay to adjourn a decision to enforce an award pending a review proceeding in the country where the award was made:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article

> V(1)(e) [of the country in which, or under the law of which, that award was made], the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

(Article VI of New York Convention, Doc. 48-2 at PageID 2360). Nexteer argues a bond is needed because of concerns over KDAC's ownership and solvency. Nexteer maintains that KDAC's halfshaft business is the least financially viable unit in the KDAC enterprise, and that due to its financial problems, it was not able to find a sale partner to date, although it is allegedly looking to do so. According to Nexteer, KDAC is about to sell its substantial thermal business, which is projected to account for 84% of KDAC's anticipated sales in the United States over the next five years, and it is unclear what the financial viability of KDAC's halfshaft business will be once separated from its fiscally sound sister unit.

KDAC maintains that it is financially viable, and a bond is unnecessary. KDAC responds that even after the spin off of its non-thermal business, the non-thermal business would post global sales of nearly $400 million, including expected sales of $17 to 26 million in the United States per year. (Doc. 66 at ¶¶ 4-6). Using KDAC's own estimates in the Singapore court, and believing that the Singapore proceedings will be resolved in the next eighteen months, the court finds that a bond in the amount of $3,000,000 is sufficient and shall require such as a condition of granting the stay.

IV. Nexteer's Motion to Confirm Arbitration Award

A. Partial Confirmation of Award Shall Be Entered

Having determined that a partial stay is warranted, the next question is whether to grant Nexteer's motion to confirm the arbitration award as to that portion of the award that shall not be stayed, namely the award as disgorgement for past sales of the KPJ halfshaft, legal fees, costs of the arbitration, fees for administrative secretary's services, and the 4.5% royalty on all sales of the KPJ halfshaft. The Convention provides for confirmation unless one of the defenses to the Convention applies:

> 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.

9 U.S.C.A. § 207. "The party resisting confirmation bears the heavy burden of establishing that one of the grounds for denying confirmation in Article V applies." *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 64 (D.D.C. 2013). Due to the extremely narrow grounds for denying the

confirmation of an arbitral award under the Convention, "confirmation proceedings are generally summary in nature." *Id.* (internal quotation marks and citation omitted). The court must confirm the award unless one of the grounds for refusal or deferral of recognition or enforcement is set forth in one of the seven circumstances set forth under Article V of the Convention.

KDAC argues that three of those limited circumstances are present here: (1) a violation of due process in violation of Article V(1)(b) because it allegedly was not on notice that Nexteer wanted a royalty payment based on products "derivative" of its KPJ halfshaft, (2) the arbitrator exceeded the scope of his authority with regard to the derivative royalty in violation of Article V(1)(c), and (3) enforcement of the award would violate the public policy of the United States in violation of Article V(2)(b). All of KDAC's arguments focus on the derivative royalty provision of the arbitral award. KDAC has not seriously challenged under Article V that portion of the award addressing damages as disgorgement for past sales of the KPJ halfshaft and the royalty award for the sale of KPJ halfshafts. Accordingly, there is no reason to delay confirmation of that portion of the award, and this court shall confirm the award as set forth below.

In addition, Article V(1)(c) specifically recognizes that in certain circumstances, it is appropriate to bifurcate an arbitral award, such that one portion of the award remains enforceable, while another is not. Specifically, Article V(1)(c) provides that enforcement may be refused upon proof that:

> The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, *that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced*.

Article V(1)(c) (Doc. 48-2 PageID 2360) (emphasis added). Here, KDAC argues that the derivative royalty award falls outside the scope of the arbitration. But KDAC does not argue that the award for disgorgement for past sales award was outside the realm of matters properly submitted to the arbitrator. Thus, it is appropriate to recognize and enforce that portion of the arbitrator's award without delay.

B. Prejudgment Interest

The arbitrator awarded prejudgment interest up to November 30, 2015. At the time of his decision, figures for sales of the KPJ joint had been updated to that date. In the motion to confirm the arbitration award, Nexteer also seeks prejudgment interest for all amounts owed for pre- and post-judgment interest on all amounts owed since November 30, 2015. Nexteer argues such interest is warranted pursuant to MCL § 600.6013, and that such an award is commonplace under the Convention. KDAC opposes the imposition of such interest on the grounds that the arbitrator did not specifically provide for such in his award. Nexteer's argument is more persuasive as without interest, Nexteer will not be fully compensated for its damages. Accordingly, the court's order shall provide for prejudgment interest.

C. Quarterly Payments, Audit Rights, Costs, Currency Provisions

KDAC also opposes Nexteer's proposed judgment to the extent that it requires quarterly payments, audit rights, costs and specific currency provisions. This court has broad discretion to enforce an arbitral award. Requiring quarterly payments is within this court's discretion. Audit rights are necessary to carry out the royalty payment on all sales of KPJ halfshafts awarded. Converting foreign currency in a foreign arbitral award into dollars in a judgment enforcing the award in the United States is the norm.

V. Conclusion

For the reasons set forth above, Nexteer's motion to confirm the Arbitration Award No. 140 of 2016 issued by the Singapore International Arbitration Center on December 28, 2016 in the matter of *Nexteer Automotive Corp. v. erae Automotive Sys. Co., Ltd.,* Arb. Nos. 106, 229, 230 and 231 of

2013 (Doc. 42) is GRANTED IN PART, and the monetary award of $5,876,666 consisting of (1) $3,328,760 as disgorgement for past sales of defendant's KPJ halfshaft, with an additional $218,861 in pre-judgment interest, (2) $2,103,572 for Nexteer's legal fees, (3) $220,492 for Nexteer's arbitration costs, and (4) $4,981 in Nexteer's fees for administrative secretary's services, and the 4.5% royalty on all sales of the KPJ halfshaft is CONFIRMED, and Nexteer's motion to confirm is DENIED IN PART in that the award of the 4.5% royalty on all future sales of any premium joint product derivative of KPJ is STAYED pending the review proceedings ongoing in Singapore.

IT IS FURTHER ORDERED that KDAC pay the amount of $5,876,666 to Nexteer consisting of the following sums:

(a) the sum of $3,328,760 as disgorgement for the past sales of KDAC's KPJ halfshaft, with an additional $218,861 in prejudment interest;

(b) the sum of $2,103,571 for Nexteer's legal fees and expenses;

(c) the sum of $220,492 in Nexteer's arbitration costs; and

(d) the sum of $4,981 in Nexteer's fees for administrative secretary's services.

IT IS FURTHER ORDERED that KDAC shall pay Nexteer a royalty of 4.5% on all sales of the KPJ halfshafts from November 30, 2015, together with an additional amount representing prejudment interest calculated in accordance with MCL.§ 600.6013(8) for all sales of these products between November 30, 2015 and the date of this order.

IT IS FURTHER ORDERED that KDAC make future royalty payments on a quarterly basis, and furnish adequate proof of its halfshaft and premium joint product sales 30 days prior to the due date for each quarterly royalty payment.

IT IS FURTHER ORDERED that Nexteer shall have the right to audit the sales and other financial records of KDAC and companies under KDAC's control to confirm compliance with the obligation to pay royalties pursuant to the Award. Any such audit is to be conducted by a mutually acceptable independent auditor, with the costs of the audit to be evenly split by the parties. KDAC shall maintain the records of its sales of the KPJ halfshafts or any premium joint product derivative of KPJ for a period of at least five years, and make them available to the auditor during normal business hours subject to a three-day written notice.

IT IS FURTHER ORDERED that all payment to Nexteer shall be made by wire transfer in U.S. currency.

IT IS FURTHER ORDERED that KDAC's motion to stay this matter pending the Singapore review process (Doc. 48) is GRANTED IN PART in that the 4.5% royalty on all future sales of any premium joint product derivative of KPJ from November 30, 2015 is STAYED pending completion of the Singapore review process, but the rest of the arbitration award is CONFIRMED as set forth above.

IT IS FURTHER ORDERED that KDAC post bond in the amount of $3,000,000 as a condition of the STAY order.

IT IS FURTHER ORDERED that the parties notify the court in writing within 10 days after the entry of this order as to whether this order should remain sealed. Absent any objection from the parties, this court shall unseal this order at that time.

IT IS SO ORDERED.

Dated: May 16, 2017

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on May 16, 2017, by electronic and/or ordinary mail.

s/Marcia Beauchemin
Deputy Clerk