NISSHO IWAI CORP., et al. VERSUS M/V JOY SEA, etc., et al.

CIVIL ACTION 98-1655 SECTION "C" (1)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2002 U.S. Dist. LEXIS 877

January 7, 2002, Decided

January 8, 2002, Filed, Entered

DISPOSITION:
[*1] Plaintiffs' Motion to Lift Stay and Reinstate Proceedings GRANTED.

COUNSEL:
For NISSHO IWAI CORPORATION, MITSUBISHI CORPORATION, TOKIO MARINE AND FIRE INSURANCE CO., LTD., THE, plaintiffs: Francis J. Barry, Jr., Brandt K. Enos, Deutsch, Kerrigan & Stiles, Jason A. Schoenfeld, Terriberry, Carroll & Yancey, New Orleans, LA.

For ASIAN HARVEST MARITIME, INC., TIANJIN OCEAN SHIPPING CO., (COSCO), defendants: Peter Brooks Sloss, Ethel Carroll Rogers, Murphy, Rogers & Sloss, New Orleans, LA.

For ASIAN HARVEST MARITIME, INC., third-party plaintiff: Peter Brooks Sloss, Ethel Carroll Rogers, Murphy, Rogers & Sloss, New Orleans, LA.

For FORESTSHIPS LTD, third-party defendant: Robert Perry McCleskey, Jr.,Robin C. Minturn, Phelps Dunbar, LLP, New Orleans, LA.

For NISSHO IWAI AMERICAN CORP., AGREX INC, third-party defendants: Francis J. Barry, Jr., Brandt K. Enos, Deutsch, Kerrigan & Stiles, Jason A. Schoenfeld, Terriberry, Carroll & Yancey, New Orleans, LA.

JUDGES: HELEN G. BERRIGAN, CHIEF JUDGE.

OPINIONBY: HELEN G. BERRIGAN

OPINION: ORDER AND REASON

Before the Court is Plaintiffs' Motion to Lift Stay and Reinstate Proceedings. Considering the applicable law, the memoranda submitted [*2] by counsel, and the record, the Court GRANTS the motion for the reasons more fully set forth below. I. Introduction

This litigation concerns a voyage of the JOY SEA from Louisiana to Japan during the Spring of 1997. On that voyage, the vessel's cargo of corn became rotten. Now, the Japanese parties who

were expecting that corn to be delivered in good condition are suing the boat in rem and its owners and operators in personam.

However, in the intricate business of shipping, these are not the only parties. A ship's owner may charter the vessel to other entities who may then become liable for problems with the cargo. In the case of the JOY SEA and the corn shipment in question, the owner "bareboat chartered," "time chartered," and"voyage chartered" the vessel. A "bareboat charter" is "[a] charter in which the shipowner provides only the ship, and the charterer provides the personnel, insurance, and other necessary expenses and materials." Black's Law Dictionary 94 (Pocket ed. 1996). A "time charter" is "[a] charter for a specified period of time, rather than for a specific task or trip." Id. And a "voyage charter" is a contract wherein "one party, the carrier (who [*3] either owns or manages a ship) promises to transport . . . cargo from one port to another . . . in return for compensation, called freight . . . , and the other party, the charterer, promises to deliver the cargo to the ship and to pay the freight." 2 Thomas J. Schoenbaum, Admiralty and Maritime Law @ 11-4(1994).

Defendant Asian Harvest Maritime, Inc. ("Asian Harvest"), is the registered owner of the vessel. Asian Harvest bareboat chartered the vessel to Defendant Tianjin Ocean Shipping Co. ("Tianjin"), also known as COSCO, who then time chartered the vessel to Third-party Defendant Forestships, Ltd. ("Forestships"). Forestships then further time chartered the vessel to Halla Merchant Marine Co., Ltd. ("Halla") (not a party to this suit). Then, Halla voyage chartered the vessel to Plaintiff Nissho Iwai Corp. ("Nissho Iwai").

But the buck does not stop with Nissho Iwai, the voyage charterer and shipper of the corn. Nissho Iwai entered into separate agreements with two shippers, Mitsubishi Corp. ("Mitsubishi"), also a Plaintiff, and Nissho Iwai American Corp. ("Nissho Iwai American"), a Third-party Defendant, to use the JOY SEA for transporting the companies' corn cargo.

On July 6, 1999, Defendants [*4] Asian Harvest, the JOY SEA's owner, and Tianjin, its bareboat charterer, supported by Forestships, n1 filed a Motion to Stay Litigation Pending Arbitration. See Rec. Doc. 43. Asian Harvest and Tianjin claimed that all disputes arising from the 1997 corn-transporting voyage were subject to arbitration in either New York State or London, England, under the terms of the series of charter agreements explained above and/or the terms of the bills of lading n2 concerning the voyage. See id. On the other hand, Nissho Iwai and Mitsubishi argued that the arbitration terms did not apply to their claims because the bills of lading did not incorporate the charter agreement between Halla and Nissho Iwai. See Rec. Doc. 50. They also contended that, even if that clause was incorporated, Asian Harvest and Tianjin could not enforce an arbitration agreement in another party's charter agreement. See id. And, lastly, they asserted that, regardless of all the other arguments against enforcing the arbitration clause, Asian Harvest and Tianjin had waived their right to arbitration. See id. - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n1 When the Motion to Stay was filed, Parakou Shipping, Ltd.

("Parakou"), was also a movant in favor of staying the litigation pending arbitration. However, after submission of the Motion to Stay, this Court granted summary judgment without opposition as to Parakou. See Rec. Doc. 58. Thereby, Parakou was dismissed from this litigation. [*5]

n2 A "bill of lading" is "[a] document of title acknowledging the receipt of goods by a carrier or by the shipper's agent." Black's Law Dictionary 66. - - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In its October 22, 1999, Order & Reasons, the Court decided that all disputes were subject to arbitration in London by virtue of Clause 10 of the Nissho Iwai bills of lading and Clause 4 of the Mitsubishi bills of lading, which provide that "all terms, conditions and provisions of the Strike, Lighterage Clause No. 26 and Arbitration Clause of the 'Centrocon' charter-party to apply." Nissho Iwai Corp. v. M/V JOY SEA, 1999 U.S. Dist. LEXIS 16661, 1999 WL 970335, at *3. n3 The Centrocon charter party is a form of contract designed specifically for the grain trade. It provides that: "all disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single Arbitrator, be referred to the final Arbitrament of two Arbitrators carrying on business in London." Kanematsu Corp. v. M/V GRETCHEN W., 897 F. Supp. 1314, 1315 (D. Or. 1995). This clause applies to all disputes arising out of the bills of lading [*6] and further provides, "Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred." Rec. Doc. 95, Ex. A at P 8. - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 In the October 22, 1999, the Court rejected Asian Harvest and Tianjin's assertion that the Court should enforce a clause specifying New York arbitration in the Halla/Nissho Iwai charter agreement. Because the Court found the London arbitration clause clearly enforceable, it declined to rule on the enforceability of the New York clause. See id. at *4. - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The parties did submit their claims to a London arbitrator, who determined that, under English law, none of the claims here was subject to arbitration. See Rec. Doc. 87 at Ex. A, Reasons for and Forming Part of the Interim Final Declaratory Arbitration Award (hereinafter "Reasons"). The arbitrator did find, however, that claims involving two non-parties were subject to arbitration. See [*7] id. at PP 14-18. First, the arbitrator decided that the Halla/Nissho Iwai charter agreement was incorporated into the Mitsbushi bill of lading. See id. at P 15. Therefore, it was necessary to arbitrate claims between Nissho Iwai and Halla in New York. See id. at P 18. Second, the arbitrator found arbitrable Plaintiffs' claims against COSCO Bulk Carriers Co., Ltd. ("COSCO Bulk"), an entity separate from the COSCO party here, pursuant to the incorporation of the Centrocon clause into the bills of lading. See id. at P 23. The arbitrator also concluded that to the extent any claims were subject to arbitration as a result of the Centrocon clause, the claims would be time-barred. See id. at P 21.

Additionally, the arbitrator conceded that although he was

deciding the matter under English law, other laws may apply. See id. at P 13. But, significantly, the parties jointly submitted the issues to be decided by the arbitrator without specifically referring to any choice-of-law issues. See Rec. Doc. 94 at Ex. A. Moreover, the joint submission contains references only to English, not American caselaw. See id.

Plaintiffs now contend that as the arbitrator decided [*8] that none of the claims here were subject to arbitration, the Court may lift the stay and reinstate the proceedings. See Rec. Doc. 87. Defendants argue that all the claims were subject to arbitration and that, as such, the arbitrator was bound to decide the claims on the merits. See Rec. Doc. 89. Alternatively, Defendants argue that Plaintiffs' claims are barred as a matter of either U.S. or English law and that the stay should be lifted for the purposes of dismissing these claims. See id.; Rec. Doc. 95. Analysis

First, Defendants contest the arbitrator's decision that the New York arbitration clause in the January 16, 1997, Halla-Nissho Iwai charter party was incorporated into the Mitsubishi bill of lading. See Rec. Doc. 87, Ex. A, Reasons at PP 15-18. The Court notes, however, that Defendants have asserted no interest specifically with respect to Nissho Iwai's claims against Halla. See Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975). Accordingly, Defendants lack standing to challenge the arbitrator's decision as to the charter party incorporation question in this Court.

Defendants, however, go on to argue [*9] that all of Plaintiffs' claims are arbitrable and, as such, the arbitrator was bound to rule on these claims. See Rec. Doc. 95 at 14. Moreover, Defendants argue, under either English or U.S. law, these claims are time-barred. See Rec. Doc. 95.

Defendants would leave the Court with two choices. First, the Court could, in effect, return the parties to the arbitrator and refuse to let them leave without a decision on the claims. Second, the Court could, in effect, review the arbitrator's decision and find that all claims must be dismissed pursuant to one or more rationales, including under the Centrocon clause, the Carriage of Goods by Sea Act, 46 U.S.C. Appendix @ 1300, et seq. ("COGSA"), and asserted interpretations of English law. The Court declines both invitations.

With respect to whether the claims should be returned to the arbitrator for a final decision, Defendants argue that the arbitrator was required to pass on the claims themselves, not simply decide that, under the agreement, the claims were not arbitrable. Defendants' argument stems from their assertion that U.S. law, not English law, controls when deciding which claims must be sent to arbitration, [*10] pursuant to Steel Warehouse Co., Inc. v. Abalone Shipping Ltd., 141 F.3d 234, 238 (5th Cir. 1998) and Duferco Steel, Inc. v. M/V KALISTI, 121 F.3d 321, 325 (5th Cir. 1997). Accordingly, under U.S. law, Defendants contend, all parties linked to a bill of lading are subject to an arbitration clause in that bill. See Ventura Mar. Co., Ltd. v. ADM Exp. Co., 44 F. Supp.2d 804, 807 (E.D. La. 1999). Consequently, Defendants' argument goes, all the claims here were required to be decided by the arbitrator.

The Court agrees with Defendants that, although the Order required the parties to submit their claims for London arbitration, the arbitrator did not decide the underlying disputes. Nevertheless, the Order did not preclude the parties from arbitrating any issue, including, necessarily, who was bound to arbitrate. Nissho Iwai Corp., 1999 U.S. Dist. LEXIS 16661, 1999 WL 970335. But this does not mean that it was necessarily proper for the arbitrator to decide whether the claims were arbitrable. The Court must back up and ask who the parties intended to decide whether the claims at issue were arbitrable in the first place-the Court or the arbitrator. [*11]

As the bills of lading are governed by COGSA, the Court agrees with Defendants that this question is a matter of U.S. law. See Steel Warehouse, 141 F.3d at 238. Under U.S. law, federal courts vigorously enforce "a liberal federal policy favoring arbitration agreements," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983), as an alternative to the costly and timely process of litigation. This Court, in particular, has explained this federal policy favoring arbitration and ruled accordingly. See Nissho Iwai Corp., 1999 U.S. Dist. LEXIS 16661, 1999 WL 970335; Japan Sun Oil Co., Ltd. v. M/V MAASDIJK, 864 F. Supp. 561 (1994).

In determining whether a party has agreed that arbitrators should decide arbitrability, however, the presumption in favor of arbitrability is reversed. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995). Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so. See id. at 944, 115 S. Ct. at 1924, 131 L. Ed. 2d 985. [*12] Here, the Centrocon clause provides, in pertinent part, "All disputes from time to time arising out of this contract shall . . . be referred to . . . final arbitrament . . . in London." Rec. Doc. 95, Ex. A at P 8 (emphasis added). Thus, the clause is open to the interpretation that the parties meant to arbitrate arbitrability. "When a contract is reasonably subject to different interpretations, the conduct of the parties before the advent of a controversy may be relied upon to discover the parties' understanding of the contract." Schultz v. Metro. Life Ins. Co., 872 F.2d 676, 679 (5th Cir. 1989). Thus, the Court here looks to the parties' conduct prior to the controversy in analyzing whether the parties clearly and unmistakably meant for the arbitrator to decide the arbitrability of the claims. Accordingly, the Court finds it clear and unmistakable that both parties intended that the arbitrator decide who was bound to arbitrate-significantly, the parties jointly submitted this question. See Rec. Doc. 94, Ex. A, Letter from Philip Roose & Bryan Nash, Clyde & Co., to Mark Hamsher (Aug. 22, 2000) at 5. No evidence prior to Defendants' objection to the arbitrator's [*13] decision suggests that Defendants intended the Court to determine the arbitrability of the claims. Consequently, it was for the arbitrator to decide, as a matter of English law, whether under the agreement, the claims submitted to him were subject to arbitration. And, as stated above, he concluded that none of the claims was arbitrable. See id. at PP 14-18, 22-23.

Additionally, Defendants request, in effect, that the Court

not recognize the arbitrator's decision. In doing so, Defendants come up squarely against the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the U.S. is a party. See 9 U.S.C. @ 201, et seq. Under the Convention, a Court may refuse to enforce an arbitral award only in the following seven instances: 1.

. . . . (a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice [*14] of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope 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; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (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. n4 2.

. . . . (a) The subject matter of the difference is not capable of settlement by arbitration under the law of [the recognizing and enforcing] country; or (b) The recognition [*15] or enforcement of the award would be contrary to the public policy of that country. n5 See @@ 201, 207. - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 The party moving the Court to refuse to enforce the award has the burden of proof as to these five grounds. See 9 U.S.C. @ 201.

n5 No burden of proof is specified as to the grounds under No. 2 here. See id. - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

To the extent that Defendants object to the arbitrator's decision on the ground that he applied the incorrect law, Defendants' contention arguably falls under grounds 1(c) and 2(b).

The Court finds, however, that the arbitrator applied the correct law here. First, the parties did select an English forum, which is at least some evidence that English law was meant to govern. See Bergesen d.y. A/S v. Lindholm, 760 F. Supp. 976, 981 n.9 (D. Conn.1991). The Bergesen court pointed out that the Restatement (Second) of Conflict of Laws @ 218 (comment b) notes that the parties' selection of a location for arbitration may evidence an intention [*16] that the law of this same location govern the contract as a whole, a principle the Supreme Court also has recognized. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.13, 94 S. Ct. 2449, 2457 n.13, 41 L. Ed. 2d 270 (1974).

Furthermore, the joint submission contains reference only to English, not U.S. caselaw. n6 See Rec. Doc. 94, Ex. A, Letter from Philip Roose & Bryan Nash, Clyde & Co., to Mark Hamsher. Although the arbitrator conceded that U.S. law might be relevant, see Rec. Doc. 95, Ex. A, Reasons at P 13, there is no sign that Defendants were not able to raise the choice-of-law issue before the arbitrator. Thus, they can hardly be heard to argue that the arbitrator's decision must, in effect, be vacated because he assertedly applied the incorrect law. - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n6 Letters included with the joint submission refer to U.S. caselaw on an issue not relevant here. - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Additionally, Defendants have not suggested that it is repugnant to U.S. public policy for an arbitrator to apply a particular [*17] country's law when the parties have not even raised the choice-of-law issue, especially in a setting such as international arbitration where choice-of-law issues fairly cry out to be addressed. On the other hand, public policy clearly favors enforcement of foreign arbitral awards, at least when none of the seven conditions in @ 201 is met. See Scherk, 417 U.S. at 520 n.15, 94 S. Ct. at 2457 n.15, 41 L. Ed. 2d 270.

Thus, as it was for the arbitrator to decide whether claims were subject to the arbitration clause, and as Defendants have submitted no sufficient justification for the Court to refuse to enforce the arbitrator's decision, the Court must give effect to it. Accordingly, under Scherk, it would be improper for the Court to review the arbitrator's decision by determining for itself whether the claims are subject to and/or time-barred under the Centrocon clause.

Defendants nevertheless argue that no party has moved to confirm the arbitration decision under 9 U.S.C. @ 207. As such, Defendants appear to argue, the Court cannot confirm the decision. See Rec. Doc. 95 at 13. Although Plaintiffs have not used the magic words, i.e. [*18] , specifically moved to confirm the decision, the Court nevertheless treats the motion as such because Plaintiffs essentially are asking the Court to confirm the arbitrator's decision and act accordingly by reinstating the proceedings. Moreover, as the Court discusses below, it is appropriate at this time to confirm the decision.

Defendants also argue that the arbitrator's decision was not final and, thus, is unenforceable because it did not reach the underlying claims. See Rec. Doc. 95 at 13-15. Defendants further point to several sections of the arbitrator's decision that allegedly stand for the proposition that no decision was actually rendered for the purpose of enforcement. For instance, the arbitrator stated that the papers submitted to him contained no suggestion that arbitration had begun and that he "had not . . . actually been appointed under . . . the bills of lading to determine any claims." See Rec. Doc. 95, Ex. A at P 33. Defendants further submit that the decision "merely provides some answers to abstract legal questions." See id., Supplemental Mem. in Response to Pls.' Mot. to Lift Stay and Reinstate Proceedings at 14.

Defendants' assertion and the arbitrator's [*19] explanation

of his role bely what actually occurred, however. The parties submitted a number of disputed issues to the arbitrator arising out of this lawsuit, not for debating purposes. It is true that the arbitrator did not determine the underlying claims. Nevertheless, under English law, as the arbitrator's decision makes plain, there is no need to arbitrate those claims-they simply are not arbitrable. Thus, the arbitrator's decision is final and enforceable.

Finally, IDS Life Ins. Co. v. Royal Alliance Assocs., Inc., 266 F.3d 645 (7th Cir. 2001), the case Defendants cite for advancing the argument that the arbitrator's decision is not final, in fact cuts against them. "We take . . . 'final' to mean that the arbitrators must have resolved the entire dispute (to the extent arbitrable) that had been submitted to them." Id. at 650. Here, the arbitrator resolved the entire dispute to the extent arbitrable--by finding that claims only as to parties not involved here were subject to arbitration. Thus, the decision is final and enforceable. n7 - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n7 Defendants cite a number of arguments to the effect that as a matter of either U.S. or English law, the case may be reopened, but solely so that Plaintiffs' claims must be dismissed. Plaintiffs' claims are variously based on the assumption that the claims are arbitrable or may be dismissed as a matter of English law. The arbitrator's decision that none of the claims herein is subject to arbitration, however, obviates the need for the Court to pass on Defendants' arbitration-based claims. As for Defendants' arguments that the claims may be dismissed as a matter of English law, these contentions have no bearing on the instant motion and, accordingly, are not addressed here. - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [*20]

Accordingly,

IT IS ORDERED that:

Plaintiffs' Motion to Lift Stay and Reinstate Proceedings is hereby GRANTED.

New Orleans, Louisiana, this 7 day of January, 2002.

HELEN G. BERRIGAN

CHIEF JUDGE