KEYTRADE USA, INC. v. M/V AIN TEMOUCHENT, US: Dist. Court, ED Louisiana 2004

(2004)
KEYTRADE USA, INC.
v.
M/V AIN TEMOUCHENT, ET AL.

Civil Action No. 01-1617 Section "N".
United States District Court, E.D. Louisiana.

April 8, 2004.

ORDER AND REASONS

KURT ENGELHARDT, District Judge.

Before the Court is a Motion to Compel Arbitration, filed by Societe Nationale de Transports Maritimes and Compagnie Nationale Algerienne de Navigation Maritime ("CNAN"). For the reasons that follow, CNAN's Motion to Compel Arbitration is DENIED.

I. BACKGROUND

Plaintiff, Keytrade USA, Inc. ("KUSA"), brings this action against the M/V Ain Temouchent, CNAN (the owner/operator of the Ain Temouchent), and Progress Bulk (a time charter of the Ain Temouchent), seeking damages for delay in a shipment of prilled urea from Kuwait to Louisiana.

KUSA is located in Chicago and sells fertilizers to buyers in the United States. It is an American subsidiary of Keytrade A.G. ("KAG"), a Swiss corporation. On March 19, 2001, KAG entered into a voyage charter with Progress Bulk to ship a cargo of prilled urea to KUSA aboard the Ain Temouchent, from Shuaiba, Kuwait to Louisiana. The Voyage Charter requires that any dispute "arising under" it be "referred to Arbitration in London."[1] While stopped in Dubai, the Ain Temouchent was arrested and subsequently arrived in the United States on May 26, 2001, some days after its original expected arrival date. When it arrived, KUSA already had filed this suit.

In December 2001, Progress Bulk moved to dismiss or stay the matter pending arbitration pursuant to the voyage charter. Progress Bulk argued that KUSA should be bound by the terms of the voyage charter because (1) the voyage charter was incorporated by reference in the bill of lading, the document relied upon by KUSA as the contract of carriage; and (2) KAG was acting on behalf of KUSA when it entered into the voyage charter, thereby binding KUSA to the charter party's terms under agency principles. In the Order and Reasons dated January 17, 2002, the Court denied Progress Bulk's motion, agreeing with KUSA that under Fifth Circuit case law, the bill of lading for the shipment did not incorporate the terms of the charter party. With regard to the agency argument, the Court found that the record did not yet permit a finding that KAG had entered into the charter under circumstances that would bind KUSA under agency principles to the charter party. Nevertheless, the Court expressly left the door open for Progress Bulk to reurge its motion should discovery reveal facts favorable to Progress Bulk regarding the relationship between KAG and KUSA and/or the circumstances surrounding formation of the voyage charter.

Thereafter, on November 26, 2002, Progress reurged its Motion to Compel Arbitration, or in the Alternative, Motion for Summary Judgment. At the same time, CNAN filed its own Motion to Compel Arbitration, or in the Alternative, Motion for Summary Judgment.

In the Order and Reasons dated January 10, 2003, the Court found that, as revealed through discovery, "KAG had the power to act and transact on behalf of KUSA in arranging and entering into the charter party and that KAG, in entering the charter, was in fact acting as agent on KUSA's behalf." Rec.Doc. 94 at 8. In so finding, the Court held that "KUSA is bound as a party to the arbitration agreement, and its claims against Progress are subject to mandatory arbitration, provided they fall within the scope of the arbitration clause [of the KAG-Progress Bulk charter party]." Rec.Doc. 94 at 8. Accordingly, the Court granted Progress Bulk's motion to compel arbitration.

In its Motion to Compel Arbitration, CNAN argued that KUSA's claims against CNAN should be ordered to arbitration based on the theory of equitable estoppel. CNAN alternatively asked the Court to stay KUSA's claims against CNAN until the arbitration with Progress Bulk has been completed. The Court did not reach the merits of CNAN's motion as it was not clear from the pleadings that plaintiff's claims against CNAN, a non-party to the voyage charter, fell within either of the two categories of equitable estoppel. The Court, however, did not reject CNAN's arguments, and stated that it would allow CNAN to reurge its "estoppel argument if at any time it becomes clear that plaintiff's claims against CNAN do rest upon obligations deriving from the charter party." Rec.Doc. 94 at 10. The Court granted CNAN's motion to compel arbitration in part, in that all claims were stayed pending completion of arbitration, and denied CNAN's motion in all other respects. In addition, the Court denied as moot the motions for summary judgment

KUSA and Progress Bulk subsequently reached a settlement of the matters in dispute between the two parties, and on November 3, 2003, the Court granted plaintiff's Motion to lift the stay, reopened case and set it for trial. CNAN now reurges its Motion to Compel, this time arguing incorporation, relying primarily on a recent decision rendered by the Fifth Circuit in the interim between entry of the stay order and the lifting of the stay.

II. LAW AND ANALYSIS

CNAN argues in its reurged Motion to Compel Arbitration that KUSA is bound to arbitrate its claims against CNAN, as the bill of lading incorporates the arbitration clause of the KAG-Progress Bulk charter party. In its Opposition, KUSA argues that it is not bound by incorporation principles, as there is no written agreement between KUSA and CNAN to arbitrate any disputes between the two parties. KUSA further argues that, in the event the Court finds that incorporation principles compel arbitration of KUSA's claims against CNAN, CNAN has waived its right to arbitrate, and the referral of the claims to arbitration would cause KUSA substantial prejudice.

International arbitration agreements are governed by The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The Convention"), reprinted as a Note to 9 U.S.C. § 201. Whether parties should generally be compelled to arbitrate under The Convention involves a two-step inquiry. First, the Court must determine whether the parties agreed to arbitrate the dispute. Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 625 (1985). Second, the Court must consider whether any federal statute or policy

renders the claim non-arbitrable. Id. At 628. The Court must inquire into the following when considering a motion to compel arbitration under The Convention:

1) Is there an agreement in writing to arbitrate the dispute?
2) Does this agreement provide for arbitration in the territory of a convention signatory?
3) Does the agreement to arbitrate arise out of a commercial legal relationship?
4) Is a party to the agreement not an American citizen?
Sedco, Inc. v. Petroleous Mexicanos Nat'l Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985). In this case, both parties agree that the dispute here is whether the KUSA is subject to an agreement in writing to arbitrate its claims against CNAN.

CNAN argues that, by suing CNAN under the bill of lading, a written document, KUSA subjected itself to the incorporated clause. CNAN relies primarily on the Fifth Circuit's decision in Cargill Ferous International v. SEA PHONIX M/V, 325 F.3d 695 (5th Cir. 2003) ("SEA PHOENIX"), a decision rendered during the time in which this matter was stayed. In SEA PHOENIX, the Fifth Circuit reversed the part of the district court's decision declining to compel arbitration of the shipper's claims against the vessel owner. The Fifth Circuit held that the "correct test for whether a bill of lading issued under a charter party that remains in the hands of the charterer incorporates the charter party is whether `no confusion' exists concerning who in fact was the charterer on a voyage or concerning which charter party governs the rights of the charterer." 325 F.3d at 704 (citing State Trading Corp. of India v. Grunstad Shipping, 582 F.Supp. 1523, 1524 (S.D.N.Y. 1984), aff'd without opinion, 751 F.2d 371 (2d Cir. 1984)).

In SEA PHOENIX, the shipper had entered into a voyage charter with a time charterer to transport the shipper's cargo. 325 F.3d at 697. The voyage charter contained a mandatory arbitration clause. Id. The time charterer had provided the M/V SEA PHOENIX, which it had time-chartered from the vessel's owner. Id. Once the cargo arrived at its destination point, the shipper discovered that water had damaged the cargo; the shipper subsequently sued the time charterer, the vessel's owner, the vessel in rem and others. Id. While the district court referred the shipper's claims against the time charterer to arbitration, the district court denied the owner's motion to compel arbitration. Id. The district court reasoned that while the bills of lading were the contracts of carriage for purposes of the shipper's claims against the vessel owner, "the bills of lading had not incorporated the voyage charter's arbitration clause." Id.

In conducting its de novo review, the Fifth Circuit found that, despite the fact that the space provided on the bill of lading for identifying the charter party was left blank, the language[2] used in the bill of lading was enough to effect incorporation where the charterer was the holder of the bills of lading and where there was no confusion concerning who was the charterer or which charter party the bills of lading sought to incorporate. 325 F.2d at 698-99 (quoting State Trading Corp., 582 F.Supp. 1523-25). In finding that there was no confusion, the Court emphasized the following facts. First, the shipper received and continued to hold the bills of lading issued pursuant to the voyage charter entered into by the shipper and time charterer. Id. at 699. Second, the agent who signed the bills of lading for the owner received its agency authority solely from a term in the voyage charter. Id. Third, the bills of lading indicated that freight was to be paid pursuant to the charter party. Id. Fourth, the voyage charter required "all bills of lading issued under the voyage charter to incorporate, among other things, the voyage charter's arbitration clause." Id. To this last point, the Court noted that the charter party's requirement of incorporation was "persuasive evidence there was no

confusion over who was a party to the charter party or which charter party should govern."[3] Id. at 704.

In light of SEA PHOENIX, the issue the Court must now determine is whether "no confusion" exists concerning who in fact was the charterer on a voyage or concerning which charter party governs the rights of the charterer. The facts pertinent to this determination are as follows: Like the plaintiff in SEA PHOENIX, KUSA received and continues to hold the bill of lading. Similarly, the instant bill of lading has a blank space where the charter party date was to be inserted. The date was not inserted, and the charter party was not otherwise identified. Also, like the bills of lading in SEA PHOENIX, the bill of lading here states that it is `TO BE USED WITH CHARTER PARTIES" and that "FREIGHT PAYABLE AS PER CHARTER PARTY." See CNAN Exhibit "C". In addition, the instant bill of lading, like those in SEA PHOENIX, contained on its reverse side an incorporation clause, stating that "[a]ll terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated." See CNAN Exhibit "C".

However, unlike the charter parties in both SEA PHOENIX and State Trading, the charter party here did not require that all bills of lading incorporate the arbitration clause. Instead, the charter party, signed by both KAG and Progress Bulk, stated as follows:

CLAUSE 44
The Both to Blame Collision Clause, New Jason Clause, Clause Paramount are deemed to be incorporates [sic] this COA and into all Bills of Lading issued hereunder.
CLAUSE 45
Any dispute arising under this Charter Party to be referred to Arbitration in London according to English Law and LMAA Rules shall apply.
See CNAN Exhibit "B". None of the items set forth in Clause 44 relate to arbitration. See 1 Thomas J. Schoenbaum, Admiralty & Mar. Law § 10-11 (4th ed.). Additionally, the recap of the charter, which both KAG and KUSA received, stated as follows: "ARB LONDON ACCDNG LMAA RULES AND ENGLISH LAW TO APPLY." See CNAN Exhibit "F". There is nothing in either the charter party or its recap that requires bills of lading to incorporate the arbitration clause. CNAN argues that the charter party, Clause 57, requires that all bills of lading incorporate the arbitration clause. Clause 57 of the KAG-Progress Bulk charter party provides that the "Charter Party terms shall always supersede Bill of Lading terms." See CNAN Exhibit "B". The Court, however, disagrees with the defendant's interpretation of Clause 57 and finds Clause 57 to be unlike the provisions found in the charter parties in SEA PHOENIX and State Trading. The Court does not find that CNAN has met its burden in proving that there is "no confusion" concerning who was in fact the charterer or which charter party the bills of lading sought to incorporate.

The Court also notes that because the determination of whether a party is obligated to arbitrate is a matter of contract, the Court must consider the intent of the parties, as expressed in the terms of the agreement. See Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 355 (5th Cir. 2003) (citing Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 528 (5th Cir. 2000). To that point, the court in SEA PHOENIX stated as follows:

the contractual terms in the voyage charter, which were actively negotiated by the parties, are far more probative of the intentions of the parties than is a bill of lading which is normally

considered a receipt, and which was issued as a matter of course by a third party agent who was removed in time and space from the negotiations regarding the charter.
325 F.3d at 704. While CNAN argues that KUSA was active in the negotiations of the KAG-Progress Bulk charter party, the charter party, as stated earlier, does not require that the arbitration clause, found in Clause 45, be incorporated into all bills of lading issued thereunder. CNAN has not produced any evidence to suggest that the intentions of the parties to the charter party was otherwise.

While arbitration agreements are favored under the law, Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 625 (1985), there must be an express agreement between the parties to arbitrate. See, e.g., Sedco, Inc. v. Petroleous Mexicanos Nat'l Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985). Because this Court today finds that CNAN has not met its burden in proving that there is "no confusion" concerning who was in fact the charterer or which charter party the bills of lading sought to incorporate, with regard to the instant bill of lading which did not identify any charter party, the Court must deny CNAN's motion to compel.

III. CONCLUSION

Accordingly, for the foregoing reasons, IT IS ORDERED that defendant CNAN's Motion to Compel Arbitration is DENIED.

[1] The arbitration clause provides: "Any dispute arising under this Charter Party to be referred to Arbitration in London according to English Law and LMAA Rules shall apply." See CNAN Exhibit "B" at Clause 45.

[2] The bills of lading in SEA PHOENIX stated that "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated." 325 F.3d at 698.

[3] In State Trading Corp. of India v. Grunstad Shipping, the case on which the SEA PHOENIX court heavily relied and often quoted, the district court distinguished cases finding the incorporation clause to be too vague from the matter before it, as the party resisting arbitration in State Trading was a signatory to the charter party, which had contained a provision that "any bill of lading signed by the Master or Agent of the Owner shall be without prejudice to the terms, conditions and exceptions of this Charter and shall be subject to all terms, conditions, and exceptions [including the mandatory arbitration clause]...." 582 F.Supp. at 1524.