United States District Court, S.D. New York.

IN RE ARBITRATION OF ARHONTISA MARITIME LTD

- **No. 01 Civ. 5044 (GEL). (S.D.N.Y. Sep 28, 2001)**
- Decided September 28, 2001

In the Matter of the Arbitration of ARHONTISA MARITIME LTD. Petitioner v. TWINBROOK CORP. and CONSTANTINE D. NICOPOULOS, Respondents.

No. 01 Civ. 5044 (GEL).

United States District Court, S.D. New York.

SEPTEMBER 28, 2001.

Tulio R. Prieto, Cardillo Corbett, New York, New York, for Petitioner Arhontisa Maritime Ltd..

Patrick C. Crilley, Law Offices of Richard A. Zimmerman, New York, New York (Salvador J. Pusateri, Johnson, Johnson, Barrios Yacoubian, New Orleans, Louisiana, of counsel), for Respondents Twinbrook Corp. and Constantine D Nicopoulos.

OPINION AND ORDER

GERARD E LYNCH, District Judge:

In this action, which arises out of a dispute about the allocation of responsibility for unexpected repairs to a maritime vessel, Arhontisa Maritime Ltd. ("Arhontisa") has petitioned the Court to compel respondent Constantine D Nicopoulos to submit to binding arbitration of various claims that Arhontisa intends to assert against him For the reasons that follow, Arhontisa's petition is denied.

BACKGROUND

The following facts pertinent to the instant petition are, except where otherwise noted, not disputed by the parties. On August 2, 1999, Arhontisa, a Liberian company, and respondent Twinbrook Corp. ("Twinbrook"), a Panamanian company, executed a Memorandum of Agreement ("MOA"), pursuant to which Twinbrook agreed to sell a ship, the M/V Popidora, to

Arhontisa for $320,000. (Pet. ¶ 6.) Nicopoulos, a resident of New Orleans, represented Twinbrook in negotiating the MOA's terms and conditions, and received the payment on Twinbrook's behalf pursuant to a provision of the MOA that required Arhontisa to wire the purchase amount to Nicopoulos' personal bank account at the Athens branch of Barclays Bank. (Pet. ¶ 11 Ex. A. at 1; Nicopoulos Aff. ¶ 14.)

The contract included a broad arbitration clause providing, among other things, that "any dispute" arising "in connection with the interpretation and fulfillment of this contract shall be decided by arbitration in the city of New York." (Pet. Ex. A at 3) It is undisputed that Nicopoulos is not a party to the clause, or to the MOA or its addendum, which clearly and expressly constitute an agreement between Twinbrook and Arhontisa. (Pet. Ex. A at 1.)

To facilitate the transaction's closing, Twinbrook designated Nicopoulos as its "attorney-in-fact." (Id. at ¶ 7 Ex. B.) Nicopoulos then assisted Twinbrook in negotiating a Bill of Sale and other documents that the parties executed precedent to the closing. (Pet. ¶ 10; Nicopoulos Aff. ¶ 16.) Additionally, as specified in the MOA. Nicopoulos received the purchase amount from Twinbrook. (Pet. ¶ 12.) The transaction closed on August 20, 1999 (Nicopoulos Aff. ¶ 17), and Arhontisa received the Popidora in New Orleans on August 29. 1999 (Pet. ¶ 8.)

Concomitant with its delivery of the vessel to Arhontisa, Twinbrook produced a Confirmation of Class Certificate from the American Bureau of Shipping ("ABS"), a private society that inspects vessels to ensure they comply with various safety regulations and are structurally sound, indicating that the Popidora met ABS's standards. (Pet. ¶ 15 Ex. C.) Arhontisa contends, however, that Twinbrook had concealed various repairs, such as the installation of steel patches to the vessel's bottom, that, if known to ABS, would have led it to withhold classification. (Pet. ¶¶ 16-17) Twinbrook essentially denies Arhontisa's allegations. (See, e.g., Resp. ¶¶ 16-17.)

In February 2000, Arhontisa discovered the patches and repaired the Popidora's hull. The repairs cost approximately $122,400. (Pet. ¶ 19.) Arhontisa also claims that Twinbrook had, in derogation of certain terms of the MOA, "removed spare parts and equipment from" the Popidora, prompting Arhontisa to expend approximately $35,000 to procure replacements. (Id. ¶ 20-21.) Consequently, Arhontisa demanded on December 22, 2000, that Twinbrook submit to binding arbitration of its claims that Twinbrook fraudulently concealed the true condition of the Popidora at the time the parties entered into the MOA. (Id. ¶ 23 Ex. D.) Arhontisa later also demanded that the parties arbitrate its claim that Twinbrook had wrongfully removed certain parts and equipment prior to delivering the vessel to Arhontisa. (Id. ¶ 23 Ex. E.) Twinbrook acceded to the demands and appointed an arbitrator. (Pet. ¶ 24, Resp. at n. 1.)

On May 11, 2001, Arhontisa further demanded that Nicopoulos be joined as a party to the arbitration on the theory that he had assisted in, among other things, fraudulently concealing the existence of various repairs to the Popidora (Pet ¶ 26.) Nicopoulos refused to submit to arbitration (Id. ¶¶ 27-28 Ex G), and Arhontisa responded by commencing the instant action on June 6, 2001.

DISCUSSION

1. **Subject Matter Jurisdiction**

Nicopoulos contends as a threshold matter that because he was not a party to the MOA or its arbitration clause, he cannot be compelled to arbitrate and, therefore, the Court lacks subject matter jurisdiction under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), as implemented by certain provisions of the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. § 201-208 His jurisdictional argument fails, however, because it confuses the merits of the petition with the question of subject matter jurisdiction to decide the merits.

Pursuant to the jurisdictional provisions of the Convention's implementing statute, the Court must first determine whether the parties' arbitration agreement is enforceable. If so, the Court then perforce has jurisdiction to determine whether, pursuant to the agreement's provisions, certain persons or entities can be compelled to participate in the arbitration See e.g., Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc. ("Smith/Enron"), 198 F.3d 88, 92 (2d Cir. 1999) However, Nicopoulous' formulation, under which the Court first determines if a particular individual can be compelled to arbitrate, would impermissibly place the petition-to-compel cart before the jurisdictional horse Accordingly, the Court must first address whether the parties' arbitration agreement falls within the Convention's auspices.

In Smith/Enron, the Second Circuit set forth four requirements that an agreement must satisfy to fall within the district court's grant of subject matter jurisdiction under the FAA's implementing provisions, all of which have been satisfied here. First, the agreement must be in writing. Id. at 92. This requirement is clearly met here by the written contract between the parties. (See Pet. Ex. A.) Second, "it must provide for arbitration in the territory of a signatory of the convention."198 F.3d at 92. Here, the MOA specifies that any arbitration between the parties shall be conducted in New York City (Pet. Ex. A at ¶ 15), and the United States is a Convention signatory. See id. at 92-93. Third, the subject matter of the agreement must be commercial in nature. Id. at 92. Arhontisa and Twinbrook contracted for the sale of a vessel, a quintessentially commercial act. Finally, the agreement cannot be entirely domestic in scope. Id. In this action, both of the parties are foreign corporations — Arhontisa is incorporated in Liberia, Twinbrook in Panama — which contracted to sell a vessel that sails under the Panamanian flag. (Pet. ¶¶ 2-3, 6.) Moreover, no provision of the MOA, its arbitration clause or the agreement s addendum purports to limit the clause to domestic disputes.

Thus, the Court has subject matter jurisdiction to decide whether arbitration can be compelled under the contract at issue in this action. Nicopoulos' objection thus properly goes not to the Court's jurisdiction to decide whether he can be compelled to arbitrate, but to whether there is any basis on the merits for compelling him to do so. To those merits we now turn.

II. **Arhontisa's Petition to Compel**

"Commercial arbitration is a creature of contract," Nat'l Broadcasting Co., Inc. v. Bear Stearns Co., Inc., 165 F.3d 184, 186 (2d Cir. 1999), and a person "cannot be required to submit to arbitration any dispute which he has not agreed to so submit." Thomas-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995), citing United Steelworkers of Am. v. Warrior

Gulf Navigation Co., 363 U.S. 574, 582,80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960). It therefore follows that Nicopoulos — who, it is agreed, was not a party to any agreement containing an arbitration clause — could not ordinarily be compelled under the FAA to participate in the arbitration proceeding.See, e.g., Thomson-CSF, 64 F.3d at 776 (2d Cir. 1995); In re Arbitration Between Promotora De Navigacion and Sea Containers, Ltd.,131 F. Supp.2d 412, 416 (S.D.N.Y. 2000). However, the Second Circuit has recognized several exceptions under which a non-signatory can be compelled to appear at an arbitration, including the following: (1) incorporation by reference in the agreement; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel. Smith/Enron,198 F.3d at 97 In this action. Arhontisa relies exclusively on the estoppel exception, contending that Nicopoulos should be estopped from refusing to arbitrate because he received a "direct benefit" from the MOA as a consequence of Arhontisa's wiring funds into his personal account under the terms of that contract See Am. Bureau of Shipping v. Tencara Shipyard S.P.A. ("Tencara"), 170 F.3d 349, 353 (2d Cir. 1999).

In its memorandum in support of its petition, Arhontisa relies solely on Tencara to bolster its contention that Nicopoulos, by merely allowing funds to be transferred into his personal account, benefitted from the terms of the MOA However, the facts of Tencara are completely distinguishable from those of the instant action In Tencara, several investors executed a construction contract with a shipyard (Tencara) to build a yacht Pursuant to certain terms of their agreement, Tencara signed an agreement with ABS (the same classification society discussed above) to certify that the prospective yacht would meet certain construction and design standards. After the yacht was completed, and subsequently certified by ABS, it sustained damage to its hull while en route to Venice. Tencara then commenced an action against ABS in Italy, while the vessel's owners and insurance underwriters filed a suit against ABS in France. ABS brought an action in this District to compel Tencara, the owners and the underwriters to participate in an arbitration provided for in the agreement between Tencara and ABS, an agreement that was separately referenced in an ABS Interim Certification of Classification ("ICC") that was furnished to the owners. Id. at 351-52. The owners argued successfully before the district court that, among other things, the benefits they received from the ICC were "indirect" and therefore did not constitute grounds to estop them from refusing to arbitrate. Id. at 352. The Court of Appeals reversed, however, finding that the owners had directly benefitted from the ICC by being able to obtain lower insurance rates on the vessel and becoming eligible to "register the vessel under the French flag." Id. at 353.

In Tencara, then, the shipyard had contracted for the classification on behalf of the yacht owners, who were the principal beneficiaries of the classification certificate. By contrast, in this case, Arhontisa seeks not to compel arbitration by the real party in interest who received the benefit of an agreement technically entered by that party's agent, but rather to compel arbitration by an individual agent who negotiated and signed an agreement expressly on behalf of the disclosed principal Here, it is difficult to conceive of any benefit that Nicopoulos directly received as a consequence of Arhontisa's entering the transaction or wiring funds into his personal account. Whether or not the account was specifically denominated as an "escrow account, no one contends that Nicopoulos served as anything other than, in effect, an escrow agent who was required to transfer the funds promptly to Twinbrook, nor is there any suggestion that he failed to fulfill that obligation.[1] Consequently, unlike the yacht owners in Tencara, who received tangible benefits from the shipyard's engagement of ABS to certify their vessel, Nicopoulos received no

benefit from Arhontisa's purchase of the ship, and merely acted as a contractually-specified conduit for a funds transfer as part of the services he provided to Twinbrook. He thus cannot be compelled to join the parties' arbitration under an estoppel theory

1.

"Indeed, if Nicopoulos failed to turn over even a portion of the money to Twinbrook without its consent, he would no doubt be subject to various forms of civil and criminal liability. If Twinbrook authorized him to retain some portion of the money as a fee, in contrast, any benefit due to him would flow not from the contract of sale, but from Nicopoulous' contract of engagement with Twinbrook.

This ruling is consistent with the well-established principle that an agent for a disclosed principal is not a party to and is not personally bound by a contract that he signs on behalf of a disclosed principal — a principle that has consistently been applied in the arbitration context. See e.g., Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd, 181 F.3d 435,445 (3d Cir. 1999) ("an employee or an agent who did not agree to arbitrate can [not] be compelled to arbitrate his personal liability on the basis of a commitment made by the corporation he serves."), Salim Oleochemicals, Inc. v. M/V Shropshire, 2001 WL 428255 at *5 n. 3 (S.D.N.Y Apr, 25, 2001) (parties who "acted as disclosed agents . . ., accordingly, are not proper defendants in this action [to compel arbitration]"). Here, there is no dispute that Nicopoulos acted as Twinbrook's agent, and signed the Bill of Sale explicitly as "Apoderado," which, it has been attested without dispute, means "agent, proxy or attorney-in-fact" (Nicopoulos Aff ¶ 20.)[2]

2.

Petitioner attempts to distinguish these cases, arguing that it seeks to premise arbitration not on Nicopoulos' status as an agent but on his alleged receipt of benefits from the contract. (Pet. R. Br. at 6-7.) But this misses the point The rationale of these cases is that agents are not personally bound to contracts they sign on behalf of disclosed principals. Such an agent stands in a completely different relationship to a contract than the yacht-owners in Tencara, who were more in the nature of principals of the party signing the arbitration agreement than its agents. The general principle protecting agents is fully applicable to this case, and serves to distinguish Tencara.

CONCLUSION

For the foregoing reasons, Arhontisa's petition to compel respondent Nicopoulos to submit to arbitration is denied. Since no relief is requested against respondent Twinbrook Corp., which has already submitted to the demanded arbitration, the Clerk of Court is respectfully directed to dismiss this action with prejudice.

SO ORDERED: