MONTAUK OIL TRANSPORTATION CORPORATION, AS OWNER OF THE T/B *CIBRO PHILADELPHIA*, *Plaintiff*

v.

THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LIMITED, *Defendant*

United States District Court, Southern District of New York. February 5, March 13 and 20, 1991
90 Civ. 3801 (JFK)

ARBITRATION — 111. Agreement to Arbitrate Future Disputes — 124. Agreement to Arbitrate, Effect on Other Proceedings — JURISDICTION — 114. Jurisdiction by Agreement — MARINE INSURANCE — 223. Foreign Insurance Companies — 291. In General — PRACTICE — 128. Stay and Injunctive Relief.

P&I policy's "New York Suable" clause does not alter the assured's obligation to comply with the claims procedures prescribed by the club's rules. Hence assured's SDNY action against the club will be stayed pending arbitration in London.

Kenneth H. Volk, Robert J. Zapf and Timothy M. Buck (Burlingham Underwood & Lord) *for Plaintiff*

Richard H. Brown, Jr., Mary L. O'Connor and Robert A. Milana (Kirlin, campbell & Keating) *for Defendant*

JOHN F. KEENAN, D.J.:

Before the Court is the motion of defendant, the Steamship Mutual Underwriting Association (Bermuda) Limited ("Steamship" or "the Club"), for an order pursuant to the Federal Arbitration Act, 9 U.S.C. §201 *et seq.*, staying the proceedings pending arbitration between Steamship and Montauk Oil Transportation Corporation ("Montauk"), as owner of the T/B *Cibro Philadelphia*. This Court has jurisdiction over this case pursuant to 28 U.S.C. 1333. For the reasons set forth below the defendant's motion is granted and the proceedings are stayed pending arbitration.

Background

Steamship is a Bermuda-based association of shipowners providing marine protection and indemnity insurance to its members. Montauk, a member of the club, was the operator of the tank barge *Cibro Philadelphia* which was covered by Steamship for protection and indemnity risks. On December 15, 1989 the *Cibro Philadelphia* spilled oil into New York Harbor, causing Montauk to incur cleanup costs in excess of $1,500,000. Montauk contends that these cleanup costs fall within the scope of the insurance coverage and should be paid by the Club.

Initially, Steamship made partial indemnification payments to Montauk. However, it is Steamship's contention that a fuller investigation is necessary before full indemnification can proceed. Steamship initiated demands for documents and interviews of personnel. Montauk advised Steamship that it would produce documents and witnesses only pursuant to the provisions of the Federal Rules of Civil Procedure concerning discovery. Steamship found this to be unsatisfactory. Thereafter on June 5, 1990, Montauk commenced this action against Steamship for indemnity under the New York suable clause of the insurance contract. In bringing suit, Montauk relied on a clause in the insurance contract which provided that the Club would appear in any suit against it by a member in the Southern District of New York.

Steamship contends that Club Rule 36 is controlling in this situation, and that Rule 36 requires that the dispute first be submitted to the directors of the Club. Steamship argues that, if the directors' decision is unacceptable to Montauk, the dispute should then be submitted to arbitration in London.

Discussion

Montauk's insurance agreement with Steamship is documented by a Certificate of Entry and Acceptance. The Certificate specifies that Montauk's account is subject to the rules of the Club, including Rule 36. The pertinent part of Club Rule 36 reads as follows:

> "If any difference or dispute shall arise between a member and the Club concerning the construction of these Rules . . . or the insurance afforded by the Club under these Rules, or any amount due from the Club to the Member, such difference or dispute shall in the first instance be referred to and adjudicated by the directors.
>
> "If the Member does not accept the decision of the Directors the difference or dispute shall be referred to . . . [arbitration] . . . in London.
>
> "No Member shall be entitled to maintain any action, suit or other legal proceedings against the Club upon any such difference or dispute unless and until the same has been submitted to the Directors and they shall have given their decision thereon, or shall have made default for three months in so doing; and, if such decision be not accepted by the member or such default be made, unless and until the difference or dispute shall have been referred to arbitration in the manner provided in this Rule, and the Award shall have been

published; and then only such sum as the Award may direct to be paid by the Club."

The unambiguous language of Rule 36 clearly states a course of action that members must follow in order to obtain relief. Montauk did not follow Rule 36, but now argues that, by way of the New York Suable Clause, Steamship has consented to be sued by Montauk in the Southern District of New York. The pertinent part of the New York Suable Clause reads as follows:

> "[T]he Association hereby undertakes to appear in any civil action which the Member may bring against the Association in the United States District Court for the Southern District of New York to recover for any loss or claim payable or alleged to be payable by the Association under the contract of insurance described in this Certificate . . . Except as to jurisdiction over the person of the Association, the foregoing provisions shall not effect any defence to which the Association would otherwise be entitled and shall not change the contractual or other substantive rights and obligations of the association or of the member."

The Club contends the New York suable clause does not affect the parties' obligations to resolve disputes by arbitration in London. The New York suable clause does not "by its terms limit the obligations to arbitrate but simply provides a consent to jurisdiction to enforce payments . . granted through arbitration." *Neca Ins. Ltd. v. National Union Fire Ins. Co.*, 595 F.Supp. 955, 958 (SDNY 1984). The clause does not eliminate the obligation to proceed with arbitration. See *Neca*, 595 F.Supp. at 958.

Since the New York suable clause does not change the obligation of the parties to submit this dispute to arbitration, the Court grants defendant's motion to stay the proceedings pending arbitration.

Conclusion

For the foregoing reasons, defendant's motion is granted. This case is placed on the suspense calendar of the Court until completion of the arbitration.

JOHN F. KEENAN, D.J. (March 13, 1991):

Before the Court is motion of plaintiff, Montauk Oil Transportation Corporation ("Montauk") for an order pursuant to 28 U.S.C. §1292(b), amending the Opinion and Order that the Court issued in this matter on February 5, 1991 to provide that a controlling question of law is

involved as to which there is a substantial ground for difference of opinion and that an immediate appeal of that Opinion and Order may materially advance the ultimate termination of this litigation.

On February 5, 1991, this Court granted the motion of defendant Steamship Mutual Underwriting Association (Bermuda) Ltd. ("Steamship"), a Bermuda based association of shipowners, for an order pursuant to the Federal Arbitration Act staying these proceedings pending arbitration of an insurance contract dispute between the parties. Plaintiff had argued that a contractual provision providing for suits between the parties in New York permitted it to file suit on the contract rather than submitting to arbitration in London. The Court disagreed and ordered the parties to proceed with arbitration.

The plaintiff can appeal the Court's February 5 decision only if the Court certifies the question for appeal pursuant to 28 U.S.C. §1292(b). Section 1292(b) grants appellate courts jurisdiction over otherwise non-appealable orders if the district judge is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Because the Court is of the view that neither of the elements required for §1292(b) certification are present in this case, plaintiff's motion is denied.

Plaintiff asserts that a "controlling question of law as to which there is substantial ground for difference of opinion" is present here: whether the New York suable clause in the insurance contract supersedes the arbitration clause in Steamship's rules. The Court disagrees. Club Rule 36, quoted in the Court's February 5 order, describes in detail the procedures to be followed "[i]f any difference or dispute shall arise between a member and the Club concerning the construction of these Rules." The Court rejects plaintiff's argument that there is a substantial ground for difference of opinion as to whether the detailed provisions for dispute resolution set forth in Club Rule 36 are superseded by the New York suable clause in the insurance contract.

Finally, there is absolutely no indication that an appeal of this Court's February 5 Order would do anything other than delay further the termination of this dispute.

Accordingly, plaintiff's application for certification of this Court's Order of February 5, 1991 is denied. This case is placed on the suspense calendar of the Court until completion of the arbitration.

ARBITRATION — 111. Agreement to Arbitrate Future Disputes — MARINE INSURANCE — 241. In General.

P&I insurance policy requires assured shipowner to arbitrate its claim against the club as provided in the club rules incorporated into the policy.

DAVID N. EDELSTEIN, D.J. (March 20, 1991):

Defendant moves pursuant to the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, and the Convention on Recognition and Enforcement of Foreign Arbitrable Awards, 9 U.S.C. §§201-208, to compel plaintiff to stay the instant action pending arbitration. Upon consideration of the papers and oral argument, defendant's motion is granted.

In the instant action plaintiff seeks to recover on an insurance policy from an accident involving the tanker *Cibro Savannah*, owned by plaintiffs. A longstanding protection and indemnity insurance relationship between the parties was renewed on February 20, 1990. The renewed insurance policy included a working slip dated 2/19/90 (the "working slip") and a broker's slip dated 2/26/90 (the "broker's slip"). Both the working slip and broker's slip included as conditions the Rules of the Club, the 1990-91 Rules of the defendant's insurance club (the "club rules").

In the instant motion plaintiff disputes whether the insurance policy between the parties established an agreement to arbitrate, and argues that the instant claim is not arbitrable. Both of these arguments are without merit and must be dismissed.

The issue of whether there exists an agreement to arbitrate revolves around a dispute between the parties over the meaning of a New York suable clause which was part of the working and broker's slips, and Rule 36 of the club rules. This exact issue regarding the interpretation of the exact same two clauses has been recently decided by this Court in the course of another dispute between the same two parties. It was recently held that "the [New York suable] clause does not eliminate the obligation to proceed with arbitration." *Montauk Oil Transportation Corporation v. Steamship Mutual Underwriting Association*, 1991 AMC 1477 at 1479 (S.D.N.Y. 1991);[1] See also *Neca Ins. Ltd. v. National Union Fire Ins. Co.*, 595 F.Supp. 958, 957-58 (SDNY 1984). As a result, there is no question but that these two clauses indicate that the parties agreed to arbitrate disputes as provided by Rule 36. *Montauk Oil v. Steamship Mutual*, supra.

1. Plaintiff further moved Judge Keenan for certification of the question decided pursuant to 28 U.S.C. §1292(b). That application was denied by order dated March 13, 1991 (*Montauk Oil v. Steamship Mutual*, 1991 AMC 1479 1991).

Further, this dispute clearly involves arbitrable questions. The instant case involves the question of whether defendant will reimburse plaintiff under the policy. Rule 36 states that all disputes "concerning the construction of these Rules . . . or the insurance afforded by the Club under these Rules . . ." shall be submitted to the directors and then to arbitration. The dispute between plaintiff and defendant obviously involves "the insurance affored by these rules . . ." As a result, this dispute is an arbitrable claim.

Accordingly, it is hereby ordered that defendant's motion to stay the instant proceedings and compel arbitration is granted. The instant case shall be placed on the suspense calendar until the completion of the arbitration.

IN RE THE *EXXON VALDEZ*

United States District Court, District of Alaska, February 8, 1991
No. A89-095 Civil (Consolidated)

JURISDICTION — 116. Damage on Land — 241. Torts in General — NAVIGABLE WATERS — 163. Actions and Enforcement.

Tanker's oil spill in navigable waters is a maritime tort subject to admiralty jurisdiction because it satisfies both the locality and maritime "nexus" criteria, and the 1948 Admiralty Extension Act gives jurisdiction for shoreside damage proximately caused by the spill.

DAMAGES — Recoverability of Purely Economic Losses in Pollution Cases — NAVIGABLE WATERS — 14212. Water Pollution Statutes — 16222. Pre-emption and Conflict — NEGLIGENCE — 161. Economic Loss.

Except to the extent that a federal statute provides for strict liability, the *Robins Dry Dock* doctrine applies to tort claims arising out of oil spill in Alaska waters, so as to preclude recovery of claims for economic loss without proof of physical damage. *Held*: Since the strict liability under the federal Trans-Alaska Pipeline Authorization Act is limited to $100 million, claims in excess of that amount under either the federal Act or Alaska state legislation imposing strict liability without any monetary ceiling remain subject to the *Robins Dry Dock* doctrine (certifying the issue for immediate appeal).

Robert S. Warren (Gibson, Dunn & Crutcher) and Charles P. Flynn (Burr, Pease & Kurtz) *for Alyeska Pipeline Service Co.*

Douglas J. Serdahely (Bogle & Gates) *for Exxon Shipping*

A. Stephen Hut, Jr. and Alan N. Braverman (Wilmer, Cutler & Pickering) and Clifford J. Groh and David A. Devine, P.C. (Groh, Eggers & Price) *for Liability Fund*

James VanR. Springer (Dickstein, Shapiro & Morin), David W. Oesting (Davis, Wright, Tremaine), Jerry S. Cohen and Gary E. Mason (Cohen, Milstein,

"The issue in this case is not whether Proeller fully disclosed his relationship with Sun at the proper time. Rather, the issue involves the consequence of Proeller's failure to resign from the panel when Sun entered a prompt and timely objection. Because he refused to do so, each of the arbitrators and Statheros ran the risk that Sun might later challenge the panel's award under §10 of the [Federal Arbitration] Act and that a court might ultimately grant Sun's motion if it agreed that there was 'evident partiality,'" the judge concluded, again citing Morelite (748 F. 2d at 81-82 & n.1).

Counsel for Sun is Patrick V. Martin and Carlos E. Ramen of Hill Rivkins Loesberg O'Brien Mulroy & Hayden of New York. Statheros is represented by Christopher H. Mansuy and Elena M. Desantis of Walker & Corsa also of New York.

[Editor's Note: A copy of the Sun opinion and order is available to subscribers for $24.00 from Mealey Publications' Document Department. Please contact Carol Baker at (215) 688-6566, or by fax at (215) 688-7552. Indicate in your request that you wish to obtain the Sun opinion and order referenced in this issue.]

SHIP OWNER, INSURER MUST ARBITRATE DISPUTE

Concluding that the New York suable clause does not set aside the parties' duty to submit their dispute to arbitration, U.S. District Judge David N. Edelstein recently stayed a suit the Montauk Oil Transport Corp. filed against the Steamship Mutual Underwriting Association (Bermuda) Limited to obtain insurance coverage as a result of an accident involving the tanker Cibro Savannah (Montauk Oil Transport Corp., as the owner of the T/B Cibro Savannah v. Steamship v. Mutual Underwriting Association, No. 90 Civ. 3792 [DNE], S.D. N.Y.).

Judge Edelstein granted Steamship's motion to stay Montauk's action pursuant to Section 1 of the Federal Arbitration Act and Sections 201-208 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in an order issued on March 20.

"The issue of whether there exists an agreement to arbitrate revolves around a dispute between the parties over the meaning of a New York suable clause which was part of the working and broker's slips, and Rule 36 of the club rules. This exact issue regarding the interpretation of the exact same two clauses has been recently decided by this Court in the course of another dispute between the same two parties. It was recently held that 'the [New

York suable] clause does not eliminate the obligation to proceed with arbitration,'" Judge Edelstein said, citing Montauk Oil Transport Corp., as the owner of the T/B Cibro Philadelphia v. Steamship v. Mutual Underwriting Association (No. 90 Civ. 3801 [JFK]).

The judge added that the dispute between the parties involves "arbitrable questions." He explained that the focus of the case is whether Steamship will reimburse Montauk under the policy it holds with Steamship.

"Rule 36 states that all disputes 'concerning the construction of these Rules . . . or the insurance afforded by the Club under these Rules . . .' shall be submitted to the directors and then to arbitration. The dispute between plaintiff and defendant obviously involves 'the insurance afforded by these rules . . ' As a result, this dispute is an arbitrable claim," Judge Edelstein concluded on March 20.

Counsel for Montauk is Kenneth H. Volk, Robert J. Zapf, Timothy M. Buck of Burlingham, Underwood & Lord. Steamship is represented by Richard H. Brown Jr., Mary L. O'Connor, and Robert A. Milana of Kirlin, Campbell & Keating. Both law firms are located in New York.

HONG KONG COURT OF APPEAL SETS ASIDE TIONG HUAT DECISION

The "express language" of the arbitration clause contained in the latex sales agreements between the Tiong Huat Rubber Factory and Wah-Chang International Co. (China) and a related local corporation specifically did not cover claims for non-acceptance or non-payment, the Hong Kong Court of Appeal concluded on Feb. 13 (Tiong Huat Rubber Factory (SDN) BHD and Wah-Chang International (China) Co. Ltd. and Wah-Chang International (Hong Kong) Corp. Ltd., 1990, No. 192 (Civil), Hong Kong Ct. of App.).

The appellate court has allowed Wah-Chang's appeal and set aside Mr. Justice Neil Kaplan's decision enforcing 17 arbitration awards totaling $2 million in favor of Tiong Huat. The 17 awards relate to three contracts between Tiong Huat and Wah-Chang (China) and two with Wah-Chang (Hong Kong). The awards exceeded the contracts because some of the contracts provided for monthly deliveries and the damages were based on Wah-Chang's failure to accept the monthly deliveries. Mr. Justice Kaplan explained in his Nov. 28, 1990 opinion.

The Malaysian Rubber Exchange and Licensing Board's arbitration clause was used in the contracts. The clause stated that "all disputes as to quality or condition of rubber or