Request District Court decision from MH Cohen - Hold over to XXIII

MONTAUK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 839 -- August Term, 1995

(Argued: January 18, 1996 Decided: March 22, 1996)

Docket No. 95-7722

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MONTAUK OIL TRANSPORTATION CORPORATION,

Plaintiff-Appellant,

- vs. -

STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LIMITED,

Defendant-Appellee.

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Before: NEWMAN, Chief Judge, MAHONEY and FRIEDMAN,*

Circuit Judges.

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Appeal from a judgment of the United States District Court for the Southern District of New York that confirmed an arbitral award against plaintiff-appellant Montauk Oil Transportation Corporation in favor of defendant-appellee Steamship Mutual Underwriting Association (Bermuda) Limited.

Affirmed.

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RAYMOND A. CORNELL, New York, New York (Cornell Losquadro & Zerbo, New York, New York, of counsel), for Plaintiff-Appellant.

RICHARD H. BROWN, JR., New York, New York (Kirlin, Campbell & Keating, New York, New York, of counsel), for Defendant-Appellee.

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MAHONEY, Circuit Judge:

Plaintiff-appellant Montauk Oil Transportation Corporation ("Montauk") appeals from a judgment entered July 3, 1995 in the United States District Court for the Southern District of New York, David N. Edelstein, Judge, that confirmed an arbitral award against Montauk in favor of defendant-appellee Steamship Mutual Underwriting Association (Bermuda) Limited (the "Association" or "Steamship Mutual") in the amount of $131,105.86, representing the fees and costs of the arbitration. Montauk argues that because a compulsory appearance clause in its insurance contract with the Association conflicts with, and supersedes, the contract's compulsory arbitration clause, the district court erred when it suspended this action and ordered the parties to submit to arbitration in London. We disagree, and accordingly affirm the judgment of the district court.

Background

Steamship Mutual is a Bermuda-based mutual association of shipowners providing marine protection and indemnity insurance to its members. When a member enters the Association to obtain insurance, the member is subject to the standard terms of entry set forth in the Rule Book of the Association (the "Club Rules"). The Association also issues a "slip" to each member that confirms the terms of coverage and sets forth any special provisions not stipulated in the Club Rules that are applicable to that member.

Beginning in 1985, Montauk contracted with the Association to cover its vessels for protection and indemnity risks. The parties renewed their contract annually, and effective February 20, 1990, Montauk's coverage was extended through February 20, 1991. Pursuant to this contract, Steamship Mutual issued a slip to Montauk on February 26, 1990 that confirmed coverage for four Montauk vessels "[s]ubject to the [Club] Rules" and "[s]ubject to New York Sunble Clause as attached."

Rule 36 of the Club Rules provides a mandatory procedure for the settlement of disputes. It states in pertinent part that:

> If any difference or dispute shall arise between a Member and the Club concerning the construction of these Rules or of the Rules applicable to any Class in the Club or of any Bye-Law passed thereunder, 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 the arbitration of two arbitrators, one to be appointed by each of the parties, in London, and the submission to arbitration and all the proceedings therein shall be subject to the provisions of the English Arbitration Act . . . .
>
> 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

* The Honorable Daniel M. Friedman, of the United States Court of Appeals for the Federal Circuit, sitting by designation.

their decision thereon . . . and, if such decision be not accepted by the Member . . ., unless and until the difference or dispute shall have been referred to arbitration in the manner provided in this Rule . . . .

(Emphasis added.)

[3] A typewritten "NEW YORK DUABLE CLAUSE" was attached to the slip, and states in pertinent part that:

> [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 provision[] shall not effect [sic] 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, which shall all be determined in accordance with English Law.

(Emphasis added.)

On March 6, 1990, the oil barge Cibro Savannah, one of the four vessels covered by the insurance contract, suffered an explosion in New York harbor that caused an oil spill. The expenses and liabilities that Montauk incurred as a result of this incident fell within the terms of the insurance contract, and Montauk promptly notified the Association about the incident. Thereafter, Steamship Mutual learned that Montauk had failed to disclose, prior to the contract's renewal, that Montauk intended to sell its vessels. Accordingly, Steamship Mutual advised Montauk on April 6, 1990 that it was entitled to avoid the policy with respect to all of Montauk's vessels due to this material nondisclosure.

[4] Montauk then brought this suit on June 4, 1990, seeking, inter alia, a declaratory judgment that Steamship Mutual was liable under the insurance contract and money damages for expenses and liabilities arising from the oil spill. In August 1990, Steamship Mutual moved to stay the suit pending arbitration in London. The district court granted Steamship Mutual's motion and ordered that the case be placed on its suspense docket, stating that:

> 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 duable] clause does not eliminate the obligation to proceed with arbitration." Montauk Oil Transportation Corporation v. Steamship Mutual Underwriting Association, No. 90 Civ. 3801 (JFK), [1991 WL 18149, at *2 (S.D.N.Y. Feb. 5, 1991]; Sales also Meca Inc. Ltd. v. National Union Fire Ins. Co., 595 F. Supp. 95[5], 957-58 (S.D.N.Y. 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.

Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n (Berm.) Ltd., No. 90 Civ. 3792 (DNE), slip op. at 2 (S.D.N.Y. Mar. 20, 1991) (first alteration in Montauk Oil) (footnote omitted).

[5] Pursuant to Club Rule 36, the dispute was referred to the directors of the Association, who denied Montauk coverage on the basis that it had failed to disclose, prior to renewal, a fact material to the risk borne by the Association under the contract. Montauk then sought arbitration of the dispute. The London arbitrators also ruled in favor of Steamship Mutual on November 16, 1990.

[6] On January 4, 1991, Steamship Mutual moved for confirmation of the London award pursuant to 9 U.S.C. § 201 et seq. The district court confirmed the award on June 15, 1995, see Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n (Berm.) Ltd., No. 90 Civ. 3792 (DNE), slip op. (S.D.N.Y. June 15, 1995), and entered a final judgment on July 3, 1995. This appeal followed.

Discussion

On appeal, Montauk argues that the "New York Duable Clause" in the slip conflicts with, and supersedes, the compulsory arbitration clause contained in Rule 36. This argument is without merit.

Club Rule 36 provides a mandatory procedure for the settlement of disputes that requires referral of disputes to the Association's directors, and arbitration in any case in which a member of the Association does not accept the decision of the directors. Under the Federal Arbitration Act, "[a] written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such . . . transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; see also Morewitz v. West of Eng. Ship Owners Mut. Protection & Indem. Ass'n (Lux.), 62 F.3d 1356, 1364 (11th Cir. 1995), cert. denied, 116 S. Ct. 915 (1996). Thus, Steamship Mutual has an affirmative right to arbitrate this dispute. See Local 1814, Int'l Longshoremen's Ass'n v. New York Shipping Ass'n, Inc., 965 F.3d 1224, 1232 (2d Cir. 1992) ("Arbitration is a contractual right . . . ."), cert. denied, 506 U.S. 953 (1992); cf. Morewitz, 62 F.3d at 1364 ("Arbitration is clearly an affirmative defense . . . .").

[4] The New York Duable Clause does not vitiate this contractual right, given its clear statement that it "shall not change the contractual or other substantive rights and obligations of the Association or of the Member." See Hart v. Orion Ins. Co., 453 F.2d 1358, 1361 (10th Cir.

1971) ("The assent of the insurer to jurisdiction does not prevent it from raising [an arbitration] defense based on policy terms."); West Shore Pipe Line Co. v. Associated Elec. & Gas Ins. Servs. Ltd., 791 F. Supp. 200, 204 (N.D. Ill. 1992) ("The . . . service of suit clause can therefore reasonably be interpreted to facilitate litigation following arbitration, concerning the validity of enforcement of any arbitration ruling, without curtailing the mandatory arbitration provision in any manner."); see also China Union Lines Ltd. v. American Marine Underwriters, Inc., 458 F. Supp. 132, 134 n.5 & 136 n.13 (S.D.N.Y. 1978) (following Hart, 451 F.2d at 1360-61).

[9]11 The principal effect of the New York Double Clause is to resolve the issue of personal jurisdiction over a foreign association, since "an arbitration award cannot be enforced without access to the courts." Heca, 595 F. Supp. at 958; see also Montauk Oil, 1991 WL 18149 at *2. Montauk argues that this interpretation of the clause is commercially unreasonable because Steamship Mutual has no assets in New York and would be unaffected by judicial enforcement of an award there. However, a contractual provision is not rendered superfluous or ineffective simply because it may not apply to a particular case. The New York Double Clause was not specially crafted by Montauk and Steamship Mutual for this insurance contract. Rather, it is a standard compulsory appearance provision commonly incorporated into such contracts to enable parties to enforce an arbitral award, see Heca, 595 F. Supp. at 958, or to compel arbitration, see Hart, 451 F.2d at 1361.

Conclusion

The judgment of the district court is affirmed.

FOOTNOTE

1. Section 207 provides that:

Within three years after an arbitral award falling under the [Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958] 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.

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#25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONTAUK OIL TRANSPORTATION CORPORATION, as owner of the T/B CIBRO SAVANNAH,

Plaintiff,

-against-

THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LIMITED,

Defendant.

MEMORANDUM & ORDER
90 Civ. 3792 (DNE)

EDELSTEIN, District Judge:

Plaintiff Montauk Oil Transportation Corporation ("Montauk") brought this action alleging breach of an insurance contract with defendant The Steamship Mutual Underwriting Association (Bermuda) Limited ("Steamship Mutual"). By Opinion and Order dated March 20, 1991, this Court granted Steamship Mutual's motion to stay this action and compel arbitration in London, England, in accordance with the terms of the insurance contract between the parties. Thereafter, plaintiff Montauk commenced arbitration in London, and on November 16, 1994, the arbitrators issued an arbitration award in favor of defendant Steamship Mutual and against Montauk.

According to the terms of the arbitration award, Montauk is directed to pay the arbitrators' fee of 24,750 pounds sterling. In addition, Montauk is directed to pay Steamship Mutual's costs in connection with the arbitration. By affidavit dated April 11, 1995, defendant advised this Court that the Supreme Court Taxing

Office of the Royal Courts of Justice in London determined that Steamship Mutual's costs were 57,401.10 pounds sterling.

Currently before this Court is defendant's motion for an order, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") as implemented by 9 U.S.C. §§ 201-208, confirming the arbitration award and entering judgment in favor of defendant.

9 U.S.C. § 207 provides:

> 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.

The Convention requires that the party applying for recognition and enforcement shall submit to the Court a duly certified copy of the award, Convention Art. IV(1)(a), and a duly certified copy of the agreement to arbitrate, Convention Art. IV(1)(b) and Art. II.

Confirmation of a foreign arbitration award is proper under 9 U.S.C. § 207 if (1) the party moving for confirmation of the arbitration award has complied with the requirements of the Convention; and (2) the party opposing the motion has failed to show the existence of any of the grounds stated in Article V of the Convention that would bar confirmation of the arbitration award. See Geotech Lizenz AG v. Evergreen Systems, Inc., 697 F. Supp. 1248, 1252 (E.D.N.Y. 1988).

Defendant has included, as exhibits to its motion papers, a certified copy of the arbitration award and a certified copy of the

agreement to arbitrate contained in the contract of insurance. In its response papers, plaintiff has advised this Court that "Montauk will not oppose confirmation" of the arbitration award. Plaintiff has not asserted any ground upon which the arbitration should not be confirmed.

Defendant has complied with all requirements for its motion pursuant to 9 U.S.C. § 207, and plaintiff does not oppose the motion. Accordingly, the motion is granted and the arbitration is confirmed.

SO ORDERED.

Dated: New York, New York
June 15, 1995

U.S.D.J.

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,