Freedberg

TROPICAL CRUISE LINES, S.A., *Plaintiff*

v.

VESTA INSURANCE COMPANY A/K/A SKADEDEFORSIKRINGS-SELSKAPET VESTA A/S OR VESTA HYGEA AND STOLT-NIELSEN, INC., *Defendants*

SOUTHTRUST BANK OF ALABAMA, *Intervenor*

United States District Court, Southern District of Mississippi (Southern Division).
May 6, 1992
Civil No. S91-0440(R)

JURISDICTION — 133. Suits between Citizens and Foreigners — MARINE INSURANCE — 223. Foreign Insurance Companies — PRACTICE — 1922. Long Arm Statutes.

Under Miss. long arm statute, Norwegian insurer is subject to personal jurisdiction in S.D. Miss. action on marine hull policy insuring vessel having her home port in the state.

JURISDICTION — 151. Contracts in General — 25. Objections to Jurisdiction — MARINE INSURANCE — 30. Actions on Policies.

Provision making marine insurance policy "subject to Norwegian jurisdiction" is purely permissive and not a forum selection clause which would exclude U.S. jurisdiction of disputes arising under the policy.

ARBITRATION — 111. Agreement to Arbitrate Future Disputes — 120. Foreign Arbitral Awards Convention — MARINE INSURANCE — 30. Actions on Policies

Under the Foreign Arbitral Awards Convention an ambiguous provision in Norwegian marine insurance policy for submission of disputes to a Norwegian average adjuster will not be construed as a valid agreement to arbitrate.

Wynn E. Clark (Owen, Galloway & Clark) *for Tropical Cruise Lines, S.A.*
Abram L. Philips (Reams, Philips, Killion, Brooks, Schell, Gaston & Hudson, P.C.) *for Vesta Ins. Co.*
George J. Fowler, III (Rice, Fowler, Kingsmill, Vance & Flint) *for Stolt-Nielsen, Inc.*

DAN M. RUSSELL, JR., D.J.:

This cause is before this Court on Motion of the defendant Vesta Insurance Company a/k/a Skadedeforsikringsselskapet Vesta A/S or Vesta Hygea (hereinafter "Vesta") to Dismiss Because of Improper Venue and Lack of Jurisdiction, or in the Alternative to Stay Pending Arbitration.[1]

1. This Court's Order of January 6, 1992, entered on the docket on January 7, 1992, granted the Motion of the defendant Stolt-Nielsen, Inc. to Stay.

The defendant Vesta moves the Court for an order dismissing it from this action on the grounds that the contract between the plaintiff and the defendant Vesta, which is the subject matter of this lawsuit, provides that the exclusive venue of any such action is in Norway and subject to Norwegian law; further, the plaintiff contends that dismissal is proper on the further grounds that the defendant Vesta has no presence in this district. Finally, the defendant Vesta asks this Court that, in the event it should not dismiss this action on one of the grounds sought, the matter be stayed pending submission to the State Adjuster in Norway.

Findings of Fact

The plaintiff, Tropical Cruise Lines, (hereinafter "Tropical Cruise"), is the owner of the seagoing vessel M/S *Southern Elegance*, which is a cruise ship home ported in Gulfport, Mississippi. On or about November 1, 1989, Stolt-Nielsen, Inc. (hereinafter "Stolt-Nielsen") and Tropical Cruise entered into a Ship Management Agreement and a Manning and Technical Agreement for the M/S *Southern Elegance*. Both Agreements remained in full force and effect at all times relevant to this action.

On March 1, 1990, Vesta issued a policy of marine hull and machinery, and war risks insurance to Tropical Cruise on the *Southern Elegance*. On September 17, 1990, while the policy of marine insurance was in full force and effect, the *Southern Elegance* suffered damage to its machinery and equipment. Tropical Cruise filed a timely proof of loss with Vesta and has otherwise complied with the terms of the policy of marine insurance. On November 21, 1990, Vesta denied Tropical Cruise's claim. Vesta continues to refuse to pay Tropical Cruise for the loss.

On July 31, 1990, Tropical Cruise executed and delivered to South-Trust a First Naval Mortgage ("Mortgage") on the *Southern Elegance* in order to secure the payment of a promissory note in the principal amount of $1,100,000. The Mortgage provides, in part, that all policies of insurance on the *Southern Elegance* "shall contain a loss payable clause to mortgagee." The Mortgage also provides that if any damage to the *Southern Elegance* exceeds $5,000, the underwriters on the policy shall not make any payment to Tropical Cruise "without first obtaining the written consent of the mortgagee." In November 1990, the policy of marine insurance was amended to make any losses insured under the policy payable to SouthTrust.

On September 17, 1991, Tropical Cruise filed the instant suit against Vesta and Stolt-Nielsen alleging that, as a result of Vesta's breach of

contract in failing to make payment under the terms of the insurance policy, Tropical Cruise had suffered damages including loss of hire, attorney's fees and interest. The complaint also alleges that Stolt-Nielsen breached the Ship Management Agreement in failing to crew the vessel; to victual and arrange the procurement of engine stores, lubricating oils, and other necessary or usual services to the vessel; to arrange cover for insurance on the vessel; to maintain the vessel in an efficient and seaworthy condition; and to handle insurance claims on the vessel pertaining to her machinery, apparel, fittings, freights, earnings, disbursements, and any claims arising out of the operation of the vessel. The complaint of Tropical Cruise demands judgment in the amount of $4,000,000, together with attorney's fees, interest and costs.

On November 7, 1991, Stolt-Nielsen filed a Motion to Stay Pending Arbitration. This Court entered an Order on January 6, 1992, granting Stolt-Nielsen's Motion staying Tropical Cruise's claims against Stolt-Nielsen. The intervenor SouthTrust submits that, pursuant to the Manning and Technical Agreement executed by Stolt-Nielsen and Tropical Cruise, this arbitration is set in Panama City, Florida, and is governed by the United States Federal Arbitration Act.

On November 12, 1991, SouthTrust filed a Motion for Leave to Intervene in this action. On March 2, 1992, SouthTrust's Motion for Leave to Intervene was granted. SouthTrust submits that during the pendency of said motion it did not have the opportunity to conduct discovery because it was not a party to the litigation.

On February 7, 1992, Vesta filed its motion to dismiss now before the Court. The plaintiff and SouthTrust both recognize that Vesta contends in its motion that it is not subject to personal jurisdiction and the venue is precluded by virtue of a forum-selection clause; however, Vesta does not address the issue of lack of jurisdiction in its memorandum supporting the motion. In any event, the motions, as briefed by the parties and as exhibited by the record before the Court, reflect that the Motion to Dismiss of Vesta is not well taken and should be denied as set forth herein.

I. *Issue regarding whether Vesta is subject to personal jurisdiction.*

If *in personam* jurisdiction is challenged, the plaintiff must establish a *prima facie* case for said jurisdiction. *De Melo v. Toche Marine, Inc.*, 711 F.2d 1260 (5 Cir. 1983). Any conflicts in the facts are to be resolved in the plaintiff's favor when determining whether a *prima facie* case for

in personam jurisdiction has been established. *Cannon v. Tokyu Car Corp.*, 580 F.Supp. 1451 (S.D. Miss. 1984).

Both SouthTrust and the plaintiff submit that, before this Court may determine that Vesta is not subject to personal jurisdiction in this Court, they should be allowed to conduct discovery to ascertain Vesta's contacts, or the lack thereof, with the forum. See *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 475 (5 Cir. 1985); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270-71 (5 Cir. 1981); (disagreed with on other grounds in *Placid Investments, Ltd. v. Girard Trust Bank*, 689 F.2d 1218, 1219 (5 Cir. 1982)); *Williamson v. Tucker*, 645 F.2d 404, 414 (5 Cir. 1981). The plaintiff also points out that the Scheduling Order allows the discovery time to run until July 1, 1992.

Furthermore, SouthTrust submits that Vesta has converted its Motion to Dismiss into a Motion for Summary Judgment by attaching the affidavit of Erik Blaker in support of its motion since matters outside the pleadings have been presented to the Court. See *Geiger v. United States*, 707 F.2d 157, 160 (5 Cir. 1983).

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c) Fed.R.Civ.P. "Barebones allegations are insufficient to withstand summary judgment because the opposing party 'must counter factual allegations by the moving party with specific, factual disputes; mere general allegations are not a sufficient response.' " *Howard v. City of Greenwood*, 783 F.2d 1311, 1315 (5 Cir. 1986) (citing *Nicholas Acoustics & Specialty Co. v. H&M Construction Co., Inc.*, 695 F.2d 839, 845 (5 Cir. 1983)).

The plaintiff submits that the instant case involves a marine insurance policy which is a maritime contract within federal admiralty jurisdiction. *Morrison Grain Co. v. Utica Mut. Ins. Co.*, 1982 AMC 658, 662, 632 F.2d 424, 428 n.4 (5 Cir. 1980); *Kossick v. United Fruit Co.*, 365 U.S. 731, 1961 AMC 833 (1961); *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 33-34 (1871). In addition to diversity jurisdiction, the plaintiff has invoked the Court's admiralty jurisdiction pursuant to 28 U.S.C. §1333(1), and the Court has federal question jurisdiction. U.S. Const., art. III, §2.

In *Smith v. De Walt Products Corp.*, 743 F.2d 277, 278 (5 Cir. 1984), the court addressed a two-step inquiry regarding the reach of federal jurisdiction in a diversity action over non-resident defendants.

> "First, the law of the forum state must provide for the assertion of such jurisdiction; and second, the exercise of jurisdiction under state law must comport with the dictates of the fourteenth amendment due process clause."

See also *Sanders v. Humphrey*, 735 F.Supp. 209, 213 (S.D. Miss. 1990).

The plaintiff submits that the first step is governed by state law; the second proceeds under federal law and consists of deciding whether the defendant has minimum contacts with the forum state so that the maintaining of the suit does not offend "traditional notions of fair play and substantial justice," *Terry v. Raymond Int'l. Inc.*, 1982 AMC 2053, 2056, 658 F.2d 398, 401 (5 Cir. 1981) cert. denied, 456 U.S. 928, 1982 AMC 2111 (1982) (which quotes *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (citing also *Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581, 585-86 (5 Cir. 1982)). In a non-diversity case the "contours of amenability are more fluid." Id. Further, the plaintiff cites *Terry* for the proposition that "[i]n a case brought under both diversity and federal case jurisdiction, the defendant's amenability to process under state law, which could be critical in a pure diversity based action, is irrelevant." Id. 1982 AMC at 2058, 658 F.2d at 402.

However, in *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (5 Cir. 1986), aff'd, 484 U.S. 97 (1987), *Terry* and *Lapeyrouse* were overruled to the extent that they differ from the holding in *Point Landing* that "absent specific congressional authority, a federal district court has no personal jurisdiction over a defendant who cannot be reached by the long-arm statute of the state in which the district court sits." Id. at 427. In a case such as the one *sub judice*, wherein a federal court is adjudicating a federal claim involving a federal statute, the aggregation of national contacts is not enough for an assertion of personal jurisdiction over the defendant. Rather, there must be sufficient local contacts to justify the use of the state long-arm statute. Id.

Section 13-3-57 (Supp. 1990) of the Mississippi Code provides three bases for obtaining jurisdiction over a non-resident defendant. Said section provides, in pertinent part:

> "Any nonresident person . . . or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business here, [1] who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or [2] who shall commit a tort in whole or in part in this state against a resident of this state, or [3] who shall do any business or perform

> any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi."

The Courts have held that, in order for the defendant to be subject to suit under this long-arm statute, it must be shown that the defendant is "doing business". However, more than merely "doing business" is required to support the exercise of personal jurisdiction. In *Allen v. Jefferson Lines, Inc.*, 610 F.Supp. 236, 239 (S.D. Miss. 1985), the court stated:

> "Before personal jurisdiction may be assumed under the 'doing business' provision of §13-3-57, the business in Mississippi of the non-resident defendant must be of a 'systematic and ongoing nature,' the plaintiff's cause of action must be incident to that business activity and the assertion of jurisdiction must not offend notions of fairness and substantial justice. *Aycock v. Louisiana Aircraft, Inc.*, 617 F.2d 432, 435 (5 Cir. 1980); *Arrow Food Distributors v. Love*, 361 So. 2d at 326, 327."

Furthermore, there must be a showing of a nexus between the defendant's activities and the plaintiff's cause of action against the defendant. Id. at 239. The cause of action must accrue from or be incident to the activities of the non-resident defendant. *Smith v. De Walt Products Corp.*, supra, 743 F.2d at 279. See also *Rittenhouse v. Mabry*, 832 F.2d 1380, 1384 (5 Cir. 1987).

As more recently noted in *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491, 494 (5 Cir. 1989), three requirements must be satisfied for the Mississippi long-arm statute to subject a non-resident defendant to personal jurisdiction. These include the following: (1) the defendant must "purposefully do some act or consummate some transaction in the forum state;" (2) "the cause of action must arise from, or be connected with, such acts or transactions;" and, (3) "the requirement of due process must be satisfied."

In the case *sub judice* Vesta provided insurance on the *Southern Elegance*, a cruise ship home ported in Gulfport, Mississippi, and owned by the plaintiff which is also located in Gulfport, Mississippi. Vesta took advantage of business opportunities in this forum when it accepted premiums to insure the plaintiff's vessel, although the policy may have been issued in Norway by Vesta. It is not illogical that Vesta had every reason to expect that, having undertaken to insure a vessel in Mississippi owned by a company headquartered in Mississippi, it would be sued in Mississippi in the event a dispute arose on its insurance obligations, if any.

The plaintiff submits that marine insurers have been held subject to personal jurisdiction in similar situations. In *McKeithen v. M/T Frosta*, 1978 AMC 51, 62, 435 F.Supp. 572, 580 (E.D. La. 1977), for example, a Scandinavian marine insurer was held to be subject to jurisdiction because it maintained insurance on vessels regularly navigating Louisiana territorial waters. Likewise in *Magnus Maritec International, Inc. v. SS St. Panteleimon*, 1978 AMC 687, 688, 444 F.Supp. 567, 568 (S.D. Tex. 1978), the court ruled that a United Kingdom marine insurer "transacts business in this forum to the extent that it insures foreign vessels entering Texas waters and is subject to personal jurisdiction in this forum. . ." Moreover, in the instant case, the *Southern Elegance* did not just wander into Mississippi territorial waters, but rather is home ported in Mississippi. See also *Comm. of Puerto Rico v. SS Zoe Colocotroni*, 1981 AMC 2185, 628 F.2d 652 (1 Cir. 1980), cert. denied, 450 U.S. 912, 1981 AMC 2099 (1981).

The plaintiff has submitted the affidavit of Harry Fulghum, its operations manager, with attachments including a report by a John Van Aken, a surveyor hired by Vesta to investigate the claim in Mississippi. Vesta has not submitted anything in support of its Motion to Dismiss for lack of personal jurisdiction, and its proposed Findings of Fact are silent on the issue. Conflicts between affidavits submitted on the question of personal jurisdiction are resolved in favor of the plaintiff and the defendant Vesta has submitted nothing to refute the affidavit of Fulghum. *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5 Cir. 1982). The Fulghum affidavit reflects that Vesta insured the *Southern Elegance* throughout the time it was home ported and based in Mississippi. Vesta hired surveyors to inspect the *Southern Elegance* in Mississippi, and those surveyors came to Gulfport, Mississippi, to inspect the vessel, investigate, and adjust the claim. The surveyors boarded the vessel on at least four occasions in Mississippi. One surveyor was John Van Aken. Significantly, another Vesta representative present in Mississippi was John Knapskog, a Vesta representative from Norway. Presumably, it was on the basis of the acts of Van Aken and Knapskog in Mississippi that Vesta refused to pay the plaintiff's claim.

It is the opinion of the Court that Vesta has sufficient contacts with this forum and is subject to personal jurisdiction before this Court. Accordingly, defendant Vesta's motion will be denied on this ground.

II. *Issue whether the policy in issue contains a forum selection clause precluding venue in this judicial district.*

Vesta contends the marine insurance policy contains a mandatory forum selection clause and relies upon the provisions to support said contention. The first provision alleged by Vesta is found on the face of the policy and provides that "[t]hese insurances are subject to Norwegian jurisdiction." The second provision alleged by Vesta is found in §88 of the Norwegian Insurance Plan of 1964 (hereinafter the "Norwegian Plan.") The third provision is found in ¶7 of the "condition for Hull-Interest Insurance."

A. The Norwegian Jurisdiction Sentence

The plaintiff submits that "[a]n agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains specific language of exclusion." *New York v. Pullman, Inc.*, 477 F.Supp. 438, 442 n.11 (SDNY 1979) (emphasis in original). The clause in issue merely subjects the policy to Norwegian jurisdiction; it does not say that all disputes concerning the policy are subject to Norwegian jurisdiction; further, it does not say that disputes concerning the policy are subject exclusively to Norwegian jurisdiction. The sentence in issue is a non-exclusive statement and does not deprive this Court of jurisdiction.

As cited by the plaintiff, in *Keaty v. Freeport Indonesia, Inc.*, 1975 AMC 387, 503 F.2d 955 (5 Cir. 1974), the contract specified that "the parties submit to the jurisdiction of the courts of New York." The district court dismissed the action on the ground that the foregoing language required that suit be instituted in New York. The Fifth Circuit reversed, holding that the language was permissive rather than exclusive:

> "We note initially that this is not a situation where the contract, on its face, clearly limits action thereunder to the courts of a specified locale. . . .
>
> • • •
>
> When previously confronted with two opposing, yet reasonable, interpretations of the same contract provision, this Court adopted the traditional rule whereby, 'an interpretation is preferred which operates more strongly against the party from whom [the words] proceed.' *Tenneco, Inc. v. Greater LaFourche Port Commission*, (5

> Cir. 1970), 427 F.2d 1061, 1065, quoting from *Restatement of Contracts* §236(d) (1932). The contract agreement, including the challenged provision, was put into written form by Freeport and must therefore be construed more strongly against it. We find that the disputed contract provision falls short of being a mandatory forum-selection clause and accordingly hold that the district court erred in its refusal to accept jurisdiction." Id. 1975 AMC at 388-89, 503 F.2d at 956-57.

Similarly in the instant case, the language of the forum selection clause should be interpreted against Vesta, the drafter.

Likewise, in *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231, 1231-32 (11 Cir. 1985), the contract declared that "[p]lace of jurisdiction is Sao Paulo/Brazil." Reversing an order of dismissal, the Court of Appeals held that this language was merely a consent to jurisdiction in Brazil, not an exclusion of jurisdiction elsewhere. See also *Kachal, Inc. v. Menzie*, 738 F.Supp. 371, 373-74 (D. Nev. 1990); *C.A. Seguros Orinoco v. Naviera Transpapel, C.A.*, 1988 AMC 1757, 677 F.Supp. 675 (D.P.R. 1988).

The policy in issue does not provide that it is subject only to litigation in Norway or only to jurisdiction in Norway. Vesta could have stated in the policy that any suit arising out of the policy must be filed in Norway but the policy does not do so. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 1972 AMC 1407 (1972) ("any dispute arising must be treated before the London Court of Justice"); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. ___, 1991 AMC 1697, 1698 (1991) ("all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country"); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 24 n.1 (1988) ("any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case and controversy arising under or in connection with this Agreement"). The policy in issue does not contain a clear and exclusive provision and as such does not preclude the plaintiff from maintaining a suit before this Court.

B. Section 88 of the Norwegian Plan

Vesta submits in its Memorandum that the policy "cover also provides that hull interests, including excess liability, was issued in accordance with the Norwegian Marine Insurance Plan of 1964." The defendant

Vesta further submits that "[t]he Norwegian Insurance Plan forms the basis of the policy with certain conditions being set out in the policy in addition to the Plan. The Norwegian Marine Insurance Plan, . . ., provides for venue as set forth in ¶88 of the Plan." Said statement is misleading as the policy actually states that "[h]ull Interest including excess liability [sic] in accordance with Norwegian Marine Insurance Plan of 1964, Chapter 15, ¶¶219-223." (emphasis added). The policy does not incorporate the entire Norwegian Plan as Vesta suggests, but, rather, incorporates only a limited portion thereof which does not include said §88.

C. Paragraph 7 of the Conditions for Hull-Interest Insurance

The defendant Vesta submits that there is additional reference to venue in ¶7 of the Conditions for Hull-Interest Insurance in addition to the Norwegian Insurance Plan Form No. 216, which is a part of the policy, which provides as follows:

> "To §88 of the Plan
>
> The insurer cannot be sued in the courts of the venue mentioned in Article 29 of the Civil Procedures Act on 13th August 1915, but only in the courts of venue mentioned in articles 17 and 21 of said Act."

The defendant Vesta cites this clause to support its argument that venue is not properly had before this Court.

This provision purports to incorporate an article of a Civil Procedures Act into the contract of insurance. Yet, as the plaintiff points out, which jurisdiction promulgated the civil procedures act is not mentioned. A copy of said civil procedures act is not provided or what venue the act would support. The plaintiff and Intervenor SouthTrust submit that Vesta's reliance on ¶7 is misplaced, and the Court agrees. A reading of ¶7 in the document entitled "Conditions for Hull-Interest Insurance" appears to amend §88 of the Norwegian Plan which this Court has found not to apply to the policy in issue as set forth herein. Furthermore, the Court agrees with the plaintiff's contention that, assuming *arguendo* that condition 7 does not apply, it still does not support the result advanced by Vesta. If the Act to which condition 7 refers is the Civil Procedures Act of 1915 of Norway, the terms of said Act are insufficient to deprive this Court of venue.

The English translation of the Act attached to the affidavit of attorney Erik Blaker translates Article 17 as follows: "All lawsuits may be brought in the defendant's venue, unless a special venue is prescribed." (emphasis added). Vesta ignores and does not address the clause "unless a special venue is prescribed." It contends merely that Article 17 is mandatory and that it requires that suit be filed in Norway. The word "may" conclusively refutes this contention. As was the case with regard to the Norwegian jurisdiction clause, this provision is *permissive*, not mandatory.[2] The plaintiff submits that no court is mentioned in Articles 17 and 21, and the only venue which could be considered prescribed is that found in 28 U.S.C. §1391(b)(2) which allows suit to be maintained in the judicial district in which the substantial part of the property that is the subject of the action is situated. The Court is of the opinion that said ¶7 does not make this Court's maintenance of venue improper.

D. Even if the policy contains a forum selection clause, the clause should not be enforced because it is unreasonable, unfair and unjust.

The intervenor SouthTrust further submits that the existence of a forum selection clause in a contract is only one factor for this Court to consider in determining whether to dismiss this action. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 1972 AMC 1407 (1972). SouthTrust submits that fairness and justice, in addition to the ambiguous forum-selection clause, dictate that this action remain in the United States District Court for the Southern District of Mississippi. One such factor to be considered is that Tropical Cruise and Stolt-Nielsen have numerous employees who will be witnesses regarding the allegations in issue. Certainly, such an example evidences that enforcement of the forum-selection clause would be burdensome, and this factor would support a finding that this cause is more properly brought in this venue.

III. *The Vesta policy does not contain an arbitration agreement.*

The defendant Vesta demands that the claim in issue be submitted for arbitration as provided by ¶87 of the Norwegian Marine Insurance Plan

2. The plaintiff submits that, in fact, Vesta's translation of Article 17 is incorrect. The plaintiff submits as a basis for this contention that the untrustworthiness of Vesta's translation is evident from the conflict between ¶6 of Erik Blaker's affidavit, which purports to summarize Article 17, and the translation of Article 17 attached to Mr. Blaker's affidavit. The Court agrees that for present purposes, it suffices to note that, even under Vesta's translation, Article 17 does not support dismissal of this lawsuit.

of 1964, which Vesta alleges is adopted and made a part of the policy. Said ¶87 provides:

> "Dispute arising out of the claims statement.
>
> "If the assured does not accept the insurer's claims statement, the assured as well as the insurer may demand submission of the statement to a Norwegian average adjuster for his opinion before the statement, if desired, is brought before the courts. The average adjuster is to be chosen by the assured.
>
> "The costs of submitting the case to the average adjuster are to be borne by the insurer, unless the assured's demand to have the claims statement amended was manifestly without foundation.
>
> "The rules in the first and second paragraphs apply correspondingly where the insurer has declined the assured's claim."

The commentary to §87 of the Norwegian Plan states:

> "The paragraph gives both parties the right to demand that an average adjuster give an opinion on the claims statement before the case is referred to the courts. The average adjuster shall not make an arbitration award, but merely give an opinion as to how the claims settlement should be effected in his view. . . . The plan does not contain any general rule relating to arbitration. . . ." (emphasis added).

The plaintiff and Intervenor SouthTrust submit that §87 does not apply because the hull-interest portion of the policy, previously discussed herein, only incorporates §219 through 223 of the Plan. Furthermore, the plaintiff submits that, even if §87 did apply, it is not an arbitration clause. Whether this Court should recognize §87 as an arbitration agreement is governed by the "Convention on Recognition and Enforcement of Foreign Arbitral Awards" found at 9 U.S.C. §201 (1991 Supp.). Article II of the Convention declares in pertinent part as follows:

> "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> "2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

The first question the Court must determine is whether the parties intended a particular dispute to be a subject to arbitration based on the language of the contract. *In re Cajun Elec. Power Coop., Inc.*, 791 F.2d 353, 360 (5 Cir. 1986). The key to determining whether a clause calls for arbitration is whether "the parties clearly intended to submit some disputes to their 'chosen instrument' for definitive settlement of certain grievances. . . ." *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 830 (2 Cir. 1988) (emphasis added). A court cannot compel a party to submit a dispute to arbitration unless there has been a contractual agreement to do so. *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37 (5 Cir. 1990).

The language in the commentary to §87 of the Norwegian Plan makes it very clear that, in the event said section were applicable, the "umpire" of the dispute would not be an arbitrator but rather an average adjuster. See *Hartford Lloyd's Insurance Co. v. Teachworth*, 898 F.2d 1058, 1063, 1061-62 (5 Cir. 1990). The term "adjuster" has long denoted one who determines the amount of a claim. e.g., *First Nat. Bank v. Manchester Fire Assurance Co.*, 64 Minn. 96, 66 N.W. 136, 138 (1896). An "average adjuster" is a specialized adjuster who performs this function in marine insurance disputes. *Lenfest v. Coldwell*, 1975 AMC 2489, 2494-95, 525 F.2d 717, 722 nn.10 and 11 (2 Cir. 1975). A statement prepared by an average adjuster is without any legal effect. *Pacific Employers Ins. Co. v. M/V Capt. W.D. Cargill*, 1986 AMC 1058, 1060, 751 F.2d 801, 804 n.4 (5 Cir. 1985). Thus, §87 is, at best, a proceeding to determine the amount of the loss. It is, in other words, an appraisal provision, not an arbitration agreement. And, at the very least, §87 is ambiguous and should be resolved against Vesta. The result under either view is that §87 is a non-binding appraisal rather than an arbitration agreement.

Conclusion

This Court does not lack personal jurisdiction over the defendant Vesta and the plaintiff's maintenance of a suit before this Court is not improper as this Court does not find that the policy in issue contains a valid forum selection clause. Furthermore, the policy in issue does not contain an arbitration clause.

It is therefore ordered and adjudged that the Motion of the defendant Vesta Insurance Company a/k/a Skadedeforsikringsselskapet Vesta A/S or Vesta Hygea to Dismiss Because of Improper Venue and Lack

of Jurisdiction, or in the Alternative to Stay Pending Arbitration is hereby denied.

GLENN ORGAN, *Plaintiff*

v.

MIKE CONNER AND BRITISH MARINE MUTUAL INSURANCE ASSOCIATION, LTD., *Defendants*

United States District Court, District of Alaska, April 21, 1992
No. A91-510 Civil

ARBITRATION — 121. Federal Arbitration Act — JURISDICTION — 151. Contracts in General — MARINE INSURANCE — 30. Actions on Policies — REMOVAL OF CAUSES — Federal Arbitration Act Authorizes Removal.

In dispute relating to applicability of arbitration clause in marine P&I policy, federal court has admiralty jurisdiction under 28 U.S. Code §1333 and removal jurisdiction under the Federal Arbitration Act, 9 U.S. Code §§203 and 205.

ARBITRATION — 111. Agreement to Arbitrate Future Disputes — MARINE INSURANCE — 291. In General.

Alaska fishing boat owner, as assured, will be required to stay his U.S. action and to arbitrate in London his claim against British P&I club even though neither the owner nor his insurance broker was aware that the club's rules provided for arbitration of disputes under the policy.

Richard J. Smith (Sandberg & Smith) *for Plaintiff*
Thomas A. Matthews (Bliss Riordan) *for British Marine Mutual Insurance Association, Ltd.*

H. RUSSEL HOLLAND, D.J.:

The court has before it a motion to compel arbitration filed by defendant British Marine Mutual Insurance Association, Limited. British Marine also requests a stay or dismissal of further proceedings in this court. Plaintiff Glenn Organ opposes the motion and requests that the matter be remanded to state court. By notice filed February 28, 1992, British Marine withdrew its request for oral argument.

Organ is a fisherman in Kodiak, Alaska. He insured his fishing vessel, the *Lady Laurie*, with British Marine. British Marine is a mutual protection and indemnity association, organized and registered under the laws of England. It is composed of shipowners who mutually agree to insure themselves against protection and indemnity risks pursuant to the associ-