1989 U.S. Dist. LEXIS 12368 printed in FULL format.

In the Matter of The Application of Midland Bright Drawn Steel Limited, Petitioner, For A Judgment Or Order Staying The Arbitration Commenced By Erlanger & Company, Inc., Respondent

No. 87 Civ. 8561 (LLS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1989 U.S. Dist. LEXIS 12368

October 18, 1989, Decided; October 19, 1989, Filed

OPINIONBY: [*1]

STANTON

OPINION: OPINION and ORDER

LOUIS L. STANTON, UNITED STATES DISTRICT JUDGE

Midland Bright Drawn Steel Limited ("Midland") petitions for a stay of arbitration commenced by Erlanger & Company, Inc. ("Erlanger"). The petition is granted.

FACTS

Midland, a United Kingdom company with its principal place of business in West Bromwich, England, manufactures finished steel. Erlanger n1, a Delaware corporation with its principal place of business in Fort Lee, New Jersey, imports and sells finished steel. Since 1984 Midland has sold steel to Erlanger on six occasions. The steel is produced and delivered in England, and the price paid in pounds sterling.

n1 In September 1986, Erlanger changed its name to S & W Berisford, Inc.

Midland and Mr. R. B. Rendle, Erlanger's agent in England, n2 negotiated the terms of each sale via telephone and telex. Prior to shipment, Mr. Rendle sent Midland two copies of Erlanger's form "Purchase Contract." Each Purchase Contract purported to constitute the parties' final agreement for that particular sale, and contained the following clauses on the reverse side:

10. (a) The parties hereto irrevocably agree that each and every controversy or claim arising out of, [*2] in connection with or relating to this contract or the interpretation, performance or breach thereof shall be settled by arbitration in the City of New York under the rules then obtaining of the American Arbitration Association.

. . .

11. This contract shall be deemed made in the State of New York and shall be interpreted under and governed by the laws of said state, including the Uniform Commercial Code as adopted in said state as effective and in force on the date

hereof. The parties recognize and consent to the jurisdiction over them of the arbitration tribunal mentioned in Section 10 and of the courts of the State of New York for all purposes in connection with such Section 10, including but not limited to, confirmation of any arbitration award.

Mr. Rendle usually sent a note requesting that Midland sign and return a copy o the Purchase Contract. Midland kept but did not sign or return any of the six Purchase Contracts.

n2 The parties dispute whether Mr. Rendle also acted as Midland's agent.

The parties began negotiations in September 1984 for the transaction in dispute. Following their established procedure, they agreed on initial terms through telephone conversations [*3] and telexes. Mr. Rendle sent Midland a Purchase Contract on November 21, 1984.

When the steel arrived in the United States in early 1985, Erlanger's customer rejected the order, claiming that the steel was not of the quality requested Erlanger resold the steel at salvage rates to mitigate damages.

On October 23, 1987 Erlanger filed a demand for arbitration, claiming that since Midland knew that the steel was subject to resale, it was liable for Erlanger's loss. Midland, in turn, filed a petition in New York Supreme Court for a stay of arbitration pursuant to N.Y. C.P.L.R. @@ 7502, 7503 (McKinney 198 & Supp. 1989), arguing that the arbitration clause in Erlanger's Purchase Contract is not part of the parties' agreement. Erlanger removed that proceedin to this court. Jurisdiction is based alternatively on diversity of citizenship under 28 U.S.C. @ 1332(a)(2) (1982), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. @@ 201 et seq. (1982).

DISCUSSION

1. Applicable Law

Federal substantive law determines whether the parties have entered a bindin agreement to arbitrate when that agreement comes under the Convention. n3 [*4] See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir. 1987); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 43 (3d Cir. 1978). Relevant federal substantive law consists of generally accepted contract law principles, including the Uniform Commercial Code ("UCC") Genesco, 815 F.2d at 845 & n.4.

n3 Other federal courts have held that state law determines whether the parties have entered into a binding arbitration agreement. Cook Chocolate Co. v Salomon. Inc., 684 F. Supp. 1177, 1181-82 (S.D.N.Y. 1988) and cases cited therein. However, even if state law were to apply, federal substantive law woul still govern. See Black & Pola v. The Manes Organization. Inc., 72 A.D.2d 514, 421 N.Y.S.2d 6 (1st Dep't 1979) (in action to stay arbitration, federal substantive law determines whether parties have agreed to arbitrate if their relationship involves interstate [and, presumably, foreign] commerce), aff'd fo reasons stated below, 50 N.Y.2d 821, 430 N.Y.S.2d 49, 407 N.E.2d 1345, (1980). See also A/S Ludwig Mowinckels Rederi v. Dow Chemical Co., 25 N.Y.2d 576, 579-80, 307 N.Y.S.2d 660, 661-62, 255 N.E.2d 774, cert. denied, 398 U.S. 939

(1970). [*5]

This case comes under UCC @ 2-207 (1972), n4 which abrogated the common law "mirror-image" rule that treated a written confirmation, containing additional terms, as a repudiation of the parties' prior agreement. Under the mirror-image rule, such a written confirmation became a counter-offer which was usually accepted by performance. The common law thus favored whomever sent the last writing. See generally E.A. Farnsworth, Contracts @ 3.21 (1982).

n4 Section 2-207 provides in relevant part:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contact unless . . .

. . .

(b) they materially alter it . . . .

Section 2-207, however, favors an agreement reached before either party sends the other a written confirmation. Under this section, additional terms in [*6] a written confirmation retained without objection by its recipient become agreed terms only if their inclusion would not materially alter the prior agreement.

This dispute thus turns on (1) whether the parties had reached an agreement before Midland received Erlanger's Purchase Contract, and if so, (2) whether inclusion of the arbitration clause would materially alter that agreement.

2. Prior Agreement

On September 13, 1984 Mr. Rendle called Midland's managing director to request quotations on a quantity of finished steel. Mr. Rendle's telex to Midland the next day confirms Midland's offer to sell Erlanger 417 metric tons of 12L14 cold drawn steel bars at 345 pounds sterling per metric ton. Further telexes show that by September 25 the parties agreed that Midland would sell Erlanger 2,110 metric tons, with negotiations continuing for another 400 metric tons. By October 17, the parties agreed to a 2,502.5 metric ton transaction. Telexes from Mr. Rendle to Midland on October 15 and 17 confirm the parties' agreement on the quality, quantity and price of these 2,502.5 metric tons. The telexes list 12L14 as the required quality of the steel and list 95 lots of steel bars priced at 345, [*7] 350 or 355 pounds sterling per metric ton depending on the dimensions of the bars in each lot. Midland's invoice follows these specifications and confirms Midland's agreement to these terms.

These writings show that the parties had concluded a contract by October 17. See UCC @ 2-201 (1972) and Official Comment 3 (writing evidencing contract for sale of goods need only identify transaction, parties, and quantity).

Erlanger argues that the statement "further order details to follow" in Mr. Rendle's October 17 telex shows that the parties had not yet finalized the terms of their contract and that they anticipated a final writing. However, "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." UCC @ 2-204(3) (1972). Moreover, "the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their in formal agreement from taking effect prior to that event." V'Soske v. Barwick, 404 F.2d 495, 499 (2d Cir. 1968), cert. denied, 394 U.S. 921 (1969). Accord Restatement [*8] (Second) of Contracts @ 27 (1981).

3. Material Alteration

Additional terms in Erlanger's Purchase Contract form became part of the agreement the parties had formed by October 17 only if they did not materially alter its terms. UCC @ 2-207(2).

Courts use two standards to determine whether an arbitration clause materially alters a prior agreement. In some jurisdictions, including New York, an arbitration clause is a per se material alteration. See In re Marlene Indus. Corp. & Carnac Textiles, Inc., 45 N.Y.2d 327, 333, 408 N.Y.S.2d 410 (1978); Frances Hosiery Mills. Inc. v Burlington Indus., Inc., 285 N.C. 344, 204 S.E.2d 834, 841-43 (1974); Windsor Mills, Inc. v. Collins & Aikman Corp., 25 Cal. App. 3d 987, 995, (1972); Universal Plumbing & Piping Supply, Inc. v. John C. Grimberg Co., 596 F. Supp. 1383, 1385 (W.D. Pa. 1984) (applying Pennsylvania law). In others, the determination is "a question of fact to be resolved by the circumstances of each particular case." N & D Fashions. Inc. v. DHJ Indus., Inc., 548 F.2d 722, 726 (8th Cir. 1977) (applying Illinois law); Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1169 & n.8 (6th Cir. 1972) (applying Georgia [*9] and Tennessee law).

Erlanger relies on Schulze & Burch Biscuit Co. v. Tree Top. Inc., 831 F.2d 709 (7th Cir. 1987), a diversity case applying the factual determination standard as developed under Illinois law. In Schulze, the seller had sent the buyer a written confirmation containing an arbitration clause for each of ten transactions. The buyer never signed any of the confirmations. However, the court determined that since the buyer had not objected to the arbitration clause for any transaction, it did not constitute an "unfair surprise" and therefore did not materially alter the parties' agreement. Id. at 715.

Notwithstanding Schulze, decisions in this circuit, and additional facts in this case, compel the conclusion that Erlanger's arbitration clause materially altered the parties' prior agreement.

First, no case in this circuit has required a party to arbitrate absent its signature or some reasonable basis for concluding that it has agreed to a proposed arbitration clause. Cf. Pervel Indus., Inc. v. T M Wallcovering, Inc., 871 F.2d 7, 8 (2d Cir. 1989) ("Although T M's president avers that a 'large majority' of these confirmation forms were not signed and returned [*10] to Pervel, it is undisputed that some of them were. Seven such documents, several of which were signed by T M's president, are included in the record on appeal. We agree with the district court that there was a binding arbitration agreement between the parties"); Genesco, 815 F.2d at 845 n.4; (subsidiary bound by parent's agreement that all affiliates arbitrate disputes). McAllister Bros.,

Inc. v. A & S Transp. Co., 621 F.2d 519, 523-24 (2d Cir. 1980); Fisser v. International Bank, 282 F.2d 231, 233-34 & n.6 (2d Cir. 1960) (same). See also Nicholas Califano, M.D., Inc. v. Shearson Lehman Bros., Inc., 690 F. Supp. 1354 1356 (S.D.N.Y. 1988).

Erlanger argues that Midland adopted the Purchase Contract by accepting certain terms, such as banking and document delivery instructions, which were not discussed by the parties in their negotiations. However, terms in the Purchase Contract which were not discussed by the parties are merely "proposals for addition to the contract." UCC @ 2-207(2). Banking and document delivery instructions are incidental to the transaction as a whole, and therefore, their inclusion did not materially alter the final agreement. UCC @ 2-207(2)(b). [*11] Midland's adoption of these immaterial terms would not mean its adoptio of all the additional terms.

Second, the arbitration clause constitutes a material alteration of the parties' agreement, because it would radically alter the means otherwise available to resolve disputes concerning the transaction. Without Midland's consent to arbitrate, Erlanger would be forced to sue in England or conceivably in New Jersey, the only forums which could possibly obtain jurisdiction over Midland. Because the agreement was made and performed in England, both the New Jersey and British courts would construe the agreement under English law. See Cockrell v. McKenna, 104 N.J.L. 592, 142 A. 20, 21 (1928); Ray v. Beneficial Fin. Co. of North Jersey, 92 N.J. Super. 519, 224 A.2d 143, 149 (N.J. Super. Ct Ch. Div. 1966). n5 The adoption of New York law would materially alter the righ of Midland, an English producer who performed and delivered in England, to the application of English law.

n5 English law would also govern an action brought in federal court in New Jersey. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

Further, the arbitration clause stipulates the City [*12] of New York as the arbitration forum. Since consent to adjudication in another jurisdiction materially alters the parties' prior agreement, this factor also supports a finding that the arbitration clause altered the agreement. PacAmOr Bearings, I[illegible] v. Molon Motors & Coil, Inc., 102 A.D.2d 355, 477 N.Y.S.2d 856, 858 (3d Dep't 1984); General Instrument Corp. v. Tie Mfg., Inc., 517 F. Supp. 1231, 123 (S.D.N.Y. 1981).

Finally, section 11 of Erlanger's Purchase Contract states that New York law governs the parties' agreement. Under New York law, an arbitration clause is a se material alteration of the parties' prior agreement. Marlene Indus., 45 N.Y.2d at 333; Schubtex. Inc. v. Allen Snyder, Inc., 49 N.Y.2d 1, 5-7, 399 N.E.2d 1154, 424 N.Y.S.2d 133, 135 (1979).

CONCLUSION

The arbitration clauses materially altered the parties' prior agreement, and were not accepted by Midland. Its petition for a stay of arbitration is granted

So ordered.

DATED: New York, New York
October 18, 1989