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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of the Arbitration

-between-

BELSHIP NAVIGATION, INC.,

Petitioner,

- and -

SEALIFT, INC.,

Respondent

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95 Civ. 2748 (RPP)

OPINION and ORDER

A P P E A R A N C E S

Counsel for Petitioner:

Keane & Marlowe
300 Park Avenue - 17th Floor
New York, NY 10022
By: Mary Ann C. Marlowe
Christopher Keane
Tel: 212-572-6210

Counsel for Respondent:

Burlingham Underwood
One Battery Park Plaza
New York, NY 10004-1484
By: Robert J. Zapf
James Savage
Tel: 212-422-7585

ROBERT P. PATTERSON, JR., U.S.D.J.

Petitioner Belship Navigation, Inc. ("Belship") petitions for an Order appointing an arbitrator on behalf of Respondent Sealift, Inc. ("Sealift") and compelling Sealift to proceed to arbitration pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 et seq.

Both parties move for costs and attorneys' fees.

BACKGROUND

The essential facts are not in dispute.

Belship, a Liberian corporation, time-charters the vessel M/V HUNTSVILLE ("the Vessel") from disponent owner[1] Seabon Holding Corp. ("Seabon"), a Panamanian corporation. Seabon in turn charters the Vessel from the Vessel's registered owner, Huntsville Navigation Company, Ltd. of Malta ("Huntsville"). Belship Am. Mem. at 2 n.1.

On September 23, 1994, Belship entered into a charter fixture (contract) for the Vessel with Sealift, a New York corporation, which arranged for Sealift to charter the Vessel for approximately thirty days commencing on October 6, 1994. Id. at 3. A one page "fixture recap" contained the description of the Vessel and the main terms of the agreement. Belship Pet. Ex. 1. The remaining terms were to be provided by Sealift's July 15, 1994 pro-forma charter for the ship A ALAMDAR. Belship Am. Mem. at 2; Belship Pet. Ex. 2.

The A ALAMDAR charter was set out on a New York Produce Exchange Time Charter form. Clause 17 of this form states:

> 17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decisions, or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be

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[1] "A 'disponent' shipowner does not own the vessel but leases or otherwise obtains it for the necessary shipping period." Farmland Industries, Inc. v. Grain Bd. of Iraq, 904 F.2d 732, 734 n.1 (D.C. Cir. 1990).

made a rule of the Court. . . .

Belship Pet. Ex. 2.

In accordance with the terms of their agreement, Belship tendered the Vessel to Sealift off the coast of Ethiopia on October 6, 1994. Sealift Reply to Pet. ¶ 6. The same day, Sealift arranged to wire transfer $84,418 to Belship. Sealift Reply Mem. at 3. The following day, Marine Midland Bank informed Sealift that the bank was obligated by the Office of Foreign Assets Control ("OFAC") to block the transfer because Huntsville "indicate[d] an interest in Cuba." Sealift Reply Mem. at 3-4; Belship Pet. Ex. 3. Sealift then advised Belship that because the Vessel was "owned by the government of Cuba," Sealift was prohibited by law from entering into a contract for the Vessel, and, consequently, the charter agreement was "null and void." Belship Pet. Ex. 4. OFAC eventually fined Sealift $8,441.87 for its involvement, stating that Huntsvilles' (both the Vessel and its registered owner) status as "specially designated national[s]" of Cuba had been available in the public records. Sealift Reply Mem. at 4-5; Sealift Reply to Pet. Exhibits C, H, I.

On December 29, 1994, Belship's counsel sent Sealift a demand for arbitration, seeking damages resulting from the cancellation of the contract. On April 20, 1995, Belship filed this petition to compel arbitration. It states that in arbitration it will seek quasi-contractual restitutionary relief. Belship Am. Mem. at 4-5.

DISCUSSION

The parties agree that the charter fixture was void ab initio pursuant to the Cuban Assets Control Regulations (CACR), 31 C.F.R. § 515.101 et seq. Belship Am. Mem. at 4-5; Sealift Reply to Pet. ¶ 4. 31 C.F.R. § 515.203(a) states:

> Any transfer . . . which is in violation of any provision of this part or of any regulation, ruling, instruction, license, or other direction or authorization thereunder and involves any property in which a designated national has or has had an interest . . . is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property.

"Transfer" is broadly defined to "include the making, execution, or deliverance of any . . . contract . . . ." 31 C.F.R. § 515.310.

Belship argues that under the Federal Arbitration Act, 9 U.S.C. § 1 et seq., the arbitration agreement contained within the void contract is nevertheless valid and enforceable and that arbitration should be compelled pursuant to 9 U.S.C. § 206. 9 U.S.C. § 4 states in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . .

In Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395

(1967), the Supreme Court instructed that an arbitration clause be treated as conceptually "separable" from the rest of the agreement. Under § 4 of the FAA, the role of the court is to "consider only issues relating to the making and performance of the agreement to arbitrate." Id. at 404. The court must order the parties to proceed to arbitration once it is satisfied that "the making of the agreement for arbitration . . . is not in issue." Id. at 403. Even a claim that the contract was induced by fraud, absent an allegation that the arbitration agreement itself was fraudulently induced, is insufficient to avoid arbitration. Id. at 403-404.[2]

The application of Prima Paint requires a two step determination: (1) whether the parties have agreed to arbitrate, and (2) if they have, whether the scope of the arbitration agreement encompasses the asserted claims. See David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 249 (2d Cir. 1991), cert. dismissed, 501 U.S. 1267 (1991). Arbitration may not be compelled unless both conditions are met because an arbitration agreement is inherently contractual, and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986) (citations omitted); see also Interocean Shipping v. National

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[2] For this reason, even if Belship fraudulently induced Sealift into entering into the agreement by hiding the Vessel's Cuban interest, as Sealift suggests, Sealift Reply Mem. at 2-3, this fraudulent inducement alone is insufficient to defeat Belship's petition. See Prima Paint, 388 U.S. at 403-404

Shipping and Trading Corp., 462 F.2d 673, 676 (2d Cir. 1972).

Although Sealift does not deny entering into the charter containing the arbitration agreement, it contends that it should not be compelled to arbitrate because (1) the scope of the arbitration clause does not cover the instant dispute because the underlying charter is void, (2) the arbitration agreement, contained within a contract void ab initio, is itself void and unenforceable, and (3) enforcement of the arbitration agreement would violate the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, (Dec. 29, 1970) ("the Convention"). These arguments will be addressed in turn.

1. The Scope of the Arbitration Agreement

The parties dispute the scope of the arbitration agreement. It is undisputed that the parties entered into an agreement to arbitrate "any disputes[s]" arising between the "Owners and the Charterers." Belship claims that since "Charterer" refers to Sealift and "Owner" to Belship, the current dispute between Belship and Sealift must necessarily fall within the scope of this broad clause.

Sealift argues that because the charter agreement is void ab initio, a charter never existed, and thus Sealift was never a "Charterer." Therefore, it is not bound by an arbitration agreement calling for the arbitration of "any disputes between Owners and the Charterers."

Sealift relies on Pollux Marine Agencies, Inc. v. Louis

Dreyfus Corp., 455 F. Supp. 211 (S.D.N.Y. 1978). Pollux involved a dispute over the same clause at issue in the instant case, Clause 17 of the New York Produce Exchange Time Charter form. The Court held that the clause was not broad enough to cover disputes about the very existence of the charter itself, stating that the use of the word "Charterers" presupposed the existence of a charter and necessarily implied that the existence of the charter itself was not one of the potential disputes subject to arbitration. Id. at 218.

Pollux is distinguishable from the case at bar. In Pollux, the parties disputed whether the essential terms necessary for a valid contract had ever been agreed upon, i.e., whether a "meeting of the minds" had occurred and an agreement had been reached. The issue before the court was who should determine if this "meeting" had occurred, an arbitrator or the court. In the instant case, the parties do not dispute entering into a comprehensive agreement, including an agreement to arbitrate their disputes.

Sealift argues that the use of "Charterers" within the arbitration clause indicates an intent to limit the scope of the clause to disputes where the underlying charter is valid. Despite its semantic appeal, this argument is unpersuasive. The substance of the parties' agreement is contained within a one page "fixture recap," which includes a description of the Vessel, the delivery date, and other main terms of the agreement. As indicated on the "recap," the other terms of the contract,

including the arbitration clause, were to be provided by Sealift's July 1994 charter for another ship, the A ALAMDAR. This practice of agreeing on the main terms of a charter fixture and referring to an entirely separate charter for the remaining terms is apparently not uncommon. See, e.g., Pollux 455 F. Supp. at 214.

The A ALAMDAR charter was a nine page document, the three page New York Produce Exchange Time Charter form and six pages of riders. Throughout the document, "Owners" and "Charterers" is used to refer to the parties to the agreement. It is likely that the term "Charterers" is merely shorthand for the party hiring the boat from its owner, rather than an attempt to limit the scope of the arbitration agreement. This interpretation gains credence when it is considered that the same contract may be used multiple times for different ships and different parties, in which case the use of the terms "Charterers" and "Owners" is perhaps the best way to clearly identify the parties.

In addition, when attempting to determine the scope of an arbitration clause, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, . . . [including] . . . the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hospital v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983). Arbitration "should be compelled 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that

covers the asserted dispute.'" David L. Threlkeld & Co., 923 F.2d at 250 (citations omitted). This presumption tips the balance of interpretation in favor of construing "any dispute between Owners and the Charterers" as "any dispute between Belship and Sealift." Therefore, the current dispute falls within the scope of the arbitration clause.

2. The Validity and Enforceability of the Arbitration Agreement

Sealift contends that since the charter agreement is void ab initio, the arbitration agreement contained therein must also be void ab initio. Relying on Pollux, Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998 (11th Cir. 1986), Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136 (9th Cir. 1991), and PMC Inc. v. Atomergic Chemetels Corp., 844 F. Supp. 177 (S.D.N.Y. 1994), Sealift claims that Prima Paint addresses only contracts that are voidable, not contracts that are void. However, in the cases cited by Sealift, there were disputes as to whether an agreement had ever been reached. In Pollux and in PMC, there were disputes as to whether a "meeting of the minds" had occurred. Pollux, 455 F. Supp. at 214; PMC, 844 F. Supp. at 180; see also, Interocean, 462 F.2d at 676-677 (arbitration clause not separable if contract never agreed to). In Cancanon, the party alleged that the contract had never been formed because fraud in factum made assent to the contract impossible. Cancanon, 805 F.2d at 1000. In Three Valleys, the municipality (Three Valleys) claimed that the contract's signatory had no authority to bind it. Three Valleys, 925 F.2d at 1139-1142.

even if the rest of the contract is invalid. Matterhorn, 763 F.2d at 869. As long as one party's agreement to arbitrate is supported by the other's, the agreements supply their own consideration, "so objections to other parts of the contract, based on fraud or unconscionability or mistake or whatever, need not spill over to the arbitration clause." Id.; see also Teledyne, Inc. v. Kone Corp, 892 F.2d 1404, 1410 (9th Cir. 1989) (Prima Paint requires "an independent challenge to the arbitration clause, rather than a challenge to the arbitration clause which must rise or fall with a challenge to the contract as a whole.")

Sealift's reliance on several state law cases to support its proposition that the arbitration clause falls with the contract is misplaced since these cases do not involve the FAA and thus are not relevant to the current dispute.

The parties, both experienced commercial corporations, agreed to submit their disputes to arbitration rather than to the courts. Both the parties' intent to arbitrate disputes as manifested in the arbitration clause and the presumption in favor of arbitration, see, e.g., Moses H. Cone Memorial Hosp., 460 U.S. at 24-25, are best satisfied by holding the arbitration clause separable from the void charter, and therefore valid and enforceable.

3. The United Nations Convention

Sealift contends that even if the arbitration agreement is valid under Chapter 1 of the FAA, 9 U.S.C. §§ 1-16, enforcement

The rationale for finding the arbitration agreements inseparable in the above cases is the severe "bootstrapping" problem that would occur if a party was forced to arbitrate the issue of whether they had actually agreed to let an arbitrator decide any disputes between the parties. See Matterhorn, Inc. v. NCR Corp., 763 F.2d 866 (7th Cir. 1985) (Posner, J.). No such bootstrapping problem exists in the instant case. Sealift does not dispute the fact that the parties reached an overall agreement containing an agreement to arbitrate, nor does it argue that it was deceived or coerced into agreeing to the arbitration clause. As acknowledged at oral argument, Sealift accepted tender of the Vessel and, until the funds transfer was blocked, performed as if the entire contract was valid.

Although the Second Circuit has not ruled specifically on the separability of arbitration agreements from contracts void ab initio in their entirety because of illegality, other circuits favor separability when the contract is void ab initio. The Fifth Circuit has held that even if a contract is void ab initio, if the making of the arbitration agreement is not called into question, then the arbitration agreement contained within the void contract remains separate and enforceable. Mesa Operating Ltd. v. Louisiana Intrastate Gas Corp., 797 F.2d 238, 244 (5th Cir. 1986) (contract void ab initio because of statutory violation); see also, Timberton Golf, L.P. v. McCumber Const., Inc., 788 F. Supp. 919, 922 (S.D. Miss. 1992). The Seventh Circuit has stated that an arbitration agreement may be valid

would violate the Convention, adopted and codified in Chapter 2 of the FAA, 9 U.S.C. §§ 201-208. The dispute between Belship and Sealift is governed by the Convention because Belship, a Liberian corporation, is not a citizen of the United States. 9 U.S.C. § 202.

Sealift argues that Article II(3) of the Convention forbids enforcement of the arbitration agreement because the charter is null and void. Article II(3) states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer to parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

(emphasis added). 9 U.S.C. § 201, T.I.A.S. No. 6997 art. II(3). An "agreement" includes an arbitration clause contained within a contract. Id. art. II(2).

Because the charter is null and void, argues Sealift, the arbitration agreement is null and void as well. This argument is without merit. Article II(3) of the Convention merely mandates that the courts of a nation governed by the Convention refer the parties to arbitration unless it determines that the arbitration agreement is "null and void." Id. art. II(3). "[N]ull and void" must be construed narrowly so as to further the Convention's goal of promoting the enforcement of arbitration agreements. Antco Shipping Co. v. Sidermar S. p. A., 417 F. Supp. 207, 216 (S.D.N.Y. 1976), citing Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969, 974 (2d

Cir. 1974).

Enforcement of the arbitration agreement between Belship and Sealift does not conflict with Chapter 2 of the FAA or with the Convention because the arbitration agreement is not null and void. Pursuant to 9 U.S.C. § 208, Chapter 1 of the FAA applies to actions brought under Chapter 2 to the extent that Chapter 1 does not conflict with Chapter 2 or the Convention. 9 U.S.C. § 208; Parsons, 508 F.2d at 973. When determining the validity and enforceability of an arbitration agreement governed by Chapter 2 of the FAA, the court uses the same rules used to determine the "interpretation, construction, validity, revocability and enforceability" of an arbitration agreement governed by Chapter 1. See, e.g., Beromun Aktiengesellschaft v. Societa Industriale Agricola "Tresse" Di Dr. Domenico E Dr. Antonio Dal Ferro, 471 F.Supp 1163, 1169 (S.D.N.Y. 1979); Genesco Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir. 1987). In addition, the presumption in favor of arbitration is even stronger in the context of arbitration agreements governed by the Convention because the goal of the Convention is to promote the enforcement of arbitral agreements and thereby facilitate international business transactions on the whole. David L. Threlkeld & Co., 923 F.2d at 248, 250. As discussed in Section 2, supra, the arbitration agreement found in Clause 17 of the pro-forma charter is valid and enforceable under Chapter 1 of the FAA, even though the charter fixture itself is null and void. Therefore, under Chapter 2 of the FAA, the arbitration agreement is separable,

valid, and enforceable.

Sealift also argues that enforcement of the arbitration agreement would be contrary to U.S. public policy as articulated in the Cuban Assets Control Regulations. Article V(2)(b) of the Convention allows a nation to refuse enforcement of an arbitration award if enforcement would be contrary to that nation's "public policy." 9 U.S.C. § 201, T.I.A.S. No. 6997 art. V(2)(b). Assuming, arguendo, that this provision allows a court to refuse to enforce an arbitration agreement, public policy still mandates enforcement of the agreement. "Public policy" and "national policy" are not synonymous. Parsons, 508 F.2d at 974. Although "national policy" prohibits dealing with Cuba, the "public policy" exception in the Convention "was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.'" Id. Instead, "public policy" is best served by promoting the "supra-national" goal of the Convention, promoting the enforcement of international arbitration agreements. David L. Threlkeld & Co., 923 F.2d at 248, 250. A "parochial refusal" to enforce an arbitration agreement would frustrate this purpose, therefore, a court should compel arbitration even if the arbitrator could make a ruling that an American court could not. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629-631 (1985). "Public policy" should be invoked to bar enforcement only when enforcement would "violate the forum state's most basic notions of morality and justice." Parsons, 508 F.2d at 974; see also

National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 808, 819-820 (D. Del. 1990) (refusing to bar enforcement of an arbitration award in favor of Libyan company despite sanctions against Libya). OFAC has granted a license allowing Belship to proceed to arbitration. Belship Pet. Ex. 5. Any award that Belship might recover through arbitration would be placed in a "blocked" interest bearing account until relations with Cuba improve to the point where the funds may be released to Belship. Allowing arbitration to proceed will hardly violate the United States' "most basic notions of morality and justice."

CONCLUSION

For the reasons stated above, Belship's motion to compel arbitration is granted. Sealift is ordered to appoint an arbitrator within 30 days and to proceed to arbitration pursuant to 9 U.S.C. § 206 and the terms of the parties' agreement.

Both parties' motions for attorneys' fees are denied.

IT IS SO ORDERED.

Dated: New York, New York
July 17, 1995

Robert P. Patterson, Jr.
U.S.D.J.