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US 245

NATIONAL MATERIAL TRADING

v.

M/V KAPTAN CEBI, ETC., ET AL.

United States District Court, District of South Carolina (Charleston Division in Admiralty), March 13, 1997

Nos. 2:95-3673-23, 2:96-0095-23 and 2:96-3288-23

BILLS OF LADING — 158. Charter or B/L — CHARTER — 24. Actions and Arbitrations.

A B/L which states that "[a]ll terms and conditions of liberties and exceptions of the Charter-Party dated as overleaf including the Law and Arbitration Clause are incorporated herewith," is specific enough to provide notice that the charter party's arbitration clause was incorporated, especially since the holder's representative signed the B/L on the same page with this language. Therefore, the holder of the B/L is bound by the C/P arbitration clause.

ARBITRATION — 125. Failure to Arbitrate, Waiver — CHARTER — 24. Actions and Arbitrations — PRACTICE — 21. Security.

A letter of undertaking issued by the vessel's P&I Club, without prejudice to the vessel's rights and defenses, does not waive the vessel's right to demand arbitration under the C/P arbitration clause of cargo damage claims, even though the letter obligates the ship owner to make an appearance in court on behalf of the vessel.

ARBITRATION — 111. Agreement to Arbitrate Future Disputes.

A federal court cannot enforce the arbitration clause in a contract of sale between a shipper and receiver of cargo if the contract refers to a forum for arbitration which does not exist (Chamber of Commerce and Industry of Switzerland). Because recourse cannot be had to a nonexistent forum, the clause is null and void.

ARBITRATION — 121. Federal Arbitration Act — 122. State Arbitration Acts.

Charter arbitration clause calling for arbitration in London is enforceable under §2 of the Federal Arbitration Act despite a South Carolina statute which denies enforceability to an arbitration agreement calling for arbitration outside the state with respect to causes of action which would otherwise be triable in South Carolina.

BILLS OF LADING — 171. Damage to Cargo While in Custody, Storing and Warehousing — MARINE INSURANCE — 29. Protection and Indemnity; Liability Policies — NEGLIGENCE — 12. Breach of Duty — SURVEYORS — Employing Insurer's Liability for Negligence.

A P&I Club, which engaged a marine surveyor to minimize cargo damage which the club would cover could be liable for the surveyor's negligence and negligent misrepresentation in handling and discharging the damaged cargo, on respondeat superior principles. The motion to dismiss of the surveyor and the club,

("GSC"), Georgetown Industries, Inc., and NMT seeking a declaration of the rights and obligations under an Open Marine Cargo Policy covering the cargo of direct reduced iron ore (DRI). On March 8, 1996, Tang/NMT filed an answer and counterclaim in the declaratory judgment action and further cross claimed against GSC. On the same date, NMT amended its complaint in the cargo action against the vessel and added Kaptan Demir Celik Endustrial v Ticaret A.S. ("Kaptan Demir"), Pegasus Denizcilikas A.S. ("Pegasus"), Concept Carriers GmbH & Co. KG ("Concept Carriers"), and Oskmet, S.A. ("OSKMET") as *in personam* defendants ("Vessel Interests"). Also on March 8, 1996, NMT filed as third-party plaintiff a complaint against the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd. ("U.K. P&I Club"), D.B. van der Staaij ("van der Staaij"), and OEMK-OSKOL Electrometallurgical ("OEMK") for loss and/or damage to the DRI cargo. Kaptan Demir and Pegasus entered their answers to the amended complaint in the cargo action on March 28, 1996, and asserted an arbitration provision as an affirmative defense.

GSC filed an answer and counterclaim in the declaratory judgment action on March 20, 1996, and answered the cross-claim of NMT on April 22, 1996. On July 22, 1996, the Vessel Interests moved to dismiss the third party complaint in the declaratory judgment action or to stay that complaint pending arbitration in London. On the same date, the Vessel Interests also moved to dismiss or stay the underlying cargo action pending arbitration in London. Likewise, OSKMET moved on July 22, 1996, to stay the underlying cargo action pending arbitration in Switzerland. Battery Creek Stevedoring moved to intervene in the original cargo action on July 26, 1996, and later moved to intervene in the declaratory judgment action on August 2, 1996. NMT filed a third party summons and complaint on December 27, 1996, against SSA/Ryan-Walsh in the declaratory judgment action.

The Vessel Interests moved to strike GSC's jury trial demand in the declaratory judgment action. Plaintiff later made a similar motion. NMT, as defendant in the declaratory judgment action, moved for partial summary judgment against the plaintiff, and for partial summary judgment against GSC.

The third action was brought by GSC on October 28, 1996, as a diversity matter alleging breach of contract by Kaptan Demir, Concept Carriers, et al. Concept Carriers made a motion to dismiss or in the alternative to stay that matter pending arbitration. Kaptan Demir, Pegasus, the U.K. P&I Club, Jarrett Kirman & Willems, and D.B. van der Staaij also made a motion to dismiss or in the alternative to stay.

II. Background

These suits arise from the import of a bulk cargo of DRI, which are iron pellets used in the steel making industry. The DRI was manufactured in Russia by OEMK and sold to OSKMET, a Swiss company, which in turn sold it to NMT, an American company. OSKMET was responsible under its contract with NMT for arranging transport of the cargo from Russia to the United States. OSKMET chartered the *Kaptan Cebi*, a Turkish ship owned by Kaptan Demir and managed by Pegasus, both Turkish companies. The ocean transport involved multiple charter-parties, which is not unusual in international bulk shipments. OSKMET subchartered the ship from Concept Carriers using a standard form (GENCON) charter dated October 5, 1995, at Lugano, Switzerland. Concept Carriers had chartered the vessel from Kaptan Demir using a similar GENCON charter form, also dated October 5, 1995. Both charter parties contain similar arbitration clauses requiring "all disputes" arising out of the charters to be arbitrated in London according to English law.

The cargo was loaded at Kerch, Russia on October 19-21, 1995. The "F.I.O." terms of the charters provided that the charterers, and not the vessel owner, were responsible for the loading and discharge of the cargo. The DRI cargo was loaded in all four of the ship's cargo holds.

After the cargo was loaded on October 21, 1995, the ship's master issued and delivered to OEMK, as the shipper, an ocean bill of lading consigned "to order of United Overseas Bank," and identifying NMT as the "notify party," the intended receiver of the cargo. Upon purchasing the cargo of DRI, NMT became the assignee of the bill of lading, and NMT acquired title to the cargo sometime prior to November 3, 1995. On that date there was a Sales Confirmation in which NMT contracted to sell the cargo of DRI to GSC "FOB Vessel Delivered Georgetown, South Carolina." The vessel was then diverted to Georgetown.

During the voyage, the ship experienced heavy weather, and on the morning of November 4, 1995, it was noted that the DRI cargo was overheating, allegedly due to contact with sea water, which had entered through the hatch covers. The ship arrived at the port of Georgetown on November 13, 1995, and a plan was devised for remediating the overheating of the cargo in hold number one, which was then safely discharged from the ship. Allegedly, the remaining cargo was not affected by the heating of the cargo in hold number one.

The various interests were present at the unloading of the ship, and there are substantial factual disputes about the acceptance and rejection of the

notice of the incorporation, the charter-party will be deemed to be incorporated. *Amoco Oil Co. v. M/T Mary Ellen*, 1982 AMC 1758, 1761, 529 F.Supp. 227, 229 (S.D.N.Y. 1981); *Midland Tar Distillers, Inc. v. M/T Lotos*, 1973 AMC 1924, 362 F.Supp. 1311 (S.D.N.Y. 1973); *Federal Insurance Company and Turbana Corp. v. M/V Audacia*, 1987 AMC 574 (E.D. Pa. 1986).

Courts find such incorporation and infer the holder of the bill's consent to the terms of the charter where the bill of lading identifies the charter-party by date and lists the names of the parties. *See Son Shipping Co. v. De Fossie & Tanghe*, 1952 AMC 1931, 199 F.2d 687 (2 Cir. 1952).

The bill of lading in this case is a "COGENBILL" edition 1994, commonly used and accepted in the industry. This specific form is, by its own direction, to be used with charter-parties. It is uncontroverted that the bill of lading was the contract of carriage in this case, and that NMT was not a signatory to either of the two charter party agreements. NMT, as purchaser from OSKMET, claims that it received the bill of lading in the mail and was an "innocent holder in due course of same." NMT maintains that the language used in the bill of lading does not identify the actual parties to the charter party supposedly incorporated. There is ample authority that before the terms of a charter-party may be incorporated into a bill of lading, the incorporation clause must be specific enough to provide the ultimate holder of the bill of lading with either actual or constructive knowledge of the specific charter party involved or its terms. *Otto Wolff Handelsgesellschaft v. Sheridan*, 1992 AMC 2646, 2648-49, 800 F.Supp. 1353, 1355-56 (E.D.Va. 1992); *State Trading Corp. of India, Ltd. v. Grunstad Shipping Corp.*, 582 F.Supp. 1523 (S.D.N.Y. 1984).

Whether or not the incorporation clause is sufficiently specific to mandate inclusion is a factual matter to be determined on a case by case basis. In this case NMT is specifically identified as the "notify party" on the face of the bill of lading, which expressly recites that "for conditions of carriage, see overleaf." The print is conspicuous and appears just above the signature block on the bill of lading. On the next page the Conditions of Carriage provide in the very first paragraph that "[a]ll terms and conditions of liberties and exceptions of the Charter-Party dated as overleaf including the *Law and Arbitration Clause*, are herewith incorporated." (Emphasis added). The signature of the agent representing NMT appears on the bottom of that same page. On the face of this particular bill of lading is typed in capital letters "FREIGHT PAYABLE AS PER CHARTER-PARTY," and in the space provided for designation of the particular charter-party appears

Parties shall not have recourse to legal proceedings." NMT argues that it had a dual relationship with OSKMET, one arising from the sales contract and the other having to do with the carriage of the cargo pursuant to OSKMET's role as charterer. OSKMET takes the position that the sales contract governs the entire relationship and that the arbitration clause is not limited in its application to disputes concerning the sale of goods, but governs any dispute between the parties.

NMT argues that if the Switzerland arbitration provision in the sales contract is enforced, NMT would be unjustly prejudiced by having to pursue the same claim in different forums against the various defendants. NMT further objects that the arbitration provision is unenforceable, because the court cannot give it an exact meaning because the place of arbitration is vague, indefinite or uncertain. The uncertainty arises because the contract provides for a referral to the Court of Arbitration at the Chamber of Commerce and Industry of Switzerland, when such a forum does not exist. OSKMET concedes that arbitration centers in Switzerland are set up by regions or cantons, and prays that the Chamber of Commerce and Industry of Lugano be substituted to reform a mutual mistake in the contract misnaming the place of arbitration. Construing the validity of arbitration clauses, it must be determined whether the essential terms are sufficiently definite, so as to enable the court to give them an exact meaning. *See Neeley v. Bankers Trust Company of Texas*, 757 F.2d 621 (5 Cir. 1985); *Hopper Furs, Inc. v. Emery Air Freight Corp.*, 749 F.2d 1261 (8 Cir. 1984). As previously explained, under the facts of this case a referral to the charter-party of October 5, 1995, was sufficiently definite that the court could give meaning to the arbitration clause. Applying the same standards as the court applied in construing the charter party arbitration clause, the OSKMET motion fails. There is no mutual mistake of fact as alleged; it is simply a unilateral mistake of OSKMET. That is to say, OSKMET named a court of arbitration that simply does not exist. The court can give no meaning to the arbitration terms, so as to validate this clause. It is undisputed that there are numerous chambers of commerce in Switzerland, presumably each of which has its own rules of evidence and procedure. This court has no authority to rewrite the contract by choosing which of those courts was intended by the arbitration agreement. If this court were to compel NMT and OSKMET to arbitration at the forum specified in the sales contract, the parties could not implement such an order because recourse cannot be had to a nonexisting forum. Consequently, no meaningful effect may be given to this clause, and it is declared null and void.

Finally, Georgetown Steel argues that "foreign arbitration" clauses are unenforceable under South Carolina Code §15-7-120(B), which provides that: "A provision in an arbitration agreement that arbitration proceedings must be held outside this state is not enforceable with respect to a cause of action, which, but for the arbitration agreement, is triable in the courts of this state." Simply stated, that code section is not controlling under the facts of this case. The Federal Arbitration Act, §2, provides that a:

> written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Supreme Court of the United States has had occasion, over the course of the past two years, to comment on the viability of arbitration clauses contained in commercial contracts. The court, in doing so, has clearly and unequivocally stated that, pursuant to the provisions of the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, such arbitration clauses are valid and enforceable. In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995); the Court reviewed the purposes of the Act. The Court stated:

> First the basic purpose of the Federal Arbitration Act is to overcome courts' refusal to enforce agreements to arbitrate. (citations omitted).
>
> . . . .
>
> Second . . . the Act "is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.' "

513 U.S. at 270-71 (citations omitted).

The court has subsequently ratified the Dobson decision in *M/V Sky Reefer, supra*; and in *Doctor's Associates, Inc. v. Paul Casarotto*, 517 U.S. ___, 116 S. Ct. 1652 (1996).

In the *Sky Reefer* case, the Supreme Court held that the provisions of the Carriage of Goods by Sea Act, 46 U.S.C.app. §1300 *et seq.* do not nullify contractual foreign arbitration clauses contained in maritime bills of lading.

V. Motions to Strike GSC's Request for a Jury Trial

Plaintiff Security Insurance and third-party defendant van der Staaij have each made a motion to strike defendant GSC's request for a jury trial. These motions are denied with leave to restore.

VI. Motions for Partial Summary Judgment*

* * *

VII. Motions to Dismiss

The U.K. P&I club and van der Staaij have made motions to dismiss, contending that they had no contract with NMT, and therefore, owed no duty to NMT upon which a claim could be based. NMT states that its third-party complaint alleges facts that would constitute an action in negligence, both directly against van der Staaij and against the U.K. P&I club pursuant to the doctrine of respondeat superior.

A claim for negligent misrepresentation can be made in the context of maritime law. *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co., Inc.*, 1988 AMC 207, 213, 826 F.2d 424, 428 (5 Cir. 1987) (allowing a party not in contractual privity to maintain a negligent misrepresentation claim against a cargo inspection company for faulty analysis of a cargo of oil); *see also Royal Embassy v. Ioannis Martinos*, 1986 AMC 769 (E.D.N.C. 1984). NMT alleges that van der Staaij was a marine surveyor appointed by the P&I club to minimize the loss for which the club would be liable as insurer of the vessel. NMT further alleges that as the marine surveyor appointed by and representing the P&I club, van der Staaij was intimately involved with and controlled most aspects of the cooling, separation, and discharge of the DRI cargo on the ship, and further, that the separation and discharge were negligently performed. The court therefore finds that NMT has alleged facts sufficient to put the U.K. P&I club and van der Staaij on notice of a claim for negligent misrepresentation. Accordingly, the motion to dismiss is denied.

Pegasus has also made a motion to dismiss. Pegasus argues that it was acting as an agent for a disclosed principal, i.e. the shipowner, and therefore, has no independent liability in the cargo damage case. However, NMT alleges that Pegasus was the operator or manager of the vessel and was negligent in the proper delivery of the cargo. An agent may be fully liable for its acts of negligence. *Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc.*, 1976 AMC 375, 381, 403 F.Supp. 562, 568 (S.D.N.Y. 1975) (holding that the managing agent, in its failure to provide a proper crew and to properly counsel in fire protection once it had assumed this managerial function, was negligent; and concluding that the vessel owner and its managing agent were jointly and severally liable to the cargo claimants);

* Discussion of summary judgment denial omitted — Eds.

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A P&I Club, which engaged a marine surveyor to minimize cargo damage which the club would cover could be liable for the surveyor's negligence and negligent misrepresentation in handling and discharging the damaged cargo, on respondeat superior principles. The motion to dismiss of the surveyor and the club,

based on their lack of a direct contract with the shipper, accordingly must be denied.

AGENTS AND BROKERS — 11. General Agents and Principles of Agency — 118. Liability and Rights of Agents — BILLS OF LADING — 1125. Carrier — 171. Damage to Cargo While in Custody, Storing and Warehousing — NEGLIGENCE — 12. Breach of Duty.

The fact that a ship manager was operating the vessel for a disclosed principal does not mean it could not be held liable directly to the shipper for cargo damage resulting from its own negligence. If the manager was responsible to make the vessel seaworthy and failed to do so, and the cargo was damaged as a result, an independent cause of action could exist against it, so that the manager's motion to dismiss the shipper's complaint must be denied.

F.A. Courtenay, Jr. (Courtenay, Forstall, Hunter & Fontana) and John Hughes Cooper *for Natl. Material Training*

Gordon D. Schreck (Buist, Moore, Smythe & McGee, P.A.) *for M/V Kaptan Cebi, et al.*

Marvin D. Infinger (Sickler & Boyd, P.A.) *for Concept Carriers, et al.*

Rivers T. Jenkins, III (Raley & Assocs., P.C.) and Martin F. Casey (DeOrchis & Partners) *for Oksmet S.A.*

Fred T. Lowrance, Michael S. Malloy and Kevin A. Dunlap (Parker, Poe, Adams & Bernstein, L.L.P.) *for Georgetown Steel*

David Popowski and C. Douglas Wheat (Plavnicky, Wheat, Marshall & Goodson) *for Stevedoring Services of America*

Michael S. Seekings and G. Turner Perrow *for Battery Creek Stevedoring*

PATRICK MICHAEL DUFFY, D.J.:

This order is amended because the court inadvertently failed to specifically set forth the disposition of the motion to dismiss or stay pending arbitration filed by defendants Kaptan Demir, Pegasus, the U.K. P&I Club, Jarrett Kirman & Willems, and D.B. van der Staaij in case number 2:96-3288-23.

I. Introduction

The parties are before the court on various motions in three related cases arising from the same factual situation. This order disposes of the pending motions in each of the three cases.

National Material Trading ("NMT") filed the first action against The M/V *Kaptan Cebi, et al.*, on November 16, 1995, alleging cargo damage and praying for immediate arrest of the vessel. In lieu of arrest, NMT accepted as security a P&I Club Letter of Undertaking.

The second suit is a declaratory judgment action filed on January 11, 1996, by Security Insurance Company of Hartford ("Security Insurance"), *et al.* against Tang Industries ("Tang"), Georgetown Steel Corporation

("GSC"), Georgetown Industries, Inc., and NMT seeking a declaration of the rights and obligations under an Open Marine Cargo Policy covering the cargo of direct reduced iron ore (DRI). On March 8, 1996, Tang/NMT filed an answer and counterclaim in the declaratory judgment action and further cross claimed against GSC. On the same date, NMT amended its complaint in the cargo action against the vessel and added Kaptan Demir Celik Endustrial v Ticaret A.S. ("Kaptan Demir"), Pegasus Denizcilikas A.S. ("Pegasus"), Concept Carriers GmbH & Co. KG ("Concept Carriers"), and Oskmet, S.A. ("OSKMET") as *in personam* defendants ("Vessel Interests"). Also on March 8, 1996, NMT filed as third-party plaintiff a complaint against the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd. ("U.K. P&I Club"), D.B. van der Staaij ("van der Staaij"), and OEMK-OSKOL Electrometallurgical ("OEMK") for loss and/or damage to the DRI cargo. Kaptan Demir and Pegasus entered their answers to the amended complaint in the cargo action on March 28, 1996, and asserted an arbitration provision as an affirmative defense.

GSC filed an answer and counterclaim in the declaratory judgment action on March 20, 1996, and answered the cross-claim of NMT on April 22, 1996. On July 22, 1996, the Vessel Interests moved to dismiss the third party complaint in the declaratory judgment action or to stay that complaint pending arbitration in London. On the same date, the Vessel Interests also moved to dismiss or stay the underlying cargo action pending arbitration in London. Likewise, OSKMET moved on July 22, 1996, to stay the underlying cargo action pending arbitration in Switzerland. Battery Creek Stevedoring moved to intervene in the original cargo action on July 26, 1996, and later moved to intervene in the declaratory judgment action on August 2, 1996. NMT filed a third party summons and complaint on December 27, 1996, against SSA/Ryan-Walsh in the declaratory judgment action.

The Vessel Interests moved to strike GSC's jury trial demand in the declaratory judgment action. Plaintiff later made a similar motion. NMT, as defendant in the declaratory judgment action, moved for partial summary judgment against the plaintiff, and for partial summary judgment against GSC.

The third action was brought by GSC on October 28, 1996, as a diversity matter alleging breach of contract by Kaptan Demir, Concept Carriers, et al. Concept carriers made a motion to dismiss or in the alternative to stay that matter pending arbitration. Kaptan Demir, Pegasus, the U.K. P&I Club, Jarrett Kirman & Willems, and D.B. van der Staaij also made a motion to dismiss or in the alternative to stay.

II. Background

These suits arise from the import of a bulk cargo of DRI, which are iron pellets used in the steel making industry. The DRI was manufactured in Russia by OEMK and sold to OSKMET, a Swiss company, which in turn sold it to NMT, an American company. OSKMET was responsible under its contract with NMT for arranging transport of the cargo from Russia to the United States. OSKMET chartered the *Kaptan Cebi*, a Turkish ship owned by Kaptan Demir and managed by Pegasus, both Turkish companies. The ocean transport involved multiple charter-parties, which is not unusual in international bulk shipments. OSKMET subchartered the ship from Concept Carriers using a standard form (GENCON) charter dated October 5, 1995, at Lugano, Switzerland. Concept Carriers had chartered the vessel from Kaptan Demir using a similar GENCON charter form, also dated October 5, 1995. Both charter parties contain similar arbitration clauses requiring "all disputes" arising out of the charters to be arbitrated in London according to English law.

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During the voyage, the ship experienced heavy weather, and on the morning of November 4, 1995, it was noted that the DRI cargo was overheating, allegedly due to contact with sea water, which had entered through the hatch covers. The ship arrived at the port of Georgetown on November 13, 1995, and a plan was devised for remediating the overheating of the cargo in hold number one, which was then safely discharged from the ship. Allegedly, the remaining cargo was not affected by the heating of the cargo in hold number one.

The various interests were present at the unloading of the ship, and there are substantial factual disputes about the acceptance and rejection of the

cargo, as well as the responsibility for the decisions to segregate and store various portions of the cargo. After discharge of the cargo was completed on November 16, 1995, NMT commenced its suit *in rem* threatening the arrest of the vessel, and a Letter of Undertaking was posted as security by the U.K. P&I Club, allowing the vessel to depart Georgetown on November 17, 1995. Several days thereafter, GSC reported additional heating of the discharged cargo which had been stored at its plant, resulting in a claim that the majority of the cargo was ultimately lost.

III. Arbitration Issues

NMT and GSC raise similar challenges to the validity and effect of the London arbitration clause in the charter-party. NMT argues: (1) the terms and conditions of the charter-party pursuant to which the *Kaptan Cebi* was employed were not validly incorporated into the ocean bill of lading because it was not sufficiently clear and because NMT did not have actual or constructive knowledge of the charter-party which was being incorporated; (2) the arbitration agreement is not binding upon NMT because it was not a signatory thereto; (3) the Vessel Interests waived the right to require arbitration by issuing security in the form of a Letter of Undertaking to avoid the arrest of the vessel; and (4) the arbitration agreement is not enforceable as to those causes of action alleged in NMT's third party complaint filed in the declaratory judgment action.

GSC argues: (1) that it is a nonsignatory to the arbitration agreement and thus, not bound by it; (2) that the Vessel Interests waived the right to demand arbitration by the issuance of a Letter of Undertaking; and (3) that the London arbitration provision is not enforceable because the bill of lading did not specifically refer to Georgetown as the discharge port.

The Vessel Interests contend that all of the arguments can be merged into three basic issues: (1) was there a validly incorporated arbitration clause in the governing contract of carriage, which is binding on those cargo claimants seeking recovery against the Vessel Interests; notwithstanding that such claimants were not signatories to the clause; (2) can NMT frustrate the arbitration by asserting cargo claims as third party tort claims in an unrelated declaratory judgment insurance dispute; and (3) was there a waiver by the Vessel Interests of the right to demand arbitration?

IV. Discussion

It is well established that where a bill of lading clearly refers to the charter-party to be incorporated, and the holder has actual or constructive

notice of the incorporation, the charter-party will be deemed to be incorporated. *Amoco Oil Co. v. M/T Mary Ellen*, 1982 AMC 1758, 1761, 529 F.Supp. 227, 229 (S.D.N.Y. 1981); *Midland Tar Distillers, Inc. v. M/T Lotos*, 1973 AMC 1924, 362 F.Supp. 1311 (S.D.N.Y. 1973); *Federal Insurance Company and Turbana Corp. v. M/V Audacia*, 1987 AMC 574 (E.D. Pa. 1986).

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Whether or not the incorporation clause is sufficiently specific to mandate inclusion is a factual matter to be determined on a case by case basis. In this case NMT is specifically identified as the "notify party" on the face of the bill of lading, which expressly recites that "for conditions of carriage, see overleaf." The print is conspicuous and appears just above the signature block on the bill of lading. On the next page the Conditions of Carriage provide in the very first paragraph that "[a]ll terms and conditions of liberties and exceptions of the Charter-Party dated as overleaf including the *Law and Arbitration Clause*, are herewith incorporated." (Emphasis added). The signature of the agent representing NMT appears on the bottom of that same page. On the face of this particular bill of lading is typed in capital letters "FREIGHT PAYABLE AS PER CHARTER-PARTY," and in the space provided for designation of the particular charter-party appears

the form language "FREIGHT PAYABLE AS PER CHARTER-PARTY dated. . . ." The date typed in is "05.10.95" (October 5, 1995).

Notice of the incorporation of the terms of a charter-party on this particular bill of lading is obvious and inescapable. That much would be obvious to even a stranger to the industry. In an effort to escape the consequences of the incorporation, NMT and Georgetown both attack the specificity as to which particular charter-party is incorporated. They are able to do this because there was a second charter-party which was also dated October 5, 1995. This argument is unavailing, however, for the following reasons: NMT acknowledges that it purchased the cargo from OSKMET, who was obligated to deliver it from Kerch, Russia to a U.S. port to be designated by NMT. NMT was also aware that OSKMET would be chartering a vessel for delivery of the cargo and was not a vessel operator. There was a charter-party agreement between Concept Carriers and OSKMET dated October 5, 1995, whereby OSKMET chartered the *Kaptan Cebi* to transport the cargo from Kerch to Georgetown. It is, therefore, apparent that this was the charter-party to which the ocean bill of lading was referring as the "Charter-Party dated October 5, 1995." Furthermore, the charter-party also listed the discharging port or place as "Georgetown." Since the sales confirmation by which NMT contracted to sell to Georgetown Steel was dated November 3, 1995, it may be reasonably inferred that the listing of final destination as Georgetown is further evidence of NMT's knowledge of which charter contract was being incorporated into the bill of lading.

Neither NMT nor Georgetown can claim prejudice from such a reading since both charter-parties contain similar arbitration clauses. There could have been no misunderstanding on the part of NMT that all disputes arising out of the charter were, under either charter-party, to be arbitrated in London.

NMT's contract with OSKMET provided that "[a]ll other transport conditions not provided for by this contract shall be regulated by terms of the covering charter-party" and further that "[t]he parties shall not have recourse to legal proceedings." In the *M/T Lotos*, case, *supra*, the district court found a valid incorporation when the bill of lading referred to the consignee and stated that it was "subject to all the terms, liberties and conditions of charter-parties. . . ."

Likewise, valid incorporations have been upheld when the language in the bill of lading identified the charter-party only by date. *Lowry & Co. v. S.S. Le Moyne D'Iberville*, 1966 AMC 2195, 2198, 253 F.Supp. 396, 398 (S.D.N.Y. 1966). It does not matter that a consignee or a holder of the bill of lading was not a signatory to the charter-party, nor does it matter

if that consignee did not receive the bill of lading until after commencement of the voyage. *Id.*; *Kanematsu Corp. v. M/V Gretchen W*, 1995 AMC 2957, 897 F.Supp. 1314 (D. Or. 1995). The court finds that the factual arguments put forth by NMT and Georgetown concerning the time and manner in which documents were received are unconvincing. *See Vimar Seguros Y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995); *Lucky Metals Corp. v. M/V Ave*, 1996 AMC 265 (S.D.N.Y. 1995). It has been consistently held that an arbitration clause in a charter-party may be enforced by the courts even though the charter party document is neither signed nor dated. *Valero Refining, Inc. v. M/T Lauberhorn*, 1987 AMC 2100, 2105, 813 F.2d 60, 64 (5 Cir. 1987).

It is clear from the documents in this case that it was the intent of the charter parties to arbitrate any disputes arising from the transportation of this cargo on the *Kaptan Cebi*.

The Fourth Circuit has recognized that "the adoption and implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . requires a federal policy in favor of arbitration to apply 'with special force in the field of international commerce.' " *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4 Cir. 1988) (citing *Mitsubishi Motors Corp. v. Soler Chrysler/Plymouth, Inc.*, 473 U.S. 614, 631 (1985)).

NMT next argues that the posting of a Letter of Undertaking as security in the *in rem* cargo claim constituted a waiver of the Vessel Interests' right to demand arbitration. The sole basis advanced by NMT in support of its proof of a waiver is the wording of the Letter of Undertaking itself. The court finds that this claim is totally without merit. The Letter of Undertaking by its express terms required only that the ship owner make an appearance on behalf of the vessel, which it has done in these lawsuits. It specifically and unequivocally provided that the letter was being issued "without prejudice to all rights or defenses which the vessel *Kaptan Cebi* and/or her owners may have, none of which is to be regarded as waived." The language of the letter is dispositive of that motion. *See Fisher v. A.G. Becker Paribas, Inc.*, 791 F.2d 691 (9 Cir. 1986); *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974 (4 Cir. 1985).

OSKMET seeks to enforce an arbitration clause contained in its sales contract with NMT. The contract provides that "Any disputes or differences that may arise out or in connection with this contract shall be referred to the Court of Arbitration at the Chamber of Commerce and Industry of Switzerland and settled in conformity with the rules and procedures of said Commission, and its award shall be final and binding on both Parties. The

Parties shall not have recourse to legal proceedings." NMT argues that it had a dual relationship with OSKMET, one arising from the sales contract and the other having to do with the carriage of the cargo pursuant to OSKMET's role as charterer. OSKMET takes the position that the sales contract governs the entire relationship and that the arbitration clause is not limited in its application to disputes concerning the sale of goods, but governs any dispute between the parties.

NMT argues that if the Switzerland arbitration provision in the sales contract is enforced, NMT would be unjustly prejudiced by having to pursue the same claim in different forums against the various defendants. NMT further objects that the arbitration provision is unenforceable, because the court cannot give it an exact meaning because the place of arbitration is vague, indefinite or uncertain. The uncertainty arises because the contract provides for a referral to the Court of Arbitration at the Chamber of Commerce and Industry of Switzerland, when such a forum does not exist. OSKMET concedes that arbitration centers in Switzerland are set up by regions or cantons, and prays that the Chamber of Commerce and Industry of Lugano be substituted to reform a mutual mistake in the contract misnaming the place of arbitration. Construing the validity of arbitration clauses, it must be determined whether the essential terms are sufficiently definite, so as to enable the court to give them an exact meaning. *See Neeley v. Bankers Trust Company of Texas*, 757 F.2d 621 (5 Cir. 1985); *Hopper Furs, Inc. v. Emery Air Freight Corp.*, 749 F.2d 1261 (8 Cir. 1984). As previously explained, under the facts of this case a referral to the charter-party of October 5, 1995, was sufficiently definite that the court could give meaning to the arbitration clause. Applying the same standards as the court applied in construing the charter party arbitration clause, the OSKMET motion fails. There is no mutual mistake of fact as alleged; it is simply a unilateral mistake of OSKMET. That is to say, OSKMET named a court of arbitration that simply does not exist. The court can give no meaning to the arbitration terms, so as to validate this clause. It is undisputed that there are numerous chambers of commerce in Switzerland, presumably each of which has its own rules of evidence and procedure. This court has no authority to rewrite the contract by choosing which of those courts was intended by the arbitration agreement. If this court were to compel NMT and OSKMET to arbitration at the forum specified in the sales contract, the parties could not implement such an order because recourse cannot be had to a nonexisting forum. Consequently, no meaningful effect may be given to this clause, and it is declared null and void.

Finally, Georgetown Steel argues that "foreign arbitration" clauses are unenforceable under South Carolina Code §15-7-120(B), which provides that: "A provision in an arbitration agreement that arbitration proceedings must be held outside this state is not enforceable with respect to a cause of action, which, but for the arbitration agreement, is triable in the courts of this state." Simply stated, that code section is not controlling under the facts of this case. The Federal Arbitration Act, §2, provides that a:

> written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Supreme Court of the United States has had occasion, over the course of the past two years, to comment on the viability of arbitration clauses contained in commercial contracts. The court, in doing so, has clearly and unequivocally stated that, pursuant to the provisions of the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, such arbitration clauses are valid and enforceable. In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995); the Court reviewed the purposes of the Act. The Court stated:

> First the basic purpose of the Federal Arbitration Act is to overcome courts' refusal to enforce agreements to arbitrate. (citations omitted).
>
> . . . .
>
> Second, . . . the Act "is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.' "

513 U.S. at 270-71 (citations omitted).

The court has subsequently ratified the Dobson decision in *M/V Sky Reefer, supra*; and in *Doctor's Associates, Inc. v. Paul Casarotto*, 517 U.S. ___, 116 S. Ct. 1652 (1996).

In the *Sky Reefer* case, the Supreme Court held that the provisions of the Carriage of Goods by Sea Act, 46 U.S.C.app. §1300 *et seq.* do not nullify contractual foreign arbitration clauses contained in maritime bills of lading.

V. Motions to Strike GSC's Request for a Jury Trial

Plaintiff Security Insurance and third-party defendant van der Staaij have each made a motion to strike defendant GSC's request for a jury trial. These motions are denied with leave to restore.

VI. Motions for Partial Summary Judgment*

* * *

VII. Motions to Dismiss

The U.K. P&I club and van der Staaij have made motions to dismiss, contending that they had no contract with NMT, and therefore, owed no duty to NMT upon which a claim could be based. NMT states that its third-party complaint alleges facts that would constitute an action in negligence, both directly against van der Staaij and against the U.K. P&I club pursuant to the doctrine of respondeat superior.

A claim for negligent misrepresentation can be made in the context of maritime law. *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co., Inc.*, 1988 AMC 207, 213, 826 F.2d 424, 428 (5 Cir. 1987) (allowing a party not in contractual privity to maintain a negligent misrepresentation claim against a cargo inspection company for faulty analysis of a cargo of oil); *see also Royal Embassy v. Ioannis Martinos*, 1986 AMC 769 (E.D.N.C. 1984). NMT alleges that van der Staaij was a marine surveyor appointed by the P&I club to minimize the loss for which the club would be liable as insurer of the vessel. NMT further alleges that as the marine surveyor appointed by and representing the P&I club, van der Staaij was intimately involved with and controlled most aspects of the cooling, separation, and discharge of the DRI cargo on the ship, and further, that the separation and discharge were negligently performed. The court therefore finds that NMT has alleged facts sufficient to put the U.K. P&I club and van der Staaij on notice of a claim for negligent misrepresentation. Accordingly, the motion to dismiss is denied.

Pegasus has also made a motion to dismiss. Pegasus argues that it was acting as an agent for a disclosed principal, i.e. the shipowner, and therefore, has no independent liability in the cargo damage case. However, NMT alleges that Pegasus was the operator or manager of the vessel and was negligent in the proper delivery of the cargo. An agent may be fully liable for its acts of negligence. *Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc.*, 1976 AMC 375, 381, 403 F.Supp. 562, 568 (S.D.N.Y. 1975) (holding that the managing agent, in its failure to provide a proper crew and to properly counsel in fire protection once it had assumed this managerial function, was negligent; and concluding that the vessel owner and its managing agent were jointly and severally liable to the cargo claimants);

* Discussion of summary judgment denial omitted — Eds.

see also Quinn v. Southgate Nelson Corporation, 121 F.2d 190 (2 Cir.), *cert. denied*, 314 U.S. 682 (1941). If Pegasus, as manager, was responsible to make the vessel seaworthy and failed to do so, an independent cause of action may exist. Accordingly, Pegasus' motion to dismiss is denied.

VIII. Motion to Intervene

Battery Creek's motions to intervene are hereby granted.

IX. Conclusion

The court finds that the provision for arbitration in the October 5, 1995 charter-party was incorporated into the ocean bill of lading and became part of the contract of carriage. That provision is therefore binding upon those parties making claims for damages for breach of the contract of carriage, just as they would be if the dispute were between just the charterer and the shipowner. The court need not determine whether each of the defendants could compel arbitration because a right to stay a proceeding pending arbitration is not always coextensive with the right to arbitrate. *Morrie Mages and Shirlee Mages Found. v. Thrifty Corp.*, 916 F.2d 402, 406-7 (7 Cir. 1990); *Cf. IDS Life Ins. Co. v. Sun America, Inc.*, 103 F.2d 524, 530 (7 Cir. 1996).

When arbitration is likely to settle questions of fact pertinent to nonarbitral claims, consideration of judicial economy and avoidance of confusion and possible inconsistent results militate in favor of staying the entire action. *American Home Assurance Co. v. Vecco Concrete Constr. Co., Inc.*, 629 F.2d 961, 964 (4 Cir. 1980). In such cases the stay can apply to parties who may play no role in the arbitration. *See, e.g., id.* Finally, arbitration was timely invoked by the defendants. *See Amoco Overseas Company v. S.T. Avenger*, 337 F.Supp. 589 (S.D.N.Y. 1975).

In the present case all of the claims arise from common factual allegations which arose out of the charter of the *Kaptan Cebi* to transport the DRI cargo from Russia to Georgetown, South Carolina. Under these circumstances all litigation should be stayed.

It is, therefore,

Ordered that National Material Trading and Georgetown Steel are compelled to arbitrate their claims in London, pursuant to the arbitration provision found in the second charter-party dated October 5, 1995, and that all actions are stayed pending arbitration;

Ordered, in case number 2:95-3673-23, that: Defendants' Motion to Stay Pending Arbitration is granted, Defendant Pegasus' Motion to Dismiss is

denied, Defendant OSKMET'S Motion to Stay Pending Arbitration in Switzerland is denied, and Battery Creek's Motion to Intervene is granted;

Ordered, in case number 2:96-0095-23, that: Third Party Defendant van der Staaij's Motion to Dismiss is denied, Third Party Defendant van der Staaij's Motion to Stay Pending Arbitration is granted, Third Party Defendant van der Staaij's Motion to Strike Georgetown Industries and Georgetown Steel's Jury Trial Demand is denied with leave to restore, Plaintiffs' Motion to Strike Jury Trial Demand is denied with leave to restore, Battery Creek's Motion to Intervene is granted, Defendant National Material Trading's Motion for Partial Summary Judgment Against Plaintiffs is denied with leave to restore, and Defendant National Material Trading's Motion for Partial Summary Judgment Against Georgetown is denied with leave to restore;

Ordered, in case number 2:96-3288-23, that: Defendant Concept Carriers' Motion to Stay Pending Arbitration is granted and Defendants Kaptan Demir's, Pegasus', the U.K. P&I Club's, Jarrett Kirman & Willems', and D.B. van der Staaij's Motion to Stay Pending Arbitration is granted.