

CIVIL ACTION NO. 98-1530 SECTION "D" (3)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT

LOUISIANA

1998 U.S. Dist. LEXIS 11175

July 15, 1998, Decided

July 15, 1998, Filed, Entered

DISPOSITION:

[*1] Plaintiff's Motion for Leave to File Second Amended Complaint for Declaratory Relief DENIED; plaintiff's Motion to Remand DISMISSED AS MOOT; defendants' Motion to Stay Litigation Pending Arbitration GRANTED.

CORE TERMS:

arbitration, coverage, subject matter jurisdiction, arbitration agreement, arbitrator, insurers, amend, agreement to arbitrate, legal relationship, et seq, signatory, pending arbitration, arbitration clause, primary coverage, subject matter, minster, arbitrability, connected, removal, confer, moot

COUNSEL:

For PHILLIPS PETROLEUM COMPANY, plaintiff: John Robert Martzell, Scott R. Bickford, Regina O. Matthews, Martzell & Bickford, New Orleans, LA.

For AMERICAN INTERNATIONAL MARINE AGENCY OF NEW YORK, INC., ESSAR,

defendants:

John F. Emmett, John Frederick Kessenich, Emmett, Cobb, Waits & Kessenich, New Orleans, LA.

For AMERICAN OFFSHORE INSURANCE SYNDICATE, ARAB INSURANCE GROUP (B.S.C.),

BALTICA, BERGENS SKIBSASSURANCEFORENING, CERTAIN UNDERWRITERS AT LLOYDS,

LONDON,

CHANCELLOR INSURANCE COMPANY LIMITED, CHRISTIANIA GENERAL INSURANCE

CORPORATION

OF NEW YORK, COLONIA INSURANCE COMPANY, COMMONWEALTH INSURANCE COMPANY,

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>
> DAI-TOKYO INSURANCE COMPANY (UK) LIMITED, EMPLOYERS MUTUAL CASUALTY
> COMPANY,
> EXCESS INSURANCE COMPANY LIMITED, GJENSIDIGE NORSK SKADEFORSIKRING, HANSA
> MARINE
> INSURANCE COMPANY LIMITED, INSURANCE COMPANY OF NORTH AMERICA (UK)
> LIMITED, LA
> REUNION FRANCAISE, S.A., LOMBARD CONTINENTAL INSURANCE PLC, LONDON MARKET
> MARINE
> CLAIMS, NATIONAL EMPLOYERS MUTUAL, NAVIGATORS[*2] INSURANCE COMPANY, NEW
> HAMPSHIRE INSURANCE COMPANY, NEW YORK MARINE & GENERAL INSURANCE COMPANY,
> NJORD
> INSURANCE COMPANY LIMITED, NORSKE TRITON, OMNIUM INSURANCE & REINSURANCE
> COMPANY, PARTICIPANT RUN-OFF LIMITED, PEARL ASSURANCE PUBLIC LIMITED
> COMPANY,
> PENNSYLVANIA LUMBERMENS MUTUAL INSURANCE COMPANY, POLARIS ASSURANCE AS,
> PROGRESSIVE CASUALTY INSURANCE COMPANY, QATAR GENERAL INSURANCE &
> REINSURANCE
> COMPANY, REPUBLIC INSURANCE COMPANY, SAMVIRKE SKADEFORSIKRING A/S, SCOR
> PARENT,
> SCOR HENRIJEAN, SCOR (UK) REINSURANCE COMPANY LIMITED, SIRIUS INSURANCE
> COMPANY
> LIMITED, SKANDIA INTERNATIONAL INSURANCE CORPORATION, SKANDIA UK INSURANCE
> PLC,
> SOMERSET MARINE INC, SPHERE DRAKE INSURANCE PLC, STOREBRAND ARENDAL A/S,
> STOREBRAND REINSURANCE COMPANY LIMITED, TERRA NOVA INSURANCE COMPANY
> LIMITED,
> AMERICAN INSURANCE COMPANY, THE, AMERICAS INSURANCE COMPANY, THE, ORION
> INSURANCE COMPANY PLC, THE, PRUDENTIAL ASSURANCE COMPANY LIMITED, THE,
> REINSURANCE CORPORATION OF NEW YORK, THE, SCOTTISH LION INSURANCE COMPANY
> LIMITED, THE, YASUDA FIRE & MARINE INSURANCE COMPANY OF

EUROPE LIMITED,
> THE,
> YORKSHIRE INSURANCE COMPANY LIMITED, THE, UNI MUTUAL
GENERAL INSURANCE
> COMPANY,
> UNITED FIRE AND CASUALTY COMPANY, [*3] WORCESTOR INSURANCE
COMPANY,
> SKADEFORSIKRINGSSSELKAPET VESTA A/S, ARENDAL
FORSKIRINGSSSELKAP A/S,
> COMMERCIAL
> UNION ASSURANCE CO. PLC, OCEAN MARINE INSURANCE CO. LTD,
INDEMNITY MARINE
> ASSURANCE CO. LTD., defendants: Mat M. Gray, III, Winston Edward Rice,
> Ella C.
> Goodyear, Marc Thomas Summers, Rice, Fowler, Kingsmill, Vance, Flint &
> Rodriguez, New Orleans, LA.
>
> For FIREMAN'S FUND INSURANCE COMPANY, MINSTER NO 3 A/C,
defendants: Mat M.
> Gray,
> III, Winston Edward Rice, Ella C. Goodyear, Rice, Fowler, Kingsmill,
> Vance,
> Flint & Rodriguez, New Orleans, LA.
>
> For CHRISTIANIA GENERAL INSURANCE CORPORATION OF NEW YORK,
defendant:
> Joseph
> Baker Guilbeau, Charles W. Farr, Juge, Napolitano, Leyva, Guilbeau & Ruli,
> Metairie, LA.
>
> For RELIANCE INSURANCE COMPANY, defendant: James M. Garner, Martha Y.
> Curtis,
> Dwayne C. Jefferson, McGlinchey Stafford P.L.L.C., New Orleans, LA.
>
> For ROYAL INDEMNITY COMPANY, defendant: Gregg Lindsey Spyridon, J. Nicole
> Heyman, Spyridon, Koch, Wallace & Palermo, L.L.C., Metairie, LA.
>
> For UNITED STATES FIRE INSURANCE COMPANY, defendant: Phillip W. Preis,
> Preis &
> Laborde, Baton Rouge, LA.
>
> For NORTHERN INSURANCE CO, LTD., THE, UNITED REINSURANCE
CORPORATION [*4]
> OF
> NEW YORK, NORGES BRANNKASSE MUTUAL INSURANCE COMPANY
(UNI), NEW YORK
> MARINE
> MANAGERS, INC., BISHOPSGATE INSURANCE COMPANY, NORTHERN
ASSURANCE CO.

> LTD.,
> movants: Mat M. Gray, III, Winston Edward Rice, Ella C. Goodyear, Rice,
> Fowler,
> Kingsmill, Vance, Flint & Rodriguez, New Orleans, LA.
>
> For UNITED STATES INSURANCE COMPANY, movant: Kirk A. Bergeron,
Hoffman,
> Sutterfield & Ensenat, Phillip W. Preis, Preis & Laborde, Baton Rouge, LA.
>
> For UNITED STATES INSURANCE COMPANY, movant: Louis G. Corsi, Landman
Corsi
> Ballaine & Ford PC, New York, NY.

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> JUDGES:
> A. J. McNamara.

> OPINIONBY:
> A. J. McNamara

> OPINION:

> Before the court is a Motion for Leave to File Second Amended Complaint
> for
> Declaratory Relief filed by plaintiff, Phillips Petroleum Company
> (Phillips).
> Certain defendants have filed memoranda in opposition. Phillips also has a
> Motion to Remand before the court and that motion is opposed by certain
> defendants. Certain defendants n1 have filed a Motion to Stay Litigation
> Pending
> Arbitration which is opposed by Phillips. All motions, set for hearing
> before
> the court on Wednesday, July 15, 1998, are before the court on briefs
> without
> oral argument.

> -----Footnotes-----

> ...
>
> n1 The following defendants have moved to stay litigation: American
> Offshore
> Insurance Syndicate, American Insurance Company, Americas Insurance
> Company,
> Arab Insurance Group (B.S.C.), Arendal Forsikringselskap A/S, Baltica,
> Bergens
> Skibassurancesforening, Bishopsgate Insurance Ltd., Certain ILU Companies,

- > Certain Underwriters at Lloyd's London, Christiania General Insurance
- > Corporation of New York, Colonial Insurance Company, Commercial Union
- > Assurance
- > Company, Commonwealth Insurance Company, Employers Mutual Casualty
- > Company,
- > Excess Insurance Company Limited, Fireman's Fund Insurance Company,
- > Fjensidige
- > Norsk Skadeforsikring, Hansa Marine Insurance Company Limited, Hansa
- > Marine
- > Assurance Company (UK) Limited, Indemnity Marine Assurance Co. Ltd.,
- > Insurance
- > Company of North America (UK) Limited, La Reunion Francaise (Hull & Co.),
- > La
- > Reunion Francaise S.A., Lombard Continental Insurance PLC, London & Hull
- > Maritime Insurance Company Limited, Minster No. 39 A/C (sued as minster
- > Insurance Company Limited), Navigators Insurance Company, New York Marine
- > Managers Inc., New York Marine & General Insurance Company, New Hampshire
- > Insurance Company, Njord Insurance Company Limited, Norges Brannkasse
- > Mutual
- > Insurance Company (UNI), Norske Triton, Northern Assurance Co. Ltd., The
- > Northern Insurance Co. Ltd., Ocean Marine Insurance Co. Ltd., Pennsylvania
- > Lumbermens Mutual Insurance Company, Polaris Assurance A/S, Progressive
- > Casualty
- > Insurance Company, The Prudential Assurance Company Limited, The
- > Reinsurance
- > Corporation of New York, Republic Insurance Company, Samvirke
- > Skadeforsikring
- > A/S, SCOR (Henrijean), SCOR (Parent), SCOR (U.K.) Reinsurance Company
- > Limited,
- > The Scottish Lion Insurance Company Limited, Sirius Insurance Company
- > Limited,
- > Skadeforsikringselskapet Vesta A/S, Skandia International Insurance
- > Corporation, Skandia International Insurance Company, Sphere Drake
- > Insurance
- > PLC, Storebrand Reinsurance Company Limited, Storebrand Arendal A/S, The
- > Threadneedle Insurance Company Limited, UNI Mutual General Insurance
- > Company,
- > Vesta Forsikring A/S (sued as Vesta A/S and Vesta (U.K.) Insurance Company
- > Limited), UNI Mutual General Insurance Company, United Fire and Casualty
- > Company, United Reinsurance Corporation of New York (sued as The
- > Reinsurance
- > Corporation of New York), Worcester Insurance Company, and The Yorkshire
- > Insurance Company Limited.
- >
- > -----End Footnotes-----
- > ---
- > [*5]
- >
- > PAGE 680

BACKGROUND

As a consequence of having been found 20% at fault in a multi-million dollar state court suit involving leakage from a tank car and its subsequent effects, Phillips has sought declaratory judgment in state court from a host of insurance companies which Phillips claims were providing excess coverage during the applicable period. A total of about 70 insurance carriers were named as parties/defendant in the original and first amended petitions which prayed for a finding of carrier liability to Phillips for judgments, costs, and related expenses in connection with the case captioned, In re New Orleans Tank Car Leakage Fire Litigation, 1998 U.S. Dist. LEXIS 11175, No. 87-16374 (Civ. Dist. Ct., Orleans Parish). Phillips sought coverage under the following six policies:

Policy Nos.	Eff. Dates	Extensions
MM 01-0333-86	09/1/86 - 09/1/87	9/1/87 - 12/1/87
MM 01-0334-86	09/1/86 - 09/1/87	9/1/87 - 12/1/87
MM 01-0419-87	12/1/87 - 12/1/88	9/1/86 - 12/1/87
MM 01-0420-87	12/1/87 - 12/1/88	9/1/86 - 12/1/87
MM 01-0378-89	12/1/89 - 12/1/90	9/1/86 - 12/1/89
# MM 01-0380-89	12/1/89 - 12/1/90	9/1/86 - 12/1/89 n2

-----Footnotes-----

n2 For ease of reference, where it is necessary to identify an individual policy, the last three digits prior to the inception year will be used. For example, the first listed policy will be identified as policy 333. The last policy listed, in bold type and marked by the # symbol, is of particular importance to these motions.

-----End Footnotes-----

[*6]

The 380 policy undisputedly has an arbitration clause and all agree that the

> inclusion of the defendants who are connected to this policy brings the
> case
> under federal court jurisdiction pursuant to the Convention on the
> Enforcement
> of Foreign Arbitral Awards. n3 Defendants thus removed the case on the
> basis of
> federal question jurisdiction. Phillips now seeks to amend its complaint
> to drop
> all claims under policy 380 and asks the court to remand the remaining
> claims to
> state court. n4 Phillips contends that the remaining policies contain no
> applicable arbitration clause and thus the claims should be resolved under
> state
> insurance law. Defendants contend that coverage under these five similar
> policies arises, if at all, from a policy section which does provide for
> arbitration.

>
> -----Footnotes-----
> ---

>
> n3 9 U.S.C. @ 201 et seq.

>
> n4 Phillips filed a Notice of Dismissal of those parties connected to
> policy
> 380 on June 2, 1998. Although this notice was filed prior to Phillips'
> receipt
> of answers from the various defendants, some answers had already been
> filed as
> of June 1, 1998. Consequently, Phillips' dismissal of these defendants
> required
> leave of court or consent of the adverse parties, neither of which was
> obtained.
> Fed. R. Civ. P. 15 (a). Those defendants named in Phillips' Notice of
> Dismissal,

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> who had already answered, are thus still parties to this suit.

> -----End Footnotes-----
> ---

> [*7]

> ANALYSIS

> I
> A. Subject Matter Jurisdiction Under the Convention > sin-caps

>
> Without subject matter jurisdiction, this court would be required to

- > dismiss
- > the case or remand to state court.
- >
- > The general rule is that the parties cannot confer on a federal court
- > jurisdiction that has not been vested in that court by the Constitution
- > and
- > Congress. This means that the parties cannot waive lack of
- > [subject-matter]
- > jurisdiction by express consent, or by conduct, or even by estoppel; the
- > subject
- > matter jurisdiction of the federal court's is too basic a concern to be
- > left to
- > the whims and tactical concerns of the litigants. n5
- >
- > Accordingly, this court addresses the propriety of its jurisdiction by
- > examining
- > the provisions of the federal arbitration statutes that triggered removal
- > of the
- > case to this court.

> -----Footnotes-----
 > ...

> n5 Marathon Oil Co. v. Ruhrgas, A.G., 145 F.3d 211, 1998 U.S. App.
 > LEXIS
 > 13358, 1998 WL 329842, *4 (5th Cir.) (citations omitted).

> -----End Footnotes-----
 > ...

- > [5] The Convention on the Recognition and Enforcement of Foreign Arbitral
- > Awards
- > n6 (the Convention) provides for [*8] original federal court jurisdiction
- > in
- > cases where the subject matter "relates to an agreement or an award
- > falling
- > under the Convention." n7 Further, the Supreme Court, in Moses H. Cone
- > Memorial
- > Hospital v. Mercury Construction Corp., n8 has stated that
- >
- > the Arbitration Act [into which the Convention is statutorily
- > incorporated]
- > establishes that, as a matter of federal law, any doubts concerning the
- > scope of
- > arbitrable issues should be resolved in favor of arbitration, whether the
- > problem at hand is construction of the contract language itself or an
- > allegation
- > of waiver, delay, or a like defense to arbitrability. n9
- >

> The reach of arbitration is thus long and courts broadly interpret
> language of
> arbitrability. n10

> -----Footnotes-----
> ...

> n6 9 U.S.C. @ 201 et seq.

> n7 9 U.S.C. @ 205.

> n8 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1982). "

> n9 103 S. Ct. at 941.

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> n10 The threshold question of whether subject matter "relates to an
> agreement
> under the Convention" is satisfied by the examination of four factors: (1)
> the
> agreement to arbitrate is in writing; (2) the agreement to arbitrate
> arises from
> a commercial legal relationship; (3) the agreement provides for
> arbitration in
> the territory of a Convention signatory; and (4) one or more of the
> parties to
> the agreement is not an American citizen. Sedco v. Petroleos Mexicanos
> Mexican
> National Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985).
is fun!
[Reprinted in Yearbook ...]

> -----End Footnotes-----
> ...

> [*9]

> B. Policy Provisions > sm capis

> To any extent that the 380 policy is involved in this case, an
> arbitration
> agreement exists and this court has original jurisdiction in the matter.
> The
> five remaining, similar policies generally provide for two coverage areas.
> The
> parties disagree as to which of the coverage areas control in this
> dispute: ...

> Section I

Section II

- > Onshore/Offshore Property Personal Injury Liability
- > Control of Well Property Damages Liability
- > Seepage & Pollution Advertising Liability
- > Removal of Debris Marine Liability
- > Replacement Costs Marine Liability
- > "All Risks" Redrilling & Removal of Debris
- > Making Wells Safe
- > Offshore Depreciation

> The defendant policies insure Section I events on an excess basis, over and above the primary coverage provided by specific underlying policies. Section II coverage makes no reference to any underlying policy. Section I (which expressly refers to "Seepage & Pollution"), in its "Terms and Conditions" section, states that it "follows the underlying policies as applicable, and is subject to all terms and conditions of the underlying policies" (except policy period, premium payment, and other inapplicable [*10] exceptions). The underlying policies are called "OIL/MAXI-OIL" and provide the primary coverage for Section I events. n11 (footnote omitted)

> The OIL/MAXI-OIL policy expressly provides for arbitration in London for any coverage disputes. Thus, if Phillips' claims fall under Section I of the defendant policies, because Section I is subject to terms and conditions providing for arbitration, this court would have jurisdiction under the Convention.

> -----Footnotes-----

> n11 "OIL" is "Oil Insurance Ltd." and is in essence a self-insurance company formed by big petroleum companies to cope with the high cost of insurance in their industry.

> -----End Footnotes-----

> Interestingly, while Phillips argues that Section II – which has no arbitration provision – applies to its claims, Section II's exclusions include the following:

> Notwithstanding anything to the contrary contained in this Policy, it is
> hereby

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> understood and agreed that this Policy shall not apply to: personal injury
> or
> bodily injury or loss of, damage to or loss of use of property directly or
> indirectly caused by [*11] seepage and/or pollution and/or contamination
> of
> air, land, water and/or any other property, however caused and whenever
> occurring n12 (footnote omitted)

> Thus, while Phillips argues that Section II alone applies to its claims,
> the
> specific policy language of that section may prevent Phillips recovery.
> n13 (footnote omitted)
> Some, if not all, defendant insurers contend that any claims of Phillips,
> if
> they are viable, arise under Section I. This court concludes that the
> dispute
> over section applicability, one of which clearly provides for arbitration,
> "relates to" an arbitration agreement and thus squarely confers
> jurisdiction in
> this court.

-----Footnotes-----

> n12 Policy 334, Section II, Exclusions (i)1 (attached as exh. B to
> Memorandum
> on Behalf of International Insurance Company, As Successor and Assuming
> Insurer
> for United States Fire Insurance Company on Policy No. MM-01-0334-86 in
> Opposition to Plaintiff's (1) Motion to Remand and (2) Motion to Amend,
> and in
> Support of Certain Defendants' Motion to Stay This Case).

> n13 Because this court finds it appropriate to stay the current
> proceedings
> pending arbitration, the court reaches no conclusion on this matter.

-----End Footnotes-----

> [*12]

> [5] Further, assuming arguendo that the court found no relevant arbitration
> provisions in any of the remaining policies and agreed to allow the

> plaintiff's
> dismissal of the policy 380 defendants, the remaining defendants have and
> would
> continue to pursue the policy 380 insurers for contribution and/or
> reimbursement. n14 These intertwined insurance packages have varying
> limits and
> triggering provisions. Efficiency dictates that the court not sever policy
> 380
> from the others.

> -----Footnotes-----

> n14 See Amended Answer, Cross-Claim and Request for Trial By Jury (Doc.
> No.
> 27 in the Record).

> -----End Footnotes-----

> [6] In summary, there is no doubt that the arbitration agreements referred
> to in
> these written policies arose from a commercial legal relationship among
> the
> insured and the various insurers. While the plaintiff is a United States
> Corporation, many of the defendant corporations are citizens of foreign
> nations.
> The arbitration agreement provides for arbitration in locales of
> Convention
> signatories. These parties' relationship to one another and the various
> [*13]
> policies clearly are covered by the Convention and thus federal
> jurisdiction is
> mandated. This court declines to allow the plaintiff to amend its
> complaint in
> an attempt to divest this court of jurisdiction that clearly existed at
> the time
> of removal; that denial thus moots plaintiff's Motion to Remand.

> Pursuant to the arbitration provisions in the policies at issue, the
> court

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> stays the current proceedings pending arbitration. Additionally, the court
> refers the matter to arbitration for determination of whether and to what
> extent
> the various policies are implicated by the judgment in Civil Action No.

> 87-16374
> (Civ. Dist. Ct., Orleans Parish). While counsel for certain underwriters
> has
> suggested that one arbitration proceeding is appropriate for resolution of
> the
> coverage disputes under the various policies, and while the court believes
> that
> a single proceeding would be more efficient to resolve the intertwining
> elements
> of coverage, the court does not wish to intrude on what may be the
> province of
> the arbitrator's discretion. Therefore, the court orders the parties to
> address
> by memoranda the following limited issues: (1) pursuant to this court's
> jurisdiction of the case under [*14] the Convention, does this court have
> authority to direct whether arbitration will proceed with one arbitrator
> for the
> entire dispute, or with a single arbitrator for each policy; and (2) if
> this
> court has the discretion to direct how arbitration will proceed, how
> should that
> discretion be exercised. Accordingly;
>
> IT IS ORDERED that plaintiff's Motion for Leave to File Second Amended
> Complaint for Declaratory Relief should be and is hereby DENIED;
>
> IT IS FURTHER ORDERED that plaintiff's Motion to Remand is DISMISSED AS
> MOOT;
>
> IT IS FURTHER ORDERED that defendants' Motion to Stay Litigation
> Pending
> Arbitration should be and is hereby GRANTED, ... 35
>
> IT IS FURTHER ORDERED that parties brief the limited issue discussed
> above
> and that such briefs be filed by Thursday, July 30, 1998, at 4:00 p.m.
>
> A. J. McNamara