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L.A.W. LIMITLESS, LLC, Petitioner, v. FR. LURSEN WERFT  
(GMBH) CO., Respondent.

98 Civ. 8433 (JSR)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT

NEW YORK

1999 U.S. Dist. LEXIS 986

February 2, 1999, Decided

February 3, 1999, Filed

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1999 U.S. Dist. LEXIS 986, \*

DISPOSITION:

[\*1] LAW's petition to compel arbitration granted.

CORE TERMS:

arbitrator, arbitration, contractual, designate, yacht, proposing,  
appoint,  
lapse, right to arbitrate, deadline, Federal Arbitration Act, Maritime  
Rules,  
necessary condition, failure to comply, immaterial, jointly, naming,  
mandatory arbitration, aforementioned, delivery, confirm, waived

COUNSEL:

For L.A.W. LIMITLESS, LLC, petitioner: Michael M. Gordon, Cadwalder  
Wickersham &  
Taft, New York, NY.

For FR. LURSEN WERFT (GMBH & CO.), respondent: Glen T. Oxton, Healy &  
Baillie,  
New York, NY.

JUDGES:

JED S. RAKOFF, U.S.D.J.

> OPINIONBY:  
> JED S. RAKOFF

> OPINION:

> MEMORANDUM ORDER

> JED S. RAKOFF, U.S.D.J.

> L.A.W. Limitless, LLC ("LAW") petitions the Court to compel arbitration  
> of  
> LAW's contractual disputes with Fr. Lurssen Werft (GMBH) Co. ("Lurssen").  
> On  
> January 19, 1999, the parties were orally advised that the Court would  
> grant the  
> petition. This Memorandum Order will formally confirm that advice and  
> briefly  
> state the reasons therefor.

> By a writing dated June 18, 1993 (the "Construction Agreement"),  
> Lurssen  
> contracted with one Jeffrey Epstein to construct a luxury yacht for a  
> corporation to be later designated (which turned out to be LAW). Section  
> 23 of  
> the Construction Agreement provided that any dispute "arising out of or  
> relating  
> to this Agreement" was to be referred to arbitration. Clause 23.3 of that  
> section stated that "The parties agree to designate and appoint a sole  
> Arbitrator . . . not later than sixty (60) days after execution [\*2] of  
> this  
> Agreement."

> The sixty-day period came and went without either party proposing an  
> arbitrator. Nonetheless, construction of the yacht went forward. On March  
> 27,  
> 1997, with construction virtually complete, the relevant parties entered  
> into a  
> further agreement (the "Assumption Agreement") specifying LAW as the  
> Epstein-designated corporation that would assume his responsibilities  
> under the  
> Construction Agreement and take delivery of the yacht. Among other things,  
> the  
> Assumption Agreement specifically and expressly reaffirmed Clause 23 of  
> the  
> Construction Agreement - without, however, making any reference to the  
> parties'  
> failure thus far to designate an arbitrator.

> Shortly after taking delivery of the yacht, LAW notified Lurssen of

> alleged  
>  
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>  
> defects in the delivered product; but Lurssen rejected these claims. On  
> March  
> 25, 1998, LAW proposed arbitration of these disputes. By letter dated  
> March 30,  
> 1998 Lurssen responded by proposing one Robert Walsh "as sole arbitrator"  
> "to  
> act in line with our contract." Affidavit of Darren K. Indyke, dated  
> November  
> 30, 1998, Exhibit F. No specific arbitrator was agreed upon, however,  
> before the  
> relationship between the parties grew acrimonious [\*3] and the  
> discussions  
> ceased.

>  
> By letter dated October 16, 1998, Lurssen, for the first time, took the  
> position that LAW had waived its right to arbitrate the disputes over the  
> alleged deficiencies in the yacht because LAW had failed to propose an  
> arbitrator within 60 days of the execution of the Construction Agreement.  
> By  
> letter dated November 10, 1998, Lurssen went still further and claimed  
> that LAW  
> was without any contractual remedy whatever for the alleged deficiencies  
> because, having agreed (directly or through its contractual predecessor  
> Epstein)  
> that all contractual disputes must be submitted to arbitration, it had  
> failed to  
> preserve that right by proposing an arbitrator before the 60-day deadline.  
> In  
> response, LAW commenced this action.

*start here*  
>  Quite aside from the inequity of Lurssen's position, it has no basis in  
> law.  
> Specifically, under New York law (which governs the contract here in  
> issue),  
> conditions precedent to otherwise obligatory arbitration requirements are  
> not  
> favored and are not to be found where, as here, they are not clearly  
> evinced by  
> the contract. See e.g., *De Vito v. Hempstead China Shop*, 38 F.3d 651, 654;  
> *Irving Trust Corporation v. Nationwide Leisure Corporation*, [\*4] 711 F.  
> Supp.  
> 166, 168 (S.D.N.Y. 1989); *Toyomenka Pacific Petroleum, Inc. v. Hess Oil*  
> *Virgin*  
> *Islands Corp.*, 771 F. Supp. 63, 67 (S.D.N.Y. 1991); *Oppenheimer & Co. v.*

- > Oppenheim, Appel, Dixon, & Co., 86 N.Y.2d 685, 691, 660 N.E.2d 415, 636
- > N.Y.S.2d
- > 734 (Ct. App. 1995); Uniroyal, Inc. v. Heller, 65 F.R.D. 83, 93 (S.D.N.Y.
- > 1974).
- > Here, nothing in the plain language of Section 23 suggests that the
- > parties
- > regarded compliance with the 60-day selection period as a necessary
- > condition
- > precedent to binding arbitration, failure to comply with which would waive
- > all
- > contractual remedies. See In re Salomon Inc. Shareholders' Derivative
- > Litigation
- > , 68 F.3d 554, 560 (2d Cir. 1995) (a "mechanical breakdown," such as "a
- > lapse in
- > time in naming of the arbitrator," is immaterial). This is in notable
- > contrast
- > to other sections of the Construction Agreement, such as Section 24, where
- > the
- > contract effectively states that failure to meet certain other deadlines
- > is
- > material and dispositive.
- >
- > [2] Moreover, far from making a party's failure to timely designate an
- > arbitrator
- > a waiver of its right to arbitrate, Section 23 provides in effect a
- > procedure
- > for selection of an arbitrator in the event the deadline lapses.
- > Specifically,
- > Clause [\*5] 23.1 states that "The Arbitration shall be conducted in New
- > York
- > City under the rules of the Society of Maritime Arbitrators ["Maritime
- > Rules"],"
- > and Section 10 of the Maritime Rules provides that "if a party fails to
- > appoint
- > its Arbitrator within the time frame specified in the arbitration
- > agreement, the
- > party demanding arbitration may resort to Section 5 of [the Federal
- > Arbitration
- > Act, 9 U.S.C. @ 1, et seq.],"
- > which provides that "if a method [for
- > selecting
- > an arbitrator] be provided [by contract] and any party shall fail to avail
- > himself of such method, or if for any other reason there shall be a lapse
- > in
- > the naming of an arbitrator . . . then upon the application of either
- > party to
- > the controversy the court shall designate and appoint an arbitrator . . ." ^
- >
- > [3] Moreover, the conduct of the parties throughout the more than five
- > years

> between the execution of the Construction Agreement on June 13, 1993 and

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Jnc > Lurssen's first enunciation of its present position on October 16, 1998

> evidences

> their view that failure to comply with the 60-day period was immaterial.

> For

> example, when entering into the Assumption Agreement on March 27, 1997

> by

> which time, on Lurssen's current argument, [\*6] both sides, because of

> their

> mutual failure to designate an arbitrator more than two-and-a-half years

> earlier, had waived forever any right either to arbitrate or to invoke any

> other contractual remedy - both sides, instead, expressly agreed that

> Section

> 23 "is incorporated herein by reference and shall govern any dispute

> arising out

> of or relating to this [Agreement]." Less than one month later, moreover,

> on

> April 21, 1997, Lurssen confirmed its belief that the arbitration remedy

> remained intact by providing a bank guarantee to LAW that stated, inter

> alia,

> that

> in the event that we receive notification from [LAW] or the Builder

> stating that

> your claim in respect of the Builder's warranty . . . has been disputed

> and

> referred to arbitration in accordance with the provisions of the

> Construction

> Agreement, this Guarantee shall be valid until thirty (30) days after the

> final

> award shall be rendered in any such arbitration . . . .

[4] > Finally, on March 30th, 1998, Lurssen sent the aforementioned letter

> proposing

> Robert Walsh "as sole arbitrator" "to act in line with our contract."

> These

> actions all confirm the parties' belief that the mandatory arbitration

> provision

> [\*7] remained in full force even though the 60-day selection period had

> been

> ignored. n1 (footnote omitted)

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

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>

> n1 It further follows that even if (contrary to the Court's conclusion)  
> the  
> 60-day selection period were a necessary condition precedent to  
> enforcement of  
> the right to arbitrate, Lurssen's aforementioned actions constitute a  
> waiver of  
> this condition. See e.g., Aini v. Sun Taiyang Co., 964 F. Supp. 762, 779  
> (S.D.N.Y. 1997); see also Empire National Bank v. United Penn Bank, 81  
> A.D.2d  
> 904, 439 N.Y.S.2d 203 (2d Dep't 1981); Oleg Cassini, Inc. v. Couture  
> Coordinates, Inc. 297 F. Supp. 821, 830 (S.D.N.Y. 1969).

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

> [5] In short, the Court concludes that the mandatory arbitration provisions  
> of  
> these contracts remain binding and that LAW's petition to compel  
> arbitration  
> must be granted. See generally Frank Felix Assocs., Ltd v. Austin Drugs,  
> Inc.,  
> 111 F.3d 284, 286 (2d Cir. 1997). The parties having advised the Court  
> that they  
> are unable to agree on a single arbitrator, the Court, pursuant to Section  
> 23.1  
> of the Construction [\*8] Agreement (as adopted by the Assumption  
> Agreement) and  
> pursuant thereby to the applicable provisions of the Federal Arbitration  
> Act, 9  
> U.S.C. @@ 5, 206, hereby appoints Judah Gribetz, Esq., of the law firm of  
> Richards & O'Neil, LLP, 885 Third Avenue, New York, NY 10022, as sole  
> arbitrator  
> , with his fees to be jointly paid by the parties at his ordinary hourly  
> rate.  
> Within no more than ten business days from the date of this Order the  
> parties  
> are directed to jointly telephone Mr. Gribetz at (212) 207-1200 to make  
> arrangements for the prompt arbitration of their disputes. Clerk to enter  
> judgment.

> SO ORDERED.

> JED S. RAKOFF. U.S.D.J

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> Dated: New York, New York