US 349

RENAISSANCE CAPITAL GROUP, LTD., et al., Petitioners, - against - HEDGE FUND ADMINISTRATORS, LTD., Respondent.

00 Civ. 3260 (NRB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2000 U.S. Dist. LEXIS 16611

November 13, 2000, Decided

November 15, 2000, Filed

DISPOSITION:
[*1] Petitioners' motion to compel respondent/cross-petitioner, Hedge Fund Administrators ("Hedge Fund" or "respondent"), to arbitrate in London and enjoin a pending National Association of Securities Dealers ("NASD") arbitration in California granted and respondent's motion to compel petitioners to arbitrate before the NASD in California denied.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioners moved to compel respondent to arbitrate in London and to enjoin a pending National Association of Securities Dealers (NASD) arbitration in California, respondent filed a cross-motion to compel petitioners to arbitrate before the NASD in California.

OVERVIEW: Petitioners brought an action to compel respondent to arbitrate their dispute over Russian securities transactions in London and enjoin a pending National Association of Securities Dealers (NASD) arbitration in California. Respondent, in contrast, sought to compel petitioners to arbitrate before the NASD in California. The court granted petitioners' motion and denied respondent's motion. The court found that the master agreement between the parties designated London, England as the forum for arbitration for disputes between the parties. The court concluded that the parties' present dispute clearly arose "in connection with" the purchase and sale of Russian securities that was the subject matter of the master agreement, and was thus subject to mandatory arbitration in London, England.

OUTCOME: Petitioners' motion to compel respondent to arbitrate in London and enjoin a pending National Association of Securities Dealers (NASD) arbitration in California was granted and respondent's motion to compel petitioners to arbitrate before the NASD in California was denied; the parties' dispute arose in connection with the subject matter of the master agreement, and was thus subject to mandatory arbitration in London, England.

CORE CONCEPTS

International Law : Dispute Resolution : Arbitration & Mediation
As part of the Federal Arbitration Act (FAA), *9 U.S.C.S.* § 1 et seq., Congress has adopted the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *9 U.S.C.S.* § § 201-208. The goal of the Convention is to promote the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions and to unify the standards by which agreements to arbitrate are observed. To this end, Congress has provided that courts may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. *9 U.S.C.S.* § 206. Thus, the court examines the parties' agreements to determine where they intended to arbitrate the present dispute.

International Law : Dispute Resolution : Arbitration & Mediation
The general arbitration rules of an exchange may be superseded by a more specific customer agreement of the parties.

COUNSEL:
For RENAISSANCE CAPITAL GROUP, LTD., RENAISSANCE CAPITAL, LTD., RENAISSANCE CAPITAL INTERNATIONAL, LTD., RENAISSANCE CAPITAL INVESTMENTS, LTD., RENAISSANCE SECURITIES LTD., ZAO VOSTOCHNY INVESTMENTS COMPANY, MATTHEW LUGAR, PAUL BASTONE, RC SECURITIES, INC., petitioners: Jerome Noll, Robert I. Lax, Lax & Noll, New York, NY.

For HEDGE FUND ADMINISTRATORS, LTD., respondent: Seth E. Lipner, Deutsch & Lipner, Garden City, NY.

JUDGES:
NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
NAOMI REICE BUCHWALD

OPINION:

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Petitioners/cross-respondents, Renaissance Capital Group Limited ("RCGL"), its subsidiaries, Renaissance Capital International Limited ("RCIL (Bermuda)"), Renaissance Capital Limited ("RCL"), Renaissance Capital Investments Limited ("RCIL (Cyprus)"), Renaissance Securities Limited ("RSL"), Zao Vostochny Investments Company ("Vostochny"), and RC Securities Incorporated ("RC Securities"), and two former employees of RCL and RC Securities, Matthew Lugar, Paul Bastone, (collectively "Renaissance" or "petitioners") bring this action to compel respondent/cross-petitioner, Hedge Fund Administrators ("Hedge Fund" or "respondent"), to arbitrate in London and enjoin a pending National Association [*2] of Securities Dealers ("NASD") arbitration in California. n1 Respondent, in contrast, seeks to compel petitioners to arbitrate before the NASD in California. For the reasons that follow, petitioners' motion is granted and respondent's motion is denied.

n1 Paul Caserias, another RC Securities employee, and Pershing, a division of Donaldson, Lufkin & Jenrette Securities, Inc., while not joining in the petition, have agreed to be bound by the Court's decision concerning the site of arbitration.

BACKGROUND

RCGL, a Bermuda company, is the corporate parent of a group of companies operating under the trade name "Renaissance," that offer investment banking services in Russia and other countries of the former Soviet Union. Pet. P 7. RCL, an English company, RCIL (Bermuda), RCIL (Cyprus) and RSL, another Cypiot company, are all subsidiaries of RCGL offering broker services and custody operations. Pet. P 8-11. RC Securities, a subsidiary of RCL, is a Delaware corporation authorized to conduct business in New York [*3] as a broker-dealer and a member of the NASD. Pet. P 12. Vostochny, another RCGL subsidiary, is a Russian company that executes trades in the Russian stock market for various RCGL subsidiaries. Pet. P 13. Respondent is an investment fund domiciled in the British Virgin Islands with its principal place of business in California. Pet. P 17, Affidavit of Dave Banerjee, President of Hedge Fund Administrators ("Banerjee Aff."), P 2.

Respondent was solicited by employees of RC securities to purchase securities on the Russian securities market. Banerjee Aff. PP 6-9. It is not disputed that respondent purchased certain Russian securities and suffered losses as the Russian securities market deteriorated in 1998. Respondent then commenced an arbitration proceeding against several of the petitioners before the NASD. Resp'ts' Ex. A, "Statement of Claim" to the NASD.

The parties agree that their dispute over the Russian securities transactions in question is subject to binding arbitration. The sole issue before the Court concerns which contractual arbitration clause controls the parties' dispute and establishes the proper forum for arbitration.

Petitioners assert that the parties are bound to [*4] arbitrate in London pursuant to the "Master Dealer and Custody Agreement" ("Master Agreement") between petitioner Vostochny and respondent Hedge Fund. Pet'rs' Ex. A. That agreement, entered into on August 19, 1997, concerns the purchase and sale of Russian securities by Vostochny as the clearing broker and custodian on behalf of Hedge Fund. Id. The Master Agreement contains an arbitration clause that provides:

Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination (each a "Dispute"), shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which rules are deemed to be incorporated by reference into this Clause. The Tribunal shall consist of three Arbitrators who shall be nominated as follows: (i) Each party shall nominate one Arbitrator; (ii) The third Arbitrator, who shall act as chairman, shall in all cases be nominated by the two Arbitrators nominated pursuant to sub-clause (i) above. The place of arbitration shall be London, England. The language of the arbitration shall be English.

Master Agreement, [*5] P 16. The Court notes that other documents contained in the "Equity Account Opening Folder" issued by Renaissance and signed by Hedge Fund likewise provide for the application of English law to disputes or permit their resolution in an English forum. n2

n2 For example, both the "Standard Terms and Conditions of Business for the Purchase and Sale of Russian Stocks by Renaissance Capital Investments (Cyprus) Limited," Pet'rs' Ex. D P 20, Ex E., and the "Master Stock Lending Agreement" Pet'rs' Ex. D p. 73, P 13(6) call for the application of English law and provide that:

The parties agree to submit to the non-exclusive jurisdiction of the courts of England in relation to disputes which may arise out of or in connection with these terms and conditions and any transactions to which they relate. The bringing of proceedings in one or more jurisdiction shall not preclude the bringing or continuing of proceedings in any other jurisdiction, whether concurrently or otherwise.

Standard Terms, P 20. The "Nominee Account Opening Form" between Renaissance Nominees (Cyprus) Limited, and Hedge Fund likewise calls for the application of English law and the parties to submit "to the non-exclusive jurisdiction of the English courts." Ex. D. p. 59, P 14(2)-(3). The "Stock Sale and Purchase Agreement," however, calls for arbitration in Russia before the *International Commercial Arbitration Court of [the] Russia Trade Industrial Center. Pet'rs' Ex. D, p. 37 P 9.*

[*6]

Respondent's sole argument to the contrary is that, as its claims against Renaissance concerns the initial solicitation of funds and subsequent advice given to respondent rather than Vostochny's clearing and custody functions, they are not within the scope of the Master Agreement. Affidavit of Steven Miller, respondent's arbitration counsel before the NASD ("Miller Aff."), P 7. Resp't's Reply Memorandum of Law ("Resp't's Mem."), p. 2.

Instead, respondent asserts that the location of arbitration proceedings should be governed by the October 8, 1997, "Cash Account Agreement" which it received from RC Securities and subsequently signed. Banerjee Aff. P 10; Resp't's Mem., p. 2-3. The Cash Account Agreement appears to be a one page form contract containing an agreement to arbitrate which provides:

It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted before the New York Stock Exchange, or any other national securities exchange on which a transaction giving rise to a claim took place (and only before such an exchange) or the National Association of Securities dealers as the undersigned may select [*7] in accordance with the rules obtaining of the selected organization....

Resp't's Ex. F. We consider each argument in turn.

DISCUSSION

As part of the Federal Arbitration Act ("FAA"), *9 U.S.C. § 1 et seq.*, Congress has adopted the U.N. **Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *9 U.S.C. § § 201-208.*** "The goal of the Convention is to promote the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions... and to unify the standards by which agreements to arbitrate are observed." *Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith/Enron Cogeneration Int'l., Inc., 198 F.3d 88, 91 (2d Cir. 1999)* (internal quotations and citations omitted). To this end, Congress has provided that courts "may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." ***9 U.S.C. § 206.*** Thus, we examine the parties' agreements to determine where they intended to arbitrate the present dispute.

The documents [*8] signed by Hedge Fund upon opening their account with Renaissance indicate that both parties contemplated the resolution of their disputes in London, England. The subsequent Master Agreement contains a broad arbitration clause that specifies the location of the arbitration, the rules governing the proceeding, the procedure for selecting arbitrators, and the language of the arbitration. Master Agreement, P 20. The Master Agreement designates London, England as the forum for arbitration for disputes between the parties, domiciled in Bermuda and the British Virgin Islands respectively, and permits them each to select one arbitrator on their panel. n3 Master Agreement, P 20. We believe the parties' present dispute clearly arises "in connection with" the purchase and sale of Russian securities that is the subject matter of the Master Agreement, and is thus subject to mandatory arbitration in London, England.

n3 Vostochny, the signatory of the Master Agreement is domiciled in Russia. Its corporate parent, RCGL is domiciled in Bermuda. While introducing brokers cannot normally assert arbitration clauses found in contracts between the clearing broker and the client, see, e.g., *Gould v. Siddl, 1990 U.S. Dist. LEXIS 16984, 1990 WL 209641*, at *2 (holding arbitration clause in contact with clearing broker can be enforced by introducing broker only where agency or third party beneficiary relationship is found), here there appears to be no dispute that RCGL may enforce the contractual arbitration clause entered into by Vostochny, its wholly owned subsidiary. Pet'rs' Ex. C (Chart demonstrating relationships among Renaissance Capital Group entities). See, e.g., *Vitzethum v. Dominick & Dominick, Inc., 1996 U.S. Dist. LEXIS 400, 1996 WL 19062* (S.D.N.Y.), at *7 (permitting corporate parent to enforce arbitration clause in agreement signed by subsidiary).

[*9]

The Cash Account Agreement, in contrast, contains boilerplate language requiring the arbitration of disputes before one of several exchanges in the United States "as the undersigned may elect." Cash Account Agreement, P 10. While this agreement would clearly be enforceable absent a more specific agreement between the parties, respondent has offered no evidence that the Cash Account Agreement was intended to abrogate the Master Agreement. Indeed, it appears the respondent became aware of the Cash Account Agreement's arbitration clause only after it commenced the NASD proceedings pursuant to the NASD Code of Arbitration Procedure, § 10201(a). Miller Aff., P P 2,4.

As the general arbitration rules of an exchange may be superseded by a more specific customer agreement of the parties, see, e.g., *Merrill Lynch v. Georgiadis, 903 F.2d 109, 112 (2d Cir 1990)*, we find that Respondent is contractually bound to arbitrate its dispute in London, England, pursuant to the Master Agreement. As it is not disputed that the Master Agreement's arbitration clause provides for an exclusive forum, the respondent is hereby enjoined from further proceedings before the NASD.

CONCLUSION [*10]

Thus, the parties are directed to proceed to arbitration in London, England in accordance with their contractual agreement and are enjoined from proceeding before the NASD. Accordingly, the Clerk of the Court shall close the above-captioned case.

IT IS SO ORDERED.

DATED: New York, New York
November 13, 2000
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE