Show Headnote

29 August 2002 - United States District Court for the Southern District of New York Parties:

claimantNew Avex, Inc. (U.S.)
defendantSocata Aircraft, Inc. (U.S.)
Judge(s): Denise Cote, Judge

Place of Arbitration:New York (United States)
Gov. law:U.S.
Subject matters:removal
choice of law
New York Convention
performance abroad
arbitrability
Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Digest by: Donald Francis Donovan, Debevoise & Plimpton, ITA Board of Reporters, InternationalADR

Plaintiff, seller and servicer of defendantÆs airplanes, sought in state court to stay arbitration of Defendant manufacturerÆs counterclaims in an arbitration between the parties. Following the courtÆs grant of this stay, defendant removed the action to the United States District Court for the

Southern District of New York and moved to vacate the stay or arbitration. The district court, holding that removal was proper under the Federal Arbitration Act (ôFAAö), granted DefendantÆs motion to vacate the stay and denied PlaintiffÆs motion to remand.

The district court explained that Defendant had met the requirements for removal under the FAA: the action was related to an arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (ôNew York Conventionö) and removal was before the trial of that action. The court found that, despite actual performance in the U.S., the contract ôenvisage[d]ö performance abroad, and thus falls under the provisions of the New York Convention. The court further noted that removal was ôbefore the trialö although the state court had already held a hearing in the matter, as no substantive issues in the case had yet been resolved by the state court.

Finally, the court agreed that defendantÆs counterclaims were arbitrable under the arbitration agreement between the parties, which provided that ôany dispute, controversy or claim arising under or related to this agreement . . . shall be referred to arbitration.ö To determine the arbitrability of the counterclaims, the court applied New York law, which governed the Agreement, stating that the unambiguous plain language of the agreement must be effectuated. The court further held that the agreementÆs New York choice of law provision did not prevent the arbitration of questions of arbitrability, as a choice of law provision in tandem with an arbitration provision encompasses substantive principles for courts to apply, but does not limit the authority of arbitrators.

Full Text:

Pursuant to Chapter 205(1) of the Federal Arbitration Act ("FAA"), 9 U.S.C. ° 205, and 28 U.S.C. ° 1441, defendant Socata Aircraft Inc. ("Socata") removed the above-captioned action to this Court from the Supreme Court of the State of New York, County of New York. Socata now moves to vacate a temporary restraining order entered by the Honorable Marilyn Shafer prior to removal. Plaintiff New Avex, Inc. ("New Avex") moves to remand the action. For the reasons stated, Socata's motion is granted and New Avex's motion is denied.

Background

Socata is a New York corporation with its principal place of business in Florida. New Avex is a California corporation with its principal place of business in California. Socata's French parent company, Socata, S.A., manufactures general aviation aircraft. Pursuant to a "Cooperative Market Development and

Distribution Agreement" (the "Agreement"), Socata granted New Avex the right to sell and service aircraft manufactured by Socata, S.A. in a territory consisting of Arizona, California, Colorado, New Mexico, Nevada and Utah.

The Agreement contains a New York choice of law provision: "This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without giving effect to principles of conflict of laws." It also contains an arbitration provision:

Any dispute, controversy or claim arising under or related to this agreement, other than a dispute concerning a Withheld Amount which shall be governed by the procedures set forth in Section 3.2 above, shall be settled by negotiations in good faith by the parties.

If there is no agreement between the parties three months after beginning such negotiations, the dispute shall be referred to arbitration in the State of New York in accordance with the procedures and rules of the American Arbitration Association by three arbitrators appointed in accordance with said rules. The award shall be final and conclusively binding upon the parties. The place of venue shall be the Federal Courts in New York, New York. (Emphasis supplied).

Alleging that it had negotiated with Socata for more than three months, on June 13, 2002, New Avex commenced an arbitration against Socata before the American Arbitration Association ("AAA") seeking a declaration of certain rights under the Agreement. On June 26, Socata served an answering statement in the arbitration which contained counterclaims alleging that New Avex was in material breach of the Agreement and requested a declaration that Socata is entitled to terminate the Agreement.

On July 16, New Avex filed a petition in New York County Supreme Court pursuant to New York Civil Practice Law and Rules ("CPLR") ° 7503 to stay arbitration of Socata's counterclaims.

New Avex argued that, in bringing its counterclaims, Socata failed to satisfy a condition precedent to arbitration of disputes arising under the Agreement, namely, compliance with the provision in the Agreement calling for good faith negotiation of disputes for ninety days before referring them to arbitration.

On July 17, on New Avex's application, Justice Shafer entered an Order to Show Cause containing a temporary restraining order staying the arbitration of Socata's counterclaims until the hearing and determination of New Avex's petition to stay arbitration. On July 29, Justice Shafer held a hearing on the matter. At the hearing, Socata requested that the stay of the arbitration of Socata's counterclaims be lifted pending the final adjudication of New Avex's petition. Justice Shafer declined to do so.

On August 15, with no Opinion having been issued by Justice Shafer, Socata removed the action to this Court, and on August 16, applied for an order vacating the stay. The Court held a conference with the parties that day and set a schedule for the simultaneous submission of memoranda of law by August 23.
Discussion

The parties dispute whether removal was proper, and if it was, whether the stay should be lifted. The issue of removal is addressed first.
I. Removal

Socata argues that the action was properly removed pursuant to both 9 U.S.C. " 205 and 28 U.S.C. " 1441. Because removal was proper under 9 U.S.C. " 205, Socata's arguments with respect to 28 U.S.C. " 1441 need not be considered.
Section 205 of the FAA provides, in pertinent part:
Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards], the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.
9 U.S.C. " 205. Thus, for removal to be proper, defendant must show that (1) the instant action relates to an arbitration "falling under" the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") and (2) that removal was conducted "before the trial" of that action.
Section 202 of the FAA defines when an agreement to arbitrate falls under the Convention. That section provides, in pertinent part:
An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.
9 U.S.C. " 202 (emphasis supplied). See Jones v. Sea Tow Services Freeport NY Inc., 30 F.3d 360, 365-66 (2d Cir. 1994) (under 9 U.S.C. " 202, an arbitration agreement falls under the Convention if it has a "reasonable relation" with a

foreign state).

Socata has shown that the Agreement satisfies the criteria set forth in Section 202. In the Agreement, New Avex agrees to purchase new aircraft "exclusively from Socata or its Parent," Socata, S.A., a French corporation. The Agreement specifically provides that Socata, S.A., as well as Socata, reserve the right to modify or cease manufacturing, selling, or supporting any models of its aircraft. The Agreement also provides that all orders "for the purchase of Aircraft from Socata or its Parent" are to be accomplished through the execution of an Aircraft Purchase Agreement, which the Agreement defines as the standard purchase agreements attached as Exhibit E-1, for "TB Aircraft" (the "TB Aircraft Purchase Agreement"), and Exhibit E-2, for "TBM Aircraft" (the "TBM Aircraft Purchase Agreement"), both of which the Agreement expressly incorporates. The TBM Aircraft Purchase Agreement provides that "[t]he Aircraft shall be delivered F.A.F. [fly away from factory] Seller's [i.e., Socata S.A.'s] facility in Tarbes, France. Title to and risk of loss for Aircraft shall pass to Buyer upon delivery thereof to Buyer at Seller's facility in Tarbes, France." Similarly, the TB Aircraft Purchase Agreement provides that "Title to the Aircraft shall pass on to Buyer at Seller's facility." In sum, the parties agreed that the aircraft would be sold by Socata and its French parent company and that the aircraft would be delivered to New Avex in France at Socata S.A.'s factory, with title and risk of loss passing to New Avex at delivery in France.

New Avex argues that notwithstanding the terms of the Agreement, in practice it has no actual dealings with Socata, S.A. It asserts that it takes delivery of and inspects the aircraft in the United States and makes payment to Socata rather than Socata, S.A. It also asserts that it bills all warranty claims to Socata rather that Socata, S.A.

The test set forth in 9 U.S.C. ° 202, however, is whether the contractual relationship "envisages" performance abroad, not whether performance actually occurs abroad. Furthermore, none of the conduct described by New Avex has altered the provisions of the Agreement relating to Socata, S.A, such as New Avex's agreement to purchase aircraft only from Socata or Socata, S.A., and Socata S.A.'s reservation of the right to modify or cease selling any models of its aircraft.

New Avex also argues that Socata waived its right to remove the action from state court when it executed the Agreement because the forum selection clauses in the TB Aircraft Purchase Agreement and in the TBM Aircraft Purchase Agreement provide that the "Superior [sic] Court of the State of New York shall be the exclusive venue and proper forum." This forum selection clause does not apply, however, to the terms of the Agreement, nor does New Avex ever suggest that it does. As quoted above, the Agreement itself provides that "[t]he

place of venue shall be the Federal Courts in New York, New York."

As to the issue of whether Socata removed the action "before the trial," New Avex argues that the Supreme Court hearing held on its petition to stay on July 29, 2002, constituted the "trial" for purposes of 9 U.S.C. ° 205 or at least the beginning of that trial.

In La Farge Coppee v. Venezolana De Cementos, S.A.C.A., C.A., 31 F.3d 70, 72-73 (2d Cir. 1994), the Second Circuit held that it had no appellate jurisdiction over the remand order at issue, but stated that even if it had such jurisdiction, it "would agree with the District Court that the case was improperly removed because it was not removed 'before the trial.' Though the proceedings in the State Court were brief, they resulted in an adjudication of the entirety of the claim that the plaintiffs tendered for decision." Id. at 72 (emphasis supplied). In Pan Atlantic Group, Inc. v. Republic Insurance Co., 878 F. Supp. 630, 638-43 (S.D.N.Y. 1995), this Court remanded an action where the state court had already ruled on the bulk of the substantive issues in the case. In Pan Atlantic, the word "trial" was construed to include "resolution of actively litigated substantive issues." Id. at 641.

Unlike in La Farge and Pan Atlantic, however, no substantive issues in the instant case were resolved by the Supreme Court.

Furthermore, the parties disputed issues of fact before the Supreme Court as to whether Socata complied with the condition precedent to arbitration set forth in the Agreement. CPLR ° 409 provides that in a special proceeding such as one brought on by a petition to stay an arbitration pursuant to CPLR ° 7503, the court shall make a summary determination "to the extent no triable issues of fact are raised." CPLR ° 409. CPLR ° 410 provides, however, that "[i]f triable issues of fact are raised they shall be tried forthwith and the court shall make a final determination thereon." The Supreme Court never reached the issue of whether material triable issues of fact existed, let alone conducted a trial to resolve such issues.

New Avex argues that Socata has sought a "second bite at the apple" by removing the action to federal court. It is certainly wasteful of judicial resources and a burden and expense for litigants to present the same issues to two different courts.

Socata, however, did not wait to remove the action until it had received an unfavorable ruling. Socata removed the action before any decision had been rendered, waiting until the last day permitted for removal under 28 U.S.C. ° 1441, that is, 30 days after it had been served with New Avex's state court petition to stay arbitration. Furthermore, it had asked the state court for an expedited decision approximately two and a

half weeks earlier, explaining to the court that AAA had begun the process of selecting arbitrators. In these circumstances, Socata's removal on August 15, 2002 is more appropriately viewed as an action to preserve its rights to remove its case to federal court and not an action taken to achieve an unfair tactical advantage in the face of an adverse ruling on the merits.

II. The Arbitrability of Socata's Counterclaims

Socata argues that the temporary restraining order staying the arbitration of its counterclaims should be vacated because the Agreement provides that "[a]ny dispute, controversy or claim arising under or related to this agreement . . . shall be referred to arbitration." Socata contends that this broad language binds the parties to arbitrate questions of arbitrability. This broadly worded arbitration clause is, under the applicable law, compelling evidence of an agreement to refer the question of arbitrability to the arbitrators. "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Nevertheless, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." Id. (citation omitted). To determine whether "clear and unmistakable evidence" exists, a court applies standard state-law principles of contract interpretation. See Bell v. Cedant Corp., 293 F.3d 563, 566 (2d Cir. 2002) ("[T]he issue of arbitrability may only be referred to the arbitrator if "there is 'clear and unmistakable' evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." (quoting Painewebber v. Bybyk, 81 F.3d 1193, 1198-99 (2d Cir. 1996) (emphasis omitted)).(2) Under New York law, which governs the Agreement, "[w]here the contract is unambiguous, courts must effectuate its plain language." Seabury Const. Corp. v. Jeffrey Chain Corp., 289 F.3d 63, 68 (2d Cir. 2002). "It is the primary rule of construction of contracts that when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations." Marshall v. Marshall, 695 N.Y.S.2d 595, 596 (2d. Dept. 1999) (citations omitted). See also Bybyk, 81 F.3d at 1199.

The broadly worded, inclusive terms of the arbitration provision of the Agreement constitute unambiguous evidence

that the parties clearly and unmistakably intended to arbitrate questions of arbitrability. In Katz v. Feinberg, 290 F.3d 95 (2d Cir. 2002), the Second Circuit held that "a single agreement contain[ing] both a broadly worded arbitration clause and a specific clause assigning a certain decision to an independent accountant . . . creates an ambiguity" requiring it to assign the question of arbitrability, at least as to the "specific clause," to the district court. Id. at 97. There is no such ambiguity in the arbitration provision of the Agreement. Rather, it provides that "[a]ny dispute, controversy or claim arising under or related to this agreement" shall be subject to arbitration. (Emphasis supplied).

New Avex argues that because the Agreement is governed by New York law, which, New Avex asserts, reserves issues of arbitrability for the courts, the arbitrability of Socata's counterclaims should be determined by the courts. It cites Volt Info. Science v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 476-77 (1989), for the proposition that the FAA does not preempt a choice-of-law provision calling for the application of state law to issues of procedural arbitrability.

Volt, however, reaffirmed that the FAA requires courts to place arbitration agreements "upon the same footing as other contracts." Id. at 478 (citation omitted). Consequently, it "requires courts to enforce privately negotiated agreements to arbitration, like other contracts, in accordance with their terms." Id.

In Bybyk, the Second Circuit cited Volt, and found that a New York choice of law provision does not prevent the arbitration of questions of arbitrability. Bybyk, 81 F.3d at 1200. The agreement at issue in Bybyk included the provision that "any and all controversies . . . concerning the construction, performance or breach of this or any other agreement . . . shall be determined by arbitration." Id. at 1199 (emphasis omitted). The Second Circuit stated that "a choice-of-law provision, when accompanied by an arbitration provision such as in the [agreement before the court] 'encompass[es] substantive principles that New York courts would apply, but not . . . special rules limiting the authority of the arbitrators.'" Id. at 1200 (quoting Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 64 (1995)) (emphasis omitted). In light of the Second Circuit's holding in Bybyk, and its more recent articulation of the standard for analyzing these issues in Bell and Katz, New Avex's argument that New York law requires that a court determine the arbitrability of Socata's counterclaims cannot succeed.

Finally, New Avex argues that under the terms of the arbitration provision in the Agreement, which provide that no dispute may be referred to arbitration until the parties have

engaged in three months of good faith negotiations to resolve that dispute, the dispute at issue in the instant action cannot be referred to arbitration for three months. New Avex objects that "[s]uch a result is absurd." Leaving aside the fact that more than two months have already passed since Socata served its answering statement, by its objection New Avex asks this Court to resolve an issue of procedural arbitrability, which, for the reasons stated above, is properly reserved for arbitration.

Conclusion

For the reasons stated, defendant's motion is granted and plaintiff's motion to remand is denied. The temporary restraining order entered by the Supreme Court of the State of New York, County of New York, on July 17, 2002, is vacated. The Clerk of Court shall enter judgment for defendant and close the case.

1 Defendant states that because of a typographical error, the Notice of Removal erroneously refers to 9 U.S.C. ° 203 rather than the intended 9 U.S.C. ° 205.

2 In discussing Connecticut's law of contracts, the Bell court described Connecticut's standard for determining whether parties agreed to arbitrate arbitrability. Bell, 293 F.3d at 567. As Bybyk explains, in applying a state's law of contract, its general substantive law and not any special rules designed to limit the authority of arbitrators applies. Bybyk, 81 F.3d at 1200. Any other rule would run afoul of "federal policy favoring arbitration." Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 62 (1995).