United States District Court, S.D. New York.

08 Civ. 8226 (SAS). (S.D.N.Y. Jun 23, 2009)

Decided June 23, 2009

KELSO ENTERPRISES LIMITED v. DIADEMA

KELSO ENTERPRISES LIMITED AND PACIFIC FRUIT LIMITED, Plaintiffs, v. M/V DIADEMA, her engines, boilers, etc., M/V ROTTERDAM, her engines, boilers, etc., M/V MARYSTOWN, her engines, boilers, etc., in rem, A.P. Moller — Maersk A/S, Maersk Line, Maersk del Ecuador C.A., CW Schiffahrts GmbH Co KG, JMS Schiffahrtsges mbH Co KG ms `Antares J', Seaspan Corp., in personam, Defendants.
· 08 Civ. 8226 (SAS).
·United States District Court, S.D. New York.
· June 23, 2009

For Plaintiffs: Peter Caro Dee, Esq., John R. Keough, III, Esq., Waesche, Sheinbaum and O'Regan, P.C., New York, NY.

For Defendants: James Lawrence Ross, Esq., Manuel A. Molina, Esq., Freehill, Hogan Mahar, LLP, New York, NY.

OPINION AND ORDER

SHIRA SCHEINDLIN, District Judge

I. INTRODUCTION

Kelso Enterprises Limited and Pacific Fruit Limited ("Kelso/Pacific") are suing A.P. Moller-Maersk A/S, Maersk Line, and Maersk del Ecuador C.A. ("Maersk") for alleged damage to a shipment of bananas. Maersk now moves to dismiss the suit based on improper forum. Kelso/Pacific cross-moves to compel arbitration. For the reasons below, both Maersk's motion to dismiss and *22 Kelso/Pacific's cross-motion to compel arbitration are granted.

II. BACKGROUND 1

On or about January 15, 2007, Kelso/Pacific and Maersk entered into a service contract for Maersk to transport bananas from Ecuador to Japan for Kelso/Pacific.2 Maersk appears to have drafted the contract. The shipments were made pursuant to ten bills of lading with identical terms and conditions.3 Some of the cargo, delivered in good condition to Maersk around August 24, 2007, arrived at its destination damaged or short.4 The shipments were transported on the M/V Maersk Rotterdam, then the M/V Maersk Diadema, and finally, the M/V Marystown. Each party to this suit is incorporated outside of the United States.5

2.

See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint ("Pl. Opp. Memo.") at 3.

3.

See id.

4.

See Complaint ("Compl.") ¶¶ 18-25.

5.

See id. ¶¶ 2-9.

The service contract and the bills of lading have different choice of *33 law clauses.6 The sixth clause of the service contract provides that any suit arising under the contract is governed exclusively by New York and U.S. federal maritime law.7 The bill of lading, by contrast, offers two options: if damage occurred en route to or from the U.S. or if the Carriage of Goods by Sea Act ("COGSA")8 applies, U.S. law applies; if not, English law applies.9 COGSA applies "to all contracts of carriage of goods by sea to or from ports of the United States in foreign trade."10 The service contract does not contain a forum selection clause. The bill of lading, on the other hand, designates the English High Court of Justice as the appropriate forum when English law applies and the United States District Court for the Southern District of New York ("S.D.N.Y.") when U.S. law applies.11

6.

See Multimodal Transport Bill of Lading ("Bill of Lading"), Ex. B to 4/22/09 Declaration of James Wang, Maersk Senior Claims Specialist, ¶¶ 6.2, 26; see Fixture Letter Service Contract Ecuador/Japan ("Service Contract"), Ex. Al to 5/15/09 Declaration of John R. Keough III, plaintiffs' counsel, ¶ 6.

7.

See Service Contract ¶ 6.

8.

46 U.S.C. §§ 1300-1315.

9.

See Bill of Lading ¶ 26.

10.

46 U.S.C. § 30701(13).

11.

See Bill of Lading ¶ 26.

Clause 7 of the service contract addresses potential conflicts between *44 the two contracts.

The terms and conditions of MAERSK LINE standard form of bill of lading covering individual shipments shall apply to shipments hereunder. The provisions in this Contract for rates and charges and U.S. arbitration/U.S. law shall not be overridden by the bill of lading. However, in the event any provision in MAERSK LINE's bill of lading which limits or governs its liability for damages to persons or property (including cargo), delays, misdelivery, or any other provision of the bill of lading mandated by applicable law is or are in conflict with the Contract, the bill of lading shall prevail.12

12.

Service Contract ¶ 7.

Clause 9 establishes that either party can initiate binding arbitration to be held in New York City "pursuant to the terms and procedures of the United States Arbitration Act."13

13.

Id. ¶ 9.

III. APPLICABLE LAW

A. Forum Selection Clause

Although forum selection clauses were once disfavored by U.S. courts, the Supreme Court has established that such provisions are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to *55 be `unreasonable' under the circumstances."14 In Phillips v. Audio Active Limited, the Second Circuit adopted a four-part test to determine whether a forum selection clause is valid and enforceable.15 First, the clause must have been reasonably communicated to the party resisting enforcement.16 Second, the clause must be mandatory.17 Third, "the claims and parties involved in the suit [must be] subject to the forum selection clause."18 A presumption of validity applies to a

forum selection clause if it was communicated to the party resisting its enforcement, it is mandatory, and both the claims and parties involved are subject to it.19 *66 Fourth, the resisting party may rebut the presumption of enforceability "by making a sufficiently strong showing that `enforcement would be unreasonable or unjust, or that the clause [is] invalid for such reasons as fraud or overreaching.'"20 This exception is to be interpreted narrowly.21 In Roby v. Corporation of Lloyd's, the Second Circuit discussed four instances where enforcement of a forum selection clause would be unreasonable: "(1) if incorporation [of the clause] into the agreement was the result of fraud or overreaching; (2) if the complaining party will for all practical purposes be deprived of his day in court, due to the grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state."22

14.

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-10 (1972). Accord D.H. Blair Co. v. Gottdiener, 462 F.3d 95, 103 (2d Cir. 2006) (explaining that forum selection clauses are enforced when several conditions are met).

15.

494 F.3d 378, 383 (2d Cir. 2007). Accord Klotz v. Xerox Corp.,519 F. Supp. 2d 430, 433 (S.D.N.Y. 2007) ("The Second Circuit recently instructed that the determination of whether to enforce a forum-selection clause involves a four-part analysis.").

16.

See Phillips, 494 F.3d at 383 (citing D.H. Blair Co.,462 F.3d at 103).

17.

See id. (citing John Boutari Son, Wines and Spirits, S.A. v. Attiki Imps. Distribs, Inc., 22 F.3d 51, 53 (2d Cir. 1994)). Accord Klotz, 519 F. Supp. 2d at 433 (explaining that the court must determine if the parties "are required to bring any dispute to the designated forum or simply permitted to do so").

18.

Phillips, 494 F.3d at 383 (citing Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1358-61 (2d Cir. 1993)).

19.

See id. (citing Roby, 996 F.2d at 1362-63).

20.

Id. at 383-84 (quoting Bremen, 407 U.S. at 15).

21.

See Roby, 996 F.2d at 1363.

22.

Id. (citations and quotations omitted).

The Second Circuit has not directly ruled on whether the expiration of the statute of limitations in the forum selected by an enforceable forum selection clause would render enforcement of the clause unjust. However, courts in this *77 district have overwhelmingly answered that question in the negative.23

23.

See, e.g., Nippon Express U.S.A. (Illinois), Inc. v. M/V Chang Jiang Bridge, No. 06 Civ. 694, 2007 WL 4457033, at *7 (S.D.N.Y. Dec. 13, 2007). In New Moon Shipping Co. v. Man B W Diesel, the Second Circuit stated in dicta that consideration of the expiration of the statutes of limitations "would create a large loophole for the party seeking to avoid enforcement of the forum selection clause. That party could simply postpone its cause of action until the statute of limitations has run in the chosen forum and then file its action in a more convenient forum."121 F.3d 24, 33 (2d Cir. 1997).

B. Motion to Dismiss

In deciding a Rule 12(b)(3) motion to dismiss the court may consider material outside of the pleadings.24 However, "[t]he plaintiff is entitled to `have the facts viewed in the light most favorable to it' and to be heard before any disputed facts are resolved against it."25 If a party does not include an objection to venue in its answer or fails to make a 12(b)(3) motion before responding to a *88 complaint, the defense is waived and the party has consented to the venue.26

24.

See Brennen v. Phyto-Riker Pharm., Ltd., No. 01 Civ. 11815,2002 WL 1349742, at *1 (S.D.N.Y. June 20, 2002) (citing New Moon,121 F.3d at 26) (considering contract term not explicitly included in the relevant contract while determining enforceability of forum selection clause). Courts in this circuit have considered dismissals pursuant to forum selection clauses under Rules 12(b)(1), 12(b)(3), and 12(b)(6). See Jockey Int'l, Inc. v. M/V "Leverkusen Express," 217 F. Supp. 2d 447, 450 (S.D.N.Y. 2002) (citations omitted). The Second Circuit has not required the use of a particular Rule. See Asoma Corp. v. SK Shipping Co., 467 F.3d 817, 822 (2d Cir. 2006) (quoting New Moon Shipping, 121 F.3d at 28). However, Second Circuit courts "appear to prefer Rule 12(b)(3)." Nippon Express U.S.A. (Illinois),2007 WL 4457033, at *3 (citation omitted).

25.

Nippon Express U.S.A. (Illinois), 2007 WL 4457033, at *3 (quoting New Moon Shipping, 121 F.3d at 29).

26.

See Fed.R.Civ.Pro. 12(h).

C. Enforceability of Arbitration Clause

Although "[p]arties may be required to arbitrate only when they have agreed to do so . . . there is an `emphatic federal policy in favor of arbitral dispute resolution.'"27 "`[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . .'"28 Arbitration must be ordered "`unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"29 "`Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.'"30 *99

27.

Bristol-Myers Squibb Co. v. SR Int'l Bus. Ins. Co.,354 F. Supp. 2d 499, 503 (S.D.N.Y. 2005) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985)).

28.

Eastern Fish Co. v. South Pacific Shipping Co., Ltd.,105 F. Supp. 2d 234, 237 (S.D.N.Y. 2000) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

29.

Id. (quoting S.A. Mineraco da Trindade-Samitri v. Utah Int'l, Inc., 745 F.2d 190, 194 (2d Cir. 1984)).

30.

John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 53 (2d Cir. 2001) (quoting A T T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986)).

The Second Circuit has adopted a two-step process for determining whether an arbitration clause governs a dispute when there are no federal statutory claims advanced.31 First, "`a court should classify the particular clause as either broad or narrow.'"32 The use of the language "arising out of or relating to" in the arbitration clause falls into the broad classification.33 Second, when interpreting a narrow arbitration clause, the court must decide if the claim involves an issue that "is on its face within the purview of the clause" or is a collateral issue. In most cases, narrow clauses do not apply to collateral issues. When interpreting a broad clause, "`there arises a presumption of arbitrability' and arbitration of even a collateral matter will be ordered if the claim alleged `implicates issues of contract construction or the parties' rights and obligations under it.'"34

31.

See Bristol-Myers Squibb, 354 F. Supp. 2d at 503 (citing Louis Dreyfus Negoce S.A. v. Blystad Shipping Trading Inc.,252 F.3d 218, 224 (2d Cir. 2001)).

32.

Id. (quoting Louis Dreyfus Negoce S.A., 252 F. 3d at 224).

33.

E.g., Eastern Fish, 105 F. Supp. 2d at 237-38 (citing Collins Aikman Prods. Co. v. Building Sys., Inc., 58 F.3d 16, 20 (2d Cir. 1995)).

34.

Bristol-Myers Squibb, 354 F. Supp. 2d at 503 (quoting Louis Dreyfus Negoce S.A., 252 F.3d at 224).

D. Contract Interpretation

"An ambiguity exists where a contract term `could suggest more than *1010 one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'"35 "`The cardinal principle for the construction and interpretation of [] contracts [] is that the intentions of the parties should control.'"36 "[A]n ambiguity in a contract should be construed against its drafter."37 When specific and general phrases conflict, the specific phrases determine the meaning of the contract.38

35.

Yakin v. Tyler Hill Corp., 566 F.3d 72, 75-6 (2d Cir. 2009) (quoting Morgan Stanley Group Inc. v. New England Ins. Co.,225 F.3d 270, 275 (2d Cir. 2000)).

36.

SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC,467 F.3d 107, 125 (2d Cir. 2006) (quoting Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d 127, 135 (2d Cir. 1986)).

37.

Herrera v. Katz Commc'ns, Inc., 532 F. Supp. 2d 644, 647 (S.D.N.Y. 2008) (citing Andy Warhol Found. for Visual Arts, Inc. v. Federal Ins. Co., 189 F.3d 208, 215 (2d Cir. 1999) (explaining that ambiguity is construed against the contract's drafter, because the drafter is responsible for the ambiguity).

38.

See Aramony v. United Way of Am., 254 F.3d 403, 413 (2d Cir. 2001) (citations omitted).

E. The New York Convention

The United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, more commonly *1111 known as the New York Convention.39 "An arbitration agreement or arbitral award arising out of a legal relationship [involving at least one non-U.S. citizen party] . . . which is considered as commercial, including a transaction, contract, or agreement . . . falls under the Convention."40 When a district court has jurisdiction over an action falling under the New York Convention and the district court is also in the "district and division which embraces the place designated in the agreement as the place of arbitration," it is the appropriate venue for the purposes of recognizing an award or compelling arbitration.41 All district courts have original jurisdiction over actions falling under the Convention.42

39.

See 9 U.S.C. § 201.

40.

Id. § 202.

41.

Id. § 204.

42.

See id. § 203.

The Federal Arbitration Act ("FAA") is applied to actions brought under the New York Convention when the two are not in conflict.43 The FAA establishes that a court must stay a proceeding when an action is brought to compel arbitration regarding a matter that is "referable to arbitration under . . . *1212 [the] agreement."44

43.

See id. § 208.

44.

Id. § 3. There is no contrary provision in the New York Convention.

V. DISCUSSION

A. This Court Lacks Jurisdiction over the Merits

Although there is no dispute that the first two parts of the Phillips test are satisfied, the parties contest the third part — which forum provided in the forum selection clause applies to the claims in this suit. Maersk argues that this Court is an inappropriate venue, and therefore that this case should be dismissed.45 Specifically, Maersk claims that clause 26 of the bill of lading mandates resolution in the English High Court of Justice, as COGSA does not apply and the United States was neither the origin nor destination of the shipments.46 Kelso/Pacific, on the other hand, argues that the service contract's choice of law clause opens an escape hatch from the bill of lading's default forum provision. Kelso/Pacific asserts that the choice of law provision found in the service contract, which *1313 dictates the application of U.S. federal maritime law, implicitly triggers the application of COGSA.47 In turn, Kelso/Pacific argues, the application of COGSA brings into effect an alternative venue provision in clause 26 of the bill of lading, which states that this Court is the exclusive venue for a suit when COGSA applies.48

45.

See Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint ("Def. Memo.") at 8; see Defendants' Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss ("Def. Reply Memo.") at 1. The parties disagree as to which of the two forums provided in the forum selection clause applies under the third step of the Phillips test — which mandates that the forum selection clause apply to the parties and claims.

46.

See Def. Memo at 8, Def. Reply Memo at 1, 5.

47.

See Pl. Opp. Memo at 6-7.

48.

See id.

Even assuming, arguendo, that the service contract's American choice of law provision prevails over the bill of lading's English choice of law provision, the application of U.S. law does not necessarily activate COGSA. COGSA only applies when a dispute concerns transportation to or from U.S. ports or arises under a "bill of lading or similar document of title . . . containing an express statement that it shall be subject to COGSA."49 Neither the bill of lading nor the service contract expressly invokes COGSA; thus the alternative venue provision of clause 26 of the bill of lading does not apply. This Court is not the proper venue for litigation on the merits of this dispute.

49.

46 U.S.C. § 30701(13).

B. The Service Contract's Arbitration Clause Applies

Even when the merits of a dispute cannot be properly brought in this *1414 Court, this Court may still entertain an action to compel arbitration under the New York Convention, as it is the designated site of arbitration pursuant to the service contract. Clause 9 of the service contract establishes that either party can require arbitration of a dispute "arising out of or relating to" the contract.50 This is a broad arbitration clause and therefore carries a presumption of arbitrability.51 The true dispute is whether the service contract or the bill of lading governs arbitrability. Clause 7 of the service contract explains how a conflict between the bill of lading and the service contract is to be resolved. However, this clause is ambiguous. The second sentence notes that the service contract's choice of U.S. arbitration and U.S. law may not be overridden by the bill of lading, while the third sentence notes that the bill of lading will prevail regarding liability as a result of cargo damage.

50.

See Service Contract ¶ 9.

51.

See Eastern Fish, 105 F. Supp. 2d at 237-38 (citing Collins Aikman Prods., 58 F.3d at 20). See also Bristol-Myers Squibb,354 F. Supp. 2d at 503 (quoting Louis Dreyfus Negoce S.A.,252 F.3d at 224).

Because any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, I find that the service contract is the governing document and establishes the applicability of the U.S. arbitration clause in cases of *1515 cargo damage.52 The fact that Maersk drafted the service contract also supports this decision, as Maersk now argues that the service contract requires that the terms of the bill of lading must apply.53 While cargo damage claims may be collateral to the substance of the service contract, which sets freight and rate charges for the transport of the bananas, the damage claim implicates the parties' rights and obligations under the contract and hence is arbitrable under the broad arbitration clause found in the service contract.

52.

See Eastern Fish, 105 F. Supp. 2d at 237.

53.

See Def. Reply Memo. at 12.

V. CONCLUSION

For the foregoing reasons, both Maersk's motion to dismiss and Kelso/Pacific's motion to compel arbitration are granted. This action is now closed, without prejudice to re-open if and when a party moves to enforce an arbitration award. The Clerk of the Court is directed to close these motions (Docket Nos. 14 and 17) and this case.

SO ORDERED: