

KUHNI AG
v.
STAR SHIPPING AS, ET AL.

South Carolina, Court of Common Pleas, Ninth Judicial Circuit, September 20, 2007
No. 06-10-2294

BILLS OF LADING — 1972. Jurisdiction or Arbitration of Controversies — CONSTITUTION — 31. Powers of States — CONTRACTS — 111. Choice of Law and Forum Provisions — STATUTES — State — South Carolina, S.C. Code §15-7-120.

A state court must follow admiralty law where it applies, as it does to a multimodal shipment involving ocean carriage. Thus, the court cannot apply a state statute, S.C. Code §15-7-120, which provides that S.C. is an alternate forum for cases that could be brought in it even if there is a contractually required forum outside the state (and makes unenforceable a requirement to arbitrate outside the state claims that could be tried in the state). Swiss forum clause in B/L is valid under admiralty law, and cargo damage case against carrier is dismissed.

David Marvel and Stanley Rodgers *for Kuhni AG*
Paul Tecklenburg and Rivers Jenkins *for Star Shipping AS*

DEADRA L. JEFFERSON, J.:

This matter came before the Court on August 13, 2006 upon Defendant Fiege Logistics (Switzerland) Ltd.’s motion to dismiss pursuant to Rule 12(b)(3), South Carolina Rules of Civil Procedure. Fiege bases its motion in this cargo damage case on a mandatory forum selection clause in the applicable bill of lading that designates Switzerland as the only forum in which actions may be instituted against Fiege. After full consideration of the pleadings, the bill of lading attached to Fiege’s motion, and arguments of counsel, this Court grants Fiege’s motion to dismiss.*

Background

This case arises from damage that occurred to a large piece of equipment, known as a solvent extraction column, while it was being transported from Switzerland to Goose Creek, South Carolina. Plaintiff Kuhni AG, an entity organized and existing under the laws of Switzerland, hired Defendant Fiege Logistics, also organized and existing under the laws of Switzerland, to arrange for transport of the damaged solvent extraction column; Defendant agreed to do so pursuant to the negotiable Multimodal Transport Bill

*An appeal of this decision to the S.C.Ct. of App. was withdrawn by the appellant on June 13, 2008. — Eds.

of Lading No. 261.29.0005. Although not significant for deciding this motion, numerous other parties were involved in the cargo's transportation. Plaintiff Kuhni alleges that the cargo was ultimately damaged when it was struck by a train while sitting in a storage area in the Port of Charleston, resulting in damage in excess of \$200,000. Plaintiff Kuhni's claims against Defendant Fiege arise from breach of contract.

The bill of lading, issued by Defendant Fiege, includes a forum selection clause providing in relevant part: "Actions against the MTO may only be instituted in Switzerland at the place of issue of the MT B/L. Swiss Law is applicable." Fiege contends that, pursuant to established maritime law, a forum selection clause in a maritime contract is enforceable and that dismissal is therefore appropriate.

Applicable Law

There is no dispute as to whether this case is governed by the general maritime law of the United States. The Plaintiff specifically alleged that "[t]his matter involves a maritime contract and is governed by the General Maritime Law of the United States, . . ." Regardless of the parties' allegations, if the facts alleged would otherwise support admiralty jurisdiction, then federal admiralty law must apply. *Norfolk Southern R.R. v. James N. Kirby, PTY Ltd.*, 543 U.S. 14, 22-23, 2004 AMC 2705, 2709-10 (2004) (discussing that maritime law governs in determination of whether limitations of liability in bills of lading were valid based on whether the contracts involved were essentially maritime in nature, despite the land transport portion of the carriage (train wreck) which gave rise to the damage). "Substantial rights are not to be determined differently whether a case is labeled law side or admiralty side on a district court's docket. Indeed, for federal common law to apply in these circumstances, this suit *must* also be sustainable under the admiralty jurisdiction." *Id.* (citing *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 411, 1954 AMC 1, 8 (1953)). It is fundamental then that "[w]ith admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp. v. Transamerica DeLaval, Inc.*, 476 U.S. 858, 864, 1986 AMC 2027, 2032 (1986). The South Carolina Supreme Court has recognized the supremacy of maritime law as well. *See Konrad v. S.C. Elec. & Gas*, 308 S.C. 167, 170, 417 S.E.2d 557, 559 (1992) ("The Supreme Court has made clear that a maritime tort is a type of action which the Constitution has placed under national power to control in its substantive *as well as its procedural* features.") (emphasis in original).

Additionally, a federal district court in South Carolina has recognized these supremacy principles in circumstances remarkably similar to the facts at bar. *See Jewel Seafoods Ltd. v. M/V Peace River*, 1999 AMC 2053, 39 F. Supp.2d 628 (D.S.C. 1999). While *Jewel* is not directly binding on this Court, the principles of maritime law illuminated in *Jewel* are persuasive by virtue of the fact these principles comprise federal common maritime law governing the enforceability of foreign forum selection clauses in international bills of lading. In *Jewel*, the court relied on *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* in holding that the Carriage of Goods by Sea Act (46 U.S.C. §§30701-30707 (“COGSA”))* does not automatically invalidate a forum selection clause. *Jewel*, 1999 AMC at 2056, 39 F. Supp.2d at 632, *Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995) (holding that “COGSA . . . did not prevent parties [in international transactions] from agreeing to enforce obligations in a particular forum so long as liability for any loss or damage is not lessened through the agreement.”). *Jewel* goes on to hold that although forum selection clauses are presumptively valid, they can be unenforceable if they are shown to be unreasonable under the circumstances. *Jewel*, 1999 AMC at 2053, 39 F. Supp.2d at 633 (citing to *Allen v. Lloyd’s of London*, 94 F.3d 923, 928 (4 Cir. 1996) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 1972 AMC 1407, 1414 (1972)). Forum selection clauses are unreasonable if:

- (1) their formation was induced by fraud or overreaching;
- (2) the complaining party will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum;
- (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or
- (4) their enforcement would contravene a strong public policy of the forum state.

Jewel, 1999 AMC at 2059, 39 F. Supp.2d at 633. Further, *Jewel* notes that “as the party seeking to avoid enforcement of the clause, Plaintiff bears the burden of proving that the applicable substantive law . . . precludes statutory COGSA remedies or otherwise reduces . . . obligations below what COGSA guarantees.” *Jewel*, 1999 AMC at 2057, 39 F. Supp.2d at 632.

Application of Law

At the hearing on this motion, counsel for the Plaintiff did not dispute that maritime law would apply to the determination of the rights of the

*This is citation of the Harter Act that was codified in 2006. COGSA is not now codified. —Eds.

parties in this case. Likewise, Plaintiff did not dispute that it had made no showing that enforcement of the forum selection clause would violate the dictates of *Sky Reefer*. Further, Plaintiff made no contention that the maritime forum selection agreement is the result of fraud or overreaching. Rather, Plaintiff argued at the motion hearing that the fourth factor to find unreasonableness in forum selection clauses (whether the enforcement of the clause would violate public policy) was violated by virtue of application of §15-7-120 of the South Carolina Code, which provides in relevant part:

(A) Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action.

(B) A provision in an arbitration agreement that arbitration proceedings must be held outside this State is not enforceable with respect to a cause of action, which, but for the arbitration agreement, is triable in the courts of this State. The enforceability of the remaining provisions of the arbitration agreement and the method of selecting a forum for the conduct of the arbitration proceedings is as provided in this title, the Federal Arbitration Act, and any applicable rules of arbitration.

The Court finds that the above provision of the South Carolina Code is inapplicable to this international contract for carriage of goods between Switzerland and South Carolina. The public policy of South Carolina in interpreting a bill of lading involving international commerce must necessarily be consistent with the maritime law of the United States, and to the extent that it is not, it is preempted. The United States Supreme Court is the authority to which this Court must look in determining such a question:

Our authority to make decisional law for the interpretation of maritime contracts stems from the Constitution's grant of admiralty jurisdiction to federal courts. *See* Art. III, §2, cl. 1 (providing that the federal judicial power shall extend to "all Cases of admiralty and maritime Jurisdiction"). *See* 28 U.S.C. §1333(1) (granting federal district courts original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction"); . . . This suit was properly brought in diversity, but it could also be sustained under the admiralty jurisdiction by virtue of the maritime contracts involved. *See Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406, 411, 1954 AMC 1, 8 (1953) . . .

Kirby, 543 U.S. at 23, 2004 AMC at 2710. Additionally, it is clear that the Supreme Court views maritime contracts as quintessentially maritime and deserving of the protection of the uniformity principle in light of the international interests so important to maritime law:

We have reiterated that the “fundamental interest giving rise to maritime jurisdiction is the protection of maritime *commerce*.” *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 1991 AMC 1821 (1991). . . . The conceptual approach [in determining maritime jurisdiction] vindicates that interest by focusing our inquiry on whether the principal objective of a contract is maritime commerce. . . . Maritime commerce has evolved along with the nature of transportation and is often inseparable from some land-based obligations. . . .

Contracts reflect the new technology, hence the popularity of “through” bills of lading, in which cargo owners can contract for transportation across oceans and to inland destinations in a single transaction. . . .

* * *

But when state interests cannot be accommodated without defeating a federal interest . . . then federal substantive law should govern. . . .

Here, our touchstone is a concern for the uniform meaning of maritime contracts like the ICC and Hamburg Sud bills. We have explained that Article III’s grant of admiralty jurisdiction “must have referred to a system of law coextensive with, and operating *uniformly in*, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.”

543 U.S. at 25-28, 2004 AMC at 2712-14 (emphasis in original).

Even if admiralty law were not applicable, it is not completely clear that South Carolina has a strong public policy against forum selection clauses as the Plaintiff contends. See *Atlantic Floor Services, Inc. v. Wal-Mart Stores, Inc.*, 334 F. Supp.2d 875, 878 (D.S.C. 2004) (discussing that a state’s mere disfavor of forum selection clause not sufficient to rebut strong federal policy favoring forum selection clause); but see *Johnson v. Key Equipment Finance*, 367 S.C. 665, 627 S.E.2d 740, 742 (2006) (noting South Carolina’s “general disfavor” of forum selection clauses); but see

Ins. Products Marketing, Inc. v. Indianapolis Life Ins. Co., 176 F. Supp.2d 544, 550 (D.S.C. 2001) (analyzing South Carolina’s general disfavor for forum selection clauses).

The public policy of the United States as pronounced by the United States Supreme Court must prevail in this action concerning enforcement of rights under a maritime contract dealing in international business. “[T]he historical judicial resistance to foreign forum selection clauses has little place in an era when . . . businesses once essentially local now operate in world markets. The expansion of American business and industry will hardly be encouraged. . . . if, notwithstanding the solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.” *Sky Reefer*, 515 U.S. at 537, 1995 AMC at 1824 (quoting *The Bremen*, 407 U.S. 1, 1972 AMC 1407 (1972)). When considering that both the Plaintiff and the moving party are companies formed under Swiss law and doing business in Switzerland, any interests that South Carolina may have in this action by virtue of the accident occurring here are trumped by the parties’ agreement in their maritime contract involving international commerce to litigate disputes in Switzerland.

Conclusion

Having fully considered the pleadings, the motion and attachment, arguments of counsel for the parties, this Court finds that the Plaintiff’s claims against Defendant Fiege are governed by the bill of lading as alleged in the complaint, and therefore, pursuant to the parties’ agreement thereunder, venue is proper only in Switzerland. Therefore, Fiege’s Motion to Dismiss is granted.

