

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MITSUBISHI INTERNATIONAL CORP.: CIVIL ACTION
et al. :
 :
v. :
 :
S/S FU AN CHENG, et al. : No. 02-545

GENERAL COCOA COMPANY : CIVIL ACTION
 :
v. :
 :
M/V "FU AN CHENG" et al. : No. 02-550
 [CONSOLIDATED]

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

August 21, 2001

Plaintiffs in these consolidated actions are in the business of importing and selling cocoa beans. Defendants, a ship, its owners, and a charterer, together arranged a shipment of plaintiffs' beans from Indonesia to Philadelphia.

During the voyage, a fire in the ship's hold prematurely roasted plaintiffs' cocoa beans. The alleged damage to the beans occasioned the ship's arrest on its arrival in Philadelphia; this action in admiralty for negligence and breach of contract followed.

Defendants, moving to transfer to the United States District Court for the Southern District of New York under 28 U.S.C.

§ 1404(a), rely on forum selection clauses in the contracts between plaintiffs and the charterer. Because those clauses are ambiguous and permissive, and because other factors under 28 U.S.S. § 1404(a) do not support transfer, defendants' motions will be denied.

I. Location of the Parties, Witnesses, and Cargo

Plaintiffs are citizens of New York. The S/S (or M/V) Fu An Cheng was arrested in Philadelphia, but has since been released to sea. The remaining defendants are foreign corporations: Defendant Lucimento Shipping (Hong Kong, China); Cosco Container Lines (Shanghai, China); Cross Chartering, M.V. (Antrap, Belgium).

The primary witnesses, members of the ship's crew, were deposed initially in Philadelphia, and again when the ship put into port in Mexico. They are almost all Chinese citizens. The defendants identify no additional witnesses, but, according to the plaintiffs, there are other witnesses in New York, New Jersey, and "other locations both in the United States and overseas."

The cargo of cocoa beans was discharged and stored in a warehouse in Philadelphia, where it apparently remains.

II. Forum Selection Clause

In the Fall of 2001, plaintiffs approached Gateway Chartering Corporation ("Gateway"), a shipbroker, to arrange the

transportation of beans to the United States via ocean carrier. Gateway booked the cargo for carriage aboard the Fu An Cheng. Plaintiffs provided Gateway with the details of their shipments; Gateway contacted Cross Chartering N.V. ("Cross Chartering"), the time charterer of the M/V Fu An Cheng.

For each of the plaintiffs, Gateway prepared a similar form chartering contract. Paragraphs 27 and 29 of the contract provide:

Paragraph 27 New York Arbitration Clause, 1954

That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen: Their decision or that of any two of them, shall be final, and for the purpose of enforcing of any award, this agreement may be made a rule of the Court. The Arbiters shall have the discretion to award the winning party its costs of the arbitration, including wholly or partly the fee and disbursements of its attorneys and/or agents.

Paragraph 29 USA Clause Paramount

USA Clause Paramount (COGSA - jurisdiction N.Y.) is to be incorporated in all Bills of Lading and this Charter Party. (Attached).

Each of the Bills of Lading including the following language:

(1) All term and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.

Thomas Carroll, President of Gateway Chartering, testified that neither plaintiffs nor defendants asked Gateway to insert the phrase "(COGSA - jurisdiction N.Y.)" into paragraph 29.¹

Carroll's deposition continued:

Defendants': What is your understanding of the meaning of
Counsel Clause 29?

. . . .

Carroll: The meaning of Clause 29 to me is that the jurisdiction for disputes on this charter party will be in New York. That was the intent when it first crept into the charter party, and that's my understanding of it.

Counsel: Is it your understanding that the intent of the language is that the disputes will be resolved in New York as opposed to anyplace else?

. . . .

Carroll: I just don't know.

III. Discussion

Defendants seek transfer to the Southern District of New York under 28 U.S.C. § 1404(a). Section 1404(a) provides: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Defendants bear the burden of proof on a § 1404(a) motion to transfer. See Jumara v. State Farm Ins. Co., 55 F.3d 873, 879

¹ "COGSA" refers to the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1331, et seq.

(3d Cir. 1995). Plaintiff's choice of forum must not be disturbed absent a clear contrary showing. The reasons for transfer listed in the statute are not exhaustive; courts must consider additional factors:

The private interests have included: plaintiff's forum preference as manifested in the original choice; the defendant's preference; whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of the witnesses -- but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum).

The public interests have included: the enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; the public policies of the fora; and the familiarity of the trial judge with the applicable state law in diversity cases.

Jumara, 55 F.3d at 879 (citations omitted).

Where a forum selection clause is asserted as a reason to transfer an admiralty action, that clause is relevant to the motion, because the parties may have previously expressed a belief that a certain forum was convenient, but it is not dispositive. See Stewart Org, Inc. v. Ricoh Corp., 487 U.S. 22, 29-30 (1988) (forum selection clause in diversity action is relevant to 1404(a) inquiry, but court must address the 1404 factors first); Lebouef v. Gulf Operators, 20 F. Supp. 2d 1057, 1059 (S.D. Tex. 1998) (in admiralty action, holding that express

forum selection clause did not mandate transfer under 1404(a); cf. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (forum selection clause generally enforceable; reversing refusal to dismiss complaint); Intermetals Corp. v. Hanover Int'l Aktiengesellschaft Fur Industrieversicherungen, 188 F. Supp. 2d 454, 457 (D.N.J. 2001) (forum selection clause enforceable: motion to dismiss granted).

1. Convenience of the Parties, Parties' Preference

Defendants assert that the clause should be interpreted to mean that the parties have expressed a preference that all disputes should be adjudicated in the Southern District of New York.

The clause is, on its face, ambiguous. Normally, ambiguous clauses are construed against their drafters. See Citro Florida, Inc. v. Citrovale, S.A., 760 F.2d 1231, 1232 (11th Cir. 1985) (ambiguous forum selection clause construed against drafter). However, the drafter of this clause is not a party to the action, and none of the parties had any knowledge of its insertion in the contract.

Carroll's testimony is relevant, because both parties stated that they looked to him for the clause's interpretation. However, Carroll was unable to say if the clause required jurisdiction in New York or merely permitted it.

In similar actions, courts have found forum selection clauses permissive and not requiring dismissal of actions brought in non-selected forums. See, e.g., Union Steel Am. Co. v. M/V Sanko Spruce, 14 F. Supp. 2d 682, 687 (D.N.J. 1998) (clause providing forum "shall have jurisdiction" left open question of whether jurisdiction was mandatory in that forum). The parties did not negotiate for this clause, and there is no evidence that they intended to make a New York forum mandatory. This conclusion is buttressed by language in the Bills of Lading, which distinguish between the "arbitration clause"² and the "Law" Clause, referring presumably to the "COGSA" clause in question. It may be that what the parties refer to as a "forum selection clause" is really a choice of law clause: this question need not be answered now.

The parties did not express any clear intent to adjudicate all disputes in New York State or the Southern District of New York.

2. Convenience of the Witnesses

Defendants list no witnesses who would be unavailable in Philadelphia but available in New York. For some witnesses, like

²By court order, the parties had until July 8, 2002, to assert the arbitration clauses or waive them. No party has asserted the arbitration clauses as a reason to either dismiss, transfer or stay these actions. Order, June 7, 2002.

the ship's Chinese crew, Philadelphia does not present any obstacle not also presented by New York.

3. Location of Books and Records

The defendants identify no relevant books and records. Presumably some material will be present on the ship, or, after discovery, in the offices of plaintiffs' attorneys in Philadelphia. Other material will be present at far-flung locations in China and Belgium. The courts finds little inconvenience in requiring the parties to bring those materials to Philadelphia instead of Manhattan.

4. Place of the Alleged Wrong

Plaintiffs' cargo was damaged on the high seas, at an indeterminate location. Neither the residents of Philadelphia nor the residents of New York City have a particularly strong interest in the fire, but the residents of Philadelphia have a stronger interest because theirs was the port at which the roasted cocoa was unloaded and remains.

5. Public Interest

The efficient administration of justice will be served by continued adjudication in this district. Not only is the court now familiar with the facts and law of this action, it has already spent significant time overseeing discovery between the

parties.³ Transfer to New York would require another Judge to become familiar with the parties and the issues, for no reason but the convenience of defendants' attorneys.

IV. Conclusion

Because transfer to the Southern District of New York does not serve the clear intent of the parties, does not affect the convenience of the witnesses, and would prejudice the timely administration of justice, plaintiff's choice of forum will be respected. Defendants' Motions to Transfer will be denied.

³This court, through its staff, supervised discovery aboard the ship on February 4, 2002.

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ORDER

AND NOW, this 21st day of August, 2002, for the reasons given in the foregoing memorandum, it is **ORDERED** that:

1. In Civil Action Number 02-cv-545, defendants' Motion to Transfer (#29) is **DENIED**.

2. In Civil Action Number 02-cv-550, defendants' Motion to Transfer (docketed, without a number, on July 3, 2002), is **DENIED**.

3. Discovery shall proceed, and shall be completed by **September 30, 2002**.

4. Pretrial memoranda in accordance with Fed. R. Civ. P. 26 as amended, Local Rule 16.1(c), and the rules of this judge as stated in the Handbook of Pre-Trial and Trial Practices and Procedures of the United States District Court for the Eastern District of Pennsylvania (available from the Clerk of Court or the Philadelphia Bar Association, or on-line at www.paed.uscourts.gov, under Judge Shapiro's procedures) shall be filed as follows:

Plaintiff - on or before **September 30, 2002**;
Defendant - on or before **October 15, 2002**.

Plaintiff shall propose stipulated facts. Defendant shall state agreement or disagreement with each of plaintiff's proposed stipulated facts and may counter-propose stipulated facts to which plaintiff is obligated to respond prior to the final pretrial conference.

Expert reports in accordance with Federal Rule of Civil Procedure 26(a)(2), if necessary, shall be submitted **with the parties' pretrial memoranda**. If the opposing party wishes to depose the expert, the deposition may be taken thereafter, unless otherwise ordered by the court. An expert's testimony at trial shall be limited to the information provided by the due date of a party's pretrial memorandum.

Exhibits shall be submitted to chambers with the final pretrial memoranda. In accordance with Fed. R. Civ. P. 26(a)(3), listed exhibits shall be numbered and **premarked** for use at trial; no exhibit shall be listed unless it is already in the possession of opposing counsel. **Only specifically listed exhibits may be used in the party's case-in-chief** except by leave of court.

As to documents listed in accordance with Fed. R. Evid. 803(6), as amended, notice in accordance with Fed. R. Evid. 902 (11) or (12) must be given no later than two weeks prior to the date the final pretrial memorandum is due.

All witnesses as to liability and damages should be listed. Only listed witnesses may testify at trial except by leave of court. Any party who intends to use deposition testimony at trial must submit deposition designations, counter-designations and objections in the final pretrial memorandum.

If it is believed that any additional discovery is necessary, it must be specifically requested, with the justification stated, in the pretrial memorandum.

Any other pretrial or trial matter requiring attention of the judge prior to trial, including but not limited to subjects for consideration at pretrial conferences listed in Fed. R. Civ. P. 16(c)(1-16), shall be specifically addressed in the final pretrial memorandum.

Any motions for summary judgment or other pretrial motions must be filed on or before the due date of the moving party's pretrial memorandum; an answer to any such motion must be filed within the time provided by the Rules of Civil Procedure. No reply is contemplated. Oral argument on any such motions will be heard at the final pretrial conference.

5. The final pretrial conference is scheduled for **November 5, 2002**, at **4:00 p.m.** Trial counsel must attend. It is the responsibility of any trial counsel who cannot attend to contact the court as soon as any conflict becomes known so the court may consider rescheduling the conference. **Unless the court has otherwise granted permission, whoever attends the final pretrial conference will try the case.**

6. This case will be placed in the non-jury trial pool on **November 6, 2002**, subject to call on 48 hours notice in accordance with the standing rule of this court as published in The Legal Intelligencer. **On or before the date of trial, the parties shall submit proposed findings of fact and conclusions of law, preferably on a computer disk in Word Perfect format.**

Norma L. Shapiro, S.J.