ACCIAI SPECIALI TERNI USA

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MEMORANDUM OPINION

This matter comes before the Court on a motion to dismiss forlack of subject matter jurisdiction, filed by the defendantTranscom Terminals, Ltd. ("Transcom"), a Maryland corporation.The plaintiff, Acciai Speciali Terni USA, Inc. ("AST"), a NewYork corporation, is seeking relief for cargo damage allegedlycaused by Transcom's negligent stevedoring. The issues have beenwell briefed by the parties, and no oral hearing is necessary.Local Rule 105.6 (Md.).

BACKGROUND

The general facts of this case are not in dispute. AcciaiSpeciali Terni, S.p.A., engaged carriers to make two shipmentsof steel sheets and coils from the port of Civitavecchia, Italy,to Baltimore, Maryland on board the M/V Berane and the M/V BulkSapphire. The M/V Berane arrived in Baltimore on May 10, 2000;the M/V Bulk Sapphire, on June 9, 2000. AST alleges that thesteel cargoes were loaded in good condition and were eitheroffloaded from the vessels in damaged condition or damaged whilebeing offloaded. Transcom, the discharging stevedore, performedthe offloading and then stored the cargoes for eventual receiptby inland carriers for delivery to AST, the consignee,purchaser, and owner of the steel. This admiralty actionfollowed.

The M/V Berane bill of lading lists Oktoih Overseas ShippingLtd. as the carrier, with its principal address in La Valletta,Malta. The M/V Bulk Sapphire bill of lading lists Adler ShippingCo. c/o Pacific & Atlantic Corp. as the carrier, with addressesin Cyprus and Piraeus, Greece, respectively. The contractualprovisions of both bills of lading, which govern the rights andobligations of the carriers and AST until delivery of thecargoes, see Wemhoener Pressen v. Ceres Marine Terminals,Inc., 5 F.3d 734, 738 (4th Cir. 1993), are identical.

Clause 2 of the bills, the General Paramount Clause, provides:

The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading . . . as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.

Trades where Hague-Visby Rules apply.

In trades where . . . the Hague-Visby Rules [] apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading. The Carrier takes all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in charge of another Carrier, and to deck cargo. . . .

Clause 3, the forum selection clause, provides:

Any dispute arising under the Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.

Finally, Clause 18, the Himalaya clause, provides:

It is hereby expressly agreed that no Servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the [consignee and owner of the cargo] for any loss, damage or delay arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors) and all such persons shall to this extent be or be deemed to be parties to the contract evidenced by Bill of Lading.

STANDARD OF REVIEW

Claiming the benefit of the forum selection clauses in thebills of lading via their Himalaya clauses, Transcom challengesCourt's subject matter jurisdiction under Federal Rule of CivilProcedure 12(b)(1). A motion to dismiss for lack of subjectmatter jurisdiction, however, seems somewhat inapt. A claimarising out of a maritime bill of lading fallssquarely within a federal court's admiralty jurisdiction under28 U.S.C. § 1333. And parties have no power by private contractto oust a federal court of its statutory jurisdiction. UnitedFuel Gas Co. v. Columbian Fuel Corp., 165 F.2d 746, 749 (4thCir. 1948). Nevertheless, no existing procedural mechanismprecisely matches a motion to dismiss based on a forum selectionclause. Not surprisingly, various circuits have adopted variousapproaches, see, e.g., Silva v. Encyclopedia Britannica Inc.,239 F.3d 385, 387 (1st Cir. 2001) (treating such motions as12(b)(6) motions to dismiss for failure to state a claim uponwhich relief can be granted); Lipcon v. Underwriters atLloyd's, London, 148 F.3d 1285, 1290 (11th Cir. 1998)(analyzing them as 12(b)(3) motions to dismiss for impropervenue); AVC Nederland B.V. v. Atrium Inv. P'ship,740 F.2d 148,

152-53 (2d Cir. 1984) (dealing with them as 12(b)(1)motions to dismiss for lack of subject matter jurisdiction).Some circuits, including the Fourth, have not decided the issue.See, e.g., Haynsworth v. Lloyd's of London, 121 F.3d 956, 961(5th Cir. 1997) (declining to resolve the "enigmatic question ofwhether motions to dismiss on the basis of forum selectionclauses are properly brought as motions under Fed.R.Civ.P.12(b)(1), 12(b)(3), or 12(b)(6), or 28 U.S.C. § 1406(a)"). Norneed this Court decide it.

The seminal Supreme Court decision enforcing a forum selectionclause places the burden on the plaintiff, who brings suit in aforum other than the contractually agreed one, to make a "strongshowing" that the court should exercise jurisdiction inderogation of the contract. M/S Bremen v. Zapata Off-ShoreCo., 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Theplaintiff bears an analogous burden to prove, when challenged,that a federal court has subject matter jurisdiction. See Evansv. B. F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999).Therefore, recognizing a 12(b)(1) motion as an imperfect, butuseful, mechanism to bring about a judicial decision, a courtmay analyze a motion to dismiss based on a forum selectionclause in the same manner as it analyzes a 12(b)(1) motion todismiss for lack of subject matter jurisdiction.

Treating Transcom's 12(b)(1) motion accordingly, the courtmust consider whether the plaintiff's allegations, standingalone and taken as true, support the court's exercise ofjurisdiction and a meritorious cause of action. See Dickey v.Greene, 729 F.2d 957, 958 (4th Cir. 1984). The Court may reviewevidence outside the pleadings without converting the proceedingto one for summary judgment. Evans, 166 F.3d at 647. Thedefendant, seeking enforcement of the clause, should prevailonly if no material facts are in dispute and the clause isenforceable as a matter of law. See Id.

ANALYSIS

Forum selection and choice of law provisions are prima facievalid and enforceable. M/S Bremen, 407 U.S. at 10, 92 S.Ct.1907; Allen v. Lloyd's of London, 94 F.3d 923, 928 (4th Cir.1996.) To overcome this presumption of enforceability, a partythat seeks to bring a suit in a forum other than the onedesignated by the forum selection clause must show thatenforcement would be "unreasonable under the circumstances."M/S Bremen, 407 U.S. at 10, 92 S.Ct. 1907 (internal quotationmarks omitted). Such circumstances may exist when: (1) theincorporation of the choice of forum and and law provisions intothe agreement was induced by fraud or overreaching; (2) thecomplaining party will for all practical purposes be deprived ofits day in court because of the grave inconvenience orunfairness of the selectedforum; (3) the fundamental unfairness of the chosen law maydeprive the plaintiff of a remedy; or (4) the provisionscontravene a strong public policy of the forum in which theplaintiff has brought suit. Allen, 94 F.3d at 928. When theprovisions belong to a bill of lading governed by the Carriageof Goods by Sea Act ("COGSA"), 46 U.S.C. App. §§ 1300-1315, theycontravene the law of the United States and are unenforceable ifthe substantive law to be applied lessens the carrier'sliability below what COGSA guarantees.[1] See Vimar Segurosy Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539, 115S.Ct. 2322, 132 L.Ed.2d 462 (1995) (involving a foreignarbitration clause); Watkins v. M/V London Senator,112 F. Supp.2d 511, 516 (E.D.Va. 2000)

(explaining how the M/V SkyReefer decision applies to foreign forum selection clauses andcollecting cases so extending it); Jewel Seafoods Ltd. v. M/VPeace River, 39 F. Supp.2d 628, 63132 (S.C. 1999) (same).

AST has not pointed to any circumstances that suggest thatenforcement of the choice of forum and law provisions in thebills of lading would be unreasonable. It alleges neither fraudnor overreaching by the carriers. It does not contend that theclauses would deprive it of its day in court or deny it remedy.Although the bills of lading at issue involve shipments to aUnited States port in international trade, AST does not arguethat the selected forum(s) or law would violate COGSA.[2]Because AST has made noshowing that enforcement would be unreasonable, the Court findsthe choice of forum and law clauses valid and enforceableagainst AST.

The Court must next determine whether the forum selectionclauses apply to Transcom, the discharging stevedore. Though nota party to the bills of lading, Transcom claims the benefit ofthe choice of forum clauses by virtue of the bills' identicalHimalaya clauses. The Himalaya clauses extend "every right,exemption from liability, defence and immunity" that thecarriers enjoy under the bills of lading to the carriers'servants, agents, and independent contractors "while acting inthe course of or in connection with [their] employment."[3]Such clauses "must be strictly construed and limited to intendedbeneficiaries." Robert C. Herd & Co. v. Krawill Mach. Corp.,359 U.S. 297, 305, 79 S.Ct. 766, 3 L.Ed.2d 820 (1959).Nevertheless, they need not employ the term "stevedores" forstevedores to be recognized as intended beneficiaries. Termssuch as "servants," "agents," or "independent contractors"sufficiently, include all those engaged by the carriers toperform the duties of the carriers under the carriage contracts.Wemhoener Pressen, 5 F.3d at 743.

The Himalaya clauses apply to all defenses that the carriersmay raise, and the forum selection clause is as valid a defensethat the carriers may raise as any other. See MarinechanceShipping, Ltd. v. Sebastian, 143 F.3d 216, 221 (5th Cir. 1998).A forum selection clause that requires litigation to be broughtin a different forum serves as a defense because it warrantsdismissal of the action, see LPR, SRL v. Challenger Overseas,LLC, 2000 A.M.C. 2887, 2892 (S.D.N.Y. 2000), and is akin to thedefenses of lack of subject matter jurisdiction, lack ofpersonal jurisdiction, and improper venue under Federal Rule ofCivil Procedure 12(b).

AST does not dispute that Transcom was an agent of thecarriers, acting within the course of its employment when thesteel was allegedly damaged. Nor is it unreasonable for theparties to the bills of lading to have expected that Transcomwould benefit from the forum selection clause to the same extentas the carriers. Indeed, it would be grossly inefficient for anaction against a carrier to be brought in one jurisdiction andanother action, arising out of the same shipment, to be broughtagainst the carrier's local agent in a different jurisdiction.See id. The parties cannot have envisioned such a result whenthey entered into the bills of lading. Transcom may thereforeinvoke the benefit of the forum selection clauses in the billsof lading.

However, a third-party beneficiary is bound by the terms andconditionsof the contract it invokes. Coastal Steel Corp. v. TilghmanWheelabrator Ltd., 709 F.2d 190, 203 (3d Cir. 1983); Trans-BayEng'rs & Builders, Inc. v. Hills, 551 F.2d 370, 378 (D.C.Cir.1976). The beneficiary "cannot accept the benefits and avoid theburdens or limitations" of the contract. Trans-Bay Eng'rs &Builders, 551 F.2d at 378. Therefore, Transcom, as a"Himalayan," third-party beneficiary of the bills of lading, isbound by the forum selection clauses it now asserts as a defensein this Court. It cannot take advantage of the clauses here butthen object to jurisdiction in the appropriate court(s). Cf.Mar. Ins. Co. v. M/V Sea Harmony, 1998 A.M.C. 1961, 1963-64,1998 WL 214777 (S.D.N.Y. 1998) (finding that Himalaya clause inbill of lading did not subject Argentinian stevedore to forumselection clause mandating litigation in U.S. District Court,noting that plaintiff could not extend a "liability" to theforeign stevedore beneficiary by enforcing the forum clause"against" it, and thus dismissing plaintiffs claims against thestevedore). The bills of lading evince no intent by the partiesto confer immunity from all jurisdiction on the intendedbeneficiaries of the Himalaya clauses. To avoid the manifestinequity that would attend Transcom's opposition, whethersuccessful or not, to jurisdiction in the selected forum(s), theCourt will therefore condition dismissal of AST's claims onTranscom's submission to jurisdiction in the appropriatecourt(s) and its waiver of any time limitation defensesotherwise applicable there. Dismissal will also be conditionedon acceptance of jurisdiction by the foreign court(s). See CBJ,Inc. v. M/V Hanjin Hong Kong, No. Civ. 99-4925, 2000 WL33258660, at *2 (N.J. Sept. 22, 2000) (imposing similarconditions on dismissal of claims against "Himalayan"beneficiary of forum selection clause); Kanematsu USA, Inc. v.M/V Pretty Prosperity, No. Civ. A. 99-1668, 2000 WL 943139, at*2-3 (E.D.La. July 7, 2000) (same); Consol. Bathurst, Ltd. v.Rederiaktiebolaget Gustaf Erikson, 645 F. Supp. 884, 887(S.D.Fla. 1986) (conditioning dismissal of claims againstthird-party beneficiary of choice of forum provision ininsurance contract upon beneficiary's acceptance of designatedcourt's jurisdiction).

CONCLUSION

For the foregoing reasons, a separate order will be issuedCONDITIONALLY GRANTING the motion of Defendant TranscomTerminals Ltd. to dismiss on the basis of the forum selectionclauses in the bills of lading.

ORDER

For the reasons stated in the Memorandum Opinion of even date,it is, this 17th day of January, 2002, hereby ORDERED:

1. That the motion of Defendant Transcom Terminals, Ltd., todismiss Plaintiffs amended complaint on the basis of the forumselection clauses in the bills of lading BE, and it hereby IS,GRANTED, and this case IS hereby DISMISSED, ON THE FOLLOWINGCONDITIONS:

a) That the Defendant submit to service of process and jurisdiction in the appropriate court or courts,

as determined by the forum selection clauses; and

b) That the Defendant waive any time bar defenses otherwise applicable in the foreign court or courts;

2. That this case will be reopened on motion of the Plaintiff,if it be shown that the Defendant has failed to meet any ofthese conditions;

3. That the Defendant may move to make this conditional Orderof dismissal final if:

a) The Plaintiff does not file in the appropriate foreign court or courts within ninety (90) days of this order; or

b) Upon timely filing, the foreign court(s) accept(s) jurisdiction, and the Defendant has complied with all conditions of this Order;

4. That, should the appropriate foreign court(s), upon timelyfiling, decline jurisdiction for any reason, the Plaintiff maymove to reopen this matter in this Court within ninety (90) daysof the foreign denial(s); and

5. That the Clerk of the Court send copies of this Order andthe Memorandum Opinion to counsel for the Parties.

1. COGSA applies ex proprio vigore to all bills of ladingfor shipments of cargo to or from a United States port inforeign trade. Section 3(8) provides that "[a]ny clause . . . ina contract of carriage relieving the carrier or the ship fromliability for loss or damages to . . . the goods . . . orlessening such liability . . . shall be null and void and of noeffect." 46 U.S.C. App. § 1303(8).

2. The parties only dispute whether COGSA (the Hague Rules asenacted in the United States) or the Hague-Visby Rules shouldapply. Citing the first paragraph of Clause 2, the GeneralParamount Clause, and Additional Clause B, Transcom contendsthat COGSA applies. AST, on the other hand, appealing to thesecond paragraph of Clause 2, argues that the Hague-Visby Rulesapply. AST, it seems, has the stronger argument. Read together,the two paragraphs of the General Paramount Clause indicate thatthe parties have agreed that the Hague-Visby Rules should governthe bills of lading whenever those rules have been enacted inthe country of shipment. See Itel Container Corp. v. M/V TitanScan, 139 F.3d 1450, 1454 (11th Cir. 1998) (interpreting aGeneral Paramount Clause identical to those here). Italy, thecountry of shipment, has enacted the Hague-Visby Rules. ASTMotion for Part. Sum. Jdgmt., Exh. B. Therefore, the Hague-VisbyRules ought to apply. Additional Clause B, which states thatCOGSA should govern whenever the bills of lading are subject toit, does not controvert this conclusion. COGSA does apply tothese bills of lading because they involve shipments to a portin the United States. However, COGSA itself expressly permitsparties to agree to increase the carrier's liability limitationsbeyond what COGSA requires. 46 U.S.C. App. §§ 1304(5), 1305; seealso J.C.B. Sales Ltd. v. Wallenius Lines, 124 F.3d 132, 136-37(2d Cir. 1997). The Hague-Visby Rules generally impose higherliability limits than COGSA. See J.C.B. Sales Ltd., 124 F.3dat 137. Thus application of COGSA does not affect the parties'agreement to raise

the limits of liability under the GeneralParamount Clause. See id. Nevertheless, the Court need notfinally decide this issue, inasmuch as neither party contendsthat the applicable law would reduce the carriers' liabilitybelow the statutory minimum established by COGSA. The disputeover which law applies is therefore immaterial and cannotprevent dismissal. Intriguingly, Clause 3 of the bills oflading, the forum selection clause, in addition to specifyingthe forums as the countries where the carriers have theirprincipal places of business, also provides that "the law of[the forum] countr[ies] shall apply except as provided elsewhereherein." Taking the bills of lading on their faces, thedesignated forums would appear to be Malta for the M/V Beraneshipment and either Cyprus or Greece for the M/V Bulk Sapphireshipment. AST neither denies that these are the agreed forumsnor quarrels with these forums qua forums. Regarding thechoice of law provision of the forum selection clause, whateverMaltese, Cypriot, or Greek law is implicated, the Court agreeswith the parties that the General Paramount Clause (togetherwith Additional Clause B) controls the choice of substantive lawin determining the liability of Transcom. But see ItelContainer Corp., 139 F.3d at 1455 (suggesting that such achoice of local law provision within a forum selection clausemight operate to trump the choice of law provisions of a generalparamount clause).

3. A passenger injured on the English ship Himalaya, theeponym of such clauses, successfully sued the negligent masterand boatswain because the carriage contract exempted the carrierfrom liability but did not extend any such exemption to thecarrier's servants or agents. See 2A Michael F. Sturley,Benedict on Admiralty § 169, at 16-51 n. 13 (7th rev. ed.,Matthew Bender & Co. 2001) (describing Adler v. Dickson,[1955] 1 Q.B. 158 (C.A. 1954)).