UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

VINOD KUMAR DAHIYA	*	CIVIL ACTION
VERSUS	*	NO. 02-2135
TALMIDGE INTERNATIONAL, LTD., ET AL.	*	SECTION "F"

ORDER AND REASONS

Before the Court is plaintiff's Motion to Remand and defendants' Motion to Compel Arbitration and Stay, or, Alternatively, to Dismiss. For the reasons that follow, the plaintiff's motion is GRANTED and the defendants' motion is DENIED.

Background

The plaintiff, Vinod Kumar Dahiya, an Indian national, was a crew member on the M/T EAGLE AUSTIN pursuant to an employment agreement with defendant Neptune Shipmanagement Services. The EAGLE AUSTIN is registered in Singapore. Plaintiff was injured on November 13, 1999 while operating the vessel's incinerator. He received medical treatment in Louisiana, and has since returned to India.

Dahiya signed an employment contract before starting work on the EAGLE AUSTIN. The contract provides:

> Any dispute arising out of this Agreement shall be subject to Arbitration under the Arbitration and Conciliation Act, 1996. The said proceedings shall take place either in Singapore or in India at the option of the Company.

On March 4, 2002, Dahiya sued Neptune and four others in Louisiana state court for damages under the Saving to Suitors clause, 28 U.S.C. § 1333(1). Defendants removed the case

to federal court. However, they did not file the removal notice within thirty days of plaintiff's initial pleading. Plaintiff now moves to remand to state court, and defendants move to compel arbitration or, in the alternative, to dismiss.

I. Validity of the Forum Selection Clause in Dahiya's Contract

The Court begins with an analysis of the contract's forum selection clause. The Supreme Court, in M/S BREMEN v. Zapata Off-Shore Co., 407 U.S. 1 (1972), affirmed that forum selection clauses in international agreements are presumptively valid. This presumption of validity may be overcome, however, by a clear showing that the clause is "unreasonable under the circumstances." THE BREMEN, 407 U.S. at 10.

A forum selection clause is unreasonable if: (1) the incorporation of the clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement "will for all practical purposes be deprived of his day in court" because of the grave inconvenience of unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the clause would contravene a strong public policy of the forum state. Haynsworth v. Lloyd's of London, 121 F.3d 956, 963 (5th Cir. 1998)(citing THE BREMEN, 407 U.S. at 12-13).

Plaintiff contends that the contract's forum selection clause is invalid because its enforcement would violate a strong public policy in Louisiana. A state's strong public policy can be "declared by statute or by judicial decision." THE BREMEN, 407 U.S. at 15. Louisiana's strong public policy against forum selection clauses in employment contracts is evident by both statute and the Louisiana Supreme Court. La.R.S. § 23:921(A)(2) states:

> The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or choice of law clause in an employee's contract of employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action. (Emphasis added).

Moreover, the Louisiana Supreme Court has held that La. R.S. § 23:921 invalidated the forum selection clause of a Polish seaman's employment contract. The high court wrote:

> [T]he United States Supreme Court in [THE BREMEN] held that forum selection clauses will be upheld unless they contravene a strong public policy of the forum in which the suit is brought. La.Rev.Stat. 23:921(A)(2) is an expression of strong Louisiana public policy concerning forum selection clauses.

Sawicki v. K/S STAVANGER PRINCE, 802 So.2d 598, 603 (La. 2002).

This Court finds that the unequivocal language of both La.R.S. § 23:921 and the Louisiana Supreme Court demonstrate that employment contract forum selection clauses contravene strong Louisiana public policy. The record is silent on the issue of plaintiff's ratification and plaintiff has specifically denied any form of ratification occurred.

II. Removal Under 9 U.S.C. § 205

"Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C. § 1441(b). Under § 203 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

"[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203.

While defendants' failure to file a notice of removal within thirty days of plaintiff's initial pleadings waives most of their subject matter jurisdiction claims, § 205 of the Convention permits removal at any time before trial. § 205 states:

> 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, 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.

An agreement to arbitrate exists within the meaning of § 205 if: (1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen. See Francisco v. STOLT ACHIEVMENT MT, 293 F.3d 270, 273 (5th Cir. 2002); U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping, 241 F.3d 135, 146 (2d Cir. 2001).

The Court finds that Dahiya's employment contract fails to satisfy the second element of an "arbitration agreement" under § 205. The forum selection clause in Dahiya's employment contract states that arbitration shall occur in either Singapore or India. While it is undisputed that both countries are signatories to the Convention, the forum selection clause is invalid because it contravenes Louisiana express public policy. Therefore, the employment contract does not

provide for arbitration in the territory of a Convention signatory, and the Court finds that no arbitration agreement exists to justify removal under § 205.[1]

Accordingly,

The plaintiff's Motion to Remand is GRANTED. Thus, defendants' Motion to Compel Arbitration and Stay, or, Alternatively, to Dismiss is DENIED.

New Orleans, Louisiana, October 11, 2002

Martin L.C. Feldman

MARTIN L.C. FELDMAN
UNITED STATES DISTRICT JUDGE

[1] In Francisco, the Fifth Circuit held that the Convention governed an employment contract containing arbitration and forum selection agreements nearly indistinguishable from those in Dahiya's contract. See id. at 278. The Francisco plaintiffs, however, did not assert that Louisiana's public policy contravened forum selection clauses in employment contracts. Thus, Francisco is not controlling.