CGB MARINE SERVICES

MINUTE ENTRY
WICKER, J.
SEPTEMBER 11, 1990

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
Sep 12 8 27 AM '90
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CGB MARINE SERVICES COMPANY AT LAPLACE AND CONSOLIDATED GRAIN AND BARGE COMPANY — CIVIL ACTION

VERSUS — 86-3877

M/S STOLT ENTENTE, her engines tackle, apparel, furniture, etc., in rem, SOCIETE FRANCAISE de TRANSPORTS MARITIMES, SOCIETE FRANCAISE de TRANSPORT PETROLIERS, in personam — SECTION "L"(3)

Defendants and third party defendants BP Oil International, Limited and its division, B. P. Marine International [collectively referred to as "BPOI"] filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction or, alternatively, to Dismiss or Stay Proceedings pending arbitration pursuant to the Convention on the Recognition and the Enforcement of Foreign Arbitral Awards and the United States Arbitration Act, 9 USC §1 et seq. BPOI's motion was submitted on briefs without oral argument on a former date.

The Court has considered the briefs, reply briefs and supplemental briefs of counsel, the record, and the applicable law. Accordingly, IT IS ORDERED that BPOI's Motion to Dismiss IS hereby DENIED; BPOI's alternative Motion to Stay Proceedings pending arbitration IS hereby GRANTED.

This litigation arose from a collision on the Mississippi River on September 6, 1986, when the M/S Stolt Entente hit and damaged a dock/boat repair facility and barges moored there. The owner of the dock/repair facility and the owner of the barges, CGB Marine Services Company at Laplace and Consolidated Grain and Barge Company [collectively referred to as "CGB"], sued the vessel and its owners, Societe Francaise de Transportes Maritimes and Societe Francaise de Transportes Petroliers [collectively referred to as "Societe"]. In an amended complaint, CGB added several defendants which allegedly provided the M/S Stolte Entente with contaminated bunker fuel and diesel oil which allegedly caused engine "black out" and the collision.[1] Societe settled with CGB and obtained assignment of their rights.

By amended cross claim and third party complaint, Societe added BPOI and claimed that contaminated bunker fuel and diesel oil sold by BPOI caused an engine "black out" and the collision. It is BPOI which invokes the arbitration clause in its contract of sale and seeks in this motion either dismissal or stay of these proceedings, pending arbitration in England. Societe claims that it is not bound by the arbitration clause in the BPOI contract.

For the reasons which follow, the Court finds that Societe is bound by the arbitration clause in the BPOI contract and finds that arbitration is appropriate under the facts of this case.

The evidence shows the following relationship between the various vessel interests:

[1] CGB added as defendants B. P. Netherlands, B. P. Malaysia and Stolt Tankers, Inc. ["STI"]. STI was dismissed by an earlier motion for summary judgment. Societe third partied BP North America Petroleum Inc. ["BPNAP"], another alleged fuel supplier. Thereafter the Court granted the motions to dismiss of BP Netherlands and BP Malaysia and denied BPNAP's motion for summary judgment.

DATE OF ENTRY: SEP 12 1990

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INTERNATIONAL ARBITRATION REPORT

The Societe Francaise de Transportes Maritimes, a corporation existing under the laws of France, was the registered owner of the M/S Stolt Entente; the Societe Francaise de Transportes Petroliers, was the technical operator of the M/S Stolt Entente. (Affidavit of Jean Yves Thomas, Societe Exhibit 3). On November 28, 1980, Societe time chartered the M/S Stolt Entente to SFTM Parcel Tankers Limited, a United Kingdom corporation ["SFTM Parcel Tankers."] (Societe Exhibit No. 3, Attachment A.) On April 9, 1985, SFTM Parcel Tankers placed the M/S Stolt Entente at the disposal of Stolt Tankers Limited, a Liberian limited partnership, SFTM Parcel Tankers was one of several limited partners in Stolt Tankers Limited. Stolt Tankers, Inc. ["STI"] was its general partner. Stolt Nielsen acted as agent for STI and entered into a contract with BPOI for sale of bunker fuel to service the M/S Stolt Entente; the BPOI contract contains an arbitration clause. [BPOI Exhibit E.]

9 USC §4 of The Federal Arbitration Act provides:

> The Court shall hear the parties[1], and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the Court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

"The Act does not require arbitration unless the parties to a dispute have agreed to refer it to arbitration... likewise, the mandatory stay provision of the [Federal Arbitration Act, 9 USC §§ 1 - 14] does not apply to those who are not contractually bound by the arbitration agreement." Matter of Talbot Bigfoot, Inc. 887 F. 2d 611, 614 (5th Cir. 1989).

In deciding that this case should be stayed pending arbitration, the Court examined three documents: (1) the Time Charter Party agreement between Societe and SFTM Parcel Tankers Limited ["Time Charter"] (Societe Exhibit 3, Attachment A); (2) the Stolt Tankers Limited Partnership Agreement and the Manual of Technical and Operational Standards for Fleet Vessels of Stolt Tankers Limited ["Limited Partnership Agreement"] (BPOI Exhibit B); and (3) the BP Oil International Limited Terms of Sale -- Bunkers ["BPOI contract"] (BPOI Exhibit E).

The Time Charter provides that the "[c]harterers shall supply

[1]This language requires an evidentiary hearing when there is a dispute over an agreement to arbitrate, but appellate courts have not held district courts to the letter of the law. In Commerce Park at DFW Freeport v. Mardian Const. Co., 729 F. 2d 334, 340 (5th Cir. 1984), the Fifth Circuit found that no evidentiary hearing was required because

> the parties were afforded the opportunity, of which they both took full advantage, exhaustively to brief the issues to the district court. As we have already noted, Commerce Park does not allege, nor does it appear on the record, that disputed factual questions going to the legal issue of arbitrability existed. In the absence of such a showing, we conclude that an evidentiary hearing was not required as a predicate for the district court's

BPOI's motion was originally set for hearing and then submitted on briefs because of renovation taking place in the courthouse. No one objected to its being submitted on briefs and neither party has specifically requested an evidentiary hearing on the arbitration issue. With a brief in support, a brief in opposition, a reply brief to the opposition, a reply brief to the reply brief to the opposition, and two supplemental memoranda, the parties like those in Commerce have exhaustively briefed the issue and those briefs contain no contention that there are material facts in dispute. Therefore for the reasons given in Commerce, the Court finds that no evidentiary hearing is needed despite the mandatory language of 9 USC §4.

for use in the main motors fuel oil [of certain specifications.]... If at Owners request the vessel is supplied with more expensive bunkers... the difference in price shall be borne by Owner." (Societe Exhibit 3, Attachment A.] The Time Charter also provides that the

> [c]harterers shall (except when incurred for Owners' purposes or during loss of time on Owners' account...) provide and/or pay for: (1) all fuel except (a) fuel for Owners' account under Clause 19, and (b) fuel used in connection with a General Average sacrifice or expenditure or with preparation for the drydocking, repair, or docking of the vessel for Owners' purposes. Id.

The Time Charter is to "be construed in accordance with the law of England [and] [a]ny dispute arising under this charter party shall be settled by arbitration in London." Id.

In his deposition, Carl Gronseth of Stolt Nielsen, Inc., explained the general terms of the Limited Partnership agreement.[1] (BPOI Exhibit C.) Under the partnership agreement, Stolt-Nielsen

[1] Article V of the Partnership Agreement DISTRIBUTION 5.01 The Fleet provides that "[t]The ships of the Limited Partners, as listed in Schedule 1 hereto, shall be traded in a pool for the Partners by the Partnership." [BPOI Exhibit B.]

Article XII, MISCELLANEOUS (a) states that "[a]ll trading of the Fleet will be done in the name of the General Partner [STI], who will ... utilize on an exclusive basis the brokerage/management services of the Stolt-Nielsen network of offices worldwide." Id.

The Manual of Technical and Operational Standards for Fleet Vessels of Stolt Tankers Limited, 1[1(a) states that the general partner "STI... shall provide and pay for the items listed in Schedule 3 of the Agreement" [those included Bunker Costs]. Specifically, §14(a) provided that

> STI shall order and pay for all fuel in accordance with [SFTM Parcel Tankers Limited]'s fuel oil specifications contained herein from a major or recognized independent suppliers.

(BPOI Exhibit C.) Under the partnership agreement, Stolt-Nielsen Inc., as the general agent for STI, purchased fuel for all ships in the pool. (Id. at 151.) Carl Gronseth also explained the fuel purchasing process. Fuel was delivered to the M/S Stolt Entente in Rotterdam. (Id. at 60.) and invoiced by BPOI in London. (BPOI Exhibit D.)

Lars Ljungberg, an executive with BP North America Petroleum Inc. ["BPNAP"], set forth the details of the particular sale which underlies this dispute. In early October, 1985, Stolt Nielsen, Inc. placed two orders through BPNAP in Houston [BPOI's USA agent] for fuel to be delivered to the M\S Stolt Entente in Rotterdam on October 8 - 10, 1985, and on October 10, 11, 1985. (Affidavit of Lars Ljungberg, BPOI Exhibit G.) BPNAP relayed the order to BPOI in London. These sales were subject to the BPOI contract which had been furnished to Stolt Nielsen, Inc. prior to the sales in question. Id.

BP Oil International Limited Terms of Sale -- Bunkers provides:

> 20. Law and Arbitration.
>
> (a) The construction, validity and performance of the contract shall be governed by English law.
>
> (b) Any dispute arising out of or in connection with the contract shall be submitted to arbitration in accordance with the English Arbitration Act, 1950 or any statutory modification or re-enactment thereof which may for the time being be in force. (Emphasis added.) (BPOI Exhibit E.)

Societe is not expressly named in either the Limited

Partnership Agreement or in the BPOI contract.[1] That fact, however, does not mean that Societe need not arbitrate this fuel dispute.

After an extensive review of the evidence and the applicable law, the Court finds that Societe interposed a related corporate entity, SFTM Parcel Tankers, in its operation and management of the M/S Stolt Entente, that Stolt-Nielsen was the authorized agent of STFM Parcel Tankers, and that Societe was the third party beneficiary of the BPOI contract.

The parties to a contract may establish rights in a third party beneficiary by indicating the intent to do so:

> A beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of a promise will satisfy an obligation of the promisee to pay money to the beneficiary ; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary. Restatement (Second) of Contracts §302. Beverly v. Macy, 702 F. 2d 931, 940 (11th Cir. 1983).

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[1] In listing the owners of the vessel the term "SFTM" appears after the M/S Stolt Entente, but the only SFTM referenced in the agreement is SFTM Parcel Tankers.

The introduction to the Limited Partnership Agreement explains that "[t]he General Partner and the Limited Partners are sometimes collectively referred to [in the Agreement] as the "Partners". The Limited Partners are sometimes collectively referred to as "Owners" in their capacity as owners or chartered owners of ships." [Emphasis supplied.] [BPOI Exhibit B.]

The identities of Societe and SFTM Parcel Tankers, Ltd. were initially confused in this case because the initials "SFTM" in the Limited Partnership Agreement referred to SFTM Parcel Tankers, Ltd., and SFTM was listed as the owner of the M/S Stolt Entente in the vessel listing attached to the Time Charter Agreement. [BPOI Exhibit B.]

In an earlier motion for summary judgment filed by Stolt Tankers, Societe did not contest the fact that "[t]he relationship between SFTM/SFTP and Stolt Tankers, Inc. is governed by the contract [The Limited Partnership agreement] between them..." In that motion the initials SFTM/SFTP referred to the same parties which are now being called "Societe." BPOI argued that SFTM/SFTP [Societe] cannot now dispute whether it is bound by the Stolt Tankers Limited Partnership agreement under Local Rule 3.10 [now 2.10E].

Local Rule 2.10E states: "All material facts set forth in the statement required to be served by the moving party will be deemed admitted, for purposes of the motion, unless controverted as required by this rule." [Emphasis added.] BPOI is not seeking to have the fact admitted for purposes of STFs motion for summary judgment; BPOI wants the fact admitted for purposes of its own motion to dismiss or stay for arbitration. There is a distinct difference. Furthermore, while it is true, as BPOI asserts, that as a general rule, "'factual assertions in pleadings are ... judicial admissions conclusively binding on the party that made them.' White v. ARCO/Polymers, 720 F. 2d 1391, 1396 (5th Cir. 1983) ... [and] [f]acts that are admitted in the pleadings 'are no longer at issue.'" [Citations omitted.] [Davis v. A.G. Edwards and Sons, Inc. 823 F. 2d 105, 108 (5th Cir. 1987)], both White and Davis are distinguishable.

In White, a party submitted a proposed pretrial order and findings of fact and conclusions of law. Then he filed an amended complaint and later submitted new proposed findings of fact and conclusions of law. The opposing party failed to contend that White's admissions barred his asserting a contrary position in his later pleadings and the court found that he had waived the argument that the contested matter was settled. Nonetheless the Court said that the contrary assertions would operate as adverse evidentiary admissions and were properly before the Court in its resolution of a factual issue. In Davis, the court granted summary judgment finding that the two year statute of limitations for securities violations had passed before suit was filed. In the complaint the plaintiffs had asserted that they closed their accounts with the defendant broker in August, 1983. Later one of the plaintiffs submitted an affidavit stating that he did not know of the violation until January 1984, when he discovered the defendant's employees had lied to him. The Court held the plaintiffs to their earlier admission in the pleadings and affirmed the district court's granting summary judgment.

For the foregoing reasons, the Court will not hold Societe to that earlier uncontested fact for purposes of this present motion.

When determining whether the parties to the contract intended to bestow a benefit on a third party, a court may look beyond the contract to the circumstances surrounding its formation (Citations omitted.) Id.

As an indication of the intent of the parties, the time charter agreement between Societe and SFTM Parcel Tankers authorized SFTM Parcel Tankers to participate in the limited partnership agreement for the operation and management of the vessel. Societe also in that time charter agreement authorized SFTM Parcel Tankers to appoint the manager for the partnership, Stolt Tankers. (Societe Exhibit J, Attachment A.) Specifically, the Time Charter includes a general statement about Scheduling and Trafficking

> 49. Charterers may made arrangements with others for managing the marketing, scheduling and trafficking of the vessel without prejudice to the respective rights and obligations of either party under this Charter, subject to prior approval of the Owners, which approval will not be unreasonably withheld. Id.

The portion of the Time Charter Agreement entitled CHARTER HIRE clearly bases the charter hire due Societe on the participation of SFTM Parcel Tankers in the Stolt Tankers Limited Partnership:

> 1 Charter Hire shall be calculated on the basis that SFTM shall be entitled to a proportionate part of the disposable earnings of the Partnership's Fleet determined in the manner set forth below. Id.

The charter hire of SFTM Parcel Tankers to Societe came from the proceeds of the Stolt Tankers Limited Partnership. (Affidavit of Jean Yves Thomas, Societe Exhibit J.) The revenue received from

the limited partnership by SFTM Parcel Tankers was paid to Societe as charter hire. Societe received revenue directly from the operation of the Stolt Tankers Limited Partnership. Therefore the Court finds that the Time Charter agreement between the Societe and SFTM Parcel Tankers contemplated and approved the participation of SFTM Parcel Tankers in the Stolt Tankers Limited Partnership.

Societe argued that they were not direct intended beneficiaries of the BPOI terms of sale since they received revenue from SFTM Parcel Tankers irrespective of whether the vessel sailed or remained idle as long as the vessel was not taken off charter hire by Stolt Tankers, Inc. Thus, Societe argued that they received only "incidental benefit" from the contract for sale of bunker fuel and mere incidental benefit is insufficient to establish third party beneficiary status. The Court agrees that mere incidental benefit fails to establish third party beneficiary status. However, the Court disagrees that the fact that Societe received revenue whether or not the M/S Stolt Entente sailed means that Societe received only incidental benefit from the sale of bunker fuel oil. The limited partnership was formed to trade vessels in the pool. Stolt Nielsen was the exclusive agent for that pool. Without fuel the primary purpose of the pool would not be realized and there would be no profits from which to pay the charter hire. Societe was certainly an intended beneficiary of the BPOI contract.

Societe also contended that Clause 17 of the BPOI/Stolt Tankers/Stolt Nielsen contract proves that it was intended that

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only the expressly named parties to be bound by the arbitration provision of the BPOI contract. Clause 17 of the BPOI Terms of Sale provides:

> The BUYER shall not assign the contract or any of its rights and obligations thereunder. [BPOI Exhibit E.]

This is not an instance where STI has assigned the contract or any of its rights and obligations, so the Court's finding Societe bound to arbitrate this fuel dispute in England as a third party beneficiary of the BPOI sales contract does not violate the BPOI contract's prohibition against assignment.

Societe's next argument was that United States and Liberian law sheltered SFTM/Societe from the obligation of a general partner or the obligations of the limited partnership as an entity because SFTM/Societe exercised no control or management over the limited partnership,. Therefore STI could not bind a limited partner to the arbitration clause in the BPOI contract. BPOI countered that Societe did participate in the management and control of the business, to which Societe replied that there was no such evidence.

The particular portion of Liberian law, on which Societe relied is Title V of the Liberian Code of Laws Revised (1976):

§31.7 of Title V Limited partner not liable to creditors provides:

> A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control and management of the business. [Societe Exhibit B.]

While the Court does not agree with BPOI that SFTM/Societe lost its limited partnership status by their election of two representatives

of SFTM to serve on the Board of Directors,[1] the Court finds that

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[1] ARTICLE IV, BOARD OF DIRECTORS of the Limited Partnership Agreement provides that

The voting power on the Board of Directors shall be equal to their respective combined earning factors allocated to each Partner.

The Board shall decide unanimously on matters such as:

- capital expenditures on a minority Owner's ship.
- change in earning factors of existing ships in the Fleet.
- assignment of earning factors to new ships brought into the Fleet
- withdrawal of a minority Owner's ship.
- all other matters which do not deal with the parcel tanker trade.

The Board shall decide by a simple majority on matters such as:

- addition of new ships.
- addition of new Owners (Partners).
- withdrawal of ships by PTI
- capital expenditures on PTI ships.
- time charter of ships into the Fleet for periods exceeding one year.
- layup or slow steaming of ships.
- all other matters which deal with the parcel tanker trade.

(BPOI Exhibit B.]

BPOI points specifically to the last category "All other matters which deal with parcel tanker trade" as indicative that the Board of Directors (and therefore SFTM Parcel Tankers) participated in decisions concerning the operation of the business. If that were the case then there would be no limited liability for any of the limited partners and would render the Limited Partnership Agreement nugatory. "[A] contract should be construed so as to give effect to its general purpose." Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F. 2d 556 (3rd Cir. 1973), citing Restatement, Contracts §§235(c), 236(b) and (c) (1932); Williston on Contract, Third Edition §§618, 619 (1961). See also Fortec Constructors v. United States, 760 F. 2d 1288, 1292 (Fed. Cir. 1985) ["[A]n interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless."] Accord Sam's Style Shop v. Cosmos Broadcasting Corp. 496 F. Supp. 46, 50 (E.D. La. 1980) ["It is hornbook law that an interpretation of a contract which preserves it is preferable to one which renders it void," citing Louisiana law.]

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§31.7 of Title V of the Liberian Code of Laws Revised has no bearing on whether the limited partner would be subject to an arbitration clause in a contract of sale for fuel oil between an agent for the general partner[4] and a third party. BPOI is not sued or being sued in the capacity of a creditor. BPOI is being sued as an alleged seller of defective bunker fuel.

Finally Societe urged the Court to find that Liberian law of limited partnership would preclude the general partner from binding the limited partner to an arbitration provision. However, the only prohibitions to the power of a general partner appear in §31.9 of Title V of the Liberian Code of Laws Revised (1976)[5] and likewise

[4] Article XII(a) of the Limited Partnership Agreement states that

> All trading of the Fleet will be done in the name of the General Partner, who will not be engaged in any other activities than managing the business of the Partnership and will utilize on an exclusive basis the brokerage/management services of the Stolt Nielsen network of offices worldwide. (BPOI Exhibit B.)

[5] §31.9 of Title V of the Liberian Code of Laws Revised (1976) Rights, powers and liabilities of a general partner provides:

> A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to
>
> (a) Do any act in contravention of the certificate.
>
> (b) Do any act which would make it impossible to carry on the ordinary business of the partnership.
>
> (c) Confess a judgment against the partnership.

have no bearing on the question of arbitration.

The final portion of Liberian law on which Societe relies is equally inapplicable. §31.26 of Title V of the Liberian Code of Laws Revised (1976) provides:

> Parties to action
>
> A contributor, unless he is a general partner, is not a liable party in proceedings against the partnership except when the object is to enforce his liability to the partnership. A limited partner, anything to the contrary notwithstanding, may always enforce his rights against the partnership. (Emphasis supplied.) Id.

Stolt Tankers Limited, the limited partnership, is not a party to this lawsuit; this matter does not involve proceedings against the partnership.

Having found that Societe is subject to the arbitration clause in the BPOI Terms of Sale, the Court must still determine whether arbitration is appropriate. Having reviewed the evidence and the applicable law, the Court finds that indeed the parties' dispute can be resolved by arbitration in England.

This Court has jurisdiction over this lawsuit because the collision took place in the waters of the Mississippi River. Even

> (d) Possess partnership property, or assign their rights in specific partnership property for other than a partnership purpose.
>
> (e) Admit a person as a general partner.
>
> (f) Admit a person as a limited partner, unless the right to do so is given in the certificate.
>
> (g) Continue the business with partnership property on the death, retirement or disability of a general partner, unless the right to do so is given in the certificate. (Societe Exhibit B.)

though it has jurisdiction, this Court need not assume jurisdiction of a suit between foreigners...."if justice would be as well done by remitting the parties to their home forum." Canada Malting Co. v. Paterson Steamships, 285 U.S. 413, 420, 52 S. Ct. 413, 76 L. Ed. 283 (1932).

The Convention on Recognition and Enforcement of Foreign Arbitral Awards ["Convention"] requires that the Courts enforce any written agreement which provides arbitration as the mechanism to resolve international commercial disputes. 9 USC §201. See generally Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Corp., 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). When analyzing whether arbitration is appropriate under the Convention, the court undertakes a limited inquiry:

> (1) is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;
>
> (2) does the agreement provide for arbitration in the territory of a Convention signatory;
>
> (3) does the agreement to arbitrate arise out of a commercial legal relationship;
>
> (4) is a party to the agreement not an American citizen?
>
> Sedco v Petroleos Mexicanos Mexican Nat. Oil Co., 767 F 2d 1140, 1144 - 1145 (5th Cir. 1985).

The Court finds all factors have been satisfied in the case at bar:

(1) There is an agreement in writing to arbitrate the dispute and that arbitration agreement is broad in scope.

> The Court should compel arbitration and permit the arbitrator to decide whether the dispute falls within the clause, if the clause is 'broad.' If the clause is 'narrow,' arbitration should not be compelled unless the court determines that the dispute falls within the clause.... the tone of the clause as a whole must be considered. Id.

"Additionally, when confronted with arbitration agreements, we presume that an arbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue....' Commerce Parks of DFW Freeport v. Mardian Construction Co., 729 F. 2d 334 (5th Cir. 1984)." Id. The Court finds that the BPOI arbitration clause can be interpreted to cover this fuel dispute.

(2) The agreement provides for arbitration in England; England/the United Kingdom is a signatory to the Convention.

(3) The agreement to arbitrate arises out of a commercial legal relationship: a shipping contract and fuel oil purchase agreement.

(4) BPOI, the seller of bunker fuel and a party to the sale of fuel oil agreement, is based in England and is not an American citizen. Stolt Nielsen, Inc. contracted with BPOI for delivery of bunker fuel. Stolt Nielsen, Inc. has a base of operations in the United States but acts as agent for SFTM Parcel Tankers, which has its principal place of business in England. Societe is registered and existing under the laws of France.

Finally the Court must determine if it can compel arbitration in the United Kingdom.

The Convention authorizes the Court to compel arbitration outside the United States if the contract expressly or implicitly

Equipment, 819 F. 2d 247, 249 (9th Cir. 1987). In [redacted] case, the arbitration clause provides that any dispute arising out of the contract shall be governed by English law and submitted to arbitration under the English Arbitration Act.

In its last supplemental memorandum, Societe raised a final argument that even if Societe, as Societe, were subject to arbitration in England over the fuel dispute, Societe as assignee of the tort claim belonging to CGB, cannot be so bound. While the Court agrees that there is a difference between Societe's position as assignee of CGB's claims and as a party directly damaged by the alleged defective product allegedly sold by BPOI, that difference does not defeat BPOI's motion to stay.*

In deciding whether a particular claim falls within the scope of an arbitration agreement, the court focuses on the factual allegations underlying the causes of action rather than the legal labels asserted. Mitsubishi, 473 U. S. at 620 - 628, 105 S. Ct. at 3351 - 3355. [In Mitsubishi, the United States Supreme Court found

* Italia Di Navigazione, SPA v. M/V Hermes I, 578 F. Supp. 81 (S.D.N.Y. 1983), cited by Societe is distinguishable. Two separate proceedings were involved. Italian Line, the time charterer, as assignee of the cargo owners, sued the vessel owner for damages for nondelivery of cargo; Italian Lines also initiated arbitration proceedings under the time charter agreement against the vessel owner seeking indemnification for cargo loss. The vessel owner sought to stay discovery in the damage suit because it alleged that what the time charterer was actually seeking in the damage suit was indemnification and indemnification was subject to arbitration. The New York district court did not agree with the vessel owner that the cargo damage claim was actually one for indemnity, denied the motion to stay, and allowed discovery to proceed in the damage suit while arbitration was ongoing.

[redacted] and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction were arbitrable pursuant to the Federal Arbitration Act.]. A presumption of arbitrability exists. "[A]rbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue.'" (Citations omitted.) Mar'Lin of Louisiana, Inc. v. Parsons-Gilbone, 773 F. 2d 633, 634 - 635 (5th Cir. 1985).

In this case, Societe asserted its damage claim against BPOI and a claim for contribution or indemnity for payments made to CGB. Societe's claims both for damages and indemnity are based on the same set of operative facts, the sale of allegedly defective bunker fuel oil to the M/S Stolt Entente. Third party claims for contribution and indemnity are arbitrable "at least and until it is otherwise decided by the arbitrator." Acevedo Maldonado v. PPG Industries, Inc. 514 F. 2d 614, 617 (1st Cir. 1975) [The contract provided for arbitration of "any controversy or claim arising out of or related to this agreement or the breach thereof." The court rejected the third party plaintiff's contention that contribution or indemnity claims in tort were outside the scope of an arbitration clause and concluded that the

> [b]road language of this nature covers contract-generated or contract-related disputes between the parties however labelled. It is immaterial whether the claims are in contract or in tort, or are couched in terms of contribution owed by one tort-feasor to another. Id. at 616.

Airlines initially accepted a proposal to sell its airplane to the plaintiffs. When T & D claimed its entitlement to this commission,

Finally, even if there were a question concerning the scope of the arbitration clause, the concerns for international comity require that "any doubts concerning the scope of a arbitrable issue should be resolved in favor of arbitration." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U. S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1982); Sedco, 767 F. 2d at 1145. It is within the province of the arbitrator to decide which disputes fall within the scope of a broad arbitration clause. Sedco, 767 F. 2d at 1145, n. 10.

Because the court does have jurisdiction over this dispute, however, the Court will grant the motion to stay so that matters unresolved through arbitration, if any, may be determined in this forum once the English proceedings are concluded.

New Orleans, Louisiana, this 11th day of September, 1990.

VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

Freedberg

CGB MARINE SERVICES COMPANY, *ET AL., Plaintiffs*

v.

M/S *STOLT ENTENTE*, HER ENGINES, *ETC., IN REM*, SOCIETE FRANCAISE DE TRANSPORTS MARITIMES, *ET AL., Defendants*

United States District Court, Eastern District of Louisiana, September 12, 1990
Civil No. 86-3877

ARBITRATION — 111. Agreement to Arbitrate Future Disputes — 120. Foreign Arbitral Awards Convention — BUNKERS — Arbitration Clause in Bunkering Contract Enforced — CONTRACTS — 132. Third Party Beneficiary — PRACTICE — 128. Stay and Injunctive Relief.

Even though plaintiff French shipowner was not named in defendant foreign oil supplier's bunkering contract, it was a third party beneficiary of that contract and is bound by its English arbitration clause. *Held*: Foreign Arbitral Awards Convention authorizes stay pending arbitration of ED La. litigation arising out of Miss. River allision allegedly caused by contaminated fuel oil which defendant had furnished to plaintiff's vessel in Rotterdam; it is immaterial that plaintiff is also suing in its capacity as assignee of other claims arising out of the allision, since the same "operative facts" are involved.

Wilton Ellwood Bland, III and Andre J. Mouledoux (Hebert, Mouledoux & Bland) *for Plaintiffs*

Joel L. Borrello (Adams & Reese) *for B.P. Oil International, et al., Defendants*

John Harold Clegg and Joseph Dwight Leblanc, Jr. (Chaffe, McCall, Phillips, Toler & Sarpy) *for Societè Francaise, et al., Defendants*

Hugh Ramsay Straub (Terriberry, Carroll & Yancey) for *M/S Stolt Entente, et al., Defendants*

James H. Roussel (Phelps, Dunbar, Marks, Claverie & Sims) *for BP Marine Intl. and BPN Amer. Petroleum Inc., Defendants*

VERONICA D. WICKER, D.J. (in part):

Defendants and third party defendants BP Oil International, Limited and its division, B. P. Marine International [collectively referred to as "BPOI"] filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction or, alternatively, to Dismiss or Stay Proceedings pending arbitration pursuant to the Convention on the Recognition and the Enforcement of Foreign Arbitral Awards and the United States Arbitration Act, 9 U.S. Code §1 *et seq.* BPOI's motion was submitted on briefs without oral argument on a former date.

This litigation arose from a collision on the Mississippi River on September 6, 1986, when the M/S *Stolt Entente* hit and damaged a dock/boat repair facility and barges moored there. The owner of the dock/repair facility and the owner of the barges, CGB Marine Services Company at Laplace and Consolidated Grain and Barge Company [collec-

tively referred to as "CGB"], sued the vessel and its owners, Société Française de Transports Maritimes and Société Française de Transports Petroliers [collectively referred to as "Société"]. In an amended complaint CGB added several defendants which allegedly provided the *Stolt Entente* with contaminated bunker fuel and diesel oil which allegedly caused engine "black out" and the collision.[1] Société settled with CGB and obtained assignment of their rights.

By amended cross claim and third party complaint, Société added BPOI and claimed that contaminated bunker fuel and diesel oil sold by BPOI caused an engine "black out" and the collision. It is BPOI which invokes the arbitration clause in its contract of sale and seeks in this motion either dismissal or stay of these proceedings, pending arbitration in England. Société claims that it is not bound by the arbitration clause in the BPOI contract.

For the reasons which follow, the Court finds that Société is bound by the arbitration clause in the BPOI contract and finds that arbitration is appropriate under the facts of this case.

The evidence shows the following relationship between the various vessel interests:

Société Française de Transports Maritimes, a corporation existing under the laws of France, was the registered owner of the *Stolt Entente*; the Société Française de Transports Petroliers was the technical operator of the *Stolt Entente*. On November 28, 1980, Société time chartered the *Stolt Entente* to SFTM Parcel Tankers Limited, a United Kingdom corporation ["SFTM Parcel Tankers."] On April 9, 1985, SFTM Parcel Tankers placed the *Stolt Entente* at the disposal of Stolt Tankers Limited, a Liberian limited partnership. SFTM Parcel Tankers was one of several limited partners in Stolt Tankers Limited. Stolt Tankers, Inc. ["STI"] was its general partner. Stolt Nielsen acted as agent for STI and entered into a contract with BPOI for sale of bunker fuel to service the *Stolt Entente*; the BPOI contract contains an arbitration clause.

9 U.S. Code §4 of the Federal Arbitration Act provides:

> "The Court shall hear the parties,[2] and upon being satisfied that the making of the agreement for arbitration or the failure to comply

[1] CGB added as defendants BP Netherlands, BP Malaysia and Stolt Tankers, Inc. ["STI"]. STI was dismissed by an earlier motion for summary judgment. Société third partied BP North America Petroleum Inc. ["BPNAP"], another alleged fuel supplier. Thereafter the Court granted the motions to dismiss of BP Netherlands and BP Malaysia and denied BPNAP's motion for summary judgment.

[2] This language requires an evidentiary hearing when there is a dispute over an agreement to arbitrate, but appellate courts have not held district courts to the letter of the law. In

> therewith is not an issue, the Court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

"The Act does not require arbitration unless the parties to a dispute have agreed to refer it to arbitration . . . likewise, the mandatory stay provision of the [Federal Arbitration Act, 9 U.S. Code §§1-14] does not apply to those who are not contractually bound by the arbitration agreement." *Matter of Talbot Bigfoot, Inc.*, 1990 AMC 1780, 1784-85, 887 F.2d 611, 614 (5 Cir. 1989).

In deciding that this case should be stayed pending arbitration, the Court examined three documents: (1) the Time Charter Party agreement between Société and SFTM Parcel Tankers Limited ["Time Charter"]; (2) the Stolt Tankers Limited Partnership Agreement and the Manual of Technical and Operational Standards for Fleet Vessels of Stolt Tankers Limited ["Limited Partnership Agreement"]; and (3) the BP Oil International Limited Terms of Sale — Bunkers ["BPOI contract"].

The Time Charter provides that the "[c]harterers shall supply for use in the main motors fuel oil [of certain specifications] . . . If at Owner's request the vessel is supplied with more expensive bunkers . . . the difference in price shall be borne by Owners." The Time Charter also provides that:

> "[c]harterers shall (except when incurred for Owners' purposes or during loss of time on Owners' account . . .) provide and/or pay for: (1) all fuel except (a) fuel for Owners' account under Clause 19, and

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Commerce Park at DFW Freeport v. Mardian Const. Co., 729 F.2d 334, 340 (5 Cir. 1984), the Fifth Circuit found that no evidentiary hearing was required because

> "the parties were afforded the opportunity, of which they both took full advantage, exhaustively to brief the issues to the district court. As we have already noted, Commerce Park does not allege, nor does it appear on the record, that disputed factual questions going to the legal issue of arbitrability existed. In the absence of such a showing, we conclude that an evidentiary hearing was not required as a predicate for the district court's stay order."

BPOI's motion was originally set for hearing and then submitted on briefs because of renovation taking place in the courthouse. No one objected to its being submitted on briefs and neither party has specifically requested an evidentiary hearing on the arbitration issue. With a brief in support, a brief in opposition, a reply brief to the opposition, a reply brief to the reply brief to the opposition, and two supplemental memoranda, the parties like those in *Commerce* have exhaustively briefed the issue and those briefs contain no contention that there are material facts in dispute. Therefore for the reasons given in *Commerce*, the Court finds that no evidentiary hearing is needed despite the mandatory language of 9 U.S. Code §4.

(b) fuel used in connection with a General Average sacrifice or expenditure or with preparation for the drydocking, repair, or docking of the vessel for Owners' purposes."

The Time Charter is to "be construed in accordance with the law of England [and] [a]ny dispute arising under this charter party shall be settled by arbitration in London."

In his deposition, Carl Gronseth of Stolt Nielsen, Inc., explained the general terms of the Limited Partnership agreement.[1] Under the partnership agreement, Stolt-Nielsen Inc., as the general agent for STI, purchased fuel for all ships in the pool. Carl Gronseth also explained the fuel purchasing process. Fuel was delivered to the *Stolt Entente* in Rotterdam and invoiced by BPOI in London.

Lars Ljungberg, an executive with BP North America Petroleum Inc. ["BPNAP"], set forth the details of the particular sale which underlies this dispute. In early October, 1985, Stolt Nielsen, Inc. placed two orders through BPNAP [BPOI's USA agent] in Houston for fuel to be delivered to the *Stolt Entente* in Rotterdam on October 8-10, 1985, and on October 10, 11, 1985. BPNAP relayed the order to BPOI in London. These sales were subject to the BPOI contract which had been furnished to Stolt Nielsen, Inc. prior to the sales in question.

BP Oil International Limited Terms of Sale—Bunkers provide:

"20. Law and Arbitration.

(a) The construction, validity and performance of the contract shall be governed by English law.

(b) *Any dispute arising out of or in connection with the contract shall be submitted to arbitration* in accordance with the English Arbitration Act, 1960 or any statutory modification or re-enactment thereof which may for the time being be in force." (Emphasis added.)

[1] Article V of the Partnership Agreement "DISTRIBUTION 5.01 *The Fleet*" provides that "[t]The ships of the Limited Partners, as listed in Schedule 1 hereto, shall be traded in a pool for the Partners by the Partnership."

Article XII, MISCELLANEOUS (a) states that "[a]ll trading of the Fleet will be done in the name of the General Partner [STI], who will . . . utilize on an exclusive basis the brokerage/management services of the Stolt-Nielsen network of offices worldwide."

The Manual of Technical and Operational Standards for Fleet Vessels of Stolt Tankers Limited, 14(a) states that the general partner "STI . . . shall provide and pay for the items listed in Schedule 3 of the Agreement" [those included Bunker Costs]. Specifically, §14(a) provided that

> "STI shall order and pay for all fuel in accordance with [SFTM Parcel Tankers Limited]'s fuel oil specifications contained herein from a major or recognized independent suppliers."

Société is not expressly named in either the Limited Partnership Agreement or in the BPOI contract.[4] That fact, however, does not mean that Société need not arbitrate this fuel dispute.

After an extensive review of the evidence and the applicable law, the Court finds that Société interposed a related corporate entity, SFTM

[4] In listing the owners of the vessel the term "SFTM" appears after the *Stolt Entente*, but the only SFTM referenced in the agreement is SFTM Parcel Tankers.

The introduction to the Limited Partnership Agreement explains that "[t]he General Partner and the Limited Partners are sometimes collectively referred to [in the Agreement] as the "Partners". The Limited Partners are sometimes collectively referred to as "Owners" in their capacity as owners or *chartered owners of ships*." (Emphasis supplied.)

The identities of Société and SFTM Parcel Tankers, Ltd. were initially confused in this case because the initials "SFTM" in the Limited Partnership Agreement referred to SFTM Parcel Tankers, Ltd., and SFTM was listed as the owner of the M/S *Stolt Entente* in the vessel listing attached to the Time Charter Agreement.

In an earlier motion for summary judgment filed by Stolt Tankers, Société did not contest the fact that "[t]he relationship between SFTM/SFTP and Stolt Tankers, Inc. is governed by the contract [the Limited Partnership agreement] between them . . ." In that motion the initials SFTM/SFTP referred to the same parties which are now being called "Société." BPOI argued that SFTM/SFTP [Societe] cannot now dispute whether it is bound by the Stolt Tankers Limited Partnership agreement under Local Rule 3.10 [now 2.10E].

Local Rule 2.10E states: "All material facts set forth in the statement required to be served by the moving party will be deemed admitted, *for purposes of the motion*, unless controverted as required by this rule." (Emphasis added.) BPOI is not seeking to have the fact admitted for purposes of STI's motion for summary judgment; BPOI wants the fact admitted for purposes of its own motion to dismiss or stay for arbitration. There is a distinct difference. Furthermore, while it is true, as BPOI asserts, that as a general rule, " ' factual assertions in pleadings are . . . judicial admissions conclusively binding on the party that made them." *White v. ARCO/Polymers*, 720 F.2d 1391, 1396 (5 Cir. 1983) . . . [and] [f]acts that are admitted in the pleadings 'are no longer at issue.' " [Citations omitted.] [*Davis v. A.G. Edwards and Sons, Inc.* 823 F.2d 105, 108 (5 Cir. 1987)], both *White* and *Davis* are distinguishable.

In *White*, a party submitted a proposed pretrial order and findings of fact and conclusions of law. Then he filed an amended complaint and later submitted new proposed findings of fact and conclusions of law. The opposing party failed to contend that White's admissions barred his asserting a contrary position in his later pleadings and the court found that he had waived the argument that the contested matter was settled. Nonetheless the Court said that the contrary assertions would operate as adverse evidentiary admissions and were properly before the Court in its resolution of a factual issue. In *Davis*, the court granted summary judgment finding that the two year statute of limitations for securities violations had passed before suit was filed. In the complaint the plaintiffs had asserted that they closed their accounts with the defendant broker in August, 1983. Later one of the plaintiffs submitted an affidavit stating that he did not know of the violation until January 1984, when he discovered the defendant's employees had lied to him. The Court held the plaintiffs to their earlier admission in the pleadings and affirmed the district court's granting summary judgment.

Parcel Tankers, in its operation and management of the *Stolt Entente*, that Stolt-Nielsen was the authorized agent of SFTM Parcel Tankers, and that Société was the third party beneficiary of the BPOI contract.

The parties to a contract may establish rights in a third party beneficiary by indicating the intent to do so:

> "A beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of a promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary. *Restatement (Second) of Contracts* §302." *Beverly v. Macy*, 702 F.2d 931, 940 (11 Cir. 1983).

When determining whether the parties to the contract intended to bestow a benefit on a third party, a court may look beyond the contract to the circumstances surrounding its formation.

As an indication of the intent of the parties, the time charter agreement between Société and SFTM Parcel Tankers authorized SFTM Parcel Tankers to participate in the limited partnership agreement for the operation and management of the vessel. Société also in that time charter agreement authorized SFTM Parcel Tankers to appoint the manager for the partnership, Stolt Tankers. Specifically, the Time Charter includes a general statement about *Scheduling and Trafficking*.

> "49. Charterers may make arrangements with others for managing the marketing, scheduling and trafficking of the vessel without prejudice to the respective rights and obligations of either party under this Charter, subject to prior approval of the Owners, which approval will not be unreasonably withheld." Id.

The portion of the Time Charter Agreement entitled "CHARTER HIRE" clearly bases the charter hire due Société on the participation of SFTM Parcel Tankers in the Stolt Tankers Limited Partnership:

> "1. Charter Hire shall be calculated on the basis that SFTM shall be entitled to a proportionate part of the disposable earnings of the Partnership's Fleet determined in the manner set forth below." Id.

For the foregoing reasons, the Court will not hold Société to that earlier uncontested fact for purposes of this present motion.

The charter hire of SFTM Parcel Tankers to Société came from the proceeds of the Stolt Tankers Limited Partnership. The revenue received from the limited partnership by SFTM Parcel Tankers was paid to Société as charter hire. Société received revenue directly from the operation of the Stolt Tankers Limited Partnership. Therefore the Court finds that the Time Charter agreement between the Société and SFTM Parcel Tankers contemplated and approved the participation of SFTM Parcel Tankers in the Stolt Tankers Limited Partnership.

Société argued that they were not direct intended beneficiaries of the BPOI terms of sale since they received revenue from SFTM Parcel Tankers irrespective of whether the vessel sailed or remained idle as long as the vessel was not taken off charter hire by Stolt Tankers, Inc. Thus, Société argued that they received only "incidental benefit" from the contract for sale of bunker fuel and that mere incidental benefit is insufficient to establish third party beneficiary status.

The Court agrees that mere incidental benefit fails to establish third party beneficiary status. However, the Court disagrees that the fact that Société received revenue whether or not the M/S *Stolt Entente* sailed means that Société received only incidental benefit from the sale of bunker fuel oil. The limited partnership was formed to trade vessels in the pool. Stolt Nielsen was the exclusive agent for that pool. Without fuel, the primary purpose of the pool would not be realized and there would be no profits from which to pay the charter hire. Société was certainly an intended beneficiary of the BPOI contract.

Société also contended that Clause 17 of the BPOI/Stolt Tankers/Stolt Nielsen contract proves that it was intended that only the expressly named parties were to be bound by the arbitration provision of the BPOI contract. Clause 17 of the BPOI Terms of Sale provides:

> "The BUYER shall not assign the contract or any of its rights and obligations thereunder."

This is not an instance where STI has assigned the contract or any of its rights and obligations, so the Court's finding that Société is bound to arbitrate this fuel dispute in England as a third party beneficiary of the BPOI sales contract does not violate the BPOI contract's prohibition against assignment.*

* The Court's discussion, leading to its rejection of Société's arguments under American and Liberian partnership law, is omitted — Eds.

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Having found that Société is subject to the arbitration clause in the BPOI Terms of Sale, the Court must still determine whether arbitration is appropriate. Having reviewed the evidence and the applicable law, the Court finds that indeed the parties' dispute can be resolved by arbitration in England.

This Court has jurisdiction over this lawsuit because the collision took place in the waters of the Mississippi River. Even though it has jurisdiction, this Court need not assume jurisdiction of a suit between foreigners. . . . "if justice would be as well done by remitting the parties to their home forum." *Canada Malting Co. v. Paterson Steamships*, 285 U.S. 413, 420, 1932 AMC 512, 515 (1932).

The Convention on Recognition and Enforcement of Foreign Arbitral Awards ["Convention"] requires that the Courts enforce any written agreement which provides arbitration as the mechanism to resolve international commercial disputes. 9 U.S. Code §201. See generally *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Corp.*, 473 U.S. 614 (1985). When analyzing whether arbitration is appropriate under the Convention, the court undertakes a limited inquiry:

> (1) is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;
>
> (2) does the agreement provide for arbitration in the territory of a Convention signatory;
>
> (3) does the agreement to arbitrate arise out of a commercial legal relationship;
>
> (4) is a party to the agreement not an American citizen?

Sedco v. Petroleos Mexicanos Mexican Nat. Oil Co., 1986 AMC 706, 710-11, 767 F.2d 1140, 1144-1145 (5 Cir. 1985).

The Court finds all factors have been satisfied in the case at bar:

(1) There is an agreement in writing to arbitrate the dispute and that arbitration agreement is broad in scope.

> "The Court should compel arbitration and permit the arbitrator to decide whether the dispute falls within the clause, if the clause is 'broad.' If the clause is 'narrow,' arbitration should not be compelled unless the court determines that the dispute falls within the clause. . . . the tone of the clause as a whole must be considered." Id.

"Additionally, when confronted with arbitration agreements, we presume that an arbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue. . . .' *Commerce Parks of DEW Freeport v. Mardian Construction Co.*, 729 F.2d 334 (5 Cir. 1984)." Id. The Court finds that the BPOI arbitration clause can be interpreted to cover this fuel dispute.

(2) The agreement provides for arbitration in England; England/the United Kingdom is a signatory to the Convention.

(3) The agreement to arbitrate arises out of a commercial legal relationship: a shipping contract and fuel oil purchase agreement.

(4) BPOI, the seller of bunker fuel and a party to the sale of fuel oil agreement, is based in England and is not an American citizen. Stolt Nielsen, Inc. contracted with BPOI for delivery of bunker fuel. Stolt Nielsen, Inc. has a base of operations in the United States but acts as agent for SFTM Parcel Tankers, which has its principal place of business in England. Société is registered and existing under the laws of France.

Finally the Court must determine if it can compel arbitration in the United Kingdom.

The Convention authorizes the Court to compel arbitration outside the United States if the contract expressly or implicitly designates the forum. *Bauhinia Corp. v. China Nat. Machinery & Equipment*, 819 F.2d 247, 249 (9 Cir. 1987). In this case, the arbitration clause provides that any dispute arising out of the contract shall be governed by English law and submitted to arbitration under the English Arbitration Act.

In its last supplemental memorandum, Société raised a final argument that even if Société, as Société, were subject to arbitration in England over the fuel dispute, Société as assignee of the tort claim belonging to CGB, cannot be so bound. While the Court agrees that there is a difference between Société's position as assignee of CGB's claims and as a party directly damaged by the alleged defective product allegedly sold by BPOI, that difference does not defeat BPOI's motion to stay.[8]

[8] *Italia di Navigazione, SPA v. M/V Hermes I*, 578 F.Supp. 81 (SDNY 1983), cited by Société is distinguishable. Two separate proceedings were involved. Italian Line, the time charterer, as assignee of the cargo owners, sued the vessel owner for damages for nondelivery of cargo; Italian Lines also initiated arbitration proceedings under the time charter agreement against the vessel owner seeking indemnification for cargo loss. The vessel owner sought to stay discovery in the damage suit because it alleged that what the time charterer was actually seeking in the damage suit was indemnification and indemnification was subject to arbitration. The New York district court did not agree with the vessel owner

In deciding whether a particular claim falls within the scope of an arbitration agreement, the court focuses on the factual allegations underlying the causes of action rather than the legal labels asserted. *Mitsubishi*, 473 U.S. at 620-628. [In *Mitsubishi*, the United States Supreme Court found that claims arising under the Sherman Act, [15 U.S. Code §1 *et seq.*], and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction were arbitrable pursuant to the Federal Arbitration Act.]. A presumption of arbitrability exists. "[A]rbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue.' " (Citations omitted.) *Mar'Lin of Louisiana, Inc. v. Parsons-Gilbone*, 773 F.2d 633, 634-635 (5 Cir. 1985).

In this case, Société asserted its damage claim against BPOI and a claim for contribution or indemnity for payments made to CGB. Société's claims both for damages and indemnity are based on the same set of operative facts, the sale of allegedly defective bunker fuel oil to the M/S *Stolt Entente*. Third party claims for contribution and indemnity are arbitrable "at least and until it is otherwise decided by the arbitrator." *Acevedo Maldonado v. PPG Industries, Inc.* 514 F.2d 614, 617 (1 Cir. 1975). In that case the contract provided for arbitration of "any controversy or claim arising out of or related to this agreement or the breach thereof." The court rejected the third party plaintiff's contention that contribution or indemnity claims in tort were outside the scope of an arbitration clause and concluded that the

> "[b]road language of this nature covers contract-generated or contract-related disputes between the parties however labelled. It is immaterial whether the claims are in contract or in tort, or are couched in terms of contribution owed by one tort-feasor to another." Id. at 616.

Finally, even if there were a question concerning the scope of the arbitration clause, the concerns for international comity require that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1982); *Sedco*, 1986 AMC at 710-11, 767 F.2d at 1145. It is within the province of the arbitrator to

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that the cargo damage claim was actually one for indemnity, denied the motion to stay, and allowed discovery to proceed in the damage suit while arbitration was ongoing.

decide which disputes fall within the scope of a broad arbitration clause. *Sedco*, 1986 AMC at 710-11, 767 F.2d at 1145, n. 10.

Because the court does have jurisdiction over this dispute, however, the Court will grant the motion to stay so that matters unresolved through arbitration, if any, may be determined in this forum once the English proceedings are concluded.

DIAMOND KO (GUAM) LTD., D/B/A GUAM SHIPPING AGENCY, *Plaintiff*

v.

YASUO YAMASHITA, *ET AL.*, *Defendants*

Territory of Guam, Superior Court, September 18, 1990
Civil No. CV1184-89

MARITIME LIENS — 144. Supplies and Bunkers — PRACTICE — 1251. Res Judicata.

Guam admiralty court's ruling that supplyman was entitled to assert a maritime lien in its prior *in rem* action against defendant's vessel is *res judicata* and precludes Guam territorial court from entertaining supplyman's subsequent *in personam* suit against the vessel's owner based on the same facts.

JURISDICTION — 137. Doing Business — PRACTICE — 115. Federal Rules of Civil Procedure — Supplemental Rule E(8) — 1261. Action in Rem as Bar to Suit in Personam — 18. Appearance.

Fact that shipowner had entered a restricted appearance under Supplemental Rule E(8) in prior *in rem* action against its vessel would not have prevented plaintiff maritime lien or from suing the owner *in personam* based on its business activities in the jurisdiction.

John B. Maher (Cunliffe, Cook, Maher & Keeler) *for Plaintiff*
Jean Melancon (Law Office of Jean Melancon) *for Defendants*

PETER C. SIGUENZA, JR., J.:

On October 2, 1987, plaintiff Diamond Ko (Guam) Ltd. invoked the admiralty jurisdiction of the Federal District Court of Guam and filed an action *in rem* against the fishing trawler M/V *Kosei Maru No. 11*. Diamond Ko claimed that the *Kosei Maru* engaged Diamond Ko to perform as the vessel's "shipping agent" to provide goods and services to the vessel when ported in Guam.

Diamond Ko sought recovery of $25,284.54 which allegedly represented the unpaid portion of a balance due Diamond Ko for certain goods and services it had provided to the vessel. These goods and services