UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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LAND, AIR & SEA TRANSPORT, d/b/a L.A.S.T.

Plaintiff,

-against-

EL NASR MINING CO.,

Defendant.
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MEMORANDUM DECISION AND ORDER
06-CV-13482 (GBD)

GEORGE B. DANIELS, District Judge:

Plaintiff, Land, Air, & Sea Transport d/b/a L.A.S.T. ("plaintiff"), brings this maritime action, petitioning this Court to confirm, recognize, and enforce two Final Arbitral Awards ("Final Awards") issued in plaintiff's favor against defendant, El Nasr Mining Co. ("defendant"), pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, Chapter Two of the Federal Arbitration Act, 9 U.S.C. §§201-208.

Plaintiff's petition relies on the Final Award issued in its favor on March 9, 2007 in London arbitration. The underlying dispute arose from a charter party contract between the parties, which plaintiff contends defendant breached. Plaintiff contends that by charter party dated September 19, 2005, plaintiff chartered the motor vessel SAFINAZ, to defendant for the carriage of bulk rock phosphate. Plaintiff asserts that defendant breached the charter party agreement when it failed to pay demurrage due and owing under the contract.

The charter party contains an arbitration clause calling for dispute resolution under

english law and arbitration proceedings to take place in London.[1] The contract also specifies guidelines for the selection of arbitrators. The contract states that:

> "[u]nless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final."

Pursuant to the charter party agreement, plaintiff commenced the London arbitration proceedings against defendant on June 14, 2006 by appointing its arbitrator and notifying defendant of the appointment. Defendant, in return, did not appoint an arbitrator within the fourteen-day period. Plaintiff's arbitrator was appointed sole arbitrator on July 5, 2006. Plaintiff served its points of claim, and on September 15, 2006, the arbitrator ordered defendant to serve its points of defense and counterclaims by October 13, 2006. Defendant did not submit any documents. On October 13, 2006, the arbitrator issued a final and peremptory order directing defendant to submit such materials by October 18, 2006. The order further explained that if defendant failed to submit documentation by the October 18 date, the arbitrator would proceed to issue an award on the basis of the submissions by plaintiff already in his possession.

The arbitrator received no response from defendant and, pursuant to his final order, ruled in plaintiff's favor on October 26, 2006. The arbitrator awarded plaintiff $43,696.33, together with interest and the costs of the award for a total of $55,770.46 ("the October Final Award"). The arbitrator found defendant responsible for paying the prevailing party's recoverable costs,

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[1]Paragraph 19(a) of the charter party provides that, "[t]his Charter Party shall be governed and construed in accordance with English law and any dispute arising out of this Charter Party shall be referred to arbitration in London in accordance with the Arbitration acts 1950 and 1979 or any other statutory modification or re-enactment thereof for the time being in force."

which were to be determined at a later date. On March 9, 2007, the arbitrator determined and awarded plaintiff its costs in the amount of HK $42,644.30, together with interest at a commercial rate of 7% per annum, compounded quarterly, from the date of the award until the date of payment. The arbitrator further ordered defendant to pay plaintiff a final award in the amount of £ 1,450.00, together with interest. The additional amount determined to be owed by defendant to plaintiff by the arbitrator in March ("the March Final Award") was $8,862.26. Plaintiff calculated that the total amount due under the Final Awards totaled $64,632.72.

Plaintiff petitioned this Court to confirm, recognize, and enforce the October Final Award and the March Final Award pursuant to the New York Convention. In addition, plaintiff petitioned the Court for an award of attorneys fees and costs in the amount of $16, 851.22. On November 20, 2007, this Court heard oral argument on the matter. Defendant contends that the decision of the arbitrator is not valid as the parties never agreed to conduct arbitration proceedings pursuant to the guidelines memorialized in the charter party, but rather contracted in the Bill of Lading to submit to arbitration in Egypt under Egyptian law.[2]

On November 27, 2006, plaintiff instituted this action by filing a Verified Complaint that included a prayer for an Ex-Parte Order of Process of Maritime Attachment and Garnishment. On November 28, 2006, this Court issued an Ex-Parte Order of Maritime Attachment and Garnishment, authorizing the attachment of defendant's property located within the Southern District of New York in an amount up to $66,050.98. Defendant's property has been attached in this District such that there exists *quasi in rem* jurisdiction and proper venue. See Amoco

[2]Paragraph (1) of the Bill of Lading provides: [a]ll terms and conditions, liberties, exceptions, of the Charter Party, dated as overleaf, including claims and Arbitration to be in Egypt according to Egyptian law.

Overseas Oil Co. v. Compagnie Nationale, 605 F.2d 648, 655 (2d Cir. 1979) ("maritime actors must reasonably expect to be sued where their property may be found").

Since plaintiff has made the requisite showing that the New York Convention applies to the London arbitral award and jurisdiction and venue are proper, this Court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in said Convention." Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 19 (2d Cir. 1997) (quoting 9 U.S.C. § 207) ("Under the Convention, the district court's role in reviewing a foreign arbitral award is strictly limited...").

Defendant challenges the recognition and enforcement of the foreign arbitral award, alleging that the London arbitration was not in accordance with the agreement of the parties. In opposition to plaintiff, defendant alleges that the parties agreed that "if a dispute were to arise between the parties concerning the vessel allegedly owned by the plaintiff, then said dispute would be subject to arbitration conducted in Egypt under Egyptian Law." Affirmation of Solomon M. Lowenbraun, June 21, 2007. Defendant asserts that arbitration in London contradicted the parties' previously agreed-upon agreement memorialized in a signed Bill of Lading, which specifies that arbitration of any disputes is to take place in Egypt under Egyptian Law. Id.

Defendant argues that the terms of the Bill of Lading take precedence over those contained in the charter party, a pro forma document unsigned by both parties. However, it is well established in this Circuit, and as a matter of shipping custom, that where there is a signed fixture recap in advance of an unsigned pro forma charter party, as was the case in the instant matter, the provisions set forth in the unsigned charter party agreement are binding on the parties. See U.S. Titan, Inc. V. Guangzhou Zhen Hua Shipping Co., Ltd., 241 F.3d 135, 149 (2d Cir.

2001); Great Circle Lines, Ltd. V. Matheson & Co., 681 F.2d 121, 124 (2d Cir. 1982).

Plaintiff and defendant signed a valid fixture recap laying out the major details of the carriage contract. The parties continued to negotiate minor details, including arbitration procedures. The charter party at issue here memorialized the agreed upon arbitration procedure and location in London. The terms of the Bill of Lading, which specifies an arbitration location and procedure different from that contained in the charter party, do not take precedence over the terms of the charter party. See Asoma Corp. V. SK Shipping Co. Ltd., 467 F.3d 817, 823 (2d Cir. 2006) ("The rule is that where there is a charter party the bill of lading operates as the receipt for the goods, and as a document of title passing the property of the goods, but not as varying the contract between the charterer and the shipowner." Id. (quoting The Fri, 154 F. 333, 336-37 (2d Cir. 1907))). The charter party's provision regarding arbitration is binding on the parties, notwithstanding conflicting language in the signed Bill of Lading. Thus, the London arbitration was in accordance with the agreement of the parties specified in the valid charter party.

Defendant has offered no proof in support of any other recognized grounds upon which courts may decide to refuse to enforce an arbitration award. Plaintiff's motion to confirm, recognize, and enforce the October Final Award and the March Final Award is GRANTED. Plaintiff is awarded $66,050.98, inclusive of interest, costs, and reasonable attorney's fees, the total amount of property located and attached within this district.

Dated: February 28, 2008
New York, New York

SO ORDERED:

George B. Daniels

GEORGE B. DANIELS
United States District Judge