IBAR LIMITED and VINCENT FRANCIS BARRETT, Petitioners,
> -against- AMERICAN BUREAU OF SHIPPING, Respondent.
>
> 97 Civ. 8592 (LMM)
>
> UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
> NEW YORK
>
> 1998 U.S. Dist. LEXIS 7792
>
> May 22, 1998, Decided
>
> May 26, 1998, Filed
>
> DISPOSITION:
> [*1] Petitioners' petition to compel arbitration granted.
>
> CORE TERMS: conveniens, vessel, arbitration clause, classification,
> motion to compel arbitration, arbitrate, arbitration agreement,
> compel arbitration, original order, relitigating, certificate,
> arbitration,
> yacht, petitioners assert, successors, formulated, surveyor,
> agreed to arbitrate, convenient forum, preclusive effect, engine room,
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> PAGE 700
> 1998 U.S. Dist. LEXIS 7792, *1
>
> non-signatories, reconsideration, distributor, machinery, issuance,
> surveyed,
> novation, started, invoke
>
> COUNSEL:
> For IBAR LIMITED, VINCENT FRANCIS BARRETT, petitioners: William N. France,
> Healy
> & Baillie, LLP, New York, NY.
>
> For AMERICAN BUREAU OF SHIPPING, respondent: Pamela Lauren Milgrim, Kirlin
> Campbell & Keating, New York, NY.
>
> JUDGES:

> LAWRENCE M. McKENNA, U.S.D.J.
>
> OPINIONBY:
> LAWRENCE M. McKENNA
>
> OPINION:
>
> MEMORANDUM AND ORDER
>
> McKENNA, D.J.
>
> Petitioners Ibar Limited ("Ibar Ltd.") and Vincent Barrett ("Barrett")
> (collectively "Ibar" or "petitioners") move, pursuant to 9 U.S.C. @@ 4, 5,
> and
> 201, for an order directing respondent American Bureau of Shipping ("ABS")
> to
> arbitrate. For the reasons set forth below, the motion is granted.
>
> I. BACKGROUND
>
> Ibar Ltd. is a corporation organized under the laws of Jersey, Channel
> Islands. Barrett is the sole director and beneficial owner of Ibar Ltd. He
> is an
> Irish citizen and resides in Switzerland.
>
> ABS is a New York corporation engaged in the business of vessel
> classification. ABS sets standards (hereinafter "Rules") for the design
> and
> construction of seagoing vessels. These Rules are formulated and
> interpreted in
> New York. ABS also tests the vessels during and after construction to
> verify
> that the [*2] vessels' design and construction are in compliance with its
> Rules.
>
> Petitioners seek to compel arbitration of their claims arising out of
> the
> loss of a luxury motor yacht named the STANY. On or about August 19, 1990,
> while
> the yacht was off the coast of Palma, Majorca, a fire started in the
> engine room
> and ultimately sank the vessel.
>
> The STANY was designed in Italy by Versilcraft Due S.R.L.
> ("Versilcraft") and
> built in 1990 at Cantiere Nautico Italversil SNC ("Italversil"), a
> shipyard in
> Viareggio, Italy. On February 5, 1990, Italversil submitted a completed
> and

> executed Request for Classification Survey Agreement ("Request for Class")
> to
> ABS's Genoa Office, expressing its desire to hire ABS to perform its
> classification services on the STANY. (France Decl. (2d) Ex. 1A). On May
> 2,
> 1990, ABS's Genoa Office acknowledged receipt of the Request for Class, in
> writing to Italversil, and provided Italversil with a fee quotation for
> the
> services ABS agreed to provide. (Id. Ex. 1B).
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> PAGE 701
> 1998 U.S. Dist. LEXIS 7792, *2
>
> Pursuant to the Request for Class, ABS reviewed the design of the STANY
> to
> determine whether it complied with ABS's Rules. ABS conducted its design
> review
> based upon drawings which the Italian designer, Versilcraft, [*3]
> submitted to
> ABS in Genoa. ABS's entire design review process took place at its office
> in
> Genoa, using ABS engineers who are citizens and residents of Italy. No ABS
> personnel in the United States had any involvement in reviewing the design
> of
> the vessel.
>
> The STANY also underwent surveys during her construction at Viareggio,
> Italy,
> on certain dates between January and June 1990, to ensure her construction
> was
> in accordance with ABS's Rules. Antonio Mercurio ("Mercurio"), a surveyor
> from
> ABS's Viareggio office, performed various surveys aboard the vessel. On
> June 26,
> 1990, Mercurio conducted a sea trial of the STANY. The surveys performed
> by
> Mercurio resulted in the issuance of various reports and an Interim Class
> Certificate, dated June 27, 1990. (Barrett Decl. Ex. A5). The STANY never
> received a final Class Certificate.
>
> The Interim Class Certificate provided that the STANY was "surveyed . .
> .
> during construction . . . and during the installation of machinery and
> equipment; and, that . . . a report stating that [the surveyor]
> consider[s] the
> vessel to be fit for the intended service; and . . . recommending that the
> vessel be classed A1 Yachting Service–AMS" has been sent to ABS's [*4]
> Classification Committee for final certification. (Id.) Below the

> surveyor's
> signature and ABS's seal is a "NOTE" stating in full:
>
> This certificate evidences compliance with one or more of the Rules,
> Guides,
> standards or other criteria of American Bureau of Shipping and is issued
> solely
> for the use of the Bureau, its committees, its clients or other authorized
> entities. The classification certificate is a representation only that the
> vessel, structure, item of material, equipment or machinery or any other
> item
> covered by this Certificate has met one or more of the Rules of American
> Bureau
> of Shipping. This certificate is governed by the terms and conditions on
> the
> reverse side hereof, and by the Rules and standards of American Bureau of
> Shipping who shall remain the sole judge thereof.
>
> (Id.)
>
> The reverse of the Interim Class Certificate states that:
>
> The issuance and interpretation of the interim class certificate is
> subject to
> the terms and conditions of the "Request for Classification and Agreement"
> which
> are hereby incorporated by reference.
>
> (Id.) The Request for Class, incorporated by reference into the Interim
> Class
> Certificate, provides [*5] for arbitration of "any and all differences
> and
> disputes of whatsoever nature arising out of this Agreement." (France
> Decl. (2d)
> Ex. 1A, at P. 15).
>
> Mercurio delivered the Interim Class Certificate to Italversil. ABS's
> Genoa
> office sent its invoices for services related to the STANY to Italversil.
> Italversil thereafter paid ABS for its services.
>
> On or about March 27, 1990, a Memorandum of Agreement ("MOA") for the
> sale
> and purchase of the STANY was entered into between Barrett, as director of
> Stessi Ltd. ("Stessi"), and Alain Nicaud ("Nicaud"), as agent for C.T.M.
> France
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> PAGE 702
> 1998 U.S. Dist. LEXIS 7792, *5

> ("CTM"). (Barrett Decl. Ex. A1). CTM was virtually the sole distributor for yachts constructed by Italversil, and acted to effect delivery of the yacht STANY from Italversil to Ibar Ltd. in 1990. (Marcuzzo Aff. P 2). The other party to the original MOA, Stessi, was a corporation wholly owned by Barrett, through which Barrett intended to purchase the STANY when he thought he was going to simultaneously trade in another vessel, the STESSI, owned by his corporation Stessi. However, on or about May 4, 1990, after Barrett decided not to trade in the STESSI, he formed Ibar Ltd. to purchase the STANY. On June 14, 1990, at [*6] the legal closing of the MOA, Stessi executed and endorsed on the MOA a novation in favor of Ibar. (Barrett Dec. Ex. A1). Shortly after the June 14th closing, petitioners received the yacht, and on August 19, 1990, a fire started in the engine room of the STANY and ultimately sank the vessel.
>
> In 1996, petitioners commenced an action for damages against ABS in the United States District Court for the District of New Jersey ("the New Jersey court"). (Milgrim Decl. Ex. A). In its answer to petitioners' complaint, ABS raised as an affirmative defense that petitioners could not litigate their claims against ABS because any such claims were subject to arbitration in New York, citing the arbitration clause in the Request for Class. (Id. Ex. B).
>
> Petitioners allege that upon learning of the arbitration agreement, they moved for an order staying the New Jersey action and directing the parties to arbitrate, but that shortly thereafter, ABS cross-moved to dismiss the action on forum non conveniens grounds. In an Opinion and Order dated June 12, 1997 (the " original order"), the New Jersey court granted ABS's cross-motion to dismiss on form non conveniens grounds. (Milgrim Decl. Ex. [*7] D). In addition, the court denied petitioners' motion to compel arbitration, but did not do so on the

> merits of the motion, having found that the court could consider whether
> the
> District of New Jersey was the most suitable forum for hearing the action
> before
> considering petitioners' motion to compel arbitration. (Id.) Thereafter,
> the New
> Jersey court denied petitioners' motion for reconsideration in an Opinion
> and
> Order dated September 2, 1997 (the "order denying reconsideration").
> (Milgrim
> Decl. Ex. H).
>
> Petitioners filed a Notice of Appeal, to the United States Court of
> Appeals
> for the Third Circuit, from the original order. (Milgrim Decl. Ex. F).
> Thereafter, petitioners moved to dismiss the appeal (Milgrim Decl. Ex. I),
> and
> opted to commence this action to compel arbitration.
>
> II. DISCUSSION
>
> A. The Preclusive Effect of the New Jersey Action
>
> ABS contends that the New Jersey court's original order, dismissing the
> New
> Jersey action and denying petitioners' motion to compel arbitration,
> precludes
> petitioners from relitigating two issues. First, ABS contends that
> petitioners
> are precluded from relitigating the forum non conveniens issue. Second,
> ABS
> claims that the New [*8] Jersey court's original order is res judicata
> with
> respect to the motion to compel arbitration. These issues will be dealt
> with
> separately below.
>
> 1. Forum Non Conveniens
>
> ABS contends that petitioners are barred from relitigating, here in the
> Southern District of New York, the forum non conveniens dismissal of
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> PAGE 703
> 1998 U.S. Dist. LEXIS 7792, *8
>
> petitioners' complaint in the New Jersey action. In the New Jersey action,
> after
> a comprehensive review of the public and private interest factors set
> forth in

> Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839
> (1947)
> and its progeny, the court found that Italy was a more well-suited forum
> than
> New Jersey to hear petitioners' claims, and thus dismissed the complaint
> on
> forum non conveniens grounds.
>
> Federal courts permit relitigation of the forum non conveniens issue in
> a
> different federal forum when the plaintiff (or, here, petitioner) has
> demonstrated different contacts between the new forum and the underlying
> dispute. Exxon Corp. v. Choo, 817 F.2d 307, 311 (5th Cir. 1987), rev'd on
> other
> grounds, 486 U.S. 140, 100 L. Ed. 2d 127, 108 S. Ct. 1684 (1988); Mizokami
> Bros.
> of Ariz. v. Mobay Chem. Corp., 660 F.2d 712, 716-17 (8th [*9] Cir. 1981).
> To
> avoid the preclusive effect of a prior forum non conveniens determination,
> "'the
> plaintiff in the new forum must do more than ask for a rebalancing of
> forum non
> conveniens considerations underlying the previous consideration. He must
> show
> objective facts relevant to the issue that materially alter the
> considerations
> underlying the previous resolution.'" Torreblanca de Aguilar v. Boeing
> Co., 806
> F. Supp. 139, 141-42 (E.D. Tex. 1992) (quoting Villar v. Crowley Maritime
> Corp.,
> 780 F. Supp. 1467, 1482 (S.D. Tex. 1992), aff'd, 990 F.2d 1489, cert.
> denied,
> 510 U.S. 1044, 126 L. Ed. 2d 658, 114 S. Ct. 690 (1994)).
>
> Petitioners have shown that New York is a more convenient forum than
> the New
> Jersey forum in which their claims were dismissed. Here, respondent ABS is
> a New
> York corporation, which formulates, publishes, and reviews its Rules in
> this
> state. See Shipping Corp. of India, Ltd. v. American Bureau of Shipping,
> 603 F.
> Supp. 801, 806-07 (S.D.N.Y. 1985) (finding that in light of these factors,
> a
> dismissal on forum non conveniens grounds was unwarranted). Of even
> greater
> importance is the fact that ABS consciously chose a New York arbitration
> [*10]
> forum for the resolution of disputes arising out of its classification

> services.
> Because ABS agreed to arbitrate in New York, "it is deemed to have agreed
> that
> New York is a convenient forum not only for arbitration, but also for
> enforcement of the arbitration agreement." Maria Victoria Naviera, S.A. v.
> Cementos Del Valle, S.A., 759 F.2d 1027, 1032 (2d Cir. 1985). Moreover,
> because
> ABS agreed to arbitration in New York, it cannot be said that petitioner
> chose
> to file suit in New York "solely to harass [respondent] in a manner
> unnecessary
> to its own right to pursue its remedy, i.e., the enforcement of the
> agreement
> to arbitrate." Id.
>
> ABS has agreed to arbitrate claims, arising out of its classification
> services, in New York. ABS's headquarters are located in New York.
> Moreover,
> ABS's Rules, which are relevant to petitioners' claims, are formulated,
> published, and reviewed in New York. These factors significantly alter the
> forum
> non conveniens analysis that has, up to this point, only been applied with
> respect to the New Jersey forum. Given the foregoing contacts with New
> York,
> together with the analysis of the public and private interests factors
> already
> set forth by [*11] the New Jersey court, this Court declines to dismiss
> the
> complaint on forum non conveniens grounds.
>
> 2. Motion to Compel Arbitration
>
> ABS contends that the New Jersey court "rejected petitioners' motion to
> compel arbitration," (Res. Mem. at 3), and that thus petitioners are
> barred
> from relitigating their motion in this Court. However, it is clear from
> the New
> Jersey court's order denying petitioners' motion for reconsideration of
> the
>
> PAGE 704
> 1998 U.S. Dist. LEXIS 7792, *11
>
> court's original order, that the court "dismissed the complaint on forum
> non
> conveniens grounds without reaching a conclusion on the merits of
> [petitioners']
> motion to stay the action and compel arbitration." (emphasis added)
> (Milgrim

> Decl. Ex. H). As a result, petitioners are not barred from relitigating
> the
> merits of its motion to compel arbitration.
>
> B. The Merits of the Motion to Compel Arbitration
>
> [3] Petitioners contend that they are entitled to arbitrate their claims
> against
> ABS by reason of the arbitration clause which appears in the Request for
> Class
> executed by Italversil and ABS. Petitioners assert that the Request for
> Class
> was executed by Italversil with ABS with the intention of obtaining a
> Class
> Certificate for the STANY, [*12] so as to assure petitioners that the
> vessel
> was seaworthy.
>
> ABS contends that petitioners are not entitled to arbitrate their
> claims
> against ABS because the arbitration clause which appears in the Request
> for
> Class does not apply to them, as non-signatories to the contract.
> Moreover, ABS
> contends that because petitioners were neither intended third-party
> beneficiaries nor successors in interest to the contract between
> Italversil and
> ABS, they cannot invoke the arbitration clause.
>
> [4] Here, petitioners may invoke the arbitration clause included in the
> Request
> for Class. Although petitioners are non-signatories attempting to enforce
> the
> arbitration clause, they may do so because they are successors in interest
> to
> Italversil, which signed the Request for Class. See Interocean Shipping
> Co. v.
> National Shipping and Trading Corp., 523 F.2d 527, 539 (2d Cir. 1975),
> cert.
> denied, 423 U.S. 1054, 46 L. Ed. 2d 643, 96 S. Ct. 785 (1976) ("The mere
> fact
> that a party did not sign an arbitration agreement does not mean that it
> cannot
> be held bound by it.").
>
> Italversil, through its distributor, CTM, entered into a MOA with
> Barrett and
> his company Stessi, which was going to purchase the STANY. [*13] Under
> the

Reported in Yearbook

> MOA, Italversil conveyed its interest in the STANY to Stessi. However,
> before
> the legal closing of the purchase, Barrett formed Ibar for the purpose of
> purchasing the STANY. As a result, at the legal closing of the purchase of
> the
> STANY, Stessi executed a novation, whereby Ibar succeeded to all rights
> and
> obligations of Stessi, as buyer of the STANY.
>
> Petitioners have adequately demonstrated that they are successors in
> interest
> to Italversil. Thus, petitioners have standing to enforce the arbitration
> agreement.
>
> [5] In addition to finding that petitioners have standing to enforce the
> arbitration agreement, the Court also finds that the claims that
> petitioners
> assert against ABS fall within the scope of the arbitration clause which
> appears
> in the Request for Class. The arbitration clause, which is notably broad
> in
> scope, provides that "any and all differences and disputes of whatsoever
> nature
> arising out of this Agreement shall be put to arbitration in the City of
> New
> York." (France Decl. (2d) Ex. 1A, at P 15).
>
> Petitioners claim that ABS improperly: (1) formulated Rules for
> classification that were applied to the STANY; (2) reviewed the design,
> construction, and materials of [*14] the STANY, and (3) surveyed,
> examined, and
> tested the STANY. ABS's alleged improper procedures and conduct are all
> part of
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> PAGE 705
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> 1998 U.S. Dist. LEXIS 7792, *14
>
> the classification process which ABS was obligated to provide under the
> Request
> for Class. Consequently, the Court finds that the claims that petitioners
> assert
> against ABS fall within the arbitration clause.
>
> III. CONCLUSION
>
> [6] For the foregoing reasons, petitioners' petition to compel arbitration
> is
> granted, and the parties are directed to arbitrate petitioners' claims in
> New

> York. n1
>
> ----------Footnotes----------
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>
> n1 The relief requested by the petition having been granted, the Clerk
> is
> directed to close this action on the Court's docket.
>
> The Court, however, retains jurisdiction for the purpose of enforcing
> this
> Memorandum and Order.
>
> ----------End Footnotes----------
> ---
>
> SO ORDERED.
>
> Date: May 22, 1998
>
> New York, New York
>
> LAWRENCE M. McKENNA
>
> U.S.D.J.
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>