UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	**CV 20-1352 FMO (MAAx)**	Date	**March 1, 2021**
Title	**Travelers Property Casualty Company of America v. Savino Del Bene U.S.A., Inc.**		

Present: The Honorable	Fernando M. Olguin, United States District Judge	
Vanessa Figueroa	None	None
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorney Present for Plaintiff(s):	Attorney Present for Defendant(s):	
None Present	None Present	

Proceedings: (In Chambers) Order Re: Pending Motion

Having reviewed the briefing filed with respect to defendant Savino Del Bene U.S.A., Inc.'s ("SDB" or "defendant") Motion to Dismiss [] Based Upon Forum Selection Clause, (Dkt. 17, "Motion"), the court finds that oral argument is not necessary to resolve the Motion, see Fed. R. Civ. P. 78(b); Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

BACKGROUND

On February 11, 2020, Travelers Property Casualty Company of America ("Travelers" or "plaintiff"), filed this action pursuant to the Carriage of Goods by Sea Act ("COGSA"), Note to 46 U.S.C. § 30701 against SDB for damage to cargo that was transported by defendant.[1] (See Dkt. 1, Complaint at ¶ 4). Plaintiff alleges that on January 22, 2019, SDB "received a shipment of plastic film rolls for carriage under bill[] of lading number[] SDB76S014896" ("bill of lading" or "BL") that was "issued by and/or on behalf" of SDB. (Id. at ¶ 6). SDB agreed to carry the cargo from Long Beach to the Dominican Republic in the "same good order, condition, and quantity as when received." (Id.). However, SDB failed to do so, and instead, "the cargo was badly damaged" and its value "depreciated in the amount of $58,524.01." (Id. at ¶ 7). Plaintiff insured the cargo and "paid to the person entitled to payment under [the insurance policy] the sum of $58,524.01[.]" (Id. at ¶ 8).

SDB now moves for dismissal pursuant to a forum selection clause contained in the bill of

[1] COGSA was initially codified at 46 U.S.C. §§ 1300, et seq., but "[i]n 2006, Congress reorganized Title 46 but did not recodify COGSA, which currently appears as a note to 46 U.S.C. § 30701." Federal Ins. Co. v. Union Pacific Railroad Co., 651 F.3d 1175, 1178 n. 5 (9th Cir. 2011)

lading.[2] (See Dkt. 17, Motion); (Dkt. 17-1, Memorandum of Points and Authorities in Support of Motion to Dismiss [ ] ("Memo") at 1).

LEGAL STANDARD

In determining a motion to dismiss for forum non conveniens, a court typically evaluates both the convenience of the parties and various public-interest considerations, see Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n. 6, 102 S.Ct. 252, 258 n. 6 (1981) (listing factors relating to private and public interests), and "a defendant invoking forum non conveniens ordinarily bears a heavy burden in opposing the plaintiff's chosen forum . . . because [] the harsh result of that doctrine" requires dismissal of the case. Atlantic Marine Constr. Co. v. U.S. Dist. Court, 571 U.S. 49, 66 n. 8,134 S.Ct. 568, 583 n. 8 (2013) (internal quotation marks, citation, and emphasis omitted). "The calculus changes, however, when the parties' contract contains a valid forum-selection clause, which represents the parties' agreement as to the most proper forum." Id. at 63, 134 S.Ct. at 581 (internal quotation marks omitted). Where a valid forum selection clause exists, "the plaintiff's choice of forum merits no weight." Id. In addition, the court need only consider the public interest factors. See id. at 64, 134 S.Ct. at 582 ("[A] district court may consider arguments about public-interest factors only."). "[T]he party defying the forum selection clause . . . bears the burden of establishing that [dismissal] is unwarranted." Id. at 63, 134 S.Ct. at 581. Finally, when COGSA applies, a forum selection clause in a bill of lading is unenforceable if "the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees." Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539, 115 S.Ct. 2322, 2329 (1995)

DISCUSSION

"COGSA governs the terms of bills of lading issued by ocean carriers engaged in foreign trade." Kawasaki Kisen, 561 U.S. at 96, 130 S.Ct. at 2440. "Although COGSA imposes some limitations on the parties' authority to adjust liability, it does not limit the parties' ability to adopt forum-selection clauses." Id. (citing Sky Reefer, 515 U.S. at 537-39, 115 S.Ct. at 2328-29). Here, the bill of lading contains a forum selection clause, stating that "[a]ctions against [defendant] may be instituted only in Florence, Italy, and shall be decided according to the law of this country." (Dkt. 17-2, Exh. A, BL at ¶ 19(a)).

Travelers argues that the forum selection clause should not be enforced for several reasons. (See Dkt. 18, Plaintiff's Opposition to Defendant's Motion to Dismiss ("Opp.") at 2-8).

[2] "A bill of lading records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage." Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 94, 130 S.Ct. 2433, 2439 (2010) (internal quotation marks omitted).

First, Travelers contends that the Motion is procedurally defective because it "does not identify the FRCP or federal code section under which it brought the motion." (Dkt. 18, Opp. at 2). While defendant failed to expressly identify forum non conveniens as the basis for its motion, it relied on cases addressing the enforceability of forum selection clauses in bills of lading subject to COGSA. (See Dkt. 17-1, Memo at 2-3) (citing e.g., M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S.Ct. 1907, 1916 (1972) ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."); Sky Reefer, 515 U.S. at 539, 115 S.Ct. at 2329 ("The relevant question . . . is whether the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees."); see, e.g., Amazon Produce Network, LLC v. NYK Line, 143 F.Supp.3d 252, 254 (E.D. Pa. 2015) (noting that although defendant did not identify forum non conveniens as the basis for its motion, "it relie[d] in its brief[ing] on cases where that doctrine is the basis for the court's decision"). "[D]efendant, albeit inartfully, has done enough to advocate under the appropriate procedural vehicle for its motion to dismiss."[3] Amazon, 143 F.Supp.3d at 254-55.

Second, Travelers argues that the bill of lading requires application of Italian law that makes the forum selection clause unenforceable. (See Dkt. 18, Opp. at 3-5). According to Travelers, Italian Code §§ 1341 & 1342 "bar enforcement of form contracts containing one-sided clauses including venue provisions absent 'special approval' – a separate, second signature by the counter-party agreeing to the clause." (Id. at 4) (emphasis omitted). However, defendant has produced evidence from an expert in Italian law, Professor Fabio Toriello, showing that neither §§ 1341 nor 1342 govern the instant action because those provisions are preempted and subject to various superseding EU regulations. (See Dkt. 22, Reply Memorandum of Points and Authorities in Support of Motion to Dismiss [] Based Upon Forum Selection Clause ("Reply") at 3); (Dkt. 22-1, Declaration of Fabio Toriello in Support of Motion to Dismiss [ ] ("Toriello Decl.") at ¶¶ 8-14). Specifically, Professor Toriello states that "there is no need of any specific negotiation or signature for either choice of law or mandatory forum provision[s]" because "EU regulations

[3] Travelers speculates that defendant "intentionally side-stepped" the forum non conveniens doctrine because "Italy is not currently admitting U.S. citizens to the country for any non-essential purposes" due to the COVID-19 pandemic, which essentially would deprive plaintiff of "its day in court." (Dkt. 18, Opp. at 3). However, plaintiff has failed to show that when it filed this action on February 11, 2020, Italy had a restriction on U.S. citizens or that entering Italy for purposes of a trial would be deemed "non-essential." (See, generally, id.). Plaintiff has also failed to show how it could not have filed its action in Italy, before COVID 19 emerged as a worldwide pandemic, and then sought to postpone any trial or litigation until the pandemic-related restrictions were lifted. (See, generally, id.). Nor has plaintiff shown that Italy would not allow depositions and trial via video or some other manner. (See, generally, id.). Finally, plaintiff has not identified specific U.S.-based witnesses who would need to be present in Italy to testify. (See, generally, id.).

concerning jurisdiction and enforcement of foreign judgments supersede[]" §§ 1341 and 1342.[4] (Dkt. 22-1, Toriello Decl. at ¶ 14); (see also id. at ¶¶ 12-13) (setting forth EU regulations that supersede §§ 1341 and 1342 and Italian case law holding).

Third, Travelers contends that the forum selection clause is unenforceable because the terms of the bill of lading violate COGSA because they reduce or limit plaintiff's remedies under COGSA.[5] (See Dkt. 18, Opp. at 5-8); Sky Reefer, 515 U.S. at 539, 115 S.Ct. at 2329 (when COGSA applies to the bill of lading at issue, a forum selection clause is unenforceable if "the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees."); Liberty Woods International, Inc. v. Motor Vessel Ocean Quartz, 889 F.3d 127, 128-29 (3d Cir. 2018) (same). Specifically, plaintiff argues that the bill of lading's nine-month period within which to bring suit in Italy, (see Dkt. 17-2, Exh. A, BL at ¶ 17) ("[Defendant] shall, unless otherwise expressly agreed, be discharged of all liability under these conditions unless suit is brought within 9 months after delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with clause 6.e failure to deliver the goods would give the consignee the right to treat the goods as lost."), violates COGSA, which provides for a statutory minimum of one year to bring suit. (See Dkt. 18, Opp. at 6-7); Sky Reefer, 515 U.S. at 535, 115 S.Ct. at 2327 (COGSA "allows the cargo owner . . . to bring suit within one year."). However, the bill of lading includes a paramount clause,[6] providing that "[t]hese conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of international

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[4] Plaintiff's reliance on Milanovich v. Costa Crociere, S.p.A., 954 F.2d 763, 765 (D.C. Cir. 1992), (Dkt. 18, Opp. at 4), is misplaced given that it predates the relevant EU regulations. (See Dkt. 22-1, Toriello Decl. at ¶ 12).

[5] Section 3(8) of COGSA provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Note to 46 U.S.C. § 30701;

[6] "A paramount clause, or clause paramount, is a commonly accepted device that identifies the law that will govern the rights and liabilities of all parties to the bill of lading." Federal Ins. Co., 651 F.3d at 1178 n. 4 (internal quotation marks omitted).

Conventions or national law applicable to the contract evidenced by this BL."[7] (Dkt. 17-2, Exh. A, BL at ¶ 7(a)). The bill of lading also provides that "[i]f any clause or part thereof is held to be invalid, the validity of this BL and the remaining clauses or part thereof shall not be affected." (Id. at ¶ 18) ("partial invalidity clause"). Pursuant to these clauses, COGSA's statutory one-year period would control rather than the nine-month deadline set forth in the bill of lading. Thus, this provision of the forum-selection clause would not "reduce [defendant's] obligations to [plaintiff] below what COGSA guarantees." Sky Reefer, 515 U.S. at 539, 115 S.Ct. at 2329.

Plaintiff next contends that the bill of lading violates COGSA because it does not provide any "notice and fair opportunity" to avoid the $500 per package limitation. (See Dkt. 18, Opp. at 7-8). Section 4(5) of COGSA provides in relevant part:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

Note to 46 U.S.C. § 30701; Kukje Hwajae Ins. Co., Ltd. v. M/V Hyundai Liberty, 408 F.3d 1250, 1255 (9th Cir. 2005) (same). "A carrier may limit its liability under COGSA only if the shipper is given a 'fair opportunity' to opt for a higher liability by paying a correspondingly greater charge." Id. (some internal quotation marks omitted).

According to plaintiff, the bill of lading's failure to include the "universal declared value space on the face of the bill" renders the forum selection clause "void and unenforceable[.]" (Dkt. 18, Opp. at 8). However, even assuming that defendant failed to provide "notice and fair opportunity" to avoid the $500 per package limitation, the forum selection clause, given the paramount clause and partial invalidity clause, would still be enforceable. (See Dkt. 17-2, Exh. A, BL at ¶¶ 7, 18); (Dkt. 22, Reply at 5). The court agrees with defendant that "[t]his . . . is something that the appropriate Court can determine at the appropriate time." (Dkt. 22, Reply at 5). Under the circumstances, the $500 per package limitation is insufficient to invalidate the entire the forum selection clause.

[7] The bill of lading also provides, under the "Paramount Clause" heading, that "[t]he Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether on deck or under deck, if compulsorily applicable to this BL or would be applicable but, for the goods being carried on deck, in accordance with a statement on this BL." (Dkt. 17-2, Exh. A, BL at ¶ 7(c)).

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CONCLUSION

Based on the foregoing, IT IS ORDERED THAT defendant's Motion to Dismiss [] Based Upon Forum Selection Clause **(Document No. 17)** is **granted**. The case is dismissed without prejudice. Judgment shall be entered accordingly.

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