UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ICC CHEMICAL CORPORATION,

Plaintiff,

-against-.

VITOL, INC.,

Defendant.

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09 Civ. 7750(PKC)

MEMORANDUM
AND ORDER

P. KEVIN CASTEL, U.S.D.J.:

Plaintiff ICC Chemical Corporation ("ICC"), invoking diversity jurisdiction, has brought this breach of contract action against Vitol, Inc., an entity it describes as one of the largest traders in the energy marketplace. The one-count complaint alleges that Vitol was contractually obligated to deliver a chemical known as "Mixed Xylenes" with a specified non-aromatics content of 1.06% by weight but in breach, it delivered Mixed Xylenes with a non-aromatics content of 2.06% by weight. Defendant Vitol moves to dismiss, pursuant to Rule 12(b)(6), Fed. R. Civ. P., or to stay pending arbitration asserting that the claims are arbitrable under the arbitration provision set forth in a written confirmation of contract terms to which no timely objection was made by ICC. ICC disputes that the Vitol confirmation became part of the contract.

For the reasons explained below, the Vitol written confirmation became part of the contract between the parties and the sole claim in the complaint is arbitrable. The action will be stayed pending arbitration.

DISCUSSION

The Federal Arbitration Act ("FAA") mandates that a district court refrain from proceeding with any issue which is referable to arbitration under a written arbitration agreement. 9 U.S.C. § 3. The purpose of the FAA is "to ensure judicial enforcement of privately made agreements to arbitrate." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985). The FAA reflects "a strong federal policy favoring arbitration as an alternative means of dispute resolution." JLM Indus. v. Stolt-Nielsen SA, 387 F.3d 163, 171 (2d Cir. 2004) (quoting Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp., 246 F.3d 219, 226 (2d. Cir. 2001)).

A district court must resolve four inquiries in order to determine whether all or part of an action is arbitrable:

> First, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.

JLM Indus., 387 F.3d at 169 (quoting Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 75-76 (2d Cir. 1998)); see Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 844 (2d Cir. 1987).

Here, the second, third and fourth inquiries of the Genesco test are easily resolved. There is no serious challenge to the notion that if the written confirmation containing the arbitration provision were to be considered binding on the parties, then the claim in Count One of the complaint would be within the scope of the provision governing arbitration of "any dispute." The entirety of Count One would be arbitrable and no federal statutory claim is asserted.

The parties dispute the outcome of the first inquiry—whether the parties agreed to arbitrate. "[A]rbitration is a matter of contract", and "a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit." Vera v. Saks & Co., 335 F.3d 109, 116 (2d Cir. 2003) (quoting Transit Mix Concrete Corp. v. Local Union No. 282, International Brotherhood of Teamsters, 809 F.2d 963, 967 (2d Cir. 1987)). Neither party disputes that New York contract law, except to the extent preempted by the FAA, applies to the issue of whether the confirmation forms part of the contract.

ICC alleges that it and Vitol negotiated an agreement through an independent broker, Moab Oil ("Moab"). (Compl. ¶ 6.) Moab sent a confirmation to ICC and Vitol on July 2, 2009 setting forth the price, quantity, quality, delivery, payment and other terms, including commission. (Compl. ¶¶ 6-7 & Ex. A.) Thereafter, on July 6, 2009 Vitol transmitted a written confirmation repeating many of the terms of the Moab confirmation but containing detailed additional terms governing, among other matters, quality, payment, credit, duties, measurement, choice of law, force majeure, assignment, default and arbitration.

The preamble to the Vitol confirmation recites that:

> In accordance with the binding agreement between the parties, this contract contains the entire agreement between the parties and supersedes all previous negotiations representations, agreements, broker confirmations, or commitments with regard to its subject matter.

Immediately following the foregoing language, it states that "Vitol is pleased to confirm the following agreement:" and then proceeds to set forth the terms, including the arbitration provision not contained in the Moab confirmation.

ICC does not dispute that it received the document from Vitol on or about July 6, 2009, but it describes the document as a "confirmation" rather than a contract. (Compl. ¶ 10.) It

is undisputed that ICC never expressed any disagreement with its terms prior to the present dispute.

Article 2 of the New York Uniform Commercial Code applies to the sale of goods and this was indisputably a contract for the "sale of goods." N.Y. U.C.C. § 2-105. There is no dispute that ICC and Vitol were acting as "merchants" with regard to the contract. N.Y. U.C.C. § 2-104.

In pertinent part, N.Y. U.C.C. § 2-207 provides as follows:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
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> (a) the offer expressly limits acceptance to the terms of the offer;
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> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Here, the Moab confirmation was a writing setting forth the terms "offered or agreed upon . . . ." The July 6 Vitol transmittal is a "written confirmation" setting forth "additional terms." It was sent on the second business day following the Moab confirmation and, therefore was sent within "a reasonable time." Because the exchange was between "merchants," the "additional terms" became part of the contract unless one of the subdivisions of N.Y. U.C.C. § 2-207(2) applies. Neither the Moab confirmation nor any communication from ICC "expressly limit[ed] acceptance to" its terms. Id. at 2(a). No notification of objection was

given prior to or within a reasonable time after the July 6 Vitol transmittal. Id. at 2(c). There remains the question whether the arbitration provision "materially altered" any term. Id. at 2(b).

Without retracing the evolution of New York law on the materiality of an arbitration provision in an agreement between merchants or federal law on the FAA's ability to preempt state contract law that discriminates against arbitration provisions, it suffices to note that the Second Circuit has held, in the context of N.Y. U.C.C. § 2-207, that:

> arbitration agreements do not, as a matter of law, constitute material alterations to a contract; rather, the question of their inclusion in a contract under section 2-207(2)(b) is answered by examining, on a case-by-case basis, their materiality under a preponderance of the evidence standard as we would examine any other agreement.

Aceros Prefabricados, S.A. v. TradeArbed, Inc. 282 F.3d 92, 100 (2d Cir. 2002).

"[T]he burden of proving the materiality of the alteration must fall on the party that opposes inclusion." Id. (quoting Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G., 215 F.3d 219, 223 (2d Cir. 2000).) "A material alteration is one that would 'result in surprise or hardship if incorporated without express awareness by the other party." Id. (quoting N.Y. U.C.C. § 2-207 cmt. 4). The Second Circuit has "noted that surprise includes 'both the subjective element of what a party actually knew and the objective element of what a party should have known.' To carry the burden of showing surprise, a party must establish that, under the circumstances, it cannot be presumed that a reasonable merchant would have consented to the additional term." Coosemans Specialties, Inc. v. Gargiulo, 485 F.3d 701, 708 (2d Cir. 2007) (internal citations omitted).

In support of the motion, Vitol submitted the declaration of a petroleum products trader who was has traded such products, including Mixed Xylenes, for six years. (Decl. of John Addison at ¶¶ 1-2.) He was involved in the transaction at issue. (Id. at ¶ 3.) He notes that after

the transmittal of the July 6 document, ICC accepted delivery of the cargo on or about July 15. (Id. at ¶ 9.) He states that mandatory arbitration clauses like the one included in the July 6 transmittal are "commonplace" and the "norm" in the industry. (Id. at ¶10.) He also states that in prior agreements for the sale of petroleum products, "[m]andatory arbitration agreements were also included in each of those previous agreements." (Id. at ¶11.) In response, ICC has submitted a "certification" from a knowledgeable project manager with 20 years experience as a trader of petroleum products; he was involved in the transaction at issue. (Decl. of Chiragh Sareen at ¶¶ 1-2) While the declarant vehemently contends that ICC ought not be bound by the terms of Vitol written confirmation, he does not dispute its receipt or the absence of a timely objection by ICC. He notes that "[t]raders in the petroleum and chemical industries sometimes agree to arbitration, and sometimes do not" and "[t]here is no custom in the trade requiring arbitration." (Id. at ¶ 17.). The declarant is notably silent as to the past practices of ICC. He does offer his subjective opinion of what ICC would have done if it thought that the Vitol confirmation had any import. In a conclusory manner and without reference to what ICC has done in other transactions, he asserts that Vitol would not have accepted the credit terms, delay penalties and arbitration clause.

The arbitration clause at issue provides as follows:

> If any dispute arises between buyer and seller in connection with this contract, the matter in dispute shall be submitted by either party hereto to arbitration in New York City, New York, USA, before three arbitrators. The party initiating arbitration shall provide written notice of its intent to submit the matter for arbitration. Such notice shall identify the arbitration claim and specify the intiating party's designated arbitrator. Within ten (10) days following such notice of arbitration, the other party shall appoint its designated arbitrator. If such party fails to appoint an arbitrator within the applicable 10-day period and give timely notice of such appointment to the initiating party, then the initiating party shall be entitled to specify such second arbitrator as

> well. The third arbitrator shall be selected by the two arbitrators so chosen. Each party will bear and pay the costs of the arbitrator appointed by (or for) it and the costs of the third arbitrator shall be borne and paid equally by the parties. The decision of the arbitrators shall be final, conclusive and binding on all parties. Judgment may be entered upon any such award in any court with jurisdiction."[1]

ICC points to the theoretical circumstance that if it were to receive an arbitration notice from Vitol but ICC failed to designate an arbitrator within ten days, then Vitol would select the two arbitrators who would in turn select the third. The circumstance would work identically, if ICC served an arbitration notice and Vitol failed to appoint a second arbitrator. The provision ensures that the party against whom a claim is asserted cannot thwart arbitration through passive resistance. ICC also asserts that it could come to pass that two party arbitrators could theoretically fail to appoint a third arbitrator and no mechanism for resolution of this impasse is provided. This rather common method of selecting a third arbitror has stood the test of time and ICC cites no instance of where such an impasse has thwarted an arbitration in the industry. Moreover, N.Y. CPLR § 7504 provides that "[i]f the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator."

ICC has failed to show that the arbitration provision—or any other provision of the Vitol written confirmation—would surprise or impose hardship on ICC. A reasonable

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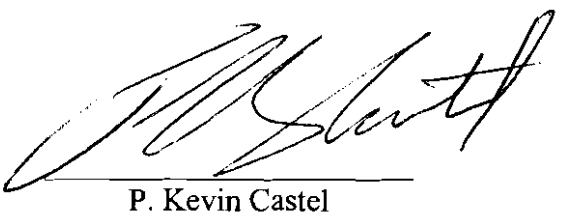
[1] The arbitration clause also provides that for disputes under $25,000, "one arbitrator shall be used as agreed by both parties. If both parties fail to agree on one arbitrator, the seller [i.e. Vitol] will appoint a suitable arbitrator." ICC argues that this provision is so unfair that it would never have agreed to it. Declarent offers no showing of the frequency in the industry—or between ICC and Vitol—that disputes under $25,000 are not negotiated to resolution by the parties without invoking a dispute resolution mechanism. Nor does he address whether industry participants have ever failed to agree on the identity of the single "suitable arbitrator."

merchant in the petroleum trading business would likely have consented to the terms of the Vitol written confirmation.

Defendant's motion to dismiss is DENIED. Defendant's alternative request for relief, a stay of the claim pending arbitration, is GRANTED. The case is placed on the suspense docket. The parties are to report on the status of the arbitration by January 23, 2010 and every sixty days thereafter. Failure to do so will result in dismissal without prejudice and without further notice.

SO ORDERED.



P. Kevin Castel
United States District Judge

Dated: New York, NY
November 18, 2009