Kluwer Arbitration Blog

P&I Insurer's Consent to U.S. Jurisdiction in Service of Suit Clause Does Not Override Contractual Right to Arbitrate

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The question of whether the jurisdictional grant in a "service of suit" clause overrides an otherwise valid and enforceable arbitration clause in the same agreement has been addressed by several courts in the United States. *See McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991); *Neca Ins., Ltd. v. Nat'l Union Fire Ins. of Pittsburgh, PA*, 595 F. Supp. 955 (S.D.N.Y. 1984); *West Shore Pipe Line Co. v. Associated Elec. and Gas Ins. Services, Ltd*., 791 F. Supp. 200 (N.D. Ill. 1992); *New Hampshire Ins. Co. v. Canali Reinsurance Co. Ltd.*, 2004 WL 769775 (S.D.N.Y. April 12, 2004); *Lloyds Underwriters v. Netterstrom*, 17 So. 3d 732 (Fla. Dist. Ct. App. 2009).

These courts have recognized the distinct purposes of the two clauses, which allow them to co-exist in harmony in the same agreement. The arbitration clause provides a choice of forum for resolving disputes under the contract, whereas the service of suit clause requires a party to consent to the jurisdiction to enforce the arbitration award. *See West Shore Pipe Line Co.*, 791 F. Supp. at 203-04 (arbitration awards are not self-enforceable and therefore, service of suit clauses can dictate the location of any action that might be necessary following arbitration in order to enforce the award).

On April 13, 2017, the United States District Court for the Southern of Texas reinforced this general proposition, that a service of suit clause is not intended to override the English arbitration clause in the same protection and indemnity ("P&I") insurance policy, holding that the two clauses, by their plain language, are to be read in harmony with each other, with the arbitration clause requiring the parties to arbitrate the substance of their dispute in England under English law, and the service of suit clause requiring the insurer to submit to the jurisdiction of an appropriate United States court for enforcement proceedings. *Gemini Ins. Co. v. Certain Underwriters at Lloyd's London*, Civ. No. 4:17-cv-01044 (S.D. Tex., April 13, 2017).

Gemini involved an insurance coverage dispute arising from a maritime personal injury accident. Paul Blasingame, a Jones Act seaman, was crushed between a wellhead and his assigned vessel, the M/V Rhea, while climbing onboard during operations for his employer, Galveston Bay Energy, LLC ("Galveston"). The seaman sued his employer and the owner of the vessel under the Jones Act in Texas state court. Among other insurance coverage, Galveston maintained primary P&I insurance through a Lloyd's syndicate, issued through the Osprey Underwriting Agency, Ltd. ("Osprey"), and commercial umbrella liability insurance through Gemini Insurance Company ("Gemini"). Gemini and other insurers whose policies were also implicated agreed to fund their

share of settlement of the maritime personal injury accident, whereas Osprey, on behalf of Lloyd's, did not agree to settle. Gemini disputed the position taken by Osprey, ultimately agreeing to pay more than its share of the settlement and obtaining from Galveston an assignment of rights to pursue Osprey and Lloyd's under the Osprey P&I policy.

The Osprey P&I policy contained a "Law and Practice Clause" which provided, in relevant part that, "[n]otwithstanding anything else to the contrary, this insurance is subject to English law and practice and any dispute under or in connection with this insurance is to be referred to Arbitration in London, …." Pursuant to the Law and Practice Clause, Osprey, on behalf of Lloyd's, commenced arbitration proceedings in England seeking a determination that it did not owe any money toward the underlying maritime personal injury settlement.

Gemini, in turn, sued Lloyd's in Texas state court, alleging that it was subrogated to Galveston's rights under the Osprey P&I policy and asserting various contract and quasi-contract theories of recovery. Gemini also sought injunctive relief preventing Lloyd's from going forward with the English arbitration. The Texas state court granted Gemini a temporary restraining order. Lloyd's then removed the action to the federal district court in Texas pursuant to 9 U.S.C. § 205 (which provides for removal where, as was the case here, the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention on the Recognition and Enforcement of Arbitral Awards) (the "New York Convention"). After the case was removed to federal district court, a hearing took place to decide whether a preliminary injunction should be entered against Lloyd's preventing them from pursuing the arbitration in England. The court denied the preliminary injunction request, favoring arbitration in England instead, as discussed below.

First, the *Gemini* court determined the "Law and Practice Clause" in the Osprey P&I policy was governed by the New York Convention and because it required arbitration under English law, it contained an implicit delegation clause for the arbitrator, not the court, to decide what claims are arbitrable. *See Gemini*, Op. at 9-10 ("By agreeing to arbitrate under English law, the parties clearly and unmistakably consented to delegate to the arbitrator the power to make threshold determinations about what claims are arbitrable.")

Next, the court addressed, and ultimately rejected, Gemini's argument that the jurisdictional grant in the Osprey P&I policy's "Service of Suit" clause requiring the insurers to submit to the jurisdiction of a United States court in the event they fail to pay any amount due under the Osprey P&I policy, overrode the Law and Practice Clause requiring arbitration in England. The Osprey P&I policy's Service of Suit clause provided, in relevant part, that "It is agreed that in the event of the failure of the Underwriters severally subscribing to this insurance (the Underwriters) to pay any amount claimed to be due hereunder, the Underwriters, at the request of the Assured, will submit to the jurisdiction of a court of competent jurisdiction within the United States of America … Subject, in all respects, to the Osprey Law and Practice Clause as contained in the clauses dated 1.04.96." This clause, Gemini argued, was more specific than the Law and Practice Clause, and therefore governed under the ordinary rule that specific provisions trump general provisions. According to Gemini, the Service of Suit clause applied to a narrower universe of claims – actions for "failure … to pay any amount claimed to be due" – which was more specific than the broader dispute resolution provision in the Law and Practice Clause.

In rejecting Gemini's arguments, the *Gemini* court noted that the Osprey P&I policy contemplated arbitration of disputes, that the summary section of the P&I policy specified that choice of law and

jurisdiction are governed by the "Law and Practice Clause," and that the "Law and Practice Clause" itself stated that arbitration in England is required "[n]otwithstanding anything else to the contrary …." The "Law and Practice Clause," the court stated, "then adds suspenders to that belt, emphasizing that '[i]n the event of a conflict between this clause and any other provision of this insurance, this clause shall prevail and the right of either party to commence proceedings before any other Court or Tribunal in any other jurisdiction shall be limited to the process of enforcement of any award hereunder.'" The Service of Suit clause, the court explained, was "explicitly subordinated" to the Law and Practice Clause because it also stated that it was "[s]ubject, in all respects, to the Osprey Law and Practice Clause…." *Gemini*, Op. at 11-12.

The *Gemini* court also found persuasive the "harmonizing" approach of the Fifth Circuit Court of Appeals in *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1200 (5th Cir. 1991) (harmonizing the two clauses by limiting the service of suit clause to actions to enforce arbitration awards issued under the arbitration clause is a reasonable and permissible interpretation of the contract) and the Florida appellate court in *Lloyds Underwriters v. Netterstrom*, 17 So. 3d 732, 736 (Fla. Dist. Ct. App. 2009) (same, and even if the two clauses conflicted, the arbitration clause controls). According to the *Gemini* court, "[t]he best way to harmonize these two provisions is not, as Gemini suggests, to treat the 'Service of Suit' provision as a carve-out from the 'Law and Practice' provision's broad sweep." The court explained that "[w]hile Gemini is correct that, all else equal, specific provisions control over general provisions," that principle of construction, according to the court, cannot override clear contract language of the two clauses at issue. *Gemini*, Op. at 12. To find otherwise would "rewrite the parties' contract," which the *Gemini* court would not do.

Gemini reinforces the proposition that courts will apply arbitration clauses and service of suit clauses in harmony with each other. Insurers and practitioners should be aware of the *Gemini* decision and that such contract provisions, as demonstrated in *Gemini*, are not intended to conflict with each other. Rather, as the *Gemini* court noted, the two provisions work together to prevent costly fights over the appropriate forum for litigating issues arising out of the parties' international insurance contract.

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