Date: 20080528

Docket: T-1928-07

Citation: 2008 FC 677

[ENGLISH TRANSLATION]

Montréal, Quebec, May 28, 2008

PRESENT: Richard Morneau, Esq., Prothonotary

BETWEEN:

FEDERAL INSURANCE COMPANY
and
THE ESTEY CORPORATION
(LUCKY ESTEYS DISTRIBUTIONS GROUP)

Plaintiffs

and

THE SHIP "MAERSK PENANG",
and
THE OWNERS AND ALL OTHERS NTERESTED
IN THE SHIP "MAERSK PENANG"
and
THE SHIP "MAERSK PERTH",
and
THE OWNERS AND ALL OTHERS INTERESTED IN
THE SHIP "MAERSK PERTH",
and
MAERSK LINE, and NIPPON YUSEN KAISHA (NYK LINE),
and
DHL DANZAS AIR & OCEAN (DHL GLOBAL FORWARDING),
and
DANMAR LINES LTD.,
and
RIKA METALLWARENGESELLSCHAFT m.b.H. & Co. KG

Defendants

and

DHL DANZAS AIR & OCEAN (DHL GLOBAL FORWARDING),
and
DANMAR LINES LTD.,

Third Party Claimants

and

THE SHIP "MAERSK PENANG",
and
THE OWNERS AND ALL OTHERS NTERESTED
IN THE SHIP "MAERSK PENANG"
and
THE SHIP "MAERSK PERTH",
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THE SHIP "MAERSK PERTH",
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MAERSK LINE, and NIPPON YUSEN KAISHA (NYK LINE),
and
RIKA METALLWARENGESELLSCHAFT m.b.H. & Co. KG

Third Party Defendants

REASONS FOR ORDER AND ORDER

[1] This is a motion by the respondent Rika Metallwarengesellschaft m.b.H. & Co. KG (hereinafter "Rika") to strike the statement of claim against it by the applicants, Federal Insurance Company (hereinafter "Federal Insurance insurers") and The Estey Corporation (Lucky Esteys

Distributions Group) (hereinafter "The Estey Corporation"), on the grounds stated in its motion record that this Court does not have jurisdiction on this action because of the application of an arbitration clause to that cause of action.

I. Background

[2] In their statement of claim, Federal Insurance insurers and The Estey Corporation seek more than $1 million for damage to a cargo of stoves manufactured and shipped by Rika by sea from Austria to Montréal, which was found to be severely damaged upon its final arrival in Oregon, United States.

[3] The action in this case was therefore instituted, inter alia, against Rika, who is seen as the shipper. The other respondents are the entities involved in the actual marine transportation of the stoves.

[4] An affidavit by Stacy Walters, dated May 2, 2008, was filed by the applicants against the motion under consideration. Paragraph 13 of the affidavit stated that the applicants held Rika at fault for improperly packaging the stoves for shipping purposes. Subsequently, some of the respondents instituted a third-party claim against Rika.

[5] It appears that the stoves were shipped in three shipments from September 2006 to November 2006.

[6] Later, on March 10, 2006, Lucky Distributing, Inc. (hereinafter "Lucky"), a subsidiary of the applicant The Estey Corporation, signed a "Distributorship Agreement" (hereinafter "Distributorship Agreement") with Rika.

[7] The following clauses of the Distributorship Agreement appear to me to reveal the nature of this agreement:

> I. Basis of the Agreement
>
> (1) (…)
>
> (2) Lucky is a distribution company with registered offices in Oregon (U.S.A.) engaged in the distribution of stoves throughout all of North America. Lucky is taking on the distribution of wood, gas and pellet fireplace stoves with the registered trademark "Rika" in North America (U.S.A. and Canada).
>
> (3) The present agreement is entered into in order to set forth the rights and obligations of both Contracting Parties flowing from this business relationship.
>
> II. Subject of the Agreement
>
> (1) RIKA grants Lucky exclusive distribution rights for the national territories of the U.S.A. and Canada for the Contract Products defined under Item I. (1) of the present agreement. This means that RIKA will supply these Contract Products in the U.S.A. and Canada exclusively to Lucky.
>
> [Emphasis added.]

[8] Like the applicants, I understand that the purpose of the Distributorship Agreement is to define and allow the arbitration, if necessary, of the rights and obligations of Rika and Lucky with

respect to the following issues, all of which is mentioned in part in paragraph 30 of the applicants' written submissions:

> 30. Moreover, the Distributorship Agreement only covers issues of distribution, protection of trade names and trade marks, sale conditions, licences, certificates, inventories, marketing, promotional materials, orders and purchases, prices and payment terms, products liability claims, manufacturer's liability (…)

II. Analysis

[9] Although Rika's motion to strike cites rule 208, it appears from the following excerpt by authors Saunders et al., Federal Courts Practice 2008, Carswell, at page 551, that this motion must be viewed implicitly as relying primarily on paragraph 221(1)(*a*) of the *Federal Courts Rules* (the Rules):

> Rule 208 governs only the consequences of a preliminary objection. It does not provide a substantive basis for objection, which must be found in other provisions of the *Federal Courts Act* or Rules or the general law. The appropriate rule under which to challenge the jurisdiction of the Court was a source of debate under the former Rules: *MIL Davie Inc. v. Hibernia Mgmt. & Dev. Co.* (1998), 226 N.R. 369, 85 C.P.R. (3d) 320 (Fed. C.A.). Under the *Federal Courts Rules* the most likely basis for objections to jurisdiction is rule 221(1)(a). (…)
>
> [Emphasis added.]

[10] Thus, the following passage from *Hodgson et al. v. Ermineskin Indian Band et al.* (2000), 180 F.T.R. 285, page 289 (affirmed on appeal: 267 N.R. 143; leave to appeal to the Supreme Court of Canada refused: 276 N.R. 193) establishes that an approach raising a question of jurisdiction or the absence of a cause of action under that paragraph must be plain and obvious for the Court to allow it. This passage also notes that with respect to jurisdiction, evidence is admissible:

> [9] I agree that a motion to strike under rule 221(1)(a) [previously rule 419(1)(a)] on the ground that the Court lacks jurisdiction is different from other motions to strike under that subrule. In the case of a motion to strike because of lack of jurisdiction, an applicant may adduce evidence to support the claimed lack of jurisdiction. In other cases, an applicant must accept everything that is pleaded as being true (see *MIL Davie Inc. v. Société d'exploitation et de développement d'Hibernie ltée* (1998), 226 N.R. 369 (F.C.A.), discussed in Sgayias, Kinnear, Rennie, Saunders, *Federal Court Practice 2000*, at pages 506-507).
>
> [10] [....] The "plain and obvious" test applies to the striking out of pleadings for lack of jurisdiction in the same manner as it applies to the striking out of any pleading on the ground that it evinces no reasonable cause of action. The lack of jurisdiction must be "plain and obvious" to justify a striking out of pleadings at this preliminary stage.

[11] However, for the two main reasons that follow, I cannot find that it is plain and obvious that the arbitration clause in the Distributorship Agreement means that this Court does not have jurisdiction over the action instituted by the applicants against Rika.

[12] First, the Distributorship Agreement was entered into between Rika and Lucky. Although for discussion purposes it can probably be argued that the Federal Insurance insurers are subrogated in the rights of their insured, The Estey Corporation, and thus their source of rights, derives from those owned by The Estey Corporation, the fact remains that the applicant, The Estey Corporation, is not a party to the agreement entered into by its subsidiary Lucky.

[13] Although paragraphs 7 and 8 of Sebastian Köck's affidavit, dated March 11, 2008, and produced by Rika, mean that at Lucky's request, the invoices for the sale of the stoves at issue were addressed to Lucky Esteys Distributions Group, and that these stoves were delivered to the same address and the invoices were therefore paid, it has not been established that Rika demanded and obtained that Lucky's parent corporation, The Estey Corporation, be notified and bound by the Distributorship Agreement and, thus, by the arbitration clause contained in the Agreement. These circumstances do not establish that all parties must understand that Lucky thereby exercised the apparent mandate to bind The Estey Corporation.

[14] Although in paragraph 3 of its statement of claim, the applicant, The Estey Corporation, considers itself to have always been the relevant owner of the stoves at issue, this state of ownership does not necessarily mean that it is covered by the Distributorship Agreement entered into by Lucky.

[15] Finally, the fact that the invoices are addressed to "Lucky Esteys Distributions Group", as mentioned above, and that this expression is repeated in parentheses in the style of cause alongside the applicant, The Estey Corporation, these two elements do not clarify the situation since the

evidence on either side of the motion records is silent as to the status and exact meaning of the term "Lucky Esteys Distributions Group."

[16] Second, and even if we were to consider that the applicant, The Estey Corporation, is bound by the Distributorship Agreement, I cannot consider it to be plain and obvious that the damage to the stoves due possibly to improper packaging is the type of issue that constitutes a "dispute [ ] arising from the present agreement or related to its infringement, termination or nullity" within the meaning of Clause XII(1) of the Distributorship Agreement. This clause reads:

> XII. General Contract Provisions
>
> (1) All disputes arising from the present agreement or related to its infringement, termination or nullity, shall be finally decided in accordance with the *Schieds- und Schlichtungsordnung des internationalen Schiedsgerichtes der Wirtschaftskammer Osterreich in Wien* [Rules of arbitration and conciliation of the Vienna International Arbitral Centre of the Austrian Federal Economie Chamber] (Vienna Rules) by three arbitrators appointed in accordance with these rules.
>
> (...)

[17] Rather, the nature and purpose of the Distributorship Agreement, as outlined in paragraphs [7] and [8], *supra*, argue in favour of the opposite view.

[18] It is actually only at the hearing of this motion that Rika sought to argue that the applicants' cause of action would be a question of civil law and therefore cannot be seen as related to Canadian maritime law.

[19] If Rika wishes to raise this point, it will have to do so by filing a motion where its motion record must contain all the evidence and the written argumentation to enable this Court to render a valid decision.

[20] For these reasons, Rika’s motion to strike the statement of claim instituted by the applicants will be dismissed, the whole with costs to the applicants.

ORDER

THIS COURT'S JUDGMENT is that Rika Metallwarengesellschaft m.b.H. & Co. KG's motion to strike the statement of claim instituted by the applicants be dismissed, the whole with costs to the applicants.

"Richard Morneau"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1928-07

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Rika Metallwarengesellschaft m.b.H. & Co. KG
Third Party Defendants

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 26, 2008

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATED: May 28, 2008

APPEARANCES:

Marc de Man	FOR THE APPLICANTS
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Jean G. Robert	FOR THE RESPONDENT RIKA METALLWARENGESELLSCHAFT m.b.H. & Co. KG

SOLICITORS OF RECORD:

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Lette & Associés Montréal, Quebec	FOR THE RESPONDENT RIKA METALLWARENGESELLSCHAFT m.b.H. & Co. KG