IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BHANDARA FAMILY LIVING TRUST, Plaintiff, v. UNDERWRITERS AT LLOYD'S, LONDON f/k/a CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, INDIAN HARBOR INSURANCE COMPANY, QBE SPECIALTY INSURANCE COMPANY, STEADFAST INSURANCE COMPANY, GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA, UNITED SPECIALTY INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, OLD REPUBLIC UNION INSURANCE COMPANY, AMRISC, LLC, and U.S. RISK, LLC, Defendants.	§ § § § § § § § § § § § § § § § § § §	CIVIL ACTION NO. H-19-968

MEMORANDUM AND ORDER COMPELLING ARBITRATION

Pending are the Insurer Defendants' Motion to Compel Arbitration and Motion to Stay or Dismiss these Proceedings (Document No. 13), Defendant U.S. Risk, LLC's Motion to Compel Arbitration and Motion to Dismiss or, Alternatively, Stay Proceedings (Document No. 15), and Defendant AmRisc, LLC's Motion to Compel Arbitration and Motion to Stay Litigation Pending Arbitration (Document No. 18).[1] After carefully considering the

[1] Insurer Defendants' Opposed Motion for Protective Order from Discovery Served while the Court's Ruling on Arbitration is Pending (Document No. 29) and Defendant AmRisc, LLC's Opposed Motion for Protective Order from Discovery Served while the Court's Ruling on

motions, responses, replies, and applicable law, the Court concludes as follows.

I. Background

Plaintiff Bhandara Family Living Trust owns four commercial properties in Houston, Texas, that were damaged during Hurricane Harvey in August 2017.[2] The properties were insured by a policy (the "Policy") that allocated premiums and liabilities among eight insurers--Defendants Certain Underwriters at Lloyd's London Subscribing Severally to Certificate No. AMR-59923 (the "Underwriters"), Indian Harbor Insurance Company, QBE Specialty Insurance Company, Steadfast Insurance Company, General Security Indemnity Company of Arizona, United Specialty Insurance Company, Lexington Insurance Company, and Old Republic Union Insurance Company (collectively, the "Insurer Defendants").[3] Plaintiff filed a claim with the Insurer Defendants, and when they did not pay the claim, Plaintiff filed this suit in state court. Plaintiff alleges claims against the Insurer Defendants for breach of contract, violations of the Texas Insurance Code, common law bad faith, and for a declaratory judgment that the damage to Plaintiff's

---

Arbitration is Pending (Document No. 30) are DISMISSED as moot.

[2] Document No. 1-11 at 6 (Pl.'s Orig. Pet.).

[3] Document No. 1-1 (the Policy).

properties is covered by the Policy.[4] Plaintiff also alleges that two insurance brokers, Defendants AmRisc, LCC and U.S. Risk, LLC (the "Broker Defendants"), violated the Texas Insurance Code when they failed to disclose an unconscionable arbitration clause in the Policy while preparing a proposal to Plaintiff for the Policy.[5] That clause is contained in Section VII.C of the Policy and provides in full:

> ARBITRATION CLAUSE: All matters in difference between the Insured and the Companies (hereinafter referred to as "the parties") in relation to this insurance, including its formation and validity, and whether arising during or after the period of this insurance, shall be referred to an Arbitration Tribunal in the manner hereinafter set out.
>
> Unless the parties agree upon a single Arbitrator within thirty days of one receiving a written request from the other for Arbitration, the Claimant (the party requesting Arbitration) shall appoint his Arbitrator and give written notice thereof to the Respondent. Within thirty days o[f] receiving such notice, the Respondent shall appoint his Arbitrator and give written notice thereof to the Claimant, failing which the Claimant may nominate an Arbitrator on behalf of the Respondent.
>
> Should the Arbitrators fail to agree, they shall appoint, by mutual agreement only, an Umpire to whom the matter in difference shall be referred.
>
> Unless the parties otherwise agree, the Arbitration Tribunal shall consist of persons employed or engaged in a senior position in Insurance underwriting or claims.
>
> The Arbitration Tribunal shall have power to fix all procedural rules for the holding of the Arbitration

---

[4] Document No. 1-11 at 7-8.

[5] Id. at 9-10.

> including discretionary power to make orders as to any matter which it may consider proper in the circumstances of the case with regard to pleadings, discovery, inspection of documents, examination of witnesses and any other matter whatsoever relating to the conduct of the Arbitration and may receive and act upon such evidence whether oral or written strictly admissible or not as it shall in its discretion think fit.
>
> All costs of the Arbitration shall be in the discretion of the Arbitration Tribunal who may direct to and by whom and in what manner they shall be paid.
>
> The seat of the Arbitration shall be in New York and the Arbitration Tribunal shall apply the law of New York as the proper law of this insurance.
>
> The Arbitration Tribunal may not award exemplary, punitive, multiple, consequential or other damages of a similar nature.
>
> The award of the Arbitration Tribunal shall be in writing and binding upon the parties who covenant to carry out the same. If either of the parties should fail to carry out any award the other may apply for its enforcement to a court of competent jurisdiction in any territory in which the party in default is domiciled or has assets or carries on business.[6]

Ten days after Plaintiff filed suit, the Insurer Defendants invoked the Policy's arbitration clause and requested arbitration of Plaintiff's claims.[7] Plaintiff refused to arbitrate, asserting that the arbitration clause in the Policy was unconscionable and likely to be voided as a matter of public policy.[8] With the consent of the other Defendants, the Underwriters, whose members

---

[6] Document No. 1-1 at 38 of 115 to 39 of 115.

[7] Document No. 13-1 at 120 of 143.

[8] Id. at 124 of 143.

include various companies registered in England and Wales, then removed the case on the basis of federal question jurisdiction, invoking the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention").[9] All Defendants now move to compel arbitration and to stay or dismiss Plaintiff's suit.[10]

II. Legal Standard

Under the Convention, courts determining whether to compel arbitration "conduct only a very limited inquiry." Freudensprung v. Offshore Tech. Servs., Inc., 379 F.3d 327, 339 (5th Cir. 2004) (citation omitted). "[A] court should compel arbitration if (1) there is a written agreement to arbitrate the matter; (2) the agreement provides for arbitration in a Convention signatory nation; '(3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen.'" Id. (quoting Francisco v. STOLT ACHIEVEMENT MT, 293 F.3d 270, 273 (5th Cir. 2002)). Once these requirements are met, the court must compel arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Id. (citation omitted). "U.S. courts have narrowly construed this 'null and void' exception." Sunkyong Eng'g & Const.

[9] Document No. 1.

[10] Document Nos. 13, 15, 18.

Co. v. Born, Inc., 149 F.3d 1174, at *6 (5th Cir. 1998) (unpublished) (collecting cases). "While an agreement to arbitrate may be null and void when it is 'subject to an internationally recognized defense such as duress, mistake, fraud, or waiver,' we resolve doubts or questions of fact regarding those defenses in favor of arbitration." Id. (citations omitted).

Although the Convention's implementing act is found in Chapter 2 of Title 9, that Chapter incorporates the provisions of the Federal Arbitration Act ("FAA") in Chapter 1 to the extent they are not inconsistent with the Convention. 9 U.S.C. § 208 ("Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."); Bautista v. Star Cruises, 396 F.3d 1289, 1297 (11th Cir. 2005) ("The FAA applies residually to supplement the provisions of the Convention Act[.]"). Both the Convention and the FAA seek to encourage the recognition and enforcement of arbitration agreements. *See* Scherk v. Alberto-Culver Co., 94 S. Ct. 2449, 2457 n.15 (1974) ("The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."); Moses H. Cone Mem'l Hosp.

v. Mercury Constr. Corp., 103 S. Ct. 927, 941 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."). The strong federal presumption in favor of arbitrability "applies with special force in the field of international commerce." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346, 3356 (1985).

III. Discussion

A. The Insurer Defendants

The uncontroverted evidence is that (1) the Policy to which Plaintiff and the Insurer Defendants are parties includes a written agreement to arbitrate all disputes involving the insurance;[11] (2) the agreement provides for arbitration in a Convention signatory nation, namely, the United States; (3) the Policy and its arbitration agreement arise out of a commercial legal relationship between Plaintiff and its insurers; and (4) a party to the Policy

[11] An insurance policy with an arbitration agreement constitutes an agreement in writing under the Convention even when it is not signed by the insured. Sphere Drake Ins. PLC v. Marine Towing, Inc., 16 F.3d 666, 669 (5th Cir. 1994).

is not an American citizen.[12] Thus, the Court must compel arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Freudensprung, 379 F.3d at 339 (citation omitted).

Plaintiff argues that the Policy's arbitration agreement is unconscionable and therefore null and void because its provision that "the Arbitration Tribunal shall consist of persons employed or engaged in a senior position in Insurance underwriting or claims" guarantees a biased decisionmaker, and because it applies New York Law and precludes the award of exemplary, punitive, and other damages permitted under Texas law.[13]

Plaintiff has not shown that the Policy mandates the selection of arbitrators who will be biased against him. Each of the cases involving biased arbitrators on which Plaintiff relies involved--in addition to a variety of other fairness concerns not present here--an agreement that arbitrators could only be chosen from a list of

---

[12] The Policy provides that "[t]his contract shall be construed as a separate contract between the Insured and each of the Underwriters." Document No. 1-1 at 6 of 115. Because the provisions of the Policy apply identically to all the Insurer Defendants and the parties have treated the Policy as a single contract, the Court will analyze it as such. Treating the Policy as a collection of separate contracts would not lead to a different outcome. *See* Port Cargo Serv., LLC v. Certain Underwriters at Lloyd's London, No. CV 18-6192, 2018 WL 4042874 (E.D. La. Aug. 24, 2018) (holding that policy with the same language created separate contracts between plaintiff and each insurer but that contracts with domestic insurers were removable under the Convention and arbitrable because of their relation to plaintiff's contracts with foreign insurers).

[13] Document No. 16.

potential arbitrators pre-selected by one side. *See* McMullen v. Meijer, Inc., 355 F.3d 485 (6th Cir. 2004); Murray v. United Food & Commercial Workers Int'l Union, 289 F.3d 297, 300 (4th Cir. 2002); Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999); Milliner v. Bock Evans Fin. Counsel, Ltd., 114 F. Supp. 3d 871, 875 (N.D. Cal. 2015); Nitro Distrib., Inc. v. Alticor, Inc., No. 03-3290-CV-W-RED, 2005 WL 6936246, at *12 (W.D. Mo. Sept. 16, 2005), *aff'd*, 453 F.3d 995 (8th Cir. 2006); *see also* Bonded Builders Home Warranty Ass'n of Tex. v. Rockoff, 509 S.W.3d 523, 536 (Tex. App.-El Paso 2016, no pet.) (arbitration agreement providing for one side to select pool of potential arbitration companies was not unconscionable). Here, in contrast, the Insurer Defendants have not preselected any list of eligible arbitrators. Plaintiff is free to select any "person[] employed or engaged in a senior position in Insurance underwriting or claims." Plaintiff cites to no authority supporting his argument that such individuals "will be inherently friendly to, and biased in favor of, the rights and protections of the Insurer Defendants and the business of insurance as a whole."[14] As the Insurer Defendants point out, Plaintiff is not limited to employees of insurance companies. For example, Plaintiff could select a broker or agent in a senior position in a business that represents insureds in making claims. Particularly in light of the fact that all doubts about Plaintiff's

[14] Id. at 9.

defense must be resolved in favor of arbitration, Sunkyong, 149 F.3d 1174, at *6, Plaintiff has not shown that the Policy's arbitration agreement is null and void on the basis of an unconscionable arbitrator selection procedure.

Plaintiff's remaining arguments challenge various provisions governing the law and remedies to be applied by the arbitrators. These are collateral to and do not call into question the parties' agreement that "[a]ll matters in difference between the Insured and the Companies . . . in relation to this insurance, including its formation and validity, and whether arising during or after the period of this insurance, shall be referred to an Arbitration Tribunal."[15] Even if the Court were to find that all of the aspects of the Policy challenged by Plaintiff were unconscionable, it does not follow that the parties' agreement to submit their disputes to arbitration would also be unconscionable. *See* Rent-A-Ctr., W., Inc. v. Jackson, 130 S. Ct. 2772, 2778 (2010) ("[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate."); Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 230-31 (Tex. 2014) (appellate court erred by holding arbitration agreement unconscionable instead of severing invalid waiver of statutory rights). Plaintiff identifies no reason why its objections to the application of New York law and to the

[15] Document No. 1-1 at 37 of 115.

Policy's contractual limits on the available remedies cannot be made to the arbitrator.

Because the Insurer Defendants have established the existence of a valid arbitration agreement subject to the Convention, which Plaintiff has not shown to be null and void, inoperative, or incapable of being performed, this Court is obliged to order the parties to arbitration. Freudensprung, 379 F.3d at 339. Plaintiff's claims against the Insurer Defendants will be stayed pending completion of the arbitration. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.").

B. The Broker Defendants

Although the Broker Defendants are not parties to the Policy, they too move to compel arbitration under its arbitration clause, arguing that (1) the question of arbitrability is itself delegated to the arbitrator by the Policy and (2) equitable estoppel requires

Plaintiff to arbitrate its claims with the Broker Defendants. Plaintiff contends that the arbitration agreement is unconscionable and that even if it applies to Plaintiff's claims against the Insurer Defendants, the Broker Defendants, as non-signatories of the Policy, are not entitled to compel arbitration. For the reasons already discussed above, the Policy's arbitration agreement is not null and void as unconscionable.

When considering a delegation argument, the Supreme Court has emphasized that courts should not assume that the parties agreed to arbitrate the question of arbitrability unless there is clear and unmistakable evidence that they did so. First Options of Chi., Inc. v. Kaplan, 115 S. Ct. 1920, 1924 (1995). The arbitration clause on which the Broker Defendants rely provides for arbitration of "[a]ll matters in difference *between the Insured and the Companies* . . . in relation to this insurance, including its formation and validity."[16] Because the arbitration agreement is expressly limited to disputes between the parties to the Policy, it does not clearly and unmistakably demonstrate an intent to submit to the arbitrators disputes about arbitrability between parties and non-parties. The question therefore arises whether the Broker Defendants are entitled to arbitrate Plaintiff's claims against them under the theory of equitable estoppel. *Cf.* Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 632 (Tex. 2018) ("Even

[16] Document No. 1-1 at 37 of 115 (emphasis added).

when the party resisting arbitration is a signatory to an arbitration agreement, questions related to the existence of an arbitration agreement with a non-signatory are for the court, not the arbitrator.").

Notwithstanding the general presumption in favor of arbitration, courts should "allow a nonsignatory to invoke an arbitration agreement only in rare circumstances." Westmoreland v. Sadoux, 299 F.3d 462, 465 (5th Cir. 2002).[17] The Fifth Circuit has identified the circumstances in which equitable estoppel allows a non-signatory to compel arbitration:

> *First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.* When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. *Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially*

[17] Plaintiff argues that Texas law governs this analysis, while the Broker Defendants argue that New York law applies. All parties agree that the choice of law makes no difference to the outcome. While noting uncertainty on the issue, the Fifth Circuit has stated that "'the federal substantive law of arbitrability' applies to the question of 'to what extent a non-signatory is bound by an arbitration provision contained in a contract she is suing under.'" Covington v. Aban Offshore Ltd., 650 F.3d 556, 559 n.2 (5th Cir. 2011) (citing Wash. Mut. Fin. Grp., LLC v. Bailey, 364 F.3d 260, 267 n.6 (5th Cir. 2004)). As in Covington, however, the Court "need not decide in this case whether those principles should be drawn from Texas law [or New York law] or federal law, because [all three] bodies of law lead us to the same conclusion." Id. at 558-59.

> *interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.*

Grigson v. Creative Artists Agency L.L.C., 210 F.3d 524, 527 (5th Cir. 2000) (quoting and adopting test from MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999)).[18] Each case, however, "turns on its facts" and "[t]he linchpin for equitable estoppel is equity--fairness." Id. at 527-28.

Plaintiff argues that equitable estoppel does not apply because its claims against the Broker Defendants are distinct from its claims against the Insurer Defendants, do not rely on the terms of the Policy, and arose before the Policy existed. While it is true that Plaintiff does not allege identical claims against the Broker Defendants and the Insurer Defendants, Plaintiff's claims against all Defendants are substantially intertwined. Plaintiff

---

[18] Grigson arose under the FAA. No party has argued that a different approach is warranted under the Convention, which adopts the FAA's provisions to the extent they are not inconsistent with the Convention, and courts in the Fifth Circuit have applied Grigson's test under the Convention. *E.g.*, Port Cargo, 2018 WL 4042874, at *6-7. The Supreme Court granted certiorari this term to decide whether the Convention permits a non-signatory to an arbitration agreement to compel arbitration based on equitable estoppel, GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, No. 18-1048, 139 S. Ct. 2776 (2019), and heard oral argument on January 21, 2020. In the absence of any contrary argument by the parties or binding authority precluding the application of Grigson to cases arising under the Convention, the Court follows Grigson.

implicitly acknowledged as much when it filed all of its claims in a single lawsuit against the Broker Defendants and the Insurer Defendants. Plaintiff's claims against the Broker Defendants are for preparing "a proposal to Plaintiff for the Policy and insurance coverages at issue in this lawsuit" and for failing to disclose therein "a unique and extremely onerous Arbitration Clause."[19] The allegedly "egregious" provisions identified by Plaintiff are the same provisions that underlie Plaintiff's unconscionability argument asserted against the Insurer Defendants.[20] Furthermore, the only injury Plaintiff alleges as a result of the Broker Defendants' acts is that the arbitration clause prejudices its ability to recover under the Policy.[21] In the absence of the Policy and its arbitration provision, Plaintiff would have no claim against the Broker Defendants.

Because Plaintiff's claim against the Broker Defendants relies on and presumes the existence of the terms of the Policy, arbitration is required. Grigson, 210 F.3d at 527 ("When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate."). Moreover, it would be

---

[19] Document No. 1-11 at 9.

[20] Id.

[21] Id.

impossible to adjudicate Plaintiff's claims against the Broker Defendants without deciding issues that are central to Plaintiff's arbitration with the Insurer Defendants. In its claims against the Broker Defendants, Plaintiff alleges that it was injured because "[t]he overall effect of the Arbitration Clause is that Plaintiff has no legitimate means to contest or challenge the coverage and payment determination of the Insurance Defendants."[22] For Plaintiff to succeed on this claim would require a finding that the arbitration is an illegitimate forum for Plaintiff to contest the Insurance Defendants' coverage and payment determinations. Fairness, the "linchpin for equitable estoppel," id. at 528, requires that all of Plaintiff's claims be decided in a single forum before an arbitrator.

Like Plaintiff's claims against the Insurer Defendants, Plaintiff's claims against the Broker Defendants will be stayed pending completion of the arbitration. 9 U.S.C. § 3.

IV. Order

Accordingly, it is

ORDERED that the Insurer Defendants' Motion to Compel Arbitration and Motion to Stay or Dismiss these Proceedings (Document No. 13), Defendant U.S. Risk, LLC's Motion to Compel Arbitration and Motion to Dismiss or, Alternatively, Stay

---

[22] Id.

Proceedings (Document No. 15), and Defendant AmRisc, LLC's Motion to Compel Arbitration and Motion to Stay Litigation Pending Arbitration (Document No. 18) are GRANTED, and it is therefore ORDERED that Plaintiff Bhandara Family Living Trust shall proceed to arbitration with Defendants in New York in accordance with the arbitration agreement in Plaintiff's Policy effective from July 18, 2017 to July 18, 2018. The Court expresses no opinion on the validity of the Policy's terms regarding choice of law and the remedies available in the arbitration, which provisions Plaintiff may challenge before the arbitral tribunal. In light of this impending arbitration, it is further

ORDERED that all proceedings in this action are STAYED pending the outcome of the arbitration or until further Order of the Court. Within thirty (30) days after a final award in arbitration has been rendered in the New York arbitration or the arbitration has otherwise concluded, any party to this action may move to lift this STAY by filing a motion accompanied by a copy of this Order and evidence that the arbitration has been concluded.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 20TH day of February, 2020.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE