IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GREEN ISLE PARTNERS, LTD., S.E., a Florida limited partnership,	)	
Plaintiff,	)	
v.	)	Civil Action No. 18416
THE RITZ-CARLTON HOTEL COMPANY L.L.C., a Delaware limited liability company, and THE RITZ-CARLTON HOTEL COMPANY OF PUERTO RICO, INC., a Delaware corporation,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: November 3, 2000
Date Decided: November 29, 2000

Josy W. Ingersoll and Martin S. Lessner, Esquires, of YOUNG, CONAWAY, STARGATT & TAYLOR, Wilmington, Delaware; and K.C. McDaniel, Michael I. Verde and Philip A. Nemecek, Esquires, of ROSENMAN & COLIN, LLP, New York, New York, Attorneys for Plaintiff.

Jesse A. Finkelstein and Daniel A. Driesbach, Esquires, of RICHARDS, LAYTON & FINGER P.A., Wilmington, Delaware; and Joseph G. Petrosinelli and Kenneth C. Smurzynski, Esquires, of WILLIAMS & CONNOLLY, LLP, Washington, DC., Attorneys for Defendants.

JACOBS, VICE CHANCELLOR

Pending is a motion to dismiss this action, brought by Green Isle Partners, LTD., S.E. ("Green Isle"), to compel an accounting and the inspection of certain books and records of the defendants, The Ritz-Carlton Hotel Co., L.L.C. ("RCHC-LLC") and The Ritz-Carlton Hotel company of Puerto Rico, Inc. ("RCHC-PR") (collectively, "Ritz-Carlton"). Ritz-Carlton has moved to dismiss this action on the ground that the forum selection clause contained in an agreement that is separate and distinct from the contract upon which this lawsuit is based, requires that this action be litigated in the courts of Puerto Rico. Because I conclude, for the reasons discussed below, that the forum selection clause does not govern this dispute, the defendants' motion to dismiss must be denied.

I. THE FACTS

Green Isle is the lessee and owner of certain property and assets located near San Juan, Puerto Rico and known as The Ritz-Carlton, San Juan Hotel, Spa & Casino, (the "Hotel" or "Hotel Project"). The Operator of the Hotel Project is Ritz-Carlton, under a Hotel Operating Agreement ("Operating Agreement") that Green Isle and RCHC-LLC entered into on December 15, 1995.[1] The Operating Agreement gave Ritz-Carlton the exclusive right, as Operator, to manage the Hotel, spa, casino lounge and parking facilities; and it also set forth the rights and

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[1] RCHC-LLC was the original Operator under the Operating Agreement, but later assigned all of its right, title, and interest in that Agreement to RCHC-PR on April 1, 1997.

duties of the Owner and Operator. The Operating Agreement provides that any disputes arising thereunder will governed by Georgia law. Unlike certain of the other agreements entered into in connection with the Hotel Project, the Operating Agreement has no forum selection clause.

The guarantor of the Hotel Project was the Puerto Rico Tourism Development Fund ("TDF") under a Guaranty and Reimbursement Agreement entered into between Green Isle, as Owner, and TDF, as guarantor, on December 19, 1995 ("Reimbursement Agreement"). Under the Reimbursement Agreement, Green Isle agreed, inter alia, to reimburse TDF for any payments that TDF made under its guaranty. The Reimbursement Agreement provides that it is to be governed by and construed in accordance with the laws of Puerto Rico. It also provides that any lawsuit arising out of that agreement may be brought in the courts of Puerto Rico, but if the action is commenced by TDF, it may be brought "...in the courts of any other jurisdiction[]."

On December 19, 1995, the same day that the Reimbursement Agreement was executed and four days after the Operating Agreement was entered into, Green Isle. Ritz-Carlton, and TDF entered into a Nondisturbance and Attomment Agreement ("Attomment Agreement"). The Attomment Agreement sets forth, among other things, the respective rights and obligations of TDF and Ritz-Carlton

if Green Isle were to default under its loan obligations or the Operating Agreement. Included in those provisions were the circumstances in which the Operating Agreement would continue or be terminated in the event of a Green Isle default or bankruptcy. The Attornment Agreement provides that any disputes arising thereunder shall be governed by Puerto Rican law, and that the exclusive venue for any action or proceeding arising out of that Agreement is Puerto Rico.

Thereafter (according to the complaint), the Hotel Project experienced financial difficulties that left Green Isle unable to pay the debt service on the bonds that TDF had guaranteed. As a result the TDF guaranty was called. The cash flow generated by the Hotel Project, however, has been inadequate to reimburse TDF for the monies that it has paid as guarantor. As a consequence, TDF gave Green Isle notices of default.

Concerned about the reasons for the Hotel Project's inadequate cash flow, Green Isle demanded to inspect certain books and records of Ritz-Carlton under Section 13.8 and other provisions of the Operating Agreement. The purpose of that demand was to enable Green Isle to evaluate its options, including banluuptcy, in light of the "imminent threat" of a foreclosure or other action by TDF to enforce its rights as guarantor. Ritz-Carlton did not respond to that demand, and thereafter Green Isle brought this action for specific enforcement of

its contractual rights to an accounting and to inspect Ritz-Carlton's books and records relating to its management of the Hotel Project.

In response, Ritz-Carlton moved to dismiss this lawsuit on the ground that under Section 10.5 of the Attomment Agreement, this action must be litigated in the courts of Puerto Rico.

II. ANALYSIS

It is undisputed that if the forum selection clause in the Attomment Agreement is applicable and governs this lawsuit, then the exclusive venue for this action would be in Puerto Rico and the motion to dismiss must be granted. Delaware Courts will enforce agreements to litigate in a particular forum.[2] The plaintiff, Green Isle, contends that the forum selection clause does not apply. If that contention is correct, then the motion must be denied. Thus, the issue is whether the forum selection clause is applicable to, and governs, this lawsuit. That issue, in these circumstances, is purely one of law.

A. The Parties' Contentions

Section 10.5 of the Attomment Agreement, upon which this motion rests, pertinently provides that:

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[2] *Elf Atochem N. Am., Inc. v. Jaffari,* Del. Supr., 727 A. 2d 286,294 (1999).

> ...all actions or proceedings in any way, manner or respect, arising out of or from or related to this Agreement shall be litigated in courts having situs within the Commonwealth of Puerto Rico....

Ritz-Carlton contends that this action "arises out of' and is "related to" the Attornment Agreement that contains the forum selection clause, because the purpose of the relief that Green Isle seeks is to evaluate its options and to defend itself against attacks on its continued ability to own and operate the Hotel Project. These options include (among other things) terminating the Operating Agreement[3] or seeking bankruptcy protection. Because these options form part of the subject matter of the Attomment Agreement, Ritz-Carlton says, this action must be deemed "related in any way, manner or respect" to the Attomment Agreement, and particularly because the Operating Agreement is "inextricably connected" to the Attornment Agreement.[4]

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[3]Ritz-Carlton points out that $6.1 of the Attornment Agreement prohibits Green Isle from terminating the Operating Agreement without the consent of TDF.

[4]Ritz-Carlton also advances a new argument, raised for the first time in a letter dated November 27, 2000 after all briefing on this motion had been completed. 'The argument is that because Ritz-Carlton had filed a lawsuit asserting claims against Green Isle and one of its attorneys in Puerto RICO (the "contractual forum") one week earlier, that lawsuit constitutes an additional reason why this Court should require this books and records dispute to be decided in Puerto Rico. Besides coming too late, this argument lacks merit. It adds nothing substantive to the legal analysis, and is at best a forum non conveniens argument that is unrelated to the forum selection clause. Moreover, the argument lacks equity, because it is essentially a bald attempt by Ritz-Carlton to "bootstrap" their forum selection argument onto the coattails of their unilateral selection of a Puerto Rican forum to which Green Isle never consented.

Green Isle hotly disputesthat contention, on 'two separate grounds. Green Isle points out that it is undisputed that (i) this action is brought under the *Operating Agreement, which* has no forum selection clause, and (ii) the motion to dismiss is based upon the *Attornment Agreement,* under which Puerto Rico is the exclusive forum to litigate the disputes covered by that agreement. For Ritz-Carlton to prevail, therefore, it must show that the dispute that underlies this action falls within that forum selection provision. Green Isle contends that it does not, because (a) the express terms of the two agreements prohibit the application of the Attomment Agreement forum selection clause, and (b) the two agreements are not sufficiently related to make that forum selection clause applicable.

The issues thus framed are (1) whether the express terms of the two agreements preclude the application of the Attornment Agreement forum selection clause, and (2) if not, does the forum selection clause, by its terms, govern this dispute. Those issues are now addressed.

B. Whether The Agreements' Express Terms Preclude The Application of The Forum Selection Clause

Critical to an analysis of this issue is the fact that although Green Isle is a party to the Attornment Agreement, Green Isle executed that Agreement for the sole purpose of consenting to the covenants made therein between TDF and Ritz-

Carlton. A nondisturbance and attomment agreement is entered into between a secured creditor of an owner (here, TDF) and that owner's managing agent (here, Ritz-Carlton) to define those parties' rights and duties should the owner become absent by reason of abandonment, foreclosure, or bankruptcy? For that reason, Section 10.13 of the Attomment Agreement was carefully crafted to limit the Owner's contractual involvement to a mere statement of present consent, to avoid creating continuing performance obligations that could render the entire contract an executory obligation of the Owner. Such an executory obligation would be rejectable in bankruptcy[6]-- an event that would frustrate the Attomment Agreement's purpose.

Consistent with that purpose, Section 10.13 provides:

> Owner's Consent. Owner is executing this Agreement solely for the purpose of consenting to the agreements set forth herein between Operator and [TDF]. Nothing contained in this Agreement is intended to amend the agreements between Owner, Issuer, the Trustee and [TDF] as set forth in the Loan Documents or the agreements between Owner and Operator as set forth in the Operating Agreement.

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[5]See Dreisbach Aff., Exh. C, §§2.2-2.4

[6]11 U.S.C. §365.

Not only does the Attomment Agreement disclaim any intent to amend the Operating Agreement, but also the Operating Agreement, by its terms, is a fully integrated contract. Section 13.16 of the Operating Agreement provides:

> Entire Agreement. This Agreement, together with the Pre-Commencement Agreement, constitutes the entire agreement between the parties relating to the subject matter hereof, superseding all prior agreements or undertakings, oral or written.

These clauses, read either separately or together, preclude the application of the forum selection clause contained in the Attomment Agreement. There are two reasons.

First, the subject matter of the Operating Agreement includes (inter alia) provisions governing Green Isle's rights to inspect Ritz-Carlton's books and records and Ritz-Carlton's obligation to provide an accounting. The integration clause of the Operating Agreement (Section 13.16) expressly makes those provisions the "entire agreement" between the parties on that particular subject. Nothing in the Attomment Agreement is inconsistent with that written expression of intent, since nowhere does the Attomment Agreement address either of those specific subjects.

Because the rights and duties relating to inspection of books and records and an accounting are governed by the Operating Agreement, so too would be any action to enforce those rights, because the Operating Agreement contains no provision that limits the parties' choice of forum. Thus, the effect of the integration clause of the Operating Agreement is to leave Green Isle free to bring this action in any appropriate forum it chooses, including Delaware.

Ritz-Carlton responds that the integration clause in the Operating Agreement does not control, because that Agreement supersedes only "prior agreements...oral or written." But, Ritz-Carlton points out, the Attomment Agreement was executed four days after the Operating Agreement and, thus, is a subseauent agreement not covered by that integration clause. The difficulty with this argument is that is a non-starter. To be sure, the integration clause of the Operating Agreement would not bar this Court from considering whatever provisions in the later-executed Attomment Agreement expressly dealt with the right to inspect books and records or the duty to account. But the Attomment Agreement is silent on those subjects. The Operating Agreement, therefore, is the only contract that controls the right to enforce Ritz-Carlton's obligations thereunder that concern Green Isle's right to inspect books and records and to

require Ritz-Carlton to provide an accounting. That enforcement right necessarily includes the choice of litigation forum. Because the Operating Agreement does not limit that choice, Ritz-Carlton's forum selection clause argument lacks merit and must be rejected.

Second, that result is also compelled by Section 10.13 of the Attomment Agreement, which relevantly provides that (i) the Owner (Green Isle) was executing that agreement only to consent to the covenants between Ritz-Carlton and TDF contained therein, and (ii) nothing in the Attomment Agreement "...is intended nor shall it be deemed to amend the agreements...between Owner and Operator set forth in the Operating Agreement." The result that flows legally from that provision is that given Green Isle's limited purpose in becoming a signatory to the Attomment Agreement, Green Isle never became substantively bound to any obligations or duties created by that Agreement, including its forum selection clause. All Green Isle did was to consent in advance to the obligations that Ritz-Carlton and TDF were undertaking in the event that Green Isle became absent due to abandonment, foreclosure, or bankruptcy.

Any arguable uncertainty as to whether that was the parties' intent is eliminated by the Section 10.13's disclaimer that the Attomment Agreement shall not be deemed to amend the Operating Agreement, which (to repeat) contains no

choice of law provision. The Attomment Agreement does contain a choice of law provision, but to apply that provision to bar this lawsuit to enforce rights created exclusively by the Operating agreement, would constitute the type of amendment of the Operating Agreement that Section 10.13 expressly prohibits. For this reason as well, Ritz-Carlton's position must be rejected.

C. **Whether Even If The Forum Selection Clause Applies, This Action Comes Within Its Scope**

The pending motion must also be denied on the alternative ground that even if (arguendo) it is assumed that the forum selection clause of the Attornment Agreement does apply, this particular action does not fall within its scope. For the forum selection clause to control, this Delaware action must, "in any way, manner or respect, aris[e] out of or relate[] to [the Attomment] Agreement." This action does not fall within that described category.

The subject matter of this action is Green Isle's claimed rights to an accounting and to inspect Ritz-Carlton's books and records under the Operating Agreement. The Attomment Agreement does not address that subject matter. It does not create such rights or even refer or allude to them, and Ritz-Carlton does not contend otherwise. Thus, the subject of this lawsuit cannot be said to in any way, manner or respect "arise out of' the Attomment Agreement. Therefore, the

only basis upon which the forum selection clause could govern would be if this action is "related to" the Attomment Agreement "in any way, manner, or r e s p e c t . . . "

Ritz-Carlton's effort to create that "relationship" would make even a medieval alchemist blush, because its argument rests upon metaphysics and hypotheticals whose foundation is based solely upon speculation about the future, as distinguished from present reality. Ritz-Carlton's logic proceeds as follows: the purpose of this action is to enable Green Isle to assess its options. Those options include possibly terminating the Operating Agreement and/or filing for bankruptcy. Should Green Isle exercise any of those options, the rights and obligations of TDF and Ritz-Carlton could be triggered. Ergo, Ritz-Carlton concludes, this lawsuit must "in [some] way, manner or respect" be related to the Attomment Agreement.

In my view, the "in any way, manner or respect" language, although broad, is not limitless. At the very least that language requires that there be some tangible, nonspeculative relationship between the lawsuit and the Attomment Agreement. Ritz-Carlton is unable to articulate any such relationship. To accept Ritz-Carlton's forum-selection-clause logic would essentially rewrite the language of that clause. The relationship required by the forum selection clause must be

between the lawsuit and the Attornment Agreement. Under Ritz-Carlton's implicit reading of that clause, the Attornment Agreement would be ousted from that relationship, and the Operating Agreement would be substituted in its place., That result is fatally at odds with what the forum selection clause actually says.

Accordingly, even if the forum selection clause were otherwise applicable, it does not dictate the forum in which this specific lawsuit can be brought.

III. CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss the complaint is denied. **IT IS SO ORDERED.**