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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ITALIA MARITTIMA, S.P.A.,

Plaintiff,

No. C 10-0803 PJH

v.

**ORDER GRANTING MOTION TO
DISMISS AMENDED THIRD-PARTY
COMPLAINT**

SEASIDE TRANSPORTATION
SERVICES, LLC, et al.,

Defendant(s).

_____ /

United States District Court
For the Northern District of California

The motion of Yang Ming Marine Transport Corporation (“Yang Ming”) to dismiss the amended third-party complaint filed by defendant and third-party plaintiff Seaside Transportation Services, LLC (“Seaside”) came on for hearing before this court on November 16, 2011.

Yang Ming appeared by its counsel James Marrison, Seaside appeared by its counsel Dena S. Aghabeg, and plaintiff Italia Marittima, S.p.A. (“Italia”) appeared by its counsel Paul L. Gale. Defendants Tricor Services, LLC (“Tricor”), and Marine Terminals Corporation (“MTC”) also briefly appeared by their counsel Gary Angel.

Having read the parties’ papers and carefully considered their arguments and the relevant legal authorities, and good cause appearing, the court hereby GRANTS the motion as follows.

BACKGROUND

This is a maritime case arising out of damage allegedly resulting from the February 2004 loading of shipping containers onto the vessel M/V MED TAIPEI at the Port of

1 Oakland, for transport to the Port of Long Beach. Yang Ming, the owner of the M/V MED
2 TAIPEI, had previously time-chartered the vessel to Italia, pursuant to an amended
3 “BOXTIME” Charterparty dated February 27, 2003 (“the Charterparty”).

4 The M/V MED TAIPEI encountered heavy seas and winds on the voyage to Long
5 Beach, and some of the containers that had been loaded at the Port of Oakland came
6 untethered and slid off the vessel into the Pacific Ocean. At least one container came to
7 rest on a portion of the ocean floor that lies within the boundaries of the Monterey Bay
8 National Marine Sanctuary. This occasioned a claim against Yang Ming and Italia by the
9 U.S. National Oceanographic and Atmospheric Administration, which claim was eventually
10 jointly settled for several million dollars.

11 Italia filed the present action on February 25, 2010, asserting that it had suffered
12 damages resulting from inadequate stevedoring services, including services relating to
13 stowage planning and the loading and securing of containers on the M/V MED TAIPEI.
14 Italia alleges that it contracted with Seaside to perform the stevedoring services, and that
15 MTC and Tricor performed the actual stevedoring and stowage planning, respectively.

16 In response to Italia’s claims, Seaside cross-claimed against MTC and Tricor, and
17 also filed a third-party complaint against Yang Ming. The court has granted numerous
18 motions to dismiss various iterations of Italia’s complaint, and there is currently pending a
19 motion by Seaside to dismiss the fifth amended complaint.

20 Seaside filed a third-party complaint against Yang Ming and MTC in October 2010,
21 and filed the amended third-party complaint (“ATPC”) on July 21, 2011, against Yang Ming
22 only. Seaside alleges that it is a third-party beneficiary of the Charterparty between Yang
23 Ming and Italia, and is therefore entitled to all benefits, including any duties owed by Yang
24 Ming, and/or for indemnity/contribution under the Charterparty, in connection with damage
25 sustained to cargoes aboard the M/V MED TAIPEI.

26 Seaside asserts causes of action for breach of contract, negligence/ indemnity,
27 contribution, and declaratory relief. Seaside claims that Yang Ming failed to maintain the
28 M/V MED TAIPEI in a seaworthy condition fit for transport of containers on the high seas,

1 and that this entitles Seaside as a third-party beneficiary of the Charterparty to recover
2 from Yang Ming any amount that Seaside might be held liable to pay Italia.

3 Seaside also alleges that the M/V MED TAIPEI was in unseaworthy condition and
4 was improperly maintained, including having a deteriorated lashing system which
5 contributed to the losses asserted in this case; that Yang Ming imposed improper
6 requirements with regard to stevedoring operations; and that the crew of the M/V MED
7 TAIPEI also bore responsibility for the damage (by failing to ensure that the containers
8 were properly secured, and by proceeding ahead during heavy weather, despite having
9 been notified of the weather conditions).

10 In the present motion, Yang Ming seeks an order dismissing the ATPC for improper
11 forum, or, in the alternative, staying all further proceedings as to Yang Ming on the ground
12 that venue is not proper before this court.¹

13 DISCUSSION

14 A. Legal Standard

15 A motion to enforce a forum selection clause is treated as a motion to dismiss
16 pursuant to Federal Rule of Civil Procedure 12(b)(3). Doe 1 v. AOL, LLC, 552 F.3d 1077,
17 1081 (9th Cir. 2009); Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996).

18 Under a Rule 12(b)(3) motion, “the pleadings are not accepted as true as would be required
19 under a Rule 12(b)(6) analysis” and the Court may consider facts outside the pleadings.
20 AOL, 552 F.3d at 1081; Argueta, 87 F.3d at 324.

21 “[I]n the context of a Rule 12(b)(3) motion based upon a forum selection clause, the
22 trial court must draw all reasonable inferences in favor of the non-moving party and resolve
23 all factual conflicts in favor of the non-moving party” Murphy v. Schneider Nat’l, Inc.,
24 362 F.3d 1133, 1138 (9th Cir. 2004). Should the motion be granted, the court may dismiss,
25 or in the interests of justice, transfer the case to a forum where venue is proper. 28 U.S.C.

27 ¹ Yang Ming also sought dismissal to the extent Seaside was invoking Federal Rule of
28 Civil Procedure 14(c). At the hearing, Seaside agreed that any claim based on Rule 14(c)
should be dismissed.

1 § 1406(a).

2 The interpretation and enforcement of forum selection clauses is governed by
3 federal law. Manetti-Farrow, Inc., v. Gucci Am., Inc., 858 F.2d 509, 513 (9th Cir. 1988). A
4 forum selection clause is “prima facie valid and should be enforced unless enforcement is
5 shown by the resisting party to be ‘unreasonable’ under the circumstances.” Pelleport
6 Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 279 (quoting M/S BREMEN v.
7 Zapata Off-Shore Co., 407 U.S. 1, 10 (1972)).

8 Invalidating such a clause is difficult. “The party challenging the clause bears ‘a
9 heavy burden of proof’ and must clearly show” that enforcement would be unreasonable
10 and unjust for one of the three reasons set out in BREMEN – (a) that the inclusion of the
11 clause in the agreement was the product of fraud or overreaching; (b) that the party wishing
12 to repudiate the clause would effectively be deprived of his day in court were the clause
13 enforced; or (c) that enforcement would contravene a strong public policy of the forum in
14 which suit is brought. See Murphy v. Schneider Nat’l Inc., 362 F.3d 1133, 1140 (9th Cir.
15 2004) (quoting BREMEN, 407 U.S. at 12-13, 15, 18).

16 B. Yang Ming’s Motion

17 Yang Ming contends that the ATPC should be dismissed for improper forum
18 because, pursuant to Rider Clause 80 of the Charterparty, for which Seaside claims to be a
19 third-party beneficiary, all disputes are to be referred to arbitration in London, UK. Thus,
20 Yang Ming asserts, venue is not proper in this court.

21 Rider Clause 80 provides, in part, as follows:

22 This contract shall be governed by and construed in accordance with English
23 law and any dispute arising out of or in connection with this Contract shall be
24 referred to arbitration in London in accordance with the Arbitration Act 1996 or
any statutory modification or re-enactment thereof save to the extent
necessary to give effect to the provisions of this Clause.

25 The arbitration shall be conducted in accordance with London Maritime
26 Arbitrators Association (LMAA) Terms current at the time when the arbitration
proceedings are commenced

27 Yang Ming asserts that Seaside is bound by the forum selection clause because it
28 alleges that it is a beneficiary under the Charterparty, and contends that Seaside’s rights as

1 a third-party beneficiary are subject to any defenses that Yang Ming may raise under the
2 terms of the Charterparty. Yang Ming argues that United States maritime law requires that
3 the mandatory arbitration provision and forum selection clause be enforced, and that given
4 that a dispute has arisen between Seaside and Yang Ming under the Charterparty, Seaside
5 is required pursuant to Rider Clause 80 to refer any claims it may have against Yang Ming
6 to arbitration in London.

7 To overcome enforcement of the forum selection clause in the Charterparty, Seaside
8 must show that it would be far more inconvenient for it to proceed to arbitration in London
9 than it would to litigate in California, and that an arbitration in London would be “so
10 manifestly and gravely inconvenient to [Seaside] that [it] will effectively be deprived of a
11 meaningful day in court.” BREMEN, 407 U.S. at 19; see also Carnival Cruise Lines, Inc. v.
12 Shute, 499 U.S. 585, 591 (1991).

13 Yang Ming contends that Seaside cannot meet this burden. Yang Ming asserts that
14 because Seaside's claim is that Yang Ming failed to maintain the Vessel, pursuant to its
15 obligations under the Charterparty, there is no direct factual connection to California and it
16 would not be “far more inconvenient” for Seaside to arbitrate in London than litigate in
17 California. Indeed, Yang Ming notes, Italia and Yang Ming are already involved in
18 arbitration in London. Nor, Yang Ming asserts, can Seaside show that arbitration in London
19 would deprive it of its “meaningful day in court,” as its rights will be fully protected under
20 English law.

21 In opposition, Seaside argues that the court should deny Yang Ming's motion for two
22 reasons. First, Seaside contends that the negligence and indemnity claims alleged in the
23 ATPC are independent of Seaside's status as a third-party beneficiary, since indemnity
24 principles under general maritime law provide a separate basis for recovery by Seaside
25 from Yang Ming for any damages it may be held liable to pay Italia in this action. Thus,
26 Seaside asserts, its negligence/indemnity claims would not in any event be subject to
27 arbitration in London pursuant to the Charterparty.

28 Seaside argues that Yang Ming's motion to dismiss focuses solely on the contractual

1 claim, in which Seaside alleges that it is a third-party beneficiary under the Charterparty.
2 Seaside argues, however, that the allegations in the ATPC are “heavily based” on the
3 fundamental indemnity rights of Seaside against Yang Ming under general maritime law for
4 damages caused by Yang Ming’s negligent acts and/or omissions as the owner of the
5 Vessel.

6 Seaside asserts that these indemnity rights based on Yang Ming’s actions as a third-
7 party tortfeasor are independent of any rights by Seaside as a third-party beneficiary under
8 the Charterparty, and that it is therefore entitled to assert those tort claims against Yang
9 Ming in this forum, where Italia has asserted its claims against Seaside. Moreover,
10 Seaside argues, the negligence/indemnity claims are not even arbitrable under the
11 Charterparty, since there was no agreement by the parties to do so, and the
12 negligence/indemnity claims can be resolved without reference to the Charterparty.

13 In its second main argument, Seaside asserts that enforcement of the arbitration
14 provision even as to Seaside’s breach of contract claim would be unreasonable and unjust,
15 because Seaside would not be accepted as a third-party beneficiary under the Charterparty
16 under English law, and would therefore be deprived of its day in court with regard to its
17 claims against Yang Ming. Thus, Seaside argues that there is a compelling and
18 countervailing reason not to enforce the London arbitration clause against it, and that Yang
19 Ming’s motion should be denied.

20 The court agrees with Yang Ming that the forum selection clause must be enforced,
21 and that Seaside’s claims for breach of contract and negligence (to the extent that Seaside
22 is alleging a separate claim for negligence) are arbitrable because they are sufficiently
23 connected to the Charterparty and are specifically contemplated by the Charterparty, of
24 which Seaside claims to be a third-party beneficiary. The court finds that the arbitration
25 provision, which states that “any dispute arising out of or in connection with this contract
26 shall be referred to arbitration,” is sufficiently broad to encompass both the contract and the
27 negligence claims, whether under English or federal law.

28 Under the Supreme Court’s decision in BREMEN, a forum-selection clause is

1 presumptively valid, and must be enforced unless enforcement is shown to be
2 unreasonable under the circumstances. BREMEN, 407 U.S. at 11. Seaside has failed to
3 show that enforcement of the forum selection clause would be unfair or unreasonable, as it
4 has not established that arbitration in London would be far more inconvenient for Seaside
5 than litigation in Oakland would be for Yang Ming. Instead, Seaside argues only that it will
6 be deprived of its day in court due to the likelihood that it will not be recognized as a
7 legitimate third-party beneficiary to the Charterparty under English law. The court finds,
8 however, that the question of Seaside's status as a third-party beneficiary under English
9 law has no bearing on the determination whether this court should enforce the forum
10 selection clause.

11 Nevertheless, the court also finds that the indemnification and contribution causes of
12 action must be dismissed as unripe. In general, a claim for indemnification or contribution
13 accrues when the indemnitee or party seeking contribution suffers a loss through payment
14 of more than his fair share of damages. See Sea-Land Serv., Inc. v. U.S., 874 F.2d 169,
15 171-72 (3rd Cir. 1989) (noting general rule that cause of action for contribution does not
16 arise until party seeking contribution has paid, or had a judgment rendered against him or
17 her for, more than his or her fair share of a common liability).

18 A similar rule applies in maritime cases. Bradford v. Indiana & Michigan Elec. Co.,
19 588 F.Supp 708, 714 (S.D.W.Va 1984) (right of action for indemnity arises at time of
20 payment or settlement by one secondarily liable, and right of contribution arises at time of
21 payment in excess of plaintiff's proportionate share); c.f. C.T. Shipping, Ltd. v. DMI (U.S.A.)
22 Ltd., 774 F.Supp. 146, 150 (S.D.N.Y. 1991) (maritime claim for indemnity accrues as soon
23 as indemnitee's liability is determined).

24 Here, Seaside alleges that "Yang Ming is obligated to indemnify and hold harmless
25 [Seaside] from and against any and all liability of [Seaside] to [p]laintiff, if such is found to
26 exist," ATPC ¶ 17; and that "in the event [Seaside] is held liable to [p]laintiff, [Seaside] is
27 entitled to a contribution from Yang Ming," ATPC ¶ 19. Thus, both the claim for
28 indemnification and the claim for contribution are based on possible future events, not on

1 any judgment that has been entered against Seaside and which Seaside has paid, or even
2 on any finding of liability as to Seaside. If Seaside is ultimately found to be liable to Italia,
3 Seaside may at that point attempt to recover from Yang Ming. (The court takes no position
4 as to the merits of such future claims.)

CONCLUSION

5
6 In accordance with the foregoing, the court finds that Yang Ming's motion to dismiss
7 the breach of contract and negligence claims asserted in the amended third-party complaint
8 must be GRANTED. The causes of action for indemnification and contribution are
9 dismissed as unripe, as is the cause of action for declaratory relief, to the extent it seeks a
10 judicial declaration as to Seaside's right to indemnification and/or contribution from Yang
11 Ming.

12
13 **IT IS SO ORDERED.**

14 Dated: December 12, 2011



PHYLLIS J. HAMILTON
United States District Judge