STAR TRANSPORT, INC.	*	**NO. 2014-C-1228**
VERSUS	*	**COURT OF APPEAL**
PILOT CORPORATION, ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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TOBIAS, J., DISSENTS IN PART, CONCURS IN PART, AND ASSIGNS REASONS.

I respectfully dissent in part and concur in part. Like the first time this case came before this court on these same issues where I agreed with Judge Love's partial dissent relating to arbitration and added my further analysis to the mix, I now agree with her well-articulated and well-reasoned dissent on the arbitration issue. I further dissent on the *forum non conveniens* issue.

I.

I find that the arbitration clause is enforceable regardless of whether Star Transport, Inc. ("Star") alleges fraud in connection with the promissory note for $14,371,133.49 for fuel (subject to certain minimal credits for payments made by Star since the promissory note's execution).[1] The promissory note, which was executed by Star and notarized with a jurat in Illinois, contains the agreement to arbitrate at issue herein. The precise language in the note, set forth in all in capital letters therein, reads:

> ANY CLAIM OR CONTROVERSY ("CLAIM") BETWEEN THE PARTIES, WHETHER ARISING IN

[1] This sum represents a portion of over ***four hundred million dollars*** ($400,000,000.00) of fuel purchased by Star from Pilot in the relevant period of time as alleged by Star in its petition. Star had fallen behind in the payment for fuel purchased from Pilot and executed the note in payment of its debt. That we are dealing with many millions of dollars clearly indicates that the parties have some business sophistication and acumen.

> CONTRACT **<u>OR TORT</u>** OR BY STATUTE, INCLUDING BUT NOT LIMITED TO, CLAIMS RESULTING FROM OR RELATING TO THIS AGREEMENT SHALL, UPON THE REQUEST OF EITHER PARTY, BE RESOLVED BY BINDING ARBITRATION IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT …. ANY DISPUTE CONCERNING WHETHER A CLAIM IS ABITRATABLE [sic] OR BARRED BY THE STATUTE OF LIMITATIONS SHALL BE DETERMINED BY THE ABRITRATOR. [Boldface and underlining added for emphasis.]

As stated by the Louisiana Supreme Court on multiple occasions (and I believe they mean what they say), arbitration is favored in Louisiana. *Hodges v. Reasonover*, 12-0043, p. 4 (La. 7/2/12), 103 So.3d 1069, 1072; *Morial v. BPI Home Builder, LLC*, 12-2195, 12-2238, p. 1 (La. 11/2/12), 99 So.3d 1006; *Aguillard v. Auction Management Corp*., 04-2804, p. 7 (La. 6/29/05), 908 So.2d 1, 7. As La. R.S. 9:4201 states:

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Under Louisiana law, fraud (La. C.C. art. 1953) is a tort with a one-year prescriptive period to which the doctrine of *contra non valentem non currit praescriptio* may be applicable. *State ex rel. Louisiana Dept. of Education-Food Service v. Bright Beginnings Child Care, Inc.*, 42,146, p. 6 (La. App. 2 Cir 5/16/07), 957 So.2d 362, 366, citing *Bell v. Demax Management Inc.,* 01-0692 (La. App. 4 Cir.7/24/02), 824 So.2d 490, *Cole v. Celotex Corp.,* 620 So.2d 1154 (La.1993), and La. C.C. art. 3492; *Chateau Homes by RLM, Inc. v. Aucoin*, 11-1118, 11-1119, p. 13 (La. App. 5 Cir. 5/31/12), 97 So.3d 398, 404.

The promissory note (a contract) calls for the payment of a liquidated sum of money, here $14,377,133.49, and for the arbitration of a claim in *tort* related thereto. Such language stands out like the proverbial "sore thumb." Certainly, any reasonably sophisticated party, as both Star, on the one hand, and Pilot Corporation and Pilot Travel Centers LLC's (collectively hereafter, "Pilot"), on the other hand, are, would question what type of tort could arise out a promissory note. The only obvious torts I can think of are an allegation of fraud and tortious interference with contract. Here, it is reasonably certain that the parties intended for all claims, regardless of source or nature and related to the promissory note, to be arbitrated in all respects, including whether the claim was subject to arbitration or not. Regardless, whether Star was told by Pilot about the federal investigation questioning their business practices, they knew during negotiations leading up to the execution of the note that they still owed millions of dollars for the purchase of fuel.[2] Under any scenario, the parties clearly wanted to arbitrate any disputes.

Further, I find nothing in either *Saavedra v. Dealmaker Developments, LLC*, 08-1239 (La. App. 4 Cir. 3/18/09), 8 So.3d 758, or *Rain CII Carbon LLC v. ConocoPhillips Co.*, 12-0203 (La. App. 4 Cir. 10/24/12, 105 So.3d 757, that warrants a finding that the present case, including the issue of fraud, should not be arbitrated. Moreover, I read *Saavedra* as requiring that the fraud issue in this case be arbitrated. That the arbitration agreement at issue in this case was agreed to in the promissory note signed years after the initial agreement for fuel sale/purchases is of no moment. Parties are free to contract as they see fit as long as their contract

[2] It is the nature of businesses that they do not want the public to know about any adverse financial situation: Star would not want their customers and competitors to know that they were behind in the payment for millions of dollars for fuel (for nothing slows down debtor payments to a creditor on accounts receivable like when the debtor knows the creditor is having financial problems) and Pilot would not want the public to know the existence of any untoward trade practices, if any. All parties would have wanted to keep such closed to the public through arbitration. I have little doubt Star would have executed the note with or without the arbitration agreement in it (or another side agreement for arbitration). Another way to look at the very broad arbitration clause is to consider that Pilot saw a "tort" coming and Star considered the "tort" language to be superfluous and not worth challenging.

does not contravene public policy; no acts contravening public policy issue is present in this case. Moreover, the issue of fraud, if any, is so integrally connected to the indebtedness that it would be a waste of energy and resources to separate them. *See Rain CII Carbon, supra*. That is, the same evidence on fraud will be determinative of the indebtedness of Star to Pilot. *Id.*

Historically, fraud is a serious allegation; once made, it opens up the party alleging fraud to claims for libel and slander (both torts) if fraud is not ultimately proven. A claim of fraud is frequently resorted to when all other possible theories of why one should prevail on a claim are unknown. In other words, one might make the claim when one has nothing to lose, *i.e.*, is approaching insolvency/ bankruptcy/receivership. It is periodically utilized to delay collection of debts. Although federal jurisprudence recognizes that when one asserts fraud (where arbitration has been agreed to by the parties in interest), such *may* very well make the case not subject to arbitration; such is not, however, always the case.[3] One must view each case on its facts. Here, that Pilot entered into a criminal enforcement agreement with federal authorities does not *per se* prove fraud; a legitimate business reason may exist for entering into such an agreement, one of which is the cost of litigation and defense of the criminal matter.

Certainly, Pilot has a right to explain its actions, and that can be done fully in arbitration in lieu of in court. *See Osborn v. Ergon Marine & Industry* Supply, Inc., 12-0183 (La. 4/13/12), 85 So.3d 687.

In any event, in the case at bar, the trial court was manifestly erroneous and abused its discretion in overturning the arbitration agreement, making a factual determination without testimonial evidence save the written pleadings, memoranda

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[3] Here, because Star has alleged fraud, a federal court under the Federal Arbitration Act (9 U.S.C.A. §1, *et seq*.) would automatically throw out the arbitration clause, begs the question of why Star did not file their suit in United States District Court. Star's argument rings hollow, reinforcing why *forum non conveniens* should be granted in this case as discussed *infra*.

of counsel, and attachments thereto; that is, no evidence save attachments to pleadings and memoranda was "heard" by the trial court.

I note the absence of counsel suggesting that a full evidentiary hearing is or was necessary with testimonial evidence. Apparently, both Star and Pilot were satisfied with the record such as it existed in the trial court and no further evidence was warranted. A remand for such a hearing causes needless delay and expense, will result in substantial discovery on what and when Pilot knew or should have known about the federal investigation into their business practices on the date that the promissory note was executed, and whether, in the course of a business relationship between multi-million dollar companies, Pilot had a duty to disclose fully details of any investigation to Star before Star signed the note. That is, if Pilot knew the federal authorities were "poking around," they had no duty to disclose anything until such time as a reasonable person would or should know that it was more likely than not that they were in trouble and potentially subject to criminal liability and such was relevant to Star's continuing to purchase fuel from Pilot.

II.

Second, unlike my colleagues, I find merit to Pilot's argument that the case should be dismissed for *forum non conveniens* pursuant to La. C.C.P. art. 123. As the record (specifically, the plaintiff's petition) before us reflects, Star is an Illinois corporation *not* qualified to do business in Louisiana. Their connection to Louisiana is tenuous at best. That is, from time-to-time their motor vehicles pass through Louisiana, and they may purchase fuel[4] in this state while doing so. To me, that does not mean Star has any connection to Louisiana for purposes of a forum in Orleans Parish (where neither of the Pilot entities markets fuel or has an office) for

[4] Star's claims relate to a diesel fuel sales discount program with Pilot in which Star claims that it did not get the discount for which they bargained.

their claims *against* Pilot any more than one would say that I have a connection to Mississippi because I drive through that state on an infrequent basis going between New Orleans and Mobile, Alabama, and may periodically buy gasoline or a meal in Mississippi while doing so.

Additionally, although the Pilot defendants are qualified to do business in Louisiana, neither of them are Louisiana entities (corporation or limited liability company). Pilot Corporation is a Tennessee corporation with its Louisiana registered office now in Baton Rouge. Pilot Travel Centers LLC is a Delaware limited liability company with its principal business office in Knoxville, Tennessee, and its Louisiana registered office now in Baton Rouge. The claim asserted by Star relates to alleged overcharging for fuel by Pilot over several years in multiple jurisdictions.[5]

Star asserts in its brief in opposition to Pilot's writ application that the reasons that they chose New Orleans as the venue for this suit was that (a) they thought it was a "fair and neutral forum;" (b) another victim of the "fraud" who did business in Orleans Parish filed suit in Orleans Parish to which Pilot did not object to the venue, and settled the suit; (c) Pilot did not file suit on the promissory note and did not file a reconventional demand; (d) they could not obtain a fair trial in Tennessee where Pilot is based and is the largest privately held company in that state (and seventh largest privately held corporation in the United States), employing 20,000 Tennessee residents and partially owned by the Tennessee governor; (e) evidence is in electronic form; (f) Star "believes" [but does not know] that evidence is located throughout the United Stated; (g) Star has hired

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[5] It is indeed puzzling that Star would not have filed its claim in United States District Court for Illinois, Tennessee, or Delaware. It is readily apparent that had Star filed its suit in a Louisiana federal district court, the Louisiana-based federal court would in an instance transfer the case to another federal court in a more convenient forum such as Illinois or Tennessee.

Harold Asher, a forensic CPA based in Orleans Parish, as an expert witness;[6] and (h) two other witnesses are located outside of Tennessee (in Iowa and Texas) who would not be inconvenienced by Louisiana as a forum. (Harold Asher is the only known witnesses in Louisiana; no known evidence is in Louisiana and whatever is here, if any, is minimal at best.) And notwithstanding those assertions in brief, *Star's counsel openly admitted in oral argument before us when questioned that he chose Louisiana as the venue because it was convenient to him; he did not allude to any of the reasons asserted in the brief*. La. C.C.P. art. 123 A references convenience to parties and witnesses, not the parties' counsel.

In sum, to burden Louisiana courts with the dispute between the relators and the respondent smacks of putting an unnecessary burden on the Louisiana judicial system.

I respectfully dissent from the majority decision not to order the trial court to transfer this case to a more appropriate forum.

III.

Finally, I concur in the majority's decision to reverse the trial court's ruling on Star's motion *in limine* to strike the promissory note from the proceedings and in dismissal of Pilot's appeal.

Excluding the promissory note from evidence was interlocutory and would create unnecessary problems for the parties and their counsel; it would not only increase the cost of the litigation, but also ultimately results in judicial inefficiency. One must remember that only the *enforcement* of the provisions of the promissory note is at issue.[7]

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[6] If a plaintiff's hiring of an expert witness to help you with its case is a rational reason to create a forum, please save me. That means that anyone could hire an expert in their local venue and bootstrap their way into creating a forum locally. Such sounds improper, even ludicrous.

[7] At oral argument, counsel alluded to the promissory note being attached to a reconventional demand by Pilot filed after the issues before us joined. However, that reconventional demand, if it exists, is not part of the record before us and cannot be considered.

IV.

Accordingly, I would grant Pilot's motion to dismiss for *forum non conveniens* and vacate the trial court's ruling on the enforceability of the arbitration clause and striking the promissory note from evidence. If *forum non conveniens* is not granted, then I would send this matter to arbitration forthwith and grant the stay pending arbitration as requested by Pilot. I find no need for a further evidentiary hearing on any issue.