UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTURY INDEMNITY COMPANY,

Plaintiff,

- against -

CLEARWATER INSURANCE COMPANY,

Defendant.

OPINION & ORDER

06 Civ. 0424 (SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Century Indemnity Company ("Century") has sued Clearwater Insurance Company ("Clearwater") seeking payment under a facultative reinsurance certificate which contains an arbitration clause. Clearwater now moves to stay this litigation and compel arbitration. For the following reasons, Clearwater's motion is granted.

II. BACKGROUND

A. The Parties

Century is a Pennsylvania corporation, with its principal place of business in Pennsylvania.[1] Clearwater is a Delaware corporation, with its

[1] *See* Complaint ("Compl.") ¶ 2.

principal place of business in Connecticut.[2] Both parties are licensed to do business in the State of New York.[3]

B. The Agreement

In the early 1970's, Clearwater issued a facultative reinsurance certificate to Century that covered an excess liability policy Century had previously issued to its insured.[4] The Certificate contains an arbitration clause that states, in pertinent part: "Should an irreconcilable difference of opinion arise as to the interpretation of this Contract, it is hereby mutually agreed that, as a condition precedent to any right of action hereunder, such difference shall be submitted to arbitration . . . ."[5]

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[2] *See id.* ¶ 3.

[3] *See id.* ¶¶ 2-3.

[4] *See* Certificate of Facultative Reinsurance ("Certificate"), Ex. C to 7/21/06 Affidavit of Defendant's Attorney Gary R. Greenman in Support to Defendant's Motion to Compel Arbitration ("Greenman Aff.") at 10-11; Memorandum of Clearwater Ins. Co. For Its Motion to Compel Arbitration and Stay This Litigation ("Def. Mem.") at 3. The Certificate was issued by Clearwater's predecessor-in-interest, The Prudential Insurance Company of Great Britain, to Century's predecessor-in-interest, Insurance Company of North America. *See id.* Clearwater and Century do not dispute they are both responsible for the Certificate. *See* Greenman Aff. ¶ 11; Memorandum of Century Indem. Co. in Opposition to Clearwater Ins. Co.'s Motion to Compel Arbitration and Stay This Litigation ("Opp. Mem.") at 1-2.

[5] Certificate ¶ 16.

C. The Events Leading to this Suit

Century made payments to or on behalf of its insured in connection with various lawsuits arising from claims related to asbestos contamination.[6] Century billed Clearwater for payment under the Certificate for its share of Century's payment of the underlying claims.[7] When Clearwater failed to pay, Century filed this suit on January 20, 2006, seeking damages for breach of the Certificate.[8]

Clearwater argues that it is not obligated to pay Century because Century has failed to satisfy certain conditions precedent to coverage that are set forth in the Certificate.[9] Clearwater served its written demand for arbitration on June 9, 2006.[10] In its demand for arbitration, Clearwater claims

> 1. Century has not provided Clearwater with full and complete access to all of Century's records in accordance with Paragraph 9 of the Certificate; 2. Century did not provide Clearwater with prompt notice of the occurrence and claim as required under

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6 *See* Opp. Mem. at 2.

7 *See id.*

8 *See* Compl. ¶¶ 13-20.

9 *See* Answer ¶ 26.

10 *See* 6/9/06 Letter from Greenman to Wayne R. Glaubinger, plaintiff's counsel, demanding arbitration ("Demand for Arbitration"), Ex. E to Greenman Aff.

> Paragraph 10 of the Certificate; and 3. Century has not provided Clearwater with sufficient proof of loss as required under Paragraph 12 of the Certificate.[11]

On June 29, 2006, Century refused to arbitrate.[12] On August 1, 2006, Clearwater moved to compel arbitration pursuant to the Federal Arbitration Act ("FAA") and stay the current proceedings.[13] Century opposes the motion and argues that the dispute is outside the scope of the arbitration clause or, alternatively, that Clearwater has waived its rights to arbitrate.[14]

III. LEGAL STANDARD

A. Arbitrability

The determination of whether a dispute is arbitrable under the FAA comprises two questions: "(1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement."[15] To

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[11] *Id.*

[12] *See* 6/29/06 Letter from Glaubinger to the Court; *see also* 6/29/06 E-mail from Greenman to Glaubinger and David Kenna, plaintiff's counsel, Ex. F to Greenman Aff.

[13] *See* Def. Mem.

[14] *See* Opp. Mem.

[15] *Hartford Acc. & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001) (quotation marks omitted).

find a valid agreement to arbitrate, a court must apply the "generally accepted principles of contract law."[16] "[A] party is bound by the provisions of a contract that [it] signs, unless [it] can show special circumstances that would relieve [it] of such obligation."[17] It is well established that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit."[18] A court should consider only "whether there was an objective agreement with respect to the entire contract."[19]

Because there is "a strong federal policy favoring arbitration . . . where [] the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability."[20] Thus, the Second Circuit has emphasized that

> any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Accordingly, [f]ederal policy requires us to construe arbitration clauses as broadly as possible. We will compel arbitration unless it may be said with positive

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16 *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845 (2d Cir. 1987).

17 *Id.*

18 *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (quotation marks omitted).

19 *Genesco*, 815 F.2d at 846.

20 *Ace Capital Re Overseas Ltd. v. Central United Life Ins. Co.*, 307 F.3d 24, 28 (2d Cir. 2002) (quotation marks and citations omitted).

> assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.[21]

However, although federal policy favors arbitration, it is a matter of consent under the FAA, and "a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit."[22]

The Second Circuit has established a three-part inquiry for determining whether a particular dispute falls within the scope of the arbitration agreement.[23] *First*, "a court should classify the particular clause as either broad or narrow."[24] *Second*, if the clause is narrow, "the court must determine whether the dispute is over an issue that 'is on its face within the purview of the clause,' or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause."[25] "Where the arbitration clause is narrow, a

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[21] *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 19 (2d Cir. 1995) (quotation marks and citations omitted). *Accord WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997).

[22] *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 224 (2d Cir. 2001) (quotation marks omitted).

[23] *See id.*

[24] *Id.*

[25] *Id.* (quoting *Rochdale Vill., Inc. v. Pub. Serv. Employees Union*, 605 F.2d 1290, 1295 (2d Cir. 1979)).

collateral matter will generally be ruled beyond its purview."[26] *Third*, if the arbitration clause is broad, "'there arises a presumption of arbitrability' and arbitration of even a collateral matter will be ordered if the claim alleged 'implicates issues of contract construction or the parties' rights and obligations under it'"[27] or "[i]f the allegations underlying the claims 'touch matters' covered by the parties' agreements."[28] In making this determination, courts must "focus on the factual allegations in the complaint rather than the legal causes of action asserted."[29]

B. Waiver of Agreement to Arbitrate

The FAA requires a court to determine whether an arbitration agreement has been waived, and is thereby unenforceable.[30] "'[T]here is a strong presumption in favor of arbitration[, and] waiver of the right to arbitrate is not to

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[26] *Id.* (citing *Cornell Univ. v. UAW Local 2300*, 942 F.2d 138, 140 (2d Cir. 1991)).

[27] *Id.* (quoting *Collins & Aikman Prods. Co.*, 58 F.3d at 23).

[28] *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004) (quoting *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999)).

[29] *JLM Indus. v. Stolt-Nielsen SA*, 387 F.3d 163, 174 (2d Cir. 2004) (quotation marks omitted).

[30] *See Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 456 (2d Cir. 1995) (describing the waiver defense as a "statutorily mandated inquiry in § 3 cases").

be lightly inferred.'"[31] "[A]ny doubts concerning whether there has been a waiver are resolved in favor of arbitration."[32]

A waiver determination is highly fact specific and no bright line rule is applied, but three factors are considered: "(1) the time elapsed from when the litigation was commenced until the request for arbitration; (2) the amount of litigation to date, including motion practice and discovery; and (3) proof of prejudice."[33] Although an extensive amount of delay between the commencement of an action and request for arbitration may suggest waiver, "delay in seeking arbitration does not create a waiver unless it prejudices the opposing party."[34] Similarly, the amount of litigation that occurs before an arbitration request will result in waiver only when substantive litigation prejudices the opposing party.[35] "Merely answering on the merits, asserting a counterclaim (or cross-claim) or

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[31] *Thyssen, Inc. v. Calypso Shipping Corp.*, 310 F.3d 102, 104-05 (2d Cir. 2002) (alterations in original) (quoting *Coca-Cola Bottling Co. v. Soft Drink and Brewery Workers Union Local 812*, 242 F.3d 52, 57 (2d Cir. 2001)).

[32] *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995) (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

[33] *Louis Dreyfus*, 252 F.3d at 229.

[34] *Leadertex*, 67 F.3d at 25.

[35] *See Thyssen*, 310 F.3d at 105; *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993).

participating in discovery, without more, will not necessarily constitute a waiver."[36] However, "engag[ing] in protracted litigation that prejudices the opposing party" will cause a party to waive its right to arbitration.[37]

Two types of prejudice are possible: substantive prejudice and prejudice due to excessive cost and time delay.

> "Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or it can be found when a party too long postpones [its] invocation of [its] contractual right to arbitration, and thereby causes [its] adversary to incur unnecessary delay or expense."[38]

IV. DISCUSSION

A. Agreement to Arbitrate and its Scope

The existence of an agreement to arbitrate under the Certificate is not disputed in this case.[39] Because there is an arbitration clause binding on both

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[36] *Dewey & Assocs., Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1018 (2d Cir. 1972), *abrogated on other grounds by Seguros "Illimani" S.A. v. M/V Popi P*, 929 F.2d 89, 93 n.3 (2d Cir. 1991).

[37] *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 162 (2d Cir. 2000).

[38] *Thyssen*, 310 F.3d at 105 (quoting *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991)).

[39] Clearwater initially asserted an affirmative defense disputing the existence of the Certificate but withdrew this defense. *See* 9/18/06 Letter from Greenman to the Court. Clearwater has reserved its rights to dispute the validity of the Certificate in arbitration. *Id.* This position, however, is immaterial to

parties, the next consideration is "whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement."[40] The Certificate's arbitration clause provides "Should an irreconcilable difference of opinion arise as to the interpretation of this Contract, it is hereby mutually agreed that, as a condition precedent to any right of action hereunder, such difference shall be submitted to arbitration . . . ."[41] The Second Circuit has not had occasion to decide whether an arbitration clause with this exact language is broad or narrow, but has held that similar clauses with additional language are broad.[42] The Sixth Circuit, on the other hand, has ruled that an arbitration clause with this precise language is narrow because it "provides for the arbitration of disagreements only in the

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Clearwater's motion because the Supreme Court has recently made it clear that, unless a party is challenging "the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna*, — U.S. —, 126 S. Ct. 1204, 1209 (2006).

[40] *Hartford Acc. & Indem. Co.*, 246 F.3d at 226.

[41] Certificate ¶ 16.

[42] *See ACE Capital Re Overseas Ltd. v. Central Union Life Ins. Co.*, 307 F.3d 24, 26, 33 (2d Cir. 2002) (holding that the clause, "any dispute [that] shall arise between the parties hereto with reference to the interpretation of this Agreement or their rights with respect to any transaction involved" was broad); *Hartford Acc. & Indem. Co.*, 246 F.3d at 227 & n.3 (holding that "if any dispute shall arise between [the parties] with reference to the interpretation of this Agreement or their rights with respect to any transaction involved" was a broad clause).

interpretation of the contract itself."[43] Here, it is not necessary to decide whether the clause at issue is broad or narrow. Even if the clause is narrow, Clearwater's dispute with Century centers around the interpretation of three provisions in the Certificate.[44] Clearwater claims it is not obligated to make payment under the Certificate because Century has not complied with Paragraphs 9, 10 and 12 of the Certificate.[45] According to Clearwater, Century has not complied with Paragraph 9 because it has not provided Clearwater with "full and complete access to all of Century's records"; Paragraph 10 because it has not provided Clearwater with "prompt notice of the occurrence and claim"; and Paragraph 12 because it has not provided Clearwater with "sufficient proof of loss."[46] As the parties' dispute clearly involves differences of opinion with respect to the interpretation of these provisions, their "dispute is over an issue that 'is on its face within the purview of the clause.'"[47]

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[43] *Associated Indem. Corp. v. Home Ins. Co.*, No. 93-1857, 1994 WL 59001, at *2 (6th Cir. Feb. 25, 1994).

[44] *See* Arbitration Demand.

[45] *See id.*

[46] *Id.*

[47] *Louis Dreyfus*, 252 F.3d at 224 (quoting *Rochdale Vill., Inc.*, 605 F.2d at 1295).

B. Waiver of the Right to Arbitrate

Clearwater did not waive its right to arbitrate its dispute with Century. *First*, less than five months have elapsed between the commencement of this litigation and Clearwater's demand for arbitration and less than three months have elapsed between Century's production of the Certificate in its entirety and Clearwater's demand.[48] This relatively short period of time does not by itself infer a waiver of arbitration.[49]

Second, this litigation is not particularly advanced. The parties have not conducted extensive discovery or engaged in any trial preparation. The Complaint and Answer have been filed and the Court has issued a scheduling order and a protective order.[50]

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[48] Reply Memorandum of Clearwater Ins. Co. For Its Motion to Compel Arbitration and Stay This Litigation at 8.

[49] *See PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 108 (2d Cir. 1997) (finding that a five-month delay did not by itself infer waiver of arbitration); *see also Rush v. Oppenheimer Co.*, 779 F.2d 885, 887 (2d Cir. 1985) ("It is beyond question that defendants' delay in seeking arbitration during approximately eight months of pretrial proceedings is insufficient by itself to constitute a waiver of the right to arbitrate . . . .").

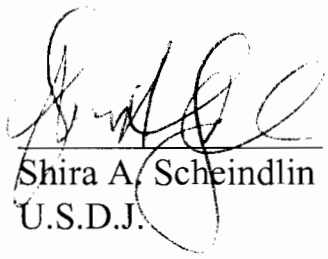
[50] *See Eastern Fish Co. v. South Pacific Shipping Co., Ltd.*, 105 F. Supp. 2d 234, 240 (S.D.N.Y. 2000) (finding that minimal litigation occurred where "[t]he complaint and answer are essentially the only pleadings that have been exchanged [and] [l]ittle discovery has been conducted").

Finally, Century's argument that it has been prejudiced by being "forced to oppose [Clearwater's] motion" and by Clearwater's "continued failure to reimburse Century Indemnity for amounts owed by Clearwater under the reinsurance contract" is unavailing.[51] This is not the type of prejudice that supports a finding of waiver as Clearwater seeks only to enforce its bargained-for agreement to arbitrate.[52]

V. CONCLUSION

For the foregoing reasons, Clearwater's motion to compel arbitration and stay these proceedings is granted. The Clerk is directed to close this motion [# 11 on the docket].

SO ORDERED:



Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
September 25, 2006

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[51] Opp. Mem. at 12.

[52] *See Louis Dreyfus*, 252 F.3d at 230 ("Prejudice does not refer to enforcing a bargained-for agreement . . . .").

- Appearances -

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