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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN A. RAKOWER J.S.C. PART Part 5

Index Number : 604218/2007

ARGONAUT INS. CO.

vs

CERADYNE, INC.

Sequence Number : 001

COMPEL OR STAY ARBITRATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3, 4,
Replying Affidavits	5, 6, 7, 8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

APR 09 2008

COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

EILEEN A. RAKOWER
J.S.C.

Dated: March 31, 2008

_____ J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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In the Matter of the Arbitration between
ARGONAUT INSURANCE COMPANY

Index No.
604218/07

Petitioner,

-against-

CERADYNE, INC.

DECISION
and ORDER

Respondent.

Mot. Seq. 001

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HON. EILEEN A. RAKOWER:

This motion to compel arbitration presents a jurisdictional question regarding a dispute between petitioner, Argonaut, an insurance company which states that it is an Illinois corporation with its principal place of business in Texas, and respondent Ceradyne, a Delaware corporation with its principal place of business in California, concerning California workers compensation insurance policies.

Petitioner, Argonaut Insurance Company, between March, 2003 and May, 2005, issued four workers' compensation policies to respondent Ceradyne, Inc., a developer and manufacturer of technical ceramic products with facilities and employees worldwide. In late 2003, petitioner and respondent entered into an "Insurance Program Agreement" (the Agreement), which further defined the obligations of the parties and included an arbitration clause.

The Agreement states, in relevant part,

ARTICLE VII. ARBITRATION

A. Submission to Arbitration:- You and we agree to arbitrate any dispute between over (sic) the interpretation, application, formation, enforcement or validity of this **Agreement** between you and us, or your and our rights with respect to any transaction involved, whether such dispute arises before or after termination

of this **Agreement**.

B. Sole Remedy:- You and we agree that arbitration is the sole remedy for the resolution of disputes between us. The board of arbitration will have complete and exclusive jurisdiction over the entire matter in dispute, including any question as to its arbitrability . . ..

D. Arbitration Board Membership:- The arbitration will be held in Stamford, Connecticut . . ..

H. Confirming Court Order:- Either party may apply to the United States District Court or to the State court in which the arbitration hearing was held for an order confirming the award or to enforce any decision by the umpire with respect to discovery. The parties consent to the jurisdiction of such court.

ARTICLE X. MISCELLANEOUS TERMS

A. APPLICABLE LAW: THE RIGHTS OF THE PARTIES TO THIS **AGREEMENT** SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO NEW YORK'S RULES ON CONFLICT OF LAWS.

H. Jurisdiction:- For the purpose of enforcing the terms of ARTICLE VII and confirming any arbitral award, you and we consent to the exclusive jurisdiction of either the U.S. District Court for the Southern District of New York or the Supreme Court of the State of New York, County of New York. (All emphasis and capitalization in the original.)

Ceradyne, in July, 2007, brought an action against Argonaut in the Superior Court of the State of California for breach of contact and other related issues. In August, 2007, Argonaut filed a Demurrer and Motion to Strike which was denied in October, 2007. Thereafter, the parties engaged in discovery. A hearing on the matter, originally scheduled for December 14, 2007, was adjourned and held on January 18, 2008. Meanwhile, on December 21, 2007, Argonaut filed both this motion in New

York to compel arbitration pursuant to the Agreement and an amended Motion to Stay or Dismiss or Compel Arbitration in California. The petition before this court seeks an order compelling the parties to arbitrate in Connecticut.

Ceradyne argues that the arbitration clause in the Agreement is invalid and unenforceable because, under California law, all such agreements must be submitted to regulatory agencies and be approved in order to be binding. Ceradyne avers that the Agreement was never submitted to these agencies for approval and is therefore *void abinitio* and unenforceable as contrary to law and public policy. Ceradyne also argues that, under California law, disputes regarding insurance policies must be litigated and cannot be arbitrated.

Ceradyne urges that this dispute belongs in California. It states that on December 12, 2007, it deposed Ms. Marilyn Brands, an Argonaut employee with knowledge of the four policies, the Agreement and how Argonaut interacts with California's insurance regulatory agencies. Ms. Brands testified that Argonaut's home office is in Menlo Park, California and its off-site storage facilities are in Los Angeles and Northern California. Ceradyne argues that this petition should be dismissed pursuant to the doctrine of *forum non conveniens*, (CPLR §327(a)), because, other than the invalid arbitration clause in the Agreement, neither it nor Argonaut have ties to either New York or Connecticut, the dispute involves California witnesses and, both the workers' compensation policies and the Agreement are subject to California's highly regulated insurance industry standards.

Ceradyne further argues that Argonaut has waived its right to arbitrate, if one ever existed, by participating in the California litigation. It states that even after Argonaut's Demurrer and Motion to Strike in the California action was denied, Argonaut actively participated in the litigation. Argonaut served discovery demands on Ceradyne, waited for those demands to be fulfilled and requested extensions of time to respond to Ceradyne's discovery demands. Additionally, it argues that there is no justifiable reason for Argonaut to have waited six months after the California litigation began, and it participated in that litigation, to seek arbitration in Connecticut.

Argonaut argues that the arbitration clause in the Agreement, including its choice of forum and choice of law provisions, are valid. It states that Ceradyne[1] is "conclusively bound" to the terms of the Agreement. (*Arnav Indus. Retirement Trust v. Brown, Raysman, Millstein, Felder and Steiner*, 96 NY2d 300 [2001]). It argues that CPLR §327(b) explicitly provides for a mandatory exception to the doctrine of *forum non conveniens* where, as here, a contract or agreement is at issue and General Obligations Law § 5-1402 applies. Argonaut argues that it did not waive its right to arbitrate by its minimal participation in the California litigation.

It is well settled that parties may consent to the jurisdiction of a state that they have no connection with. (*National Union fire Insurane Company of Pitsburg, PA v. worley*, 257 AD2d 228 [1st Dept. 1999]). CPLR § 327(b), in conjunction with General Obligations Law §5-1402 prohibits the court from dismissing a contract action pursuant to the doctrine of *forum non conveniens* where the parties consent in their contract to New York's jurisdiction with New York law to govern their dispute. Additionally, courts favor permitting consenting parties to submit their disputes to arbitration and "the law has adopted a policy of noninterference, with few exceptions, in this mode of dispute resolution." (*Sprinzen v. Nomberg*, 46 NY2d 623 [1979]).

Here, the Agreement, Article X, sections A and H make clear that the parties consent to the jurisdiction of New York courts and the application of New York law to their dispute. Moreover, Article VII, section B unequivocally states that the parties agree to arbitration as the sole remedy for their disputes, "including any question as to its arbitrability. . . ."

There are certain exceptions where New York courts will refuse to enforce an agreement to arbitrate. One such exception is where a party has participated in litigation to the extent that it manifests "an affirmative acceptance of the judicial forum " and its "actions are then inconsistent with a later claim that only the arbital forum is satisfactory." (*DeSapio v. Kohlmeyer*, 35 NY2d 402 [1974]). Another exception is where the agreement would violate public policy (*Sprinzen v. Nomberg*, *supra* at 630).

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[1]Argonaut's reply repeatedly refers to the respondent as "Grove," an apparent transcription error as Argonaut also seeks to compel arbitration with Grove Lumber and Building Supply, Inc., under index number 116348/07, before the Honorable Charles E. Ramos.

Here, Argonaut did not seek to compel arbitration until more that six months after the litigation in California began, after it made discovery demands on Ceradyne and after it produced a witness for deposition in the California matter. Argonaut's actions and delay in seeking to compel arbitration evince its willingness to assent to the jurisdiction of the California court. (*DeSapio v. Kohlmeyer, supra*).

Additionally, in New York, the violation of a statute designed to protect the public generally renders a contract unenforceable. (*In re Migdal Plumbing and Heating Corp.*, 232 AD2d 62 [1st Dept. 1997]). While New York favors arbitration, it recognizes that there are matters beyond the reach of the arbitrator's discretion (*Matter of Associated Teachers of Huntington v. The Board of Eduation*, 33 NY2d 229 [1973]), and it will not enforce the arbitration clause of a contract that violates public policy. (*Mendelsohn v. A.D. Catering*, 100 AD2d 209 [2nd Dept. 1984]).

Ceradyne states that the Agreement is void as against public policy because it was never submitted to California's Insurance Regulatory agencies, as required by California law. On January 18, 2008, a hearing was held in the Superior Court of California, County of Orange, Complex Litigation Center, before the Honorable Thierry Patrick Colaw regarding Argonaut's amended Motion to Stay or Dismiss or Compel Arbitration,(case number 07CC01316.) Judge Colaw's decision stated, *inter alia*, "Argonaut did not comply with Ins. Code §11658 requiring submission of insurance contracts and endorsements to the Department of Insurance. The Insurance Program Agreement is unenforceable and void."

The principle of comity is not a rule of law but "[r]ather it is an expression of one State's entirely voluntary decision to defer to the policy of another. Today in New York the determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy . . .." (*Curtis, Mallet-Prevost, Colt & Mosle, LLP v. Garza-Morales*, 308 AD2d261 [1st Dept. 2003]). However, it is unnecessary for this court to search the record of the California litigation.

Argonaut's failure to seek to compel arbitration until well after its participation in litigation and discovery in California goes beyond "purely defensive action" and is indicative of its willingness to accept California as the proper judicial forum for this matter. (*DeSapio v. Kohlmeyer, supra*). Accordingly, this petition must be denied.

Wherefore, it is hereby

ORDERED that this petition is denied and the proceeding is dismissed.

All other relief requested is denied.

This constitutes the decision and order of the court.

Dated: March 31, 2008

EILEEN A. RAKOWER, J.S.C.