

Glencore Ltd. v Kamca Trading S.A.

2025 NY Slip Op 31324(U)

April 15, 2025

Supreme Court, New York County

Docket Number: Index No. 651244/2025

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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<p>GLENCORE LTD.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>KAMCA TRADING S.A., KAMCA OIL & BUNKERS CORP., KAMCA HOLDING PANAMA S.A.</p> <p style="text-align: center;">Defendant.</p>	<p>INDEX NO. <u>651244/2025</u></p> <p>MOTION DATE <u>03/03/2025</u></p> <p>MOTION SEQ. NO. <u>001</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 29, 30, 31, 43, 44, 45, 46, 47, 48, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, it is

This is an action to enforce the forum selection provisions and choice of law provisions in marine fuel contracts between plaintiff Glencore Ltd. (Glencore), which was to deliver fuel in March and April 2018, and defendant Kamca Trading S.A., the purchaser in Panama. (NYSCEF Doc. No. [NYSCEF] 1, Complaint ¶ 2.)

In motion sequence 001, Glencore moves, pursuant to CPLR 6301, to restrain and enjoin defendants Kamca Trading S. A.,¹ Kamca Oil & Bunkers Corp., and Kamca Holding Panama S.A. (collectively, Kamca)

“along with any of their respective parent companies, affiliates, successors, predecessors, subsidiaries, divisions, branches, units, personal representatives, or assigns thereof, as well their managers, agents, attorneys, officers, directors, shareholders, members, employees, or partners, and any other parties with knowledge of this order,

¹ Kamca Trading S. A. is in bankruptcy and did not appear at oral argument.

- (a) from pursuing the claims, causes of action, or other attempts to receive relief in the lawsuit captioned *Kamca Trading S.A., Kamca Oil & Bunkers Corp. and Kamca Holding Panama, S.A. v. Glencore plc and Glencore Ltd.*, File no. RUE : 93516, in the *Segundo Tribunal Marítimo de Panamá* in the Republic of Panama (the “Panama Lawsuit”), or any such claims, causes of action or other requests for relief arising out of or related to the contracts or facts and circumstances at issue in the Panama Lawsuit, in any court or venue other than the United States District Court for the Southern District of New York or the State Courts of New York, located in New York City, Borough of Manhattan;...
- (b) from attempting to seize, attach, or otherwise restrain property of Glencore, or any of its respective parent companies, affiliates, successors, predecessors, subsidiaries, divisions, branches, units, personal representatives, or assigns thereof, as well their managers, agents, attorneys, officers, directors, shareholders, members, employees, or partners, in connection with the Panama Lawsuit.” (NYSCEF 2, Order to Show Cause [mot. seq. 001].)

In March and April 2022, Kamca initiated actions against Glencore, alleging that the fuel Glencore delivered to Kamca did not meet the standards and specifications required by the contracts. (See Index Nos. 651089/2022, 651279/2022, 651840/2022, and 651993/2022.) Kamca Trading S.A. was declared bankrupt on September 19, 2022. (NYSCEF 62, Notice of Bankruptcy at 3.) Accordingly, the New York Actions are stayed. (Index No. 651089/2022[NYSCEF 14, April 18, 2023 Order].) The Swiss bankruptcy proceedings continue. (NYSCEF 4, Behmke aff ¶ 4.)

On August 25, 2024, Kamca, including bankrupt Kamca Trading S.A., filed an action in Panama against Glencore, which was served on Glencore on February 20, 2025. (See NYSCEF 61, August 2, 2024 Statement of Claim in Panama [SOC]; NYSCEF 4, Behmke aff ¶ 13.)² Kamca’s Statement of Claim is based on the same contracts and delivery of fuel. (NYSCEF 61, SOC at 3³.) Kamca acknowledges that

² Parties are reminded to read Part 48 procedures. Exhibits should be numbered not lettered. (See Part 48 Procedures ¶ 6 [D].)

³ NYSCEF pagination.

New York law applies under the contracts. (*Id.* at 6 [¶ 8].) The damages are identical to the New York damages. (*Id.* at 9 [¶ 11].) Indeed, the Swiss bankruptcy administrator for Kamca Trading S.A. demanded that Kamca Trading S.A. withdraw the lawsuit because it was in violation of Swiss criminal law. (NYSCEF 70, October 17, 2024 Letter to Juan David Marulanda Cuartas; NYSCEF 71, October 17, 2024 Letter to Jos Ignacio Arbelaez Montoya.)

“A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual.” (CPLR 6301.)

To obtain a preliminary injunction, a movant must establish: “(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party’s favor.” (*Doe v Axelrod*, 73 NY2d 748, 750 [1988] [citation omitted].)

The contracts at issue contain the following provision, which mandates that Kamca’s claims be litigated here in New York:

“Any dispute between the Parties arising out of, or in connection with, the Contract shall be submitted to the exclusive jurisdiction of the United States District Court for the Southern District of New York in the City of New York, unless that court does not have subject-matter jurisdiction or declines jurisdiction, in which case any such dispute shall be submitted to the exclusive jurisdiction of the State Court for the State of New York in the Borough of Manhattan, City of New York.” (NYSCEF 56, March 2018 Contract at 5.)

Regardless of how Kamca labels its Panamanian claims, those claims must be litigated here in New York because they “arise[] out of, or in connection with” the contracts at issue here. (*Wang v UBS AG*, 139 AD3d 448, 448 [1st Dept 2016] [“The forum selection clause applies to the fraud claims, as they arise out of and in connection with the parties’ account agreement.”].) New York is the exclusive forum for these claims.

(*Pub. Adm'r Bronx County v Montefiore Med. Ctr.*, 93 AD3d 620, 621 [1st Dept 2012].)

In addition, the Kamca entities have a sufficiently close relationship to enforce the forum selection clause against them. (*Indosuez Intl. Fin., B.V. v Natl. Reserve Bank*, 304 AD2d 429, 431 [1st Dept 2003] ["Plaintiff's parent and subsidiary, although not parties to the agreement containing the choice of law and forum selection clauses, were sufficiently close in their relation to plaintiff to be included within the permanent injunction's protective ambit."] [collecting authorities].) "The closely related' test is also satisfied in situations where the non-signatory is alleged to have acted in concert with the signatory . . . or where the complaint treats them as a single unit." (*Cognizant Tech. Solutions Corp. v Bohrer PLLC*, 2022 WL 1720319, at *4 [SDNY May 27, 2022] [internal citations omitted].) In the Panama action, Kamca pleads that the "Kamca Group" maintained integrated operations "dedicated to the purchase, sale, and supply of marine fuel." (NYSCEF 61, SOC at 5 [¶ 4].) Finally, the non-signatory, Kamca Oil & Bunkers Corp. and Kamca Holding Panama S.A., assert claims under the contracts that puts them in the shoes of the signatory to the contracts, Kamca Trading S.A. (*New Greenwich Litig. Trustee, LLC v Citco Fund Servs. (Europe) B.V.*, 145 AD3d 16, 19 [1st Dept 2016].) Accordingly, the court rejects Kamca Oil & Bunkers Corp. and Kamca Holding Panama S.A. argument that they are not parties to the contracts at issue by relying on the Third Party Rights paragraph in the contracts, which provides that:

"No term of this Contract is intended to, or does, confer a right, benefit or remedy on any third party." (NYSCEF 56, March 2018 Contract ¶ 23; NYSCEF 58, April 2018 Contract ¶ 23; NYSCEF 60, May 2018 Contract ¶ 20.)

Alternatively, "[a]n injunction may be issued 'where it can be shown that the suit sought to be restrained is not brought in good faith, or that it was brought for the

purpose of vexing, annoying and harassing the party seeking the injunction.” (*IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd.*, 59 AD3d 366, 366–67 [1st Dept 2009] [citations omitted].) Here, Glencore will incur excessive and duplicative litigation expenses if it is forced to litigate in two forums. (See *Jay Franco & Sons Inc. v G Studios, LLC*, 34 AD3d 297, 298 [1st Dept 2006] [affirming anti-suit injunction, in part, “to prevent the waste of judicial resources and unnecessary legal expenses”] [citations omitted].) Additionally, duplicative actions risk inconsistent orders. (See *IRB-Brasil Resseguros S.A.*, 59 AD3d at 367 [“Since a contrary decision in the foreign court would interfere with the New York court’s ability to resolve the issues before it, it is entirely appropriate . . . to enjoin the action in the foreign court.”] [quotations and citations omitted].) Such bad faith is demonstrated where there is a significant delay between the alleged 2018 breach and the filing of the Panamanian action in 2024 to the extent that the statute of limitations allegedly expired two years earlier. (See *id.*) The court is also confounded by the delay in service of the pleadings in the Panamanian action on Glencore six months after it was filed. (NYSCEF 13, Panamanian Action; NYSCEF 4, Behmke aff ¶ 13.)

Glencore has satisfied the requirements of CPLR 6301. Glencore is likely to succeed on its first cause of action for a declaratory judgment that the forum selection clause is enforceable, and the Panamanian action is in contravention of that clause. (See NYSCEF 1, Complaint ¶¶ 46-51.) Glencore has also established irreparable harm. (*Madden Intl., Ltd. v Lew Footwear Holdings Pty Ltd.*, 50 Misc 3d 1210, 2016 NY Slip Op 50061 at *16 [Sup Ct, NY County 2016], *affd* 143 AD3d 418 [1st Dept 2016] [irreparable harm to party forced to litigate in contravention to forum selection clause].)

Finally, the equities favor Glencore. “The probability of hardship to each of the parties from the grant or denial of the application must be weighed in the balance.” (*Finger Lakes Health Sys. Agency v St. Joseph's Hosp.*, 81 AD2d 403, 408 [3d Dept 1981].) Kamca fails to identify why equities are in its favor since, in either forum, it will litigate the same issues, and its affiliate has agreed to New York as a forum.

It appears to this court that a cause of action exists in favor of Glencore and against Kamca, and that Glencore is entitled to a preliminary injunction on the ground that Kamca threaten or are about to do or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual.

Accordingly, it is

ORDERED that the motion is granted; and it is further

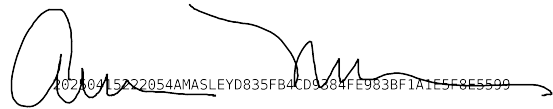
ORDERED that the undertaking is fixed in the sum of \$10,000 conditioned that Glencore, if it is finally determined that it was not entitled to an injunction, will pay to Kamca all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that Kamca, its agents, servants, employees, and all other persons acting under the jurisdiction, supervision and/or direction of Kamca, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

- (a) “from pursuing the claims, causes of action, or other attempts to receive relief in the lawsuit captioned *Kamca Trading S.A., Kamca Oil & Bunkers Corp. and Kamca Holding Panama, S.A. v. Glencore plc and Glencore Ltd.*, File no. RUE : 93516, in the *Segundo Tribunal Marítimo de Panamá* in the Republic of

Panama (the "Panama Lawsuit"), or any such claims, causes of action or other requests for relief arising out of or related to the contracts or facts and circumstances at issue in the Panama Lawsuit, in any court or venue other than the United States District Court for the Southern District of New York or the State Courts of New York, located in New York City, Borough of Manhattan;...

(b) from attempting to seize, attach, or otherwise restrain property of Glencore, or any of its respective parent companies, affiliates, successors, predecessors, subsidiaries, divisions, branches, units, personal representatives, or assigns thereof, as well their managers, agents, attorneys, officers, directors, shareholders, members, employees, or partners, in connection with the Panama Lawsuit.(NYSCEF 2, Order to Show Cause.)


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4/15/2025

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: