UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FIRST STATE INSURANCE COMPANY AND NEW ENGLAND REINSURANCE CORPORATION, Plaintiffs, -v- NATIONAL CASUALTY COMPANY, Defendants.	13 Civ. 0704 (AJN) MEMORANDUM AND ORDER

ALISON J. NATHAN, District Judge:

National Casualty Company ("National Casualty") brings this motion to dismiss or, in the alternative, transfer venue of First State Insurance Company's and New England Reinsurance Corporation's (collectively "First State") Petition to Confirm the Arbitration Panel's "Final Order Regarding the Motion on Contract Interpretation" dated December 13, 2012 ("December 13, 2012 Final Order"). The Court has jurisdiction based on diversity of citizenship.[1] 28 U.S.C § 1332. For the reasons set forth below, the Court transfers this action to the United States District Court for the District of Massachusetts.

I. Background and Procedural History

First State and National Casualty are parties to various reinsurance agreements, each of which contains an arbitration provision. Ex. 1 at 1 of Pet. for Order Confirming December 13, 2012 Final Order ("Pet."). Due to irreconcilable disputes between the parties regarding those agreements, First State "demanded arbitration against National Casualty on August 23, 2011." Pet. ¶7. Pursuant to that demand, the parties negotiated an Agreement for Consolidation of

[1] There is complete diversity of citizenship in this case. First State Insurance Company and New England Reinsurance Corporation are both incorporated in Connecticut and each has its principal place of business in Connecticut. National Casualty is incorporated in Wisconsin and has its principal place of business in Arizona. More than $75,000 is at stake in the controversy. (Pet. to Confirm 1-2.)

Arbitration ("Agreement"), which was fully executed on March 19, 2012. *Id.* at ¶8. The Consolidation Agreement provides that "[a]ny arbitration hearing pursuant to this Agreement shall take place in Boston, Massachusetts, unless the Panel and parties agree otherwise." Ex. 1 of Pet. at 3. It further provides that "[a]ny judicial proceeding concerning this Agreement, or confirmation, vacatur, or modification of any award pursuant to Sections 9, 10, or 11 of the Federal Arbitration Act, shall be brought in the district court in and for the district within which the arbitration hearing is held (the 'Court')." *Id.*

On August 30, 2012, the Arbitration Panel (" Panel") held an Organizational Meeting in Boston, Massachusetts, and determined that "the best way to proceed [with the arbitration] would be to see if many of the claims at issue could be removed by the establishment of a payment protocol based upon the terms of the subject reinsurance agreements." Ex. 2 of Pet. at 1. Accordingly and based upon "the suggestion of Petitioner," the Panel instructed the Petitioner, First Casualty, to submit a Motion on Contract Interpretation to the Panel. *Id.* After full briefing on the motion, the Panel heard oral arguments in this district on December 10, 2012. *Id.* The Panel issued its Final Order Regarding the Motion on Contract Interpretation on December 13, 2012. *Id.* Soon thereafter, on January 31, 2013, First State filed the present action to confirm the December 13, 2012 Final Order.

In between the issuance of the Panel's December 13, 2012 Final Order and First State's filing the present action, there were important intervening activities. On January 16, 2013, National Casualty wrote a letter to First State noting that pursuant to the December 13, 2012 Final Order, National Casualty "issued payment last week" but warned First State that its payment was "subject to a full and complete reservation of rights." Ex. 5 of Rep. to Resp. to Mot. to Dismiss at 1 ("Rep. to Resp."). On January 25, 2013, in what First State itself calls the

"Interim January Order," the Panel determined that though the December 13, 2012 Final Order noted that "payments" made by National Casualty to First State "may be made subject to an appropriate reservation of rights by National Casualty," National Casualty's "purported reservation of rights letter…did not comply with the [Final Order]." Ex. 8 of Rep. to Resp. at 2. First State further notes that the Interim January Order identified three remaining issues to be decided at the arbitration hearing: (i) any claims that National Casualty had denied and (ii) National Casualty's so-called "London Market" defense and, finally, (iii) First State's claims for interest and attorney fees. Ex. 6 of Rep. to Resp. at 1.

Shortly after the filing of the present action, on February 4, 2013, National Casualty petitioned the Panel to clarify the Panel's Interim January Order. On February 27, 2013, in what First State calls the "Interim February Order," the Panel ruled that based upon intervening actions taken by both parties, "there remain no denied claims to consider at the hearing" leaving First State's claims for interest and attorneys fees and National Casualty's London Market defense for the arbitration hearing. Ex. B of Decl. of Kendall W. Harrison in Supp. of Mot. to Dismiss at 1. Further, in this Interim February Order, the Panel stated that "[t]he Panel Order of January 25, 2013, as regards the invalid reservation of rights letter does not apply to National Casualty's right to file an appropriately specific reservation of rights letter on future billings on these accounts." *Id.* at 2.

On March 12, 2013, the Panel held an evidentiary hearing in order to resolve remaining liability and damages issues and on March 28, 2013, the Panel issued the "Final Monetary Award." Ex. 3 of Rep. to Resp.

The instant motion, seeking to dismiss First State's Petition for an Order Confirming "Final Order Regarding the Motion on Contract Interpretation" and Judgment pursuant to Fed. R.

Civ. P. 12(b)(3) or, alternatively, to transfer venue to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1406(a), was brought by National Casualty on February 28, 2013.

II. Legal Standard

The Supreme Court has held that the venue provisions of the Federal Arbitration Act ("FAA") are to be interpreted permissively "allowing a motion to confirm, vacate, or modify an arbitration award to be brought. . . .either where the award was made or in any district proper under the general venue statute." *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 195 (2000) (interpreting 9 U.S.C. §§ 9-11). The civil venue statute, 28 U.S.C.A. § 1391(b), "permits venue in multiple judicial districts as long as 'a substantial part' of the underlying events took place in those districts. . . ." *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 356 (2d Cir. 2005) (citing *Jenkins Brick Co. v. Bremer,* 321 F.3d 1366, 1371 (11th Cir.2003); *Uffner v. La Reunion Francaise, S.A.,* 244 F.3d 38, 42 (1st Cir.2001); *First of Mich. Corp. v. Bramlet,* 141 F.3d 260, 263 (6th Cir.1998); *Setco Enters. v. Robbins,* 19 F.3d 1278, 1281 (8th Cir.1994)).

As the Second Circuit has held, the plaintiff bears the burden of establishing that venue is correct. However, if a court is resolving a 12(b)(3) motion based upon pleadings and affidavits, to avoid dismissal "the plaintiff need only make a prima facie showing of venue." *Gulf Ins. Co. v. Glasbrenner,* 417 F.3d 353, 355 (2d Cir.2005) (citation and internal quotation marks omitted). Moreover, a court "analyzing whether the plaintiff has made the requisite prima facie showing that venue is proper…view[s] all the facts in a light most favorable to plaintiff." *Phillips v. Audio Active Ltd.,* 494 F.3d 378, 384 (2d Cir. 2007).

If the plaintiff cannot establish that the chosen venue is correct, "[t]he district court ... shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in

which it could have been brought." 28 U.S.C. § 1406. Furthermore, the Second Circuit requires that, "where one party has shown an apparently governing forum-selection clause, the party opposing litigation in the so designated forum must make a strong showing to defeat that contractual commitment." *Asoma Corp. v. SK Shipping Co., Ltd.*, 467 F.3d 817, 822 (2d Cir. 2006). Here, National Casualty points to an apparently governing forum-selection clause requiring First State's Petition for an Order Confirming "Final Order Regarding the Motion on Contract Interpretation" and Judgment to be heard in the District of Massachusetts.

III. Discussion

While venue is to be granted permissively under the statute, it cannot be granted in a manner that conflicts with the parties stated intentions as articulated in the Agreement. The Supreme Court has clearly stated that "the forum clause should control absent a strong showing that it should be set aside." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). And though the Second Circuit has permitted more flexibility in its reading of forum-selection clauses by holding that "an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains *specific language of exclusion*," *John Boutari and Son, Wines and Spirits, S.A. v. Attiki Importers and Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994) (emphasis added)(citation and internal quotation marks omitted)(holding that a forum-selection clause which stated that, "any dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts," was permissive rather than mandatory), as discussed below, the language of the forum selection clause in the Agreement is unambiguous and specifically excludes alternative venue for the petition to confirm the Final Order.

Section 7 of the Agreement clearly states that "[a]ny judicial proceeding concerning this Agreement, or confirmation, vacatur, or modification of any award pursuant to Section 9, 10, or

11 of the Federal Arbitration Act, shall be brought in the district court in and for the district within which the arbitration hearing is held (the 'Court')." Ex. 1 of Pet. at 3. There are two clauses within this passage that the Court must construe to determine whether venue is proper here: "shall be brought" and "the arbitration hearing."

First, an agreement providing information on where a proceeding shall "be brought" is construed as a mandatory forum-selection clause. *Phillips v. Audio Active Ltd.*, 494 F. 3d 378, 386 (2d Cir. 2007) (interpreting the provision that "any legal proceedings that may arise out of [the agreement] are to be brought in England" as mandatorily conferring exclusive jurisdiction); *cf. John Boutari & Son,* 22 F.3d at 53 (holding that "[a]lthough the word 'shall' is a mandatory term, here it mandates nothing more than that the [Greek courts] have jurisdiction."). Because the Agreement does not describe the court that "shall have jurisdiction" but rather, it identifies the court in which a given proceeding "shall be brought," Section 7 exclusively determines that this motion must be brought "in the district court in and for the district within which the arbitration hearing is held." Ex. 1 of Pet. at 3.

Second, to identify if *this* district is indeed the district within which the arbitration hearing was held, the Court must first determine the meaning of "the arbitration hearing" in the context of Section 7, an issue in dispute between the parties.

National Casualty argues there can only be one arbitration hearing under Section 7 and that because that "hearing…will be held in Boston, Massachusetts" the present action "is improperly venued and must be dismissed." Def.'s Mot. Dismiss at 6. First State interprets Section 7 to contemplate many arbitration hearings and argues that the December 10, 2012 hearing that resulted in the Final Order is one such arbitration hearing, making this action properly venued in this Court.

As a preliminary matter, the Court agrees with National Casualty that the Agreement language unambiguously references a single arbitration hearing by its textual reference to "the" hearing. In cases where the agreement language is unambiguous, the Court must give it its ordinary meaning. *Bethlehem Steel Co. v. Turner Construction Co.*, 2 N.Y.2d 456, 459 (1957) (holding that courts cannot find ambiguity by "straining the contract language beyond its reasonable and ordinary meaning."); *see also Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) ("Language whose meaning is otherwise plain is not ambiguous merely because the parties urge different interpretations in the litigation.").

To support a contrary position, First State points to cases in which parties "specified the court that would enter judgment on the arbitration award" and "consented to the jurisdiction of S.D.N.Y. for all proceedings relevant to the arbitration agreement" and notes that in these cases, venue was proper in the Southern District of New York. Pl. Opp. at 8 (citing *U.S. for Use of Fidelity and Deposit Co. of Maryland v. Suffolk Construction Co.*, 2000 WL 10412 at *1 (S.D.N.Y. Jan. 3, 2000); *China Grove Cotton Mills Co., v. Industrion, Inc*, 1990 WL 41726 at *1-3 (S.D.N.Y. Apr. 4, 2000)). However, unlike in *U.S. for Use of Fidelity*, in this case, First State has failed to establish – even viewing the facts in the light most favorable to it – that the award it is seeking to confirm is a final award, inclusive of all claims and counterclaims. The undisputed facts instead demonstrate that the December 12, 2012 Final Order provided preliminary findings on liability and left counterclaims and affirmative defenses for a later date. Ex. 6 of Rep. to Resp. at 1. Furthermore, unlike in *China Grove*, the parties did not consent to venue in the Southern District of New York for all proceedings relevant to the arbitration agreement as noted by the fact that the evidentiary hearing that led to the Final Monetary Award was held in Boston, Massachusetts, and even under First State's reading of Section 7,

confirmation of the award would therefore need to take place in the District of Massachusetts.

First State further argues that National Casualty recognized that the contract issues before the panel during the December 10th hearing "were the subject of an arbitration 'hearing.'" Pl. Opp. at 4. However, whether or not there was a hearing on December 10, 2012, is not in dispute. The debate is around whether the hearing on December 10, 2012, was "the arbitration hearing" for purposes of Section 7 of the Agreement. The Court finds that the hearing was not "the arbitration hearing" for purposes of Section 7 of the Agreement.

While the complexity of the arbitration can undoubtedly demand a series of proceedings in order to reach completion, *see e.g.*, *Stolt-Nielsen SA v. Celanese AG*, 430 F. 3d 567 (2d Cir. 2005) (" [a]rbitrators may need to hear testimony or receive evidence on preliminary issues such as whether an arbitration clause is enforceable or whether a claim is barred by relevant statutes of limitations in advance of an ultimate hearing on the substantive merits of the underlying claims....") this does not mean that there are a number of "arbitration hearings." If, as First State readily acknowledges, an arbitration hearing is comparable to trial (Pl. Opp. at 2, 9), then just as there are many preliminary hearings, motions, and determinations that often precede the ultimate and singular trial, there can be preliminary hearings, motions, and determinations that precede the ultimate arbitration hearing.

As both findings of liability and damages occurred in the evidentiary hearing in Massachusetts on March 12, 2013, that hearing is more appropriately "the arbitration hearing" referenced in Section 7 of the Agreement. Furthermore, interpreting the language of the Agreement in this way ensures that this Court and the District of Massachusetts are not making separate and concurrent liability confirmation determinations at the heart of this arbitration, threatening to both duplicate judicial resources and undermine finality of each court's decision.

Given the clear language of the Agreement, this case is "indeed, in the 'wrong' district" under 28 U.S.C. § 1406(a). *SST Global Tech., LLC v. Chapman*, 270 F. Supp. 2d 444, 452 (S.D.N.Y 2003). Given that liability and damages determinations were made by the Panel in Boston, Massachusetts and that there is active litigation on this case in the District of Massachusetts (Decl. of Kendall W. Harrison in Supp. of Mot. to Dismiss ¶¶10,13) the Court finds that it is within the interest of justice to transfer the case to the District of Massachusetts, where venue is proper pursuant to the parties Agreement. *See Metropa Co., Ltd. v. Choi*, 458 F. Supp. 1052, 1055-56 (S.D.N.Y. 1978) (stating that "courts will generally transfer such cases when it is clear wherein proper venue would be laid"); *see also Int'l Flavors & Fragrances Inc. v. Van Eeghen Int'l B.V.*, 06 CIV. 490 (JFK) 2006 WL 1876671 (S.D.N.Y. July 6, 2006) (noting that "dismissal is a harsh remedy that is best avoided when another avenue is open" and finding that when "as a practical matter, if the Court dismisses the instant action and IFF inevitably will re-file in the Eastern District of California…the court sees no need to dismiss in order to achieve that result.").

IV. Conclusion

For the reasons discussed herein, Defendant's motion to transfer to the United States District Court for the District of Massachusetts is granted. This order resolves Docket Number 26 and closes the case. The Clerk of the Court is directed to terminate this action.

SO ORDERED.

Dated: September 27, 2013
New York, New York

ALISON J. NATHAN
United States District Judge