IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ALSTOM POWER INC.	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Case No. 04C-02-275 CLS
	)	
DUKE/FLUOR DANIEL CARRIBBEAN S.E.	)	
	)	
Defendant,	)	
	)	

Upon Consideration of Defendant's Motion to Dismiss.
DENIED.

Date submitted: October 27, 2004
Date decided: January 31, 2005

MEMORANDUM OPINION

Richard R. Wier, Jr., Esquire, Daniel W. Scialpi, Wilmington, Delaware, James E. Edwards, Jr., Esquire, John F. Morkan III, Esquire, John Anthony Wolf, Esquire, Jeffrey A. Regner, Esquire, Ober, Kaler, Grimes & Shriver, Baltimore, Maryland, Attorneys for the Plaintiffs.

Donald E. Reid, Esquire, Morris, Nichols, Arsht & Tunnel, Wilmington, Delaware. Fred T. Lowrance, Esquire, Michael S. Malloy, Esquire, Parker Poe Adams & Bernstein L.L.P, Charlotte, North Carolina, Attorneys for the Defendants.

SCOTT, J.

I. Background

Defendant Duke Fluor Daniels ("Duke") is a Puerto Rican special partnership which has its corporate headquarters in Charlotte, North Carolina. Plaintiff Alstom Power, Inc. ("Alstom") is a Delaware corporation which has its headquarters in Windsor, Connecticut. Duke constructed a power plant in Puerto Rico pursuant to a contract with AES Puerto Rico, L.P.. Alstom was a subcontractor to Duke pursuant to two subcontracts. The subcontracts were negotiated and executed in North Carolina. Provision 39.4 of the contract reads "[t]his Contract shall be subject to the law and jurisdiction of the State of Delaware, unless expressly designated otherwise within this Contract." The performance of the contracts was in Puerto Rico.

AES filed a lawsuit in Delaware Federal District Court alleging that Duke had failed to complete its work as required by their contract. In addition, Duke filed a Third Party Complaint in the District of Delaware action alleging that Alstom should indemnify Duke on any claims by AES. Alstom then filed a Counterclaim, alleging breach of the subcontracts by Duke.

On October 31, 2003, Duke and AES settled their dispute. AES' Complaint was subsequently dismissed on November 18, 2003. On September 27, 2004, Judge Farnan of the District of Delaware granted Alstom's Motion to Dismiss. The Delaware Federal action had been continuing under supplemental jurisdiction because Duke and Alstom were not completely diverse after AES settled. In his discretion, Judge Farnan dismissed the action against Alstom holding that because only state claims remained, the suit was more appropriate for the state court.

The claims that remain were filed in this Court on February 25, 2004 by Alstom. Alstom is claiming damages in excess of $25 million based on breach of contract, breach of implied contract, unjust enrichment, indemnification, and equitable relief. Duke claims $90 million in damages based on contractual indemnity, common law indemnity, and breach of contract.

II. Discussion

A. Forum Selection Clause Conferring Personal Jurisdiction

The first issue this Court must decide is whether *in personam* jurisdiction exists over Duke under the forum selection clause. Duke asserts that provision 39.4 was merely a choice of law provision. Accordingly, they are not subject to litigation in Delaware. In contrast, Alstom argues this clause is a forum selection clause, which, due to its language, establishes Delaware has jurisdiction over Duke.

In considering the enforceability of forum selection provisions, Delaware courts have followed the approach adopted by the United States Supreme Court in *M/S Bremen v. Zapata Off-Shore Company*.[1] In *Zapata*, the Court held that "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."[2] Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.[3]

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[1] 407 U.S. 1 (1972); *Chaplake Holdings, Ltd. v. Chrysler Corp.*, 1995 WL 653510 *6 (Del. Super. 1995).
[2] *Zapata*, 407 U.S. at 18.
[3] *Id*. at 16.

In addition, "it is well settled that a party can consent to the personal jurisdiction of the court."[4] A forum selection clause is one avenue to expressly consent to personal jurisdiction.[5] In *Resource Ventures v. Resources Management International, Inc*., the parties to the litigation had a forum selection clause in their contract. It read "'[i]n the event of litigation, the case shall be tried by the appropriate courts in the State of Delaware.'"[6] The defendants conceded that it was a forum selection clause, however, they claimed the provision did not confer jurisdiction over them because of the lack of the word "jurisdiction."[7] The Court rejected this argument and held that there was jurisdiction over the defendants.[8] The Court reasoned that "[s]ince the parties have asserted that the purpose of the clause was to provide a forum in the event of litigation, then the parties must have also intended the clause to be an agreement as to personal jurisdiction so that any lawsuit could be maintained in the Delaware forum."[9]

Duke would like this Court to follow the holding in *Eisenbud v. Omnitech Corporate Solutions, Inc.* to deny jurisdiction exists.[10] The forum agreement in *Eisenbud* read:

> The parties hereto agree that if any disagreement shall arise between the Shareholders hereunder, the same shall be resolved pursuant to the laws of New Jersey. As the corporation maintains its principal office in Bergen County, New Jersey, the parties further agree that the Court having competent jurisdiction over all legal and equitable matters shall be the Superior Court of the State of New Jersey in Bergen County, New Jersey.[11]

There, the defendants argued that the forum selection clause exclusively restricted the case to New Jersey. The court disagreed and held that "absent clear language, a court will not

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[4] *Res. Ventures, Inc. v. Res. Management Int'l, Inc.*, 42 F.Supp.2d 423, 431 (D. Del. 1999).
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Resources Ventures*, 42 F.Supp.2d at 432.
[10] 1996 WL 162245 (Del. Ch. 1996).
[11] *Id*. at *1.

interpret a forum selection clause to indicate the parties intended to make jurisdiction exclusive."[12] Then Vice-Chancellor Steele reasoned "[p]arties should not be bound forever to a static forum selection process unless unequivocal language expresses that intention so clearly that a court could not interpret the professed forum selection clause otherwise."[13]

The Court finds that clause 39.4 is a forum selection clause agreed upon by Plaintiff Alstom and Defendant Duke to consent to jurisdiction of the Delaware Courts. Therefore, Defendant Duke Fluor Daniel's Motion to Dismiss is **DENIED**.

This Court disagrees with Defendant's assertion that *Eisenbud* should govern the instant Motion. This case is distinguishable from *Eisenbud*. In *Eisenbud* the forum selection clause was for New Jersey and the lawsuit was brought in Delaware. The Court believed that New Jersey was not the exclusive forum. Here, the forum selection clause is for Delaware and the lawsuit is brought in Delaware. Exclusivity is not the issue. In order for *Eisenbud* to govern, Plaintiffs would have to have brought suit in Delaware when the forum selection clause designated North Carolina for litigation.

In addition, Duke will not be inconvenienced and miss its day in court by litigating in Delaware. According to *Zapata*, Duke had to show why litigating in Delaware would be "so gravely difficult." Duke has failed to do so. Neither in its brief, nor during the Motion did Duke focus on why Delaware would be an inconvenient forum. This Court acknowledges that Duke has its headquarters in North Carolina, however, that alone does not warrant a dismissal of Duke for inconvenience.

Finally, Duke is a sophisticated entity that engaged in the formation of a contract. Surely it had the opportunity and resources to bargain for a fair contract. The Court finds it

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[12] *Id*. at *1.
[13] *Id*. at *2.

very compelling that Duke entered into a contract subjecting itself to the jurisdiction of Delaware. Provision 39.4 specifically states that the contract would be subject to Delaware *unless expressly designated otherwise within this contract*. (Emphasis added). No where in the contract is another forum selected. Like the clause in *Resources Ventures*, this provision confers jurisdiction over Duke.

B. Service of Process

Having found that Duke consented to personal jurisdiction in Delaware, this Court must now determine if and how process can be served. Duke has repeatedly asserted in its Motions to Dismiss that service of process is not proper under the Court rules, Delaware Long-Arm Statute, or otherwise. This Court disagrees.

Superior Court Civil Rule 4(f)(VI) provides: "(f) Service of summons shall be made as follows: (VI) [w]henever a statute, rule of court or an order of court provides for service of summons or of a notice or of an order in lieu of summons upon a party not an inhabitant of or found within the State, service shall be made under the circumstances and in the manner prescribed by that statute, rule or order." This Court holds that Alstom has properly served Duke through the Long-Arm statute. Duke's Motion to Dismiss is **DENIED**.

Six *Del. C.* § 17-911(a) governs service of process on non-resident partnerships by way of the Secretary of State. It states in pertinent part:

> Any foreign limited partnership which shall do business in the State of Delaware without having registered under § 17-902 of this title shall be deemed to have thereby appointed and constituted the Secretary of State of the State of Delaware its agent for the acceptance of legal process in any civil action, suit or proceeding . . .

In *USH Ventures v. Global Telesystems Group, Inc.*,[14] Judge Quillen relied on Superior Court Civil Rule 4(f)(VI) in determining how to sufficiently serve process on a party. In *USH*, the party consented to jurisdiction in the State, but did not reside in Delaware. The party also appeared to lack any other contact sufficient for service of process. The court found that Rule 4 "clearly demonstrates that it allows the Court to tailor a manner of service when the facts of the particular case make it difficult to effectuate service of process."[15] The party challenging process in that case was defendant GTS-Hungary, a Hungarian limited liability company. GTS, a co-defendant, was a Delaware corporation and a joint-venturer with all GTS groups. The court tailored service of process under Rule 4 by allowing GTS-Hungary to be served through GTS.[16]

This Court also finds persuasive the recent Chancery court decision in *Hovde Acquisition, LLC v. Thomas*.[17] Like Judge Quillen, Vice-Chancellor Lamb relied on Court of Chancery Rule 4(d)(7) to tailor a means of service of process in cases where a person has consented to jurisdiction, but not to service of process. The court reasoned that if a party consented to jurisdiction of a state, "[t]hose parties must have reasonably expected to be served by some method of service. . ."[18] Moreover, the court reasoned that if a party consented to jurisdiction, but there was no valid way to serve them, the consent would be rendered useless.[19]

This Court holds that Duke has been properly served through the Long-Arm Statute. Like the cases above, this Court must tailor a means of service of process. Duke consented to

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[14] 1998 WL 281250 (Del. Super.).
[15] *USH Ventures*, 1998 WL 281250 *7.
[16] *Id*.
[17] 2002 WL 1271681 (Del. Ch.).
[18] *Id*. at *4.
[19] *Id*.

jurisdiction, therefore, Duke has consented to service of process by some means. This Court holds that a foreign limited partnership who consents to jurisdiction through a forum selection clause, "does business" for purposes of 6 *Del. C.* § 17-911, and can be served through the Secretary of State. Because the forum selection clause subjected Duke to Delaware's jurisdiction, they have sufficiently engaged in business to satisfy the Long-Arm Statute. Alstom's service through the Secretary of State is, therefore, valid. Duke's Motion is **DENIED**.

IT IS SO ORDERED.

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Judge Calvin L. Scott, Jr.