UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 17-22366-WILLIAMS

OPEN SEA INVESTMENT, S.A.,

Plaintiff,

vs.

CRÉDIT AGRICOLE CORPORATE AND INVESTMENT BANK and EMILIO VOLZ,

Defendants.
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ORDER

THIS MATTER is before the Court on the following motions: (DE 6) Defendant Crédit Agricole Corporate and Investment Bank's ("Crédit Agricole") motion to dismiss on grounds of *forum non conveniens*; (DE 8) Defendant Crédit Agricole's motion to compel arbitration and stay action; (DE 7) Defendant Emilio Volz's motion to quash service of process or to dismiss complaint for lack for personal jurisdiction; and (DE 12) Plaintiff Open Sea Investment, S.A.'s ("Open Sea") motion to remand this case to state court. These motions are fully briefed and ripe for adjudication. For the reasons below, Defendant Crédit Agricole's motion to compel arbitration is **GRANTED**. All other pending motions are **DENIED.**

I. BACKGROUND

A. The Arbitration Agreement

Open Sea is a Panamanian company owned by Roger Russowski, a Brazilian citizen. (DE 10-11, Compl., ¶¶ 3, 17-18). Defendant Crédit Agricole is a French bank with its principal place of business in Florida. (*Id.* ¶ 4). Defendant Volz works as a

senior wealth manager for a subsidiary of Crédit Agricole. (*Id.* ¶ 5); (DE 7-1, Volz Decl., ¶¶ 4-6). In the fall of 2009, Russowski—acting on Volz's "solicitations and purported experience and knowledge"—opened an investment account owned by Open Sea to be managed by Volz with Crédit Agricole's Miami office. (Compl. ¶¶ 20-21).

To that end, on August 21, 2009, Russowski, on behalf of Open Sea, executed an Account Opening Application (the "Application") governing the terms of Open Sea's investment account with Crédit Agricole. (*Id.* ¶¶ 26-33); (DE 1-2, Application, at 7). In the Application, just above Russowski's signature, in bold, Russowski "acknowledge[d] receipt of and agree[d] to bound by all of the provisions contained in the bank's general account terms and conditions [(the "Terms and Conditions)]." (*Id.*). The Application also includes a choice of law and forum selection clause providing that the Application and Terms and Conditions are governed by Florida law, and that Open Sea "irrevocably submits to the jurisdiction of any state and federal court in Miami-Dade County, Florida in any action or proceeding relating in any way to" the Application, the Terms and Conditions, or Open Sea's account with Crédit Agricole. (*Id.*).

Part of and attached to the Terms and Conditions is a document entitled Investment Advisory Agreement, which includes an arbitration provision requiring arbitration in Miami-Dade County, Florida, of all disputes between Open Sea and Crédit Agricole "arising out of or concerning" Open Sea's investment account:

> The Client agrees and the Bank agrees by carrying the Account that all controversies between the Client and the Bank or its agents, representatives, or employees arising out of or concerning the Account, any transactions between the Client and the Bank or for the Account, or the construction, performance or breach of this or any other agreement between the Client and the Bank, whether entered into prior to, on, or subsequent to the date below, shall be determined by arbitration in

> accordance with the rules of the American Arbitration Association. Any arbitration proceeding between the Client and the Bank shall be held in Miami-Dade County, Florida.
>
> The award of the arbitrator or a majority of the arbitrators shall be final. Judgment on the award rendered may be entered in any state or federal court having jurisdiction.

(DE 15-1, Terms and Conditions, at 24).[1]

B. Procedural History

Open Sea filed this lawsuit against Defendants in the Circuit Court for Miami-Dade County on April 5, 2017, asserting claims for Negligence (Count I), Negligent Misrepresentation (Count II), Fraudulent Misrepresentation (Count III), and Breach of Fiduciary Duty (Count IV) relating to Defendants' role in the allegedly fraudulent and improper sale of debt securities to Open Sea. (Compl. ¶ 1).

On June 16, 2017, Crédit Agricole removed the action to this Court. (DE 1). Based on the Application and arbitration provision included in the Terms and Conditions, Crédit Agricole cited the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), and its implementing jurisdiction, 9 U.S.C. §§ 201-208, as the basis for federal jurisdiction. (DE 1). Crédit Agricole then filed a motion to compel arbitration and stay case (DE 8) and a motion to dismiss Open Sea's complaint on grounds of *forum non conveniens* (DE 6). Volz moved to quash service of process or, alternatively, to dismiss the complaint based on

[1] Crédit Agricole's notice of removal includes a copy of its terms and conditions effective 2015 (DE 1-3) because, according to Crédit Agricole, "they govern Open Sea's claims as the most current version of the document." (DE 15 at 9, n.3). In its motion to remand, Open Sea argues that no binding arbitration agreement exists because it could not have agreed in 2009 to an arbitration provision that was created in 2015. Crédit Agricole, however, has submitted the 2009 terms and conditions effective when the Application was executed, and it includes an identical arbitration provision. (DE 15-1).

lack of personal jurisdiction (DE 7). For its part, Open Sea timely moved to remand this action back to state court, arguing that the Parties never entered into an arbitration agreement as defined under the Convention, and thus the Court lacks subject matter jurisdiction over this case. (DE 12).

II. LEGAL STANDARD

The Convention requires courts of signatory nations, such as the United States, to give effect to private arbitration agreements and to enforce arbitral awards made in signatory nations. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I (1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3; *see also Sierra v. Cruise Ships Catering & Servs. Int'l, N.V.*, 631 F. App'x 714, 715-16 (11th Cir. 2015); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 959 (10th Cir. 1992) (The Convention "imposes a mandatory duty on the courts of a Contracting State to recognize, and enforce an agreement to arbitrate . . . ."). The United States enforces its agreement to the Convention's terms through Chapter 2 of the Federal Arbitration Act ("FAA"). *See* 9 U.S.C. §§ 201-208.

In ruling on a motion to enforce an arbitration agreement under the Convention, a district court conducts a "very limited inquiry." *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005). "[T]he Convention requires that a motion to compel arbitration must be granted so long as (1) the four jurisdictional prerequisites are met and (2) no available affirmative defense under the Convention applies." *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 546 (11th Cir. 2016) (emphasis in original). The four jurisdictional prerequisites that must be satisfied for the Convention to apply are:

> (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

Escobar v. Celebration Cruise Operator, Inc., 805 F.3d 1279, 1285 (11th Cir. 2015) (citing *Bautista*, 396 F.3d at 1294-95 & n.7). If the agreement satisfies those jurisdictional prerequisites, the district court must order arbitration unless any of the Convention's affirmative defenses apply. *Bautista*, 396 F.3d at 1294-95. "That is, arbitration is mandatory unless the plaintiff proves that the agreement is 'null and void, inoperative or incapable of being enforced.'" *Azevedo v. Carnival Corp.*, 2008 WL 2261195, at *3 (S.D. Fla. May 30, 2008) (quoting *Vacaru v. Royal Caribbean Cruises, Ltd.*, 2008 WL 649178, at *4 n.3 (S.D. Fla. Feb. 1, 2008)). The Convention "generally establishes a strong presumption in favor of arbitration of international commercial disputes." *Bautista*, 396 F.3d at 1295 (citation omitted); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-31 (1985); *Escobar*, 805 F.3d at 1286.

III. ANALYSIS

Crédit Agricole argues that federal question jurisdiction exists under the Convention because Open Sea's claims are subject to the Parties binding international arbitration agreement, consisting of the Application and Terms and Conditions, which includes an arbitration provision. Crédit Agricole moves to compel arbitration based on this arbitration agreement. Open Sea, however, argues that the Convention does not apply, and thus the Court lacks jurisdiction and remand is required, because there is no

"agreement in writing" to arbitrate.[2] Specifically, Open Sea asserts that (1) the Terms and Conditions were not incorporated by reference in the signed Application; and (2) the arbitration provision in the Terms and Conditions "directly conflicts" with the forum selection clause in the Application, rendering the arbitration provision invalid. (DE 19 at 4-10).

1. The Signed Application Incorporates The Arbitration Provision By Reference

Open Sea argues that the Terms and Conditions is "not sufficient to satisfy the 'agreement in writing' requirement" because it was "not signed by Open Sea, was never provided to Open Sea, and . . . was not properly incorporated by reference" because it was not sufficiently described in the Application (DE 19 at 4). These arguments are belied by the record and the law.

Open Sea's beneficial owner, Roger Russowski, executed the Application for Open Sea. (DE 1-2; DE 6-1, Pate Decl., ¶ 13; Compl. ¶ 21). On the last page, he printed and signed his name below three paragraphs in bold text, the first of which provides:

> **By signing this application, the client acknowledges receipt of and agrees to be bound by all of the provisions contained in the bank's general account terms and conditions . . . .**

(DE 1-2 at 7).

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[2] Open Sea's only challenge to the Court's jurisdiction under the Convention and to arbitration of its claims is that no valid "agreement in writing within the meaning of the Convention" exists. Open Sea does not dispute that if the Application and Terms and Conditions together constitute a valid agreement in writing to arbitrate, then all other elements of the *Bautista* test are met, and no affirmative defense applies. *See Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1285 (11th Cir. 2015) (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1294-95 & n.7 (11th Cir. 2005). Open Sea also does not dispute that its claims fall within the scope of the arbitration provision.

"The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Bautista*, 396 F.3d at 1296 n.9; *see e.g., Alfred v. Royal Caribbean Cruises Ltd.*, No. 08-20390-CIV, 2008 WL 11331852, at *3 (S.D. Fla. Mar. 10, 2008) (holding that an arbitration provision incorporated into a separate signed document constitutes an agreement in writing under the Convention."). And "[i]t is a generally accepted rule of contract law that, where a writing expressly refers to and sufficiently describes another document, that other document . . . is to be interpreted as part of the writing." *Avatar Props., Inc. v. Greetham*, 27 So. 3d 764, 766 (Fla. 2d DCA 2010) (reversing the denial of a motion to compel arbitration). The signed Application satisfies this standard by including language (in bold) that the signor specifically "acknowledges receipt of and agrees to be bound by all of the provisions contained in the bank's general account terms and conditions." (DE 1-2 at 7). The arbitration provision in the Terms and Conditions is therefore part of the signed, written Application.

Open Sea argues that it should not be bound by the Terms and Conditions because it was never provided to Russowski. The Court initially notes that Crédit Agricole disputes this assertion. Alexandre Pate, who supervises the operations of Crédit Agricole's Miami agency, attests that on "August 21, 2009 Russowski was provided with the General Account Terms and Conditions and Investment Advisory Agreement." (DE 8-1 ¶ 14).

In light of this evidence and the law in the Eleventh Circuit, Open Sea's argument that Russowski never received a copy of the Terms and Conditions is unavailing. When Russowski signed the Application and specifically acknowledged receiving the Terms

and Conditions, which includes an arbitration provision, he entered into a signed "agreement in writing" to arbitrate. *See Hodgson v. Royal Caribbean Cruises, Ltd.*, 706 F. Supp. 2d 1248, 1256 (S.D. Fla. 2009) ("The [Collective Bargaining Agreement], which contains an arbitration clause, is incorporated expressly into the Agreement. Hodgson agreed to be bound by its terms and conditions, and his signature appears immediately above the acknowledgment-of-receipt paragraph . . . . In conducting a limited inquiry 'colored by a strong preference for arbitration,' there is an agreement in writing within the meaning of the Convention." (citations omitted)); *Hiotakis v. Celebrity Cruises, Inc.*, No. 10-22954-CIV-LENARD/O'SULLIVAN, 2011 U.S. Dist. LEXIS 58396, at *17 (S.D. Fla. May 31, 2011) (finding the first jurisdictional prerequisite was met where a signed agreement incorporated by reference another agreement containing an arbitration clause, and further finding that by signing the agreement, the party acknowledged receipt of the other agreement); *Allen v. Royal Caribbean Cruise, Ltd.*, No. 08-22014-CIV, 2008 WL 5095412, at *4 (S.D. Fla. Sept. 30, 2008) ("[A]n agreement in writing to arbitrate exists even where the arbitration language is not stated in the main contract itself but, rather, is contained in a separate contract that is incorporated by reference into the main contract" and where plaintiff "acknowledged receipt" of the separate, incorporated contract upon signing the main contract.), *aff'd sub nom. Allen v. Royal Caribbean Cruises, Ltd.*, 353 F. App'x 360 (11th Cir. 2009).

Moreover, the Eleventh Circuit has rejected Open Sea's argument that the Court should ignore the plain language of the Application acknowledging receipt of the arbitration provision. In *Bautista,* a group of plaintiff-seaman challenged the application of an arbitration clause to their employment contracts claiming that they were never

specifically notified of the arbitration provision. 396 F.3d at 1301. The Eleventh Circuit emphatically rejected this argument:

> Plaintiffs, however, offer no authority indicating that the Convention or the Convention Act impose upon the party seeking arbitration the burden of demonstrating notice or knowledgeable consent. To require such an evidentiary showing in every case would be to make an unfounded inference from the terms of the Convention and would be squarely at odds with a court's limited jurisdictional inquiry, an inquiry colored by a strong preference for arbitration . . . . [V]irtually every case would be susceptible to a dispute over whether the party resisting arbitration was aware of the arbitration provision when the party signed the agreement. In the limited jurisdictional inquiry prescribed by the Convention Act, we find it especially appropriate to abide by the general principal that "[o]ne who has executed a written contract and is ignorant of its contents cannot set up that ignorance to avoid the obligation absent fraud and misrepresentation."

Id. at 1301 (citing *Vulcan Painters v. MCI Constructors,* 41 F.3d 1457, 1461 (11th Cir. 1995)); *see Allen*, 2008 WL 5095412, at *5 (explaining that *Bautista* rejected the argument that, after acknowledging receipt of a document, a plaintiff could avoid being bound by that document by disavowing notice of its contents). Open Sea's signed acknowledgement that it received the Terms and Conditions, coupled with the record evidence that Crédit Agricole in fact received the document,[3] compels the conclusion that Open Sea is bound by a "signed agreement in writing" to arbitrate its claims.

2. The Arbitration Provision Does Not Conflict With The Forum Selection Clause

Open Sea next argues that the "jurisdictional clause in the [Application] and the arbitration clause in the Terms and Conditions contradict each other," and that—because the two clauses "cannot be reconciled"—the Court "must find that no arbitration agreement exists." (DE 19 at 8). The Court disagrees.

[3] The cases cited by Open Sea are distinguishable: None involve both a plaintiff who specifically acknowledged receipt of the incorporated document and additional record evidence that the plaintiff in fact received the incorporated document.

As explained by the Ninth Circuit,

> [N]o matter how broad the arbitration clause, it may be necessary to file an action in court to enforce an arbitration agreement, or to obtain a judgment enforcing an arbitration award, and the parties may need to invoke the jurisdiction of a court to obtain other remedies. It is apparent that the venue provision here was intended for these purposes, and to identify the venue for any other claims that were not covered by the arbitration agreement.

Mohamed v. Uber Techs., Inc., 848 F.3d 1201 (9th Cir. 2016) (citations omitted); *see also Rimel v. Uber Techs., Inc.*, 246 F. Supp. 3d 1317, 1325 (M.D. Fla. 2017).

Here, the arbitration provision is broad, concerning "all controversies . . . arising out of or concerning the Account." (DE 15-1 at 24). The forum selection clause applies if the parties must resort to the court to obtain judicial intervention, *e.g.*, to compel arbitration, seek enforcement of a subpoena, or confirm an arbitral award. The Court therefore concludes that the jurisdictional clause and the arbitration provision are not inconsistent as to render the arbitration provision invalid.

3. Crédit Agricole's Motion To Dismiss On Grounds Of Forum Non Conveniens Is Denied

Finally, before moving to compel arbitration, Crédit Agricole moved to dismiss this case on the basis of *forum non conveniens*. (DE 6). This motion is denied. Crédit Agricole removed this case because the Application and Terms and Condition require binding arbitration of Open Sea's claims in Miami-Dade County. The Parties' Agreement clearly specifies Miami-Dade County as the proper venue for legal disputes concerning the Account. *See, e.g., Linea Navira De Cabotaje, C.A. v. Mar Caribe De Navegacion, C.A.*, 169 F. Supp. 2d 1341, 1350 (M.D. Fla. 2001) (finding that an arbitration provision stating that any disputes shall be arbitrated in New York waived any

forum non conveniens arguments because "[t]he integrity of the parties' agreement to arbitrate any disputes in New York trumps [Defendant's] complaints of inconvenience."). As a result, the Court will honor the Parties' agreement to resolve their dispute in Miami-Dade and deny the motion to dismiss.

IV. CONCLUSION

For the foregoing reasons, the Court **ORDERS AND ADJUDGES** that:

1. Defendant Crédit Agricole's motion to compel arbitration and stay action (DE 8) is **GRANTED**. Plaintiff Open Sea's claims against Defendants shall be submitted to binding arbitration before a neutral arbitrator pursuant to the terms of the arbitration provision in the Terms and Conditions.

2. Judicial proceedings in this matter are **STAYED**.

3. Plaintiff Open Sea's motion to remand (DE 12) is **DENIED.**

4. Defendant Crédit Agricole's motion to dismiss on grounds of *forum non conveniens* (DE 6) is **DENIED.**

5. Defendant Emilio Volz's motion to quash service of process or to dismiss complaint for lack for personal jurisdiction (DE 7) is **DENIED AS MOOT.**

6. The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in chambers in Miami, Florida, this 12th day of January, 2018.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE