UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

KELLER NORTH AMERICA, INC.,

Plaintiff,

and

HAMPTON ROADS CONNECTOR PARTNERS,

Intervenor-Plaintiff,

v. **Civil No. 4:23cv56**

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON subscribing to Policy Number CNNCN2001061; SCOR UK Company Limited,

Defendants.

OPINION AND ORDER

This matter is before the Court on a motion to stay and compel arbitration filed by Defendants SCOR UK Company Limited, Helvetia Swiss Insurance Company in Liechtenstein Ltd., American International Group UK Limited, Aviva Insurance Limited, Allianz Global Corporate & Specialty SE, Aspen Insurance UK Ltd., Allied World Managing Agency Limited, AXIS Specialty Europe SE d/b/a AXIS Specialty London, Great Lakes Insurance SE, and QBE Europe (collectively, "Defendants").[1] ECF No. 3. After careful

[1] Defendants are certain insurers subscribing to Policy No. CNNCN2001061, ECF No. 1, at 1, and are named in the operative complaint as "Certain Underwriters at Lloyd's of London subscribing to Policy Number CNNCN2001061; SCOR UK Company Limited," ECF No. 1-1, at 69.

consideration of the briefs submitted by the parties, the Court determines that a hearing is unnecessary because the facts and legal contentions are adequately presented, and oral argument would not aid in the decisional process. Fed. R. Civ. P. 78(b); E.D. Va. Loc. R. 7(J). For the reasons discussed below, the Court **GRANTS** Defendants' motion. ECF No. 3.

I. FACTUAL AND PROCEDURAL HISTORY

Defendants subscribe to a "builders risk" insurance policy, Policy No. CNNCN2001061, (the "Policy") issued to plaintiff-intervenor Hampton Roads Connector Partners ("HRCP"). ECF No. 1, at 4. This case arises out of an insurance claim submitted by plaintiff Keller North America, Inc., ("Keller") under the Policy for claimed losses from an incident that occurred during the construction of the Hampton Roads Bridge-Tunnel Expansion Project (the "HRBT Project"), for which HRCP is the construction contractor. ECF No. 23, at 4. Keller, as a subcontractor on the HRBT Project, is also a "named insured" under the Policy. ECF No. 1-3, at 4.

The specific facts underlying Keller's insurance claim are of limited relevance to the instant motion to stay and compel arbitration, but the Court will summarize them briefly to offer some context. As described in Keller's opposition brief, the HRBT Project involves the construction of "new twin tunnels running across the harbor" between Norfolk and Hampton, Virginia. ECF No.

6, at 2. Prior to building the new tunnels, it was necessary to construct "two Tri-Cell launch pits-slurry walls, one on the South Island and one on the North Island." Id. HRCP subcontracted with Keller to construct the Tri-Cell launch pit-slurry walls. Id. Keller began work on the "South Island Tri-Cell launch pit slurry walls" on December 3, 2020. Id. On December 16, "it was discovered that panel PP-13 had moved from its design location, approximately three to four feet laterally at its top and nine feet at its bottom, towards panel PC-14's excavation." Id. at 2-3. "The movement rendered this panel segment useless, . . . [and] HRCP subsequently determined that the only viable repair option for the South Island Tri-Cell launch pit was to build a functionally equivalent diaphragm wall segment." Id. at 3. At HRCP's direction and in accordance with HRCP's remediation plan, Keller repaired the damaged South Island Tri-Cell. Id.

After completing its work on the South Island Tri-Cell, Keller submitted an insurance claim under the Policy, seeking coverage for the losses that Keller incurred in connection with the South Island Tri-Cell incident and remediation. ECF No. 3, at 3. According to Keller, "Defendants [] refused to admit liability for a majority of Keller's claim," ECF No. 6, at 4, and, on August 12, 2022, Keller instituted a civil action against Defendants in the Circuit Court for the City of Hampton, ECF No. 1-1, at 6-16. One month later, Keller filed an amended complaint, again in Hampton

Circuit Court. Id. at 64-81. Keller did not serve either complaint on Defendants until it requested that Defendants waive service on March 30, 2023, ECF No. 1, at 2, one day after Keller, Defendants, and HRCP "jointly began mediation," ECF No. 24, at 2. Defendants waived service on April 25, 2023. ECF No. 1, at 2.

Three days later, on April 28, Defendants removed the Hampton action to this Court on two independent bases: "Removal under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" and "Removal based on Diversity Jurisdiction." ECF No. 1, at 4, 8. On that same day, Defendants filed the instant motion to stay this action and to compel arbitration of the dispute. ECF No. 3. Keller filed an opposition brief on May 9, 2023. ECF No. 6. After initially filing their reply on May 17, Defendants resubmitted their reply brief, accompanied by a notice of supplemental authority, with leave of Court on May 23, 2023. ECF Nos. 10, 16.

On May 19, 2023, HRCP filed a motion to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. ECF No. 11. Defendants filed a response on June 2, 2023, indicating no opposition to HRCP's motion "insofar as HRCP seeks to intervene in this lawsuit" but requesting that HRCP be bound by the Court's eventual ruling on Defendant's motion to stay and compel

arbitration.[2] ECF No. 20, at 2. HRCP filed a reply on June 5, 2023, attaching a proposed response brief to Defendants' motion to stay and compel arbitration. ECF No. 21. On June 12, 2023, the Court granted HRCP's motion to intervene and offered Defendants the opportunity to reply to HRCP's response to their motion to stay and compel arbitration. ECF Nos. 22, 24. Defendants filed a reply brief in support of their motion and in response to HRCP on June 16, 2023. ECF No. 30. Accordingly, Defendants' motion is ripe for consideration.[3]

II. LEGAL STANDARD

Defendants' motion implicates both the Federal Arbitration Act (the "FAA") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), an international treaty that "sets forth standards for the observance and enforcement of arbitration awards and requires signatory states to recognize and enforce such arbitration awards from other states." Reddy v. Buttar, 38 F.4th 393, 398 (4th Cir. 2022). "The United States acceded to the Convention in 1970, see 21 U.S.T. 2517, and Congress enacted an implementing statute that same year, see 9 U.S.C. §§ 201-08." Id. Since that time, the "emphatic

[2] Keller did not file a response to HRCP's motion.

[3] On July 21, 2023, the parties jointly moved to stay this case until the Court resolved Defendants' motion to stay and compel arbitration. ECF No. 36. That same day, the Court granted the joint motion to stay, and this case has been stayed since that date. ECF No. 37.

federal policy in favor of arbitral dispute resolution . . . [has] applie[d] with special force in the field of international commerce." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985). Section 203 of the FAA grants district courts original jurisdiction over any "action or proceeding falling under the Convention." 9 U.S.C. § 203; see also Reddy, 38 F.4th at 398 (explaining that "both § 203 and [28 U.S.C.] § 1331 confer subject matter jurisdiction over enforcement actions brought under the Convention"). An arbitration agreement is deemed to fall under the Convention if it "aris[es] out of a legal relationship, whether contractual or not, which is considered as commercial," as long as that relationship is not "entirely between citizens of the United States," unless it "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[4] 9 U.S.C. § 202.

[4] Neither Keller nor HRCP has contested that the Policy's arbitration agreement "falls under" the Convention, given that: (1) it arises out of the commercial, legal relationship established by the Policy; and (2) each of the Defendant insurers is a foreign corporation. As discussed in Part III.B below, Keller instead argues that the Convention does not apply here because Virginia insurance law "reverse preempts" the FAA and the Convention and voids the Policy's arbitration agreement. However, Keller's challenge does not undermine this Court's federal question jurisdiction to determine whether the Policy's arbitration agreement is enforceable. Notably, as the Fourth Circuit recently explained in Reddy, the jurisdictional question is different than the question of whether the arbitration agreement is ultimately enforceable under the Convention, which is a separate merits determination. 38 F.4th at 399 ("[T]he Convention's requirements for an agreement that can give rise to an enforceable award speak to the merits of a plaintiff's enforcement action, whereas § 203 confers subject matter jurisdiction on U.S. district courts over actions 'falling under' the

Section 206 of the FAA provides that a "court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206. The Convention requires that a "court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Convention, art. II(3). For an arbitration agreement to be enforceable under the Convention it must "be in writing, contain an arbitration clause, and be signed by the parties." Reddy, 38 F.4th at 399 (citing Convention, art. II).

"Whether a party has agreed to arbitrate an issue is a matter of contract interpretation," which is a question of state law.[5] Mey v. DIRECTV, LLC, 971 F.3d 284, 288, 292 (4th Cir. 2020) (citations omitted). "In view of the FAA's federal policy favoring

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Convention." (emphases in original)). However, even if federal question jurisdiction were lacking, the Court would still have subject matter jurisdiction under 28 U.S.C. § 1332 because there is complete diversity and the amount in controversy exceeds $75,000. See ECF No. 1, at 8-9.

[5] The Policy includes a choice of law provision, directing that "any dispute between the Insured and [Defendants] relating to this Policy or to a claim thereof (including but not limited thereto, the interpretation of any provision of the Policy) shall be governed by and construed in accordance with the laws of The Commonwealth of Virginia." ECF No. 1-3, at 8.

arbitration, however, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Id. at 292 (cleaned up); see also Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 710 (4th Cir. 2001) ("Agreements to arbitrate are construed according to the ordinary rules of contract interpretation, as augmented by a federal policy requiring that all ambiguities be resolved in favor of arbitration.").

III. DISCUSSION

A. The Policy

The Policy provides "builders risk" insurance coverage for the period from September 22, 2020, through October 31, 2025, with a loss limit of $350 million per "any one Claim or Occurrence." ECF No. 1-3, at 4-5. Both Keller and HRCP allege that they suffered millions of dollars in covered damages arising from "Damage" to "Insured Property" that occurred during the "Period of Insurance." Id. at 75; ECF No. 23, at 10-11. As relevant to the instant motion, the Policy includes two provisions relating to dispute resolution. Condition 9 of the Policy, entitled "Mediation," (hereinafter, "Condition 9") provides, in relevant part:

> If any dispute or difference of whatsoever nature arises out of or in connection with this Policy, including any question regarding its existence, validity or

> termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to arbitration in accordance with Condition 10, they will seek to have the Dispute resolved amicably by mediation.
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> . . .
>
> The mediation may be terminated should any party so wish by written notice to the appointed mediator and to the other party to that effect. Notice to terminate may be served at any time after the first meeting or discussion has taken place in the mediation.
>
> If the Dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice initiating mediation, or if either party fails or refuses to participate in the mediation, or if either party serves written notice terminating the mediation under this clause, then either party may refer the Dispute to arbitration in accordance with General Condition 10-Arbitration.

ECF No. 1-3, at 29. Condition 10, entitled "Arbitration," (hereinafter, "Condition 10") provides in relevant part:

> All disputes arising out of or in connection with amount to be paid under this Policy (liability being otherwise admitted) shall be settled under the International Chamber of Commerce (ICC) Arbitration Rules. The procedural law of California shall apply where the ICC Arbitration Rules are silent. The number of arbitrators shall be three (3). The seat of the arbitration shall be Virginia, USA. The language to be used in the arbitral proceedings shall be English.

Id.

B. Enforceability of the Arbitration Agreement

Before the Court can turn to the parties' arguments regarding whether Condition 10 requires the Court to compel arbitration of this matter, the Court first must address Keller's argument that

Condition 10 is entirely unenforceable under Virginia law. In its opposition brief, Keller argues that Condition 10 is "void because Virginia law explicitly prohibits the enforcement of arbitration agreements within insurance contracts under Virginia Code Ann. § 38.2-312." ECF No. 6, at 4. Section 38.2-312 provides, in relevant part:

> No insurance contract delivered or issued for delivery in this Commonwealth and covering subjects which are located or residing in this Commonwealth, or which are performed in this Commonwealth shall contain any condition, stipulation or agreement . . . [d]epriving the courts of this Commonwealth of jurisdiction in actions against the insurer.
>
> Any such condition, stipulation or agreement shall be void, but such voiding shall not affect the validity of the remainder of the contract.

Va. Code Ann. § 38.2-312. Although federal law generally preempts contradictory state law, Keller argues that the federal McCarran-Ferguson Act provides for the "reverse preemption" of federal law by state law governing insurance. ECF No. 6, at 4 (citing 15 U.S.C. § 1012).

Keller is correct that, as a general matter, the McCarran-Ferguson Act "authorizes 'reverse preemption' of generally applicable federal statutes by state laws enacted for the purpose of regulating the business of insurance," including reverse preemption of the FAA by state laws declaring arbitration provisions in insurance contracts void. ESAB Grp., Inc. v. Zurich Ins. PLC, 685 F.3d 376, 380 (4th Cir. 2012) (citing Safety Nat'l

Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 720 (5th Cir. 2009) (en banc)). Defendants do not dispute this but rather argue that the McCarran-Ferguson Act "does not apply in cases involving arbitration agreements with foreign parties, like that here, which are subject to" the Convention. ECF No. 10, at 2.

The Court agrees with Defendants. As Defendants highlight, id. at 4, the Fourth Circuit squarely addressed this issue in ESAB Grp. v. Zurich. Much like Keller argues here, ESAB Group argued that South Carolina's bar on arbitration agreements in insurance contracts "reverse preempted" the Convention pursuant to the McCarran-Ferguson Act. ESAB Grp., 685 F.3d at 379. The Fourth Circuit disagreed, holding that "the Convention Act [9 U.S.C. §§ 201-208], as implementing legislation of a treaty, does not fall within the scope of the McCarran-Ferguson Act" because "Supreme Court precedent dictates that McCarran-Ferguson is limited to legislation within the domestic realm, and prior precedent of [the Fourth Circuit] and [its] sister circuits supports a narrow reading of the Act." Id. at 388. Therefore, in keeping with the Fourth Circuit's holding in ESAB Grp., this Court finds that the McCarran-Ferguson Act does not authorize "reverse preemption" of the Convention by § 38.2-312 of the Virginia Code. As a result, Condition 10, the Policy's arbitration agreement, is not void on that basis.

C. Policy Analysis

Having determined that Condition 10 is generally valid and enforceable, the Court now turns to whether the Policy requires arbitration of the parties' instant insurance dispute.

1. Effect of the Mediation Provision

Condition 9, the Policy's mediation provision, requires that the parties "seek to have the Dispute resolved amicably by mediation" before turning to arbitration pursuant to Condition 10. ECF No. 1-3, at 29. Condition 9 further provides that such a mediation "may be terminated should any party so wish by written notice to the appointed mediator and to the other party" and that "[n]otice to terminate may be served at any time after the first meeting or discussion has taken place in the mediation." Id.

The parties jointly began mediation on March 29, 2023. HRCP argues in its response brief that Defendants' motion to stay and compel arbitration is premature because, as of June 12, 2023, when HRCP filed its brief, none of the parties had yet terminated the mediation. ECF No. 24, at 1-2. Thereafter, on June 16, 2023, Defendants conveyed a "Notice of Termination" to the mediator, Keller, and HRCP, ending the mediation. ECF No. 32-1. Although it appears that HRCP's argument was well-founded at the time it was made, the Court finds that Defendants' termination of the mediation has since rendered the argument moot.

2. Application of the Arbitration Agreement

The remaining question before the Court is whether this dispute falls within the scope of Condition 10, which directs that the parties "shall" arbitrate "[a]ll disputes arising out of or in connection with amount to be paid under this Policy (liability being otherwise admitted)." ECF No. 1-3, at 29. The parties' disagreement focuses on the import of the parenthetical, i.e., the limitation that the arbitration requirement only applies after liability has been "otherwise admitted" by the insurer. Defendants assert that this limitation has been met because they have admitted some liability and, therefore, the parties' remaining disagreements go to the question of how much Defendants are required to pay, not whether they are required to pay something. In contrast, Keller and HRCP argue that the limitation draws a distinction between issues of coverage and issues of quantum. They assert that the arbitration provision only compels arbitration of disagreements regarding the proper quantification of the covered damages after all of the contract interpretation questions have been resolved, establishing the scope of Defendants' liability under the Policy. In other words, it is only after the parties have resolved which damages (if any) Defendants are liable to provide coverage for that the Policy then requires the parties to arbitrate the proper measurement of those damages.

At the heart of these arguments is a disagreement about what it means for an insurer to admit liability. Both of the competing interpretations offered by the parties are at least reasonable. However, while the Court is somewhat inclined to view Keller and HRCP's interpretation as the "better" interpretation of the Policy language, that is not the standard against which the Court must consider Condition 10. Rather, the Fourth Circuit has emphasized that the "heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." Mey, 971 F.3d at 292 (quoting Levin v. Alms and Assocs., Inc., 634 F.3d 260, 266 (4th Cir. 2011)). Therefore, as directed by the Fourth Circuit, this Court "must resolve a dispute about the scope of an arbitration agreement in favor of arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Id. (cleaned up) (quoting Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 92 (4th Cir. 1996)).

Here, nothing in Condition 10 specifically requires that all liability (i.e., coverage) issues be resolved prior to compelling arbitration or that the arbitration be strictly limited to issues of quantum. Although it seems that some coverage issues remain, the parties agree that Defendants have admitted some liability

under the Policy. Moreover, no party has identified any controlling precedent regarding either (1) whether the phrase "disputes arising out of or in connection with [the] amount to be paid under" an insurance policy would encompass disputes regarding the applicability of the policy's sublimits or deductibles or (2) what it means for "liability" to have been "otherwise admitted," and the Court has not independently identified any such precedent.[6] It is also significant that neither Keller nor HRCP has suggested that Defendants have acted in bad faith by admitting some de minimis amount of liability in order to force an otherwise inappropriate arbitration. See ECF No. 6, at 8 (asserting that Defendants have "assert[ed] nearly half of Keller's claimed losses are not covered under the Policy's coverage grant"); ECF No. 23

[6] Defendants do, however, highlight an unpublished opinion from the Western District of Louisiana, in which the court considered whether a coverage dispute that was not solely limited to quantum fell within an arbitration agreement that only compelled arbitration if the parties "shall fail to agree as to the amount to be paid under this Policy." Kvaerner v. Nat'l Union Fire Ins. Co. of La., No. 10-CV-00278, 2013 WL 6244167, at *4 (W.D. La. Dec. 2, 2013), report and recommendation adopted sub nom. Aker Kvaerner/IHI v. Nat'l Union Fire Ins. Co. of Louisiana, No. 2:10-CV-00278, 2014 WL 547042 (W.D. La. Feb. 10, 2014). The Kvaerner court held that the arbitration provision did apply to the dispute, noting "it is difficult to imagine a more fundamental dispute over 'the amount to be paid under [the] Policy' than when the insured claims that $24 million is due and the insurers respond that $0 is due." Id. Although the language in Condition 10 differs somewhat from the arbitration provision in Kvaerner, that court's analysis supports Defendants' position here that "disputes arising out of or in connection with [the] amount to be paid under" can be reasonably interpreted to refer to disputes that include coverage issues, not solely to disputes concerning quantum alone. This position appears even more reasonable where, as here, the arbitration provision includes the threshold requirement that liability be "otherwise admitted" by the insurer before compelling arbitration. Such a requirement ensures that the arbitration panel will decide "the amount to be paid" under the policy, with all parties in agreement that some amount (not "$0") will be paid.

¶¶ 61-64 (indicating that Defendants have paid HRCP $1,822,072.59, out of approximately $23.6 million in submitted damages and describing Defendants sublimit- and deductible-based coverage positions).

It is reasonable, then, to interpret Condition 10's limitation that "liability [must be] otherwise admitted" before requiring arbitration as being met by Defendants' acknowledgement that they are, at least to some extent, liable for damages that their insureds incurred in connection with the South Island Tri-Cell incident. And, consequently, it is also a reasonable interpretation to describe the remaining insurance dispute as a dispute about how much Defendants will be required to pay, rather than whether they will be required to pay, fitting Condition 10's broad introductory language requiring the arbitration of "[a]ll disputes arising out of or in connection with [the] amount to be paid under this Policy." ECF No. 1-3, at 29. The Court thus concludes that Condition 10 is "susceptible of an interpretation that covers the asserted dispute." Mey, 971 F.3d at 292 (citation omitted). Just as the Fourth Circuit found in Mey, the "text of [Condition 10] arguably contemplates arbitration of [Keller's and HRCP's] claims, and any ambiguity about whether those claims are included must be resolved in favor of arbitration," particularly

where, as here, "the arbitration clause is broadly worded."[7] Id. at 294 (internal quotation marks and citations omitted). Therefore, the Court finds it appropriate to compel arbitration of this matter at this time.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion to stay and compel arbitration is **GRANTED**. ECF No. 3. Pursuant to 9 U.S.C. § 3, the Court **STAYS** these proceedings pending completion of arbitration and **DIRECTS** the Clerk of Court to remove this case from the active docket. The parties are **DIRECTED** to file a status report with the Court every sixty (60) days from the date of this Opinion and Order.

The Clerk is **REQUESTED** to send a copy of this Opinion and Order to counsel of record for the parties.

IT IS SO ORDERED.

/s/MSD
Mark S. Davis
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
August 15, 2023

[7] The breadth of Condition 10 is further supported by the breadth of Condition 9, which requires mediation of "any dispute or difference of whatsoever nature [that] arises out of or in connection with this Policy" before the parties may proceed with arbitration under Condition 10, suggesting that the Policy intends for the same expansive range of disputes to ultimately be resolved through arbitration, if not first resolved through mediation. ECF No. 1-3, at 29.