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REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
of the
REPUBLIC OF THE MARSHALL ISLANDS

VIRGILIO T. DIERON, JR., Plaintiff, vs. STAR TRIDENT XII, LLC, and STAR BULK SHIPMANAGEMENT COMPANY (CYPRUS) LIMITED Defendants.	Civil Action No. 2017-245 **ORDER GRANTING MOTION FOR INJUNCTION PENDING APPEAL**

TO: Tatyana Cerullo, Melvin Narruhn, Richard Dodson, and Kenneth Hooks, III, counsel for plaintiff Virgilio T. Dieron, Jr.
Dennis J. Reeder and Nenad Krek, counsel for defendant Star Trident XII, LLC, and intervening defendant Star Bulk Shipmanagement Company (Cyprus) Limited

ORDER GRANTING MOTION FOR INJUNCTION PENDING APPEAL

Defendants' STAR TRIDENT XII, LLC, and STAR BULK SHIPMANAGEMENT COMPANY (CYPRUS) LIMITED Motion for a Temporary Restraining Order or Injunction Pending Appeal came on for hearing on Wednesday, November 13, 2019 (Majuro date), with Nenad Krek, Esq. and Dennis J. Reeder, Esq., appearing for Defendants. No appearances were made on behalf of Plaintiff VIRGILIO T. DIERON, JR. or his Counsel, Richard J. Dodson,

Kenneth H. Hooks, III, and Tatyana Cerullo, against whom the injunction was sought. The Court finds that Plaintiff and his Counsel, including also Melvin Narruhn, were duly served with the Order to Show Cause, which included a notice of this hearing.

As discussed below, the Court finds that Defendants have satisfied the standards for both an anti-suit injunction and an injunction pending appeal, and therefore grants the motion.

I. Relevant Facts and Procedural History

Plaintiff Virgilio T. Dieron ("***Dieron***"), filed his Complaint against Defendant STAR TRIDENT XII, LLC ("***Trident***"), alleging tort claims for negligence, unseaworthiness and maintenance and cure related to personal injury he sustained while employed on board the STAR MARKELLA (the "***Vessel***"), owned by Trident. Intervening Defendant STAR BULK SHIPMAGEMENT COMPANY (CYPRUS) LIMITED ("***SBSC***"), moved for leave to intervene, and both Trident and SBSC moved to compel Dieron to arbitrate his claims in the Philippines under Philippine law in accordance with his standard Philippine Overseas Employment Administration ("***POEA***"), contract. On November 15, 2018, the Court issued its Order Granting SBSC's Motion to Intervene (the "***Intervention Order***"). On November 23, 2018, the Court issued its Order Granting Motions to Compel Arbitration (the "***Arbitration Order***"), in which it

ordered Dieron to "arbitrate his claims against Trident and SBSC in the Philippines under Philippine law in accordance with the POEA contract." *Id.* at 14. On December 21, 2018, Dieron filed its Notice of Appeal from both Orders (the "Appeal").

On October 8, 2019, Dieron's *pro hac vice* counsel, Richard J. Dodson, Kenneth H. Hooks, III, and Tatyana Cerullo (collectively the "Counsel"), filed with the Integrated Bar of the Philippines ("***IBP***") a demand for an *ad hoc* arbitration ***with Trident only*** (the "Demand"), attaching Dieron's Complaint in this action and the Arbitration Order. The Demand states *inter alia*:

> (b) A copy of Arbitration agreement and any other basis, if any, upon which the appointment of the Arbitrator by the National President is sought:
> This arbitration was ordered by the Order entered in the High Court of the Republic of the Marshall Islands, Civil Number 2017-245[.]
>
> * * *
>
> (d) The general nature and summary of the dispute:
> This is a Complaint for Damages for Damages and Unseaworthiness as described in the Complaint filed in the High Court of the Republic of the Marshall Islands H.Ct. Civil Number 2017-245, a copy being attached and as set forth in full. The complaint and this Arbitration seeks damages that [sic] unseaworthiness caused catastrophic injuries to Virgilio T. Dieron, Jr. and general and compensatory damages in the amount of $25 million Dollars [sic] and punitive damages in the amount of $25 million all under the General Maritime Law of the United States as recognized by the Republic of the Marshall Islands.

Demand at 2 -3.

In response, on October 21, 2019, Defendants filed the instant motion, seeking to restrain Dieron and the Counsel from demanding, prosecuting or maintaining the IBP Arbitration during the pendency of his Appeal. On the same day, the Court issued an Order to Show Cause why a TRO or an injunction should not issue, imposed a briefing schedule, and set a hearing for November 13, 2019, at 10 a.m.

On November 4, 2019, Dieron and the Counsel opposed the motion by advising the Court that they had requested to IBP to stay the arbitration they demanded. They also argued that earlier proceedings in the Philippines between Dieron and Defendants showed that Defendant's instant motion had no merit. Defendants filed a reply in support of their motion on November 5, 2019.

On November 6, 2019, the Court requested further briefing on two issues. First, whether the Court had to consider the *Unterweser* factors in the context of this motion. Second, how the earlier proceedings in the Philippines affects the disposition of this motion. Both Defendants and Dieron/Counsel responded on November 12, 2019 with further written submissions. On November 13, 2019, a hearing took place as noticed, and Defendants' counsel presented oral argument.

II. Jurisdiction

Rule 8(a)(1) of the Supreme Court Rules of Procedure provides in relevant part:

> An application in a civil case ... for an order ... granting an injunction during the pendency of an appeal shall ordinarily be made in the first instance to the court appealed from.

It is settled law that the trial court retains jurisdiction during the pendency of an appeal to act to preserve the status quo. *Natural Res. Def. Council v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). This jurisdiction includes issuance of injunctions restraining parties from maintaining other proceedings inconsistent with the ruling being under appeal. *See, e.g., Kidder Peabody & Co. v. Maxus Energy Co.*, 925 F.2d 556, 565 (2d Cir. 1991) (affirming issuance of an injunction against a Texas action which was inconsistent with terms of the appealed federal declaratory judgment).

III. Standard of Review

An injunction pending appeal seeking to enjoin another action or proceeding must also satisfy the usual requirements for an anti-suit injunction. *See, e.g., Bank Leumi USA v. Ehrlich*, 2015 U.S.Dist. Lexis 191459, 2015 WL 12591663 (S.D.N.Y. September 23, 2015).

A. Anti-Suit Injunction

The Court of Appeals for the Ninth Circuit has adopted and expanded the standard for issuance of an injunction against foreign action developed by the

Court of Appeals for the Fifth Circuit. Under this standard:

> First, we determine "whether or not the parties and the issues are the same" in both the domestic and foreign actions, "and whether or not the first action is dispositive of the action to be enjoined." (citations omitted). Second, we determine whether at least one of the so-called "*Unterweser*[1] factors" applies. Finally, we assess whether the injunction's "impact on comity is tolerable."
>
> The *Unterweser* factors are a disjunctive list of considerations that may justify a foreign anti-suit injunction ... The full list of *Unterweser* factors is as follows:
> [whether the] foreign litigation . . . would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's *in rem* or *quasi in rem* jurisdiction; or (4) where the proceedings prejudice other equitable considerations.

Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 881-82 (9th Cir. 2012) ("*Microsoft*") (citations omitted).

B. Injunction Pending Appeal

> A party seeking a preliminary injunction must fulfill one of two standards, described in the Ninth Circuit as "traditional" and "alternative." Under the traditional standard, a court may issue preliminary relief if it finds that (1) the moving party will suffer irreparable injury if the relief is denied; (2) the moving party will probably prevail on the merits; (3) the balance of hardships favors the moving party; and (4) the public interest favors granting relief. Under the alternative standard, the moving party may meet its burden by demonstrating

[1] *In re Unterweser Reederei GMBH*, 428 F.2d 888, 896 (5th Cir.1970), aff'd on reh'g, 446 F.2d 907 (5th ir.1971) (*en banc*) (*per curiam*), rev'd on other grounds sub nom. *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

> either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions exist and the balance of hardships tips sharply in its favor. This latter formulation represents two point[s] on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.

Nuka v. Morelik, 3 MILR 39, 41 (2007) (citations omitted).

IV. The Standard for An Anti-~~Trust~~ Suit Injunction Is Satisfied

The first step under the *Microsoft* analysis is "whether or not the parties and the issues are the same" in both the domestic and foreign actions, "and whether or not the first action is dispositive of the action to be enjoined." *Id.*, 696 F.3d at 881 (citations omitted). This step is clearly satisfied here.

In this action, Dieron filed his Complaint seeking to litigate his tort claims against Trident under the general maritime law. In the Arbitration Order, this Court held that Dieron cannot do so, and that he must arbitrate his personal injury claims arising from his employment with SBSC and Trident in the Philippines under Philippine law and in accordance with his POEA contract, i.e., before the NLRC or the voluntary arbitrator(s) appointed by the NCMB. The Arbitration Order is dispositive of the IPB arbitration and clearly does not allow it.

The Court finds that the first *Unterweser* factor is satisfied. Allowing Dieron to proceed with the IBP arbitration would frustrate public policy of the RMI of respect for jurisdiction and decisions of its Courts:

> [O]ne clear policy that all federal courts recognize—even those which have been loath to interfere with foreign proceedings—is the need to protect the court's own jurisdiction . . . [P]olicies against avoiding inconsistent judgments, forum shopping and engaging in duplicative and vexatious litigation [are] sufficient to satisfy this step.

Huawei Technologies, Co., Ltd. v. Samsung Electronics Co., Ltd.,2018 WL 1784065, Civ. No. 3:16-cv-02787-WHO (N.D.Ca. April 13, 2018) at *10, citing *Zynga, Inc. v. Vostu USA, Inc.*, No. 11-CV-02959-EJD, 2011 WL 3516164, at *3 (N.D. Cal. Aug. 11, 2011).

As to the second factor, the Court finds that Dieron's demand for IBP arbitration is vexatious and oppressive. "Vexatious" means "'without reasonable or probable cause or excuse; harassing; annoying.'" *Microsoft*, 696 F.3d at 886, citing *Black's Law Dictionary* 1701 (9th ed.2009). In *Microsoft*, the Court of Appeals held that the District Court did not abuse its discretion by deeming Motorola's conduct in bringing a suit in Germany on two of the patents which were disputed in a pending action between Microsoft and Motorola in a federal court in California to be "a procedural maneuver designed to harass Microsoft." *Id.*

Here, the IBP arbitration was commenced by way of representation by Dieron's Counsel to the IBP that this Court ordered Trident to arbitrate Dieron's tort claims for unseaworthiness with Dieron under the U.S. or RMI general

maritime law. This, however, is not true.

In its Arbitration Order, this Court unambiguously ordered Dieron to arbitrate his claims with Trident and SBSC under Philippine law and in accordance with his Philippine Overseas Employment Administration ("POEA") contract, which includes a mandatory compensation scheme in lieu of tort liability. *See* Arbitration Order at 4-5, points 13-14. Moreover, the arbitration under the POEA terms is not an *ad hoc* arbitration before the IBP, but an institutional arbitration before the Philippine National Labor Relations Commission ("***NLRC***"), or optionally, before voluntary arbitrators appointed by the National Conciliation and Mediation Board ("NCMB") of the Philippine Department of Labor and Employment. *Id.* at 5, point 15. The Arbitration Order cannot be reasonably interpreted in the way it was represented to the IBP. The Demand for IBP Arbitration was made in disregard of the Arbitration Order and misrepresented to the IBP the substance of the Arbitration Order.

Moreover, as per Declaration of Ma. Gina B. Guinto, a Philippine lawyer, provided by Defendants, under Philippine law the NLRC has the original and exclusive jurisdiction over Dieron's claims form personal injury related to his employment under his POEA Contract, and IBP has no jurisdiction over such claims. In sum, Dieron's Demand for IBP Arbitration is vexatious and oppressive.

The third *Unterweser* factor is not applicable. As to the fourth factor, the

Court finds that an anti-suit injunction is necessary here to prevent Dieron and his Counsel from preventing fraud upon the IBP by the false representation that this Court in its Arbitration Order directed Trident to arbitrate Dieron's tort claims with Dieron under the U.S. or RMI general maritime law. This Court will not countenance such egregious acts by Dieron's Counsel.

In sum, three of the four *Unterweser* factors strongly support issuance of an anti-suit injunction here, while one is not applicable.

The final inquiry under the *Microsoft* analysis is whether the requested injunction implicates comity concerns. As a matter of law, issuance of an anti-suit injunction to enforce a private international contractual commitment to litigate a dispute in a particular forum is unlikely to implicate comity concerns.

> [C]omity is less likely to be threatened in the context of a private contractual dispute than in a dispute implicating public international law or government litigants. [W]here two parties have made a prior contractual commitment to litigate disputes in a particular forum, upholding that commitment by enjoining litigation in some other forum is unlikely to implicate comity concerns at all.

Microsoft, 696 F.3d at 887, citing *Gallo*, 446 F.3d at 994 and *Applied Med.*, 587 F.3d at 921.

Moreover, issuance of an anti-suit injunction to prevent a party from avoid the rightful authority of the court seized with jurisdiction over the matter does not intolerably impact comity:

> [W]here "subsequent filing" of foreign action

> "raises the concern that [party] is attempting to evade the rightful authority of the district court," enjoining foreign action would not "intolerably impact comity[.]"

Microsoft, 696 F.3d at 887, citing *Applied Med.*, 587 F.3d at 921.

The Court finds that by demanding IBP Arbitration, Dieron is attempting to evade the rightful authority of this Court, whose jurisdiction he had voluntarily chosen to assert his claims, just because he does not like the Arbitration Order he has received. The Ninth Circuit has held that this is intolerable:

> [W]here there is no public international issue raised, a foreign government is not involved in the litigation, and the litigation involves private parties concerning disputes arising out of a contract, not only would an anti-suit injunction not have an intolerable impact on comity, but allowing foreign suits to proceed in such circumstances would seriously harm international comity.

Tahaya Misr Investment, Inc. v. Helwan Cement S.A.E., 2016 WL 4072332, Civ. No. 2:16-cv-01001-CAS(AFMx) (C.D.Cal. June 27, 2016) at *5 (quoting *Applied Med.*, 587 F.3d at 921 (citing *Gallo*, 446 F.3d at 994)).

The Court also finds, based on the Declaration of Ms. Guinto and the NLRC Decisions she submitted, that the issuance of an anti-suit injunction here is consistent with the NLRC policy of deferring to the first tribunal that acquires jurisdiction over a dispute, and NLRC decisions holding that this Court is the first tribunal that acquired jurisdiction over Dieron's claims.

Accordingly, the Court concludes that the standard for an anti-suit injunction

has been amply met in this case.

V. The Standard for An Injunction Pending Appeal Has Been Met

A. Defendants are facing irreparable injury

Courts have repeatedly found that immediate and irreparable injury results from having to defend claims that should be barred. *Rancho Holdings, LLC v. Manzanillo Associates, Ltd.*,2013 WL 6055223, No. 4:10–cv–00997–JTM (W.D.Miss. Nov. 14, 2013) ("*Rancho*") at *5 (citing *Commercializadora Portimex, S.A. de CV* v. *Zen–Noh Grain Corp.*, 373 F.Supp.2d 645, 653 (E.D. La. 2005) ("*Portimex I*") (quoting *New York Life Ins. Co. v. Deshotel,* 946 F.Supp. 454, 465 (E.D.La.1996). The inability to enforce a contractually agreed forum selection clause and having to litigate a separate action in another forum constitutes, by itself, irreparable harm. *Interdigital Technology Corp. v. Pegatron Corp.*, 2015 WL 3958257, Civ. No. 15-CV-02584-LHK (N.D.Cal. June 29, 2015) ("*Interdigital*") at *9, citing *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 855 (9th Cir.1981) and *In re Unterweser Reederei GMBH*, 428 F.2d 888, 896 (5th Cir.1970), aff'd on reh'g, 446 F.2d 907 (5th ir.1971) (en banc) (per curiam), rev'd on other grounds sub nom. *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1 (1972). *See also Younis Bros. &Co. v. Cigna Worldwide Ins. Co.,* 167 F.Supp.2d 743, 747 (E.D.Pa.2001) (finding that defendant would be irreparably harmed "if it is forced to continue to defend against plaintiff's vexatious

and duplicative Liberian litigation and/or defend against execution upon a judgment that conflicts with the final judgment in this case").

B. Trident will probably prevail on the merits of Dieron's appeal

In its *Mongaya* Opinion, the Supreme Court rejected Mongaya's argument that RMI law required that he be allowed to pursue his tort claims under the general maritime law rather than under Philippine law in accordance with his POEA contract and characterized this argument as leading to an "absurd result." *Id.* at 20. The Supreme Court also rejected Mongaya's argument that the vessel owner as a non-signatory to Mongaya's POEA contract was not entitled to compel Dieron to arbitrate and denied Mongaya's motion to reconsider its Opinion on this point. *Id.* at 9-18, Order Denying Motion for Reconsideration filed on September 5, 2018.

That this Court properly followed *Mongaya* in its Arbitration Order cannot be seriously questioned, and Dieron's appeal cannot succeed unless the Supreme Court overrules *Mongaya*. In his Opening Brief filed on October 5, 2019, Dieron argues that the Supreme Court should overrule its rulings in *Mongaya*. *Id.* at 1, point V. It appears unlikely that the Supreme Court would do so, particularly as most of Dieron's arguments simply rehash the arguments that were raised and rejected by the Court in *Mongaya* (point V) and in its order denying reconsideration (point III). Accordingly, Trident will probably prevail on the

merits of Dieron's appeal.

Although Dieron argues that Trident should not benefit from his employment contract that that Trident did not sign, Dieron has not establish that he is likely to succeed on the merits.

C. The balance of hardships favors Trident

The balance of hardships favors Trident. As discussed above, Trident will suffer irreparable harm if it has to defend the IBP Arbitration upon Dieron's tort claim that this Court ordered to be arbitrated under Philippine law in accordance with POEA contract terms. In contrast, Dieron will suffer no hardship if he is enjoined from pursuing the IBP arbitration. If he wins his appeal, he will be able to arbitrate his tort claim in the RMI or before the IBP, and will have lost nothing. Also, as a general proposition, equities favor enforcement of a contractually agreed method of resolving disputes as set forth in Dieron's POEA contract. *See, e.g., Interdigital* at *9-10.

D. The public interest favors granting relief

In *Interdigital,* the Court stated that in a purely private litigation, public interest ordinarily is a neutral factor. *Id.* at *10. However, as the Supreme Court noted in its *Mongaya* Opinion, if the provision in Mongaya's employment contract requiring Philippine arbitration were not enforced, this would adversely affect all RMI flag vessels and the orderliness and predictability essential to international

business transactions. *Id.*, at 19-20. The same holds true as to Dieron.

VI. The Injunction Will Cover Dieron's Counsel

The Court does will not countenance the Counsel's willful misrepresentation of its Arbitration Order to the IBP. The Court also takes notice that in the *Mongaya* action, Judge Winchester extended a like anti-suit injunction against Messrs. Dodson and Hooks when they caused the defendants' vessel to be attached by the process of Louisiana State Court after Judge Winchester had ordered Mongaya to arbitrate his claim in the Philippines under Philippine law and after the RMI Supreme Court affirmed this order. See injunction issued on October 9, 2018 in Civil Action 2017-044, styled *Mongaya v. AET MCV BETA, LLC, et al.* Accordingly, the injunction will also issue against the Counsel, i.e., Messrs. Dodson and Hooks, and Ms. Cerullo.

VII. No Bond Is Required

No bond is required for issuance of an anti-suit injunction if there is no likelihood of harm to the opposing parties. *Interdigital* at *11, citing *Johnson v. Couturier,* 572 F.3d 1067, 1086 (9th Cir.2009); *Kaepa, Inc. v. Achilles Corp.,* 76 F.3d 624, 628 (5th Cir. 1996). The Court finds that no harm can possibly occur to Dieron, Dodson, Hooks and Cerullo from having to discontinue the IBP arbitration until the resolution of Dieron's current appeal in this action.

VIII. An Injunction Can Properly Issue

When an adverse party has been served with an application for a temporary restraining order, and has been provided an opportunity to respond, this Court has discretion to treat the motion for temporary restraining order as a motion for a preliminary injunction. *Interdigital* at *10, citing Wright & Miller, *Federal Practice and Procedure* § 2951 (3d ed.); *Klinke v. Bannister*, No. 12–CV–00032, 2013 WL 6120437, at *4 (D.Nev. Nov. 20, 2013). *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n. 7 (9th Cir.2001).

IX. The Motion Has Not Been Rendered Moot

The Court does not agree that the motion has been rendered moot by the Counsel having requested the IBP to stay the arbitration. The Court finds that Dieron / the Counsel have neither withdrawn or dismissed the Demand which was based upon a misrepresentation of this Court's Arbitration Order. The Court also notes that the Additional Briefing submitted by Dieron / Counsel on November 12, 2019, attempts to further re-argue points settled in this Court's Arbitration Order. Therefore, the Court concludes that Dieron and his Counsel have failed to make it clear that their disregard of this Court's Arbitration Order will not recur. *See, e.g., Friends of the Earth, Inc. et al. v. Laidlaw Env. Srvs.*, 528 U.S. 167, 189 (1999).

Now, therefore, good cause appearing, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Defendants' motion for an injunction be, and hereby is, GRANTED.

2. Plaintiff Dieron and his Counsel, Richard J. Dodson, Kenneth H. Hooks, III and Tatyana Cerullo are hereby ordered to dismiss or withdraw the arbitration before the Integrated Bar of the Philippines against Star Trident XII, LLC forthwith and no later than within five business days from the service of this Order.

3. Plaintiff Dieron and his Counsel, Richard J. Dodson, Kenneth H. Hooks, III and Tatyana Cerullo are hereby enjoined against demanding, commencing or maintaining any arbitration proceedings against either Defendant herein before the Integrated Bar of the Philippines until Dieron's appeal in this action to the Supreme Court of the Republic of the Marshall Islands has been finally resolved.

4. Disobedience with this injunction shall be punished as contempt of this Court.

Ordered and Entered: November 13, 2019.

Carl. B. Ingram
Chief Justice, High Court