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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH,
PENNSYLVANIA,

Cross-Complainant and Appellant,

v.

XL INSURANCE COMPANY, LTD.,

Cross-Defendant and Respondent.

A130878

(Alameda County
Super. Ct. No. VG05201140)

This is an appeal from an order staying proceedings on a cross-complaint by a domestic insurer against a foreign insurer. The basis for the order was the trial court's conclusion that the domestic insurer was subject to a forum selection provision in the foreign insurer's policy that mandated jurisdiction in an English court. We hold that the trial court's decision was not an abuse of its discretion, and therefore affirm.

BACKGROUND

The circumstances generating this dispute are without dispute.

RMC Pacific Materials, Inc., a subsidiary of RMC USA, Inc. (hereafter collectively, RMC) owns and operates a number of quarries in Livermore. In 2001, a number of homeowners adjacent to one of the quarries noticed property damage that the City of Livermore and the County of Alameda subsequently attributed to RMC's quarry. The City and the County demanded RMC undertake remediation efforts, which RMC was doing when, in October 2005, it was sued by a number of the adjacent homeowners.

In apparent anticipation of that suit, RMC in March of 2005 sued a number of its insurers. Proceedings on RMC's complaint were stayed. The homeowners suit was settled in January 2010. XL Insurance Global Risk, a division of XL Capital, Ltd., and a Cayman Island corporation, was one of RMC's insurers which contributed to the settlement. However, XL had already sued RMC in a British court claiming there was no coverage under its policy. That litigation was stayed pending resolution of the homeowners' action.

After the stay was lifted, RMC filed an amended complaint against a number of insurers, including XL Insurance Global Risk and National Union Fire Insurance Company of Pittsburg, Pennsylvania (hereafter National Union). RMC's causes of action were styled as breaches of the insurers' duties to defend and indemnify, under the general claim that "XL and National Union have deprived RMC of the security and benefits of the policies of insurance to which it is entitled."

Even though it was XL Insurance Global Risk that was named in RMC's amended complaint, it was XL Insurance Company, Ltd. (hereafter XL) that was named in National Union's cross-complaint filed in April 2010. National Union sought declaratory relief that if RMC was "entitled to insurance coverage under the National Union policies . . . then XL also has an obligation to provide such insurance coverage [to RMC] under the XL policy." National Union also stated causes of action for equitable contribution and equitable subrogation for amounts National Union might be obligated to pay on RMC's behalf.

While moving to lift the stay of its British action, XL moved to quash service of summons, or, alternatively, "to dismiss or stay National Union's Cross-Complaint," based on the forum selection provision. The trial court conducted a hearing on the motion, and granted only XL's request for a stay. The court composed a ten-page order that was obviously the result of considerable thought and effort. The order deserves quotation at length (with minor nonsubstantive editorial changes that we have made):

"The motion to dismiss or stay the action on forum non conveniens is GRANTED insofar as it seeks a stay rather than dismissal. The court finds that the forum selection

clause in the XL Master Policy is critical to this analysis. In a motion to stay or dismiss based on forum non conveniens, if there is an applicable and enforceable mandatory forum selection clause, such clause is generally given presumptive effect. While mandatory forum selection clauses do not ‘completely eliminate a court’s discretion to make appropriate rulings regarding choice of forum,’ such clauses are given effect ‘unless they are unfair or unreasonable.’ (*Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 358-359, quoting *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495.)

“NU’s opposition papers did not address or refute XL’s argument that the forum selection provision is mandatory rather than permissive. Although NU disputed this issue at the hearing, it did not make a persuasive showing in this regard based on the language of the provision and applicable authority. The forum selection clause at issue provides as follows:

“Any dispute concerning the interpretation of terms, conditions, limitations, and/or exclusions contained herein is understood and agreed by both the Insured and the Insurer to be subject to English law.

“Each party agrees to submit to the jurisdiction of any court of competent jurisdiction within England and to comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practices of such court.

“Although the parties’ agreement ‘to submit to the jurisdiction of’ English courts, in itself, is permissive and not mandatory, the language requiring the parties to ‘comply with all requirements necessary to give [the English court] jurisdiction,’ and requiring that ‘all matters arising [under the policy] shall be determined in accordance with’ English law and practice, has sufficient indicia to make such jurisdiction mandatory. This distinguishes the clause at issue from cases in which courts have held that clauses providing that a particular court ‘shall have jurisdiction,’ without additional language of exclusivity, provides only for ‘permissive’ rather than mandatory jurisdiction. (See, e.g., *Berg, supra*, 61 Cal.App.4th at p. 357 [parties agreed to ‘submit[] to the jurisdiction of’ California courts]; *Hunt Wesson Foods, Inc. v. Supreme Oil Co.* (9th Cir. 1987) 817 F.2d

75, 76 [parties agreed that California courts ‘shall have jurisdiction over the parties in any action’ relating to the contract].) The court finds that the additional language at the end of the clause, requiring the parties to comply with ‘all requirements necessary’ to give English courts jurisdiction, and to have ‘all matters arising hereunder . . . determined in accordance with the . . . practice of such court,’” makes it mandatory and exclusive.

“Accordingly, the forum selection clause is to be given effect unless it is ‘unfair or unreasonable.’ (*Berg, supra*, 61 Cal.App.4th at pp. 358-359; *Smith, supra*, 17 Cal.3d at p. 495.) The party opposing the enforcement of a forum selection clause bears the burden of proof on that issue. (*Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1680, citing *Smith, supra*, 17 Cal.3d at p. 496.) The court finds that NU did not meet that burden.

“First, the court rejects NU’s argument that it is not restrained by the forum selection clause in bringing its contribution and subrogation claims against XL because NU is not a party to the policy and did not agree to the forum selection provision. Under California law, a forum selection clause may be enforced against a claimant who is not a party to the contract in question if the claimant is determined under the circumstances to be ‘closely related to the contractual relationship.’ (*Lee v. Southern California University for Professional Studies* (2007) 148 Cal.App.4th 782, 788; *Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583, 588-589.) In *Net2Phone*, for example, the court held that where a consumer protection group was suing in a representative capacity challenging certain terms in contracts issued to individuals, it was ‘“closely related” to the contractual relationship because it stands in the shoes of those whom it purports to represent.’ (*Id.* at p. 589.)

“Here, NU is asserting cross-claims against XL both for contribution and for subrogation. A subrogation claim ‘is purely derivative’; an insurer seeking such relief ‘is in the same position as an assignee of the insured’s claim, and succeeds only to the rights of the insured.’ (*Travelers Casualty & Surety Co. v. American Equity Ins. Co.* (2001) 93 Cal.App.4th 1142, 1151.) Thus the subrogated insurer is said to ‘stand in the shoes’ of its insured and be subject to the same defenses assertable against the insured. (*Id.*)

Accordingly, to the extent NU is proceeding on a subrogation theory, it is appropriate to bind it to the forum selection provision in RMC's policy. (See, e.g., *Net2Phone*, *supra*, 109 Cal.App.4th at p. 589; cf. *Adams v. Unione Mediterranea Di Sicurta* (5th Cir. 2004) 364 F.3d 646, 652 [while finding that contribution claim did not subject insurer to forum selection clause in other insurer's policy, court cited with approval district court's statement that subrogation claim would have subjected insurer to such provision].)

“Second, NU is correct that in pursuing its contribution claim, in contract, it does not strictly ‘stand in the shoes’ of its insured. ‘Unlike subrogation, the right to equitable contribution exists *independently* of the rights of the insured.’ (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1295.) Nevertheless, the fact that such a claim is ‘independent’ in some ways—such as the fact that a third party insurer can bring a claim regardless of whether the insured chooses to sue its own insurer directly—does not mean that such claim does not depend on the existence of coverage under the terms of the insured's policy. To the contrary, ‘[e]quitable contribution . . . assumes the existence of two or more valid contracts of insurance *covering the particular risk of loss* and the particular casualty in question.’ (*Id.* [emphasis added].) This contradicts NU's argument that a determination of coverage under the terms of the XL policy is not a necessary element of its contribution claim. NU has not cited any California authority holding that this close relationship between an insurer's request for contribution against a second insurer and the terms of the second insurer's policy with its insured makes it unfair or unreasonable to bind the first insurer to a forum selection provision in the second insurer's policy.

“In *Adams*, a Fifth Circuit decision cited in NU's opposition, the court held that an insurer suing another insurer for contribution was not bound by such a forum selection provision in the second insurer's policy. That court did not apply California law, however, nor did it find that enforcement of the provision would be unfair or unreasonable under the principles discussed in California authority. Instead, after acknowledging that ‘the terms of the defendant's co-insurer's policy limit the rights of the plaintiff co-insurer in asserting a contribution claim’ and that the co-insurer ‘can rely

upon provisions in its policy to show it had no coverage for the loss sued upon or how the loss should be allocated between multiple insurers,’ the court held that the ‘forum selection clause [at issue] is not relevant to either of these questions.’ (*Adams v. Unione Mediterranea Di Sicurta, supra*, at p. 653.) Here, in contrast, the policy at issue expressly provides that any coverage under the policy ‘shall be determined in accordance with the law and practice of [an English] court,’ which makes that provision relevant to a determination of coverage under the policy. Further, *Adams* did not engage in any considered analysis of this point or cite authority supporting its conclusion, much less any authority that addresses the principles discussed in the California authority.

“Although the parties do not cite any California authority directly on point, the court finds the discussion in *Great American West, Inc. v. Safeco Ins.* (1991) 226 Cal.App.3d 1145 to be analogous. There, the Abramses had homeowner’s insurance with Safeco for the period 1976 to 1981 and with Great American from 1981 through at least 1985. In 1978, Mr. Abrams first noticed cracks in the pavement at the property, but he did not assert a claim until 1985 when there was more serious damage to the home’s structure and foundation. Great American settled the claim in June 1986 for \$112,940 and then brought a claim two years later against Safeco for contribution or indemnity. Safeco defended based on a limitation in its policies with the Abramses requiring that suits ‘on the policy’ be filed within one year after ‘inception of the loss.’ (*Id.* at pp. 1147-1148.) Great American argued, as NU does here, that it was not bound by this provision because its claim was in the nature of contribution or indemnity rather than subrogation. The Court of Appeal held that it made no difference how the claim was classified, ruling as follows:

“This argument improperly seeks to strip Great American’s indemnity claim from the Safeco insurance policy on which it is based. Safeco has no responsibility except as provided by the terms of its contract with the Abramses. One provision of that contract specifies the time within which a suit ‘on the policy’ must be filed. Where a party like Great American seeks indemnity based on another party’s (Safeco’s) contractual responsibilities, provisions of the contract imposing time constraints—like any other

provision of the contract—cannot be ignored. To do so would be to impose liability no longer based on the contract.

“(Id. at p. 1150.) That reasoning is equally applicable here.

“Third, NU has not otherwise met its burden of showing that enforcement of the forum selection provision in the context of its cross-complaint would be unreasonable. As discussed, there is no dispute that NU’s subrogation or contribution/indemnity rights depend on a determination of whether there is coverage to XL’s insured, RMC Group P.L.C. and/or its subsidiaries, and that those duties are to be determined in accordance with English law. This sets NU’s cross-complaint against XL apart from the other coverage claims that will be resolved in this action, including the claim under primary policies by XL’s subsidiary, XL Insurance Global Risk to Plaintiff RMC USA, Inc. Also, there is already a pending declaratory relief action in England, which XL filed in February 2008 against RMC Group P.L.C. and its U.S. subsidiaries, to determine the existence and scope of coverage to the RMC entities under the XL master policy. NU’s argument that it is not subject to personal jurisdiction in England is irrelevant, as this does not preclude NU from bringing its cross-complaint against XL there. Further, the mere inconvenience of suing in a foreign country is not enough to meet NU’s burden. (See, e.g., *Smith, supra*, 17 Cal.3d at p. 494 [‘the party assailing the clause [must] establish[] that its enforcement would be unreasonable, i.e., that the forum selected would be unavailable or unable to accomplish substantial justice’].)

“Accordingly, IT IS ORDERED that NU’s cross-complaint against XL in this action is STAYED pending the determination of NU’s claims against XL in an English court or until further order of this court. NU may bring a motion to lift the stay based on the existence of a substantive impediment beyond considerations of convenience, to bringing its cross-complaint against XL in England.”

National Union then perfected this timely appeal from the order, which is appealable. (Code Civ. Proc., § 904.1, subd. (a)(3).)

REVIEW

This court has held that a trial court's decision whether to enforce a contractual forum selection provision will be reviewed according to the lenient abuse of discretion standard. (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 7-9.)

National Union's position, explained at length and with considerable force in its brief, is easily restated. The forum selection provision is part of a contract between RMC and XL. National Union is not a signatory to that contract, and never consented to the provision. It is therefore fundamentally unfair to apply that provision to National Union's action in a California court. The only weakness National Union is willing to admit is that can be argued that its subrogation claim amounts to an embrace of the contract between RMC and XL, and thus the forum selection provision. However, to neutralize this concession, National Union states that it is willing to abandon its subrogation claim, or to have that claim stayed, in order to proceed on its claim for equitable contribution.

Ultimately, National Union's litigation posture stands on the absence of any California authority holding that "a non-party to a contract can be bound to a forum selection clause if the non-party asserts a claim against a party for equitable contribution." That appears to be true, but there is precedent from other jurisdictions. (*Tourtellot v. Harza Architects* (N.Y.App. 2008) 866 N.Y.S.2d 793; *Stravalle v. Land Cargo, Inc.* (N.Y.App. 2007) 835 N.Y.S.2d 606; *Best Cheese Corp. v. All-Ways Forwarding Int'l* (N.Y.App. 2005) 808 N.Y.S.2d 694; *In re Kyocera Wireless Corp.* (Tex.Civ.App. 2005) 162 S.W.3d 758; cf. *Cooper v. Meridian Yachts, Ltd.* (11th Cir. 2009) 575 F.3d 1151 [non-signatory seeking contribution bound by choice of law provision].) The general thinking is that "a plaintiff who is a non-signatory to a contract containing a forum-selection clause may be bound by that clause when it is shown that his or her claims are closely related to the contract." (*Caperton v. A.T. Massey Coal Co.* (W.Va. 2008) 679 S.E.2d 223, 229, revd. on other grounds, (2009) 556 U.S. 868; accord, *Lipcon v. Underwriters at Lloyd's, London* (11th Cir. 1998) 148 F.3d 1285, 1298-1299.)

California law is in agreement with this approach. Two authorities cited by the trial court state: “ ‘A forum selection clause may . . . be enforced against a plaintiff who is not a party to the contract in question if the plaintiff is “closely related to the contractual relationship.” ’ ” (*Lee v. Southern California University for Professional Studies, supra*, 148 Cal.App.4th 782, 788, quoting *Net2Phone, Inc. v. Superior Court, supra*, 109 Cal.App.4th 583, 588.) These authorities are not outliers. (*Bugna v. Fike* (2000) 80 Cal.App.4th 229, 233; *Berclain America Latina v. Baan Co.* (1999) 74 Cal.App.4th 401, 407; *Bancomer, S.A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1461; *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1493.)

National Union is obviously aware of the principle that an insurer pressing its policy right of subrogation is commonly said to “stand in the shoes” of its insured, and thus subject to any defenses which can be asserted against the insured. (*Nation Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 53.) This court has applied the concept. (*Travelers Casualty & Surety Co. v. American Equity Ins. Co., supra*, 93 Cal.App.4th 1142, 1151.) And, although the principle is most commonly applied to claims of express contractual subrogation, it also applies to an insurer’s claim for equitable subrogation. (See *Dobbas v. Vitas* (2011) 191 Cal.App.4th 1442, 1449; *Great American Ins. Cos. v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 451-452.)

National Union repeatedly underscores that it is not a party to XL’s contract of insurance with RMC. But an examination of National Union’s cross-complaint demonstrates that National Union is hardly a complete stranger to the XL policy. In its cause of action for declaratory relief, National Union alleged that “Plaintiffs [RMC] contend National Union has an obligation to provide insurance coverage to plaintiffs for the [county and homeowners’ actions]. National Union generally denies plaintiffs’ allegations and alleges that if plaintiffs are entitled to insurance coverage under the National Union policies . . . , then XL also has an obligation to provide such insurance coverage to plaintiffs *under the XL policy.*” (Italics added.) These allegations are also asserted in National Union’s causes of action for equitable contribution and subrogation,

both of which are based on XL's denial of "coverage . . . *under the XL policy.*" (Italics added.)

It thus appears that National Union is in effect alleging that it has been prejudiced because XL has not fulfilled various obligations required by XL's own policy to RMC. National Union is therefore claiming benefits due "*under the XL policy.*" As the trial court noted, the policy is put at issue by National Union's causes of action because the foundational question is whether there is coverage under the XL policy and "any coverage under the policy 'shall be determined in accordance with the law and practice of [an English] court,' which makes that provision relevant to a determination of coverage under the policy." National Union is therefore " 'closely related' to the contractual relationship" between XL and RMC. (*Net2Phone, Inc. v. Superior Court, supra*, 109 Cal.App.4th 583, 589.) By alleging its entitlement to equitable subrogation, National Union makes itself subject to the forum selection provision of the XL policy. Like the trial court, we discern no logical reason why, by also linking its claim for equitable contribution to the XL policy, National Union should be exempt from that provision as it may apply to that claim as well.

National Union places considerable reliance on *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, an authority not mentioned in its written opposition submitted to the trial court. *Crowley's* attraction for National Union is obvious. It too involved a claim against an insured that was paid by two American insurers, which in turn cross-complained for equitable contribution from foreign insurers. The foreign insurers moved to have proceedings stayed pending initiation and completion of arbitrating the dispute. The arbitration provisions were in each of the two policies the foreign insurers had issued to Crowley, the insured. The domestic insurers opposed the foreign insurers' motion, on the ground that they—the domestic insurers—were not signatories to the policies between Crowley and the foreign insurers. In *Crowley*, Division One of this District held that the foreign insurers' motion was correctly denied because "an equitable contribution claim does not arise from contract but from equity,

and because there are no applicable exceptions to the general rule that nonsignatories to an arbitration agreement cannot be compelled to arbitrate.” (*Id.* at p. 1066.)

National Union’s reliance on *Crowley* is misplaced because that decision is easily distinguishable. Most fundamentally, *Crowley* did not involve a forum selection provision. Equitable contribution was involved, but only within the larger context of resolving that issue by arbitration. No question of arbitration is presented here. *Crowley* is also distinguishable because it did not involve a claim for subrogation, which even National Union concedes ties it to XL’s policy. Lastly, *Crowley* did not examine the “closely related to the contractual relationship” approach discussed above. Apart from domestic insurers opposing foreign insurers, and equitable contribution being involved, *Crowley* bears no resemblance to the actuality of the dispute between national Union and XL.

We also see no basis for concluding the trial court abused its discretion in treating the forum selection provision as mandatory. Although, unlike the trial court, we believe the language “Each party agrees to submit to the jurisdiction of any court of competent jurisdiction within England” sounds more mandatory than permissive, the overall import of the provision is clearly mandatory. Its scope is extremely broad—“Any dispute concerning the interpretation of terms, conditions, limitations and/or exclusions contained herein” as well as “all matters arising hereunder.” Not only the choice of law, but also the court to apply that law is specified. Both of these subjects specify England as the exclusive source of law and venue. The provision may lack absolutist language of command and acquiescence, but we agree with the trial court that it “has sufficient indicia to make [it] mandatory.” National Union’s challenge to the trial court’s conclusion is not persuasive.

Once a forum selection provision is determined to be valid and mandatory, the party challenging its application has the burden of establishing that enforcement of the provision would be unreasonable. (*Smith, Valentino & Smith, Inc. v. Superior Court*, *supra*, 17 Cal.3d 491, 496; *Lee v. Southern California University for Professional Studies*, *supra*, 148 Cal.App.4th 782, 788; *Net2Phone, Inc. v. Superior Court*, *supra*,

109 Cal.App.4th 583, 588.) “If there is no mandatory forum selection clause, a forum non conveniens motion ‘requires the weighing of a gamut of factors of public and private convenience’ [Citation.] However, if there *is* a mandatory forum selection clause, the test is simply whether application of the clause is unfair or unreasonable, and the clause is usually given effect. Claims that the . . . forum is unfair or inconvenient are generally rejected. [Citation.] A court will usually honor a mandatory forum selection clause without extensive analysis of factors relating to convenience. [Citation.] ‘ “Mere inconvenience or additional expense is not the test of unreasonableness. . . .” ’ of a mandatory forum selection clause.” (*Berg v. MTC Electronic Technologies Co., supra*, 61 Cal.App.4th 349, 358-359.) Given that we have held the forum selection provision was mandatory, it follows that we must necessarily reject National Union’s contention that “the trial court improperly placed the burden on National Union to show it was unreasonable to enforce the forum selection clause and failed to conduct a proper forum non conveniens analysis.”

In light of the foregoing, we hold that the trial court did not abuse its discretion when it granted XL’s stay motion. (*America Online, Inc. v. Superior Court, supra*, 90 Cal.App.4th 1, 7-9.)

DISPOSITION

The order is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Haerle, J.