IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

SOUTHWEST LTC-MANAGEMENT SERVICES, LLC, Plaintiff, vs. LEXINGTON INSURANCE COMPANY, QBE SPECIALTY INSURANCE COMPANY, STEADFAST INSURANCE COMPANY, CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY/CERTIFICATE NO. AMR-36293-03, UNITED SPECIALTY INSURANCE COMPANY, GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA, INDIAN HARBOR INSURANCE COMPANY, PRINCETON EXCESS AND SURPLUS LINES INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY OF HANNOVER SE, Defendants.	No.1:18-CV-00491-MAC

REPORT AND RECOMMENDATION
GRANTING MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

This case is assigned to the Honorable Marcia A. Crone, United States District Judge, and is referred to the undersigned for pretrial management. Pending before the court is Defendants', Certain Underwriters at Lloyd's, London Subscribing to Certificate No. AMR-36293-03 (Underwriters) and International Insurance Company of Hannover SE (Hannover), joined by Indian Harbor Insurance Company, QBE Specialty Insurance Company, Steadfast Insurance Company, General Security Indemnity Company of Arizona, United Specialty Insurance Company, Lexington Insurance Company, and Princeton Excess and Surplus Lines Insurance

Company (collectively, Defendants), "Motion to Compel Arbitration and to Stay Litigation Pending Arbitration." Doc. No. 7. On December 24, 2018, Plaintiff Southwest LTC-Management Services, LLC filed a response. Doc. No. 14. On December 28, 2018, Defendants filed a reply. Doc. No. 15. After reviewing the motion and the applicable responses, the undersigned recommends granting Defendants' motion (Doc. No. 7) to compel the parties to arbitration and to stay the matter pending arbitration.

I. BACKGROUND

On May 14, 2018, Plaintiff filed a petition in the 136th Judicial District Court for Jefferson County, Texas seeking a judgment that the subject commercial property insurance policy (Policy) issued by Underwriters, Hannover, and the other Defendants is binding and enforceable, and that the Policy's flood sublimit does not apply to reduce Plaintiff's claim for loss and damage. Doc. No. 1, Ex. B-1. The Policy bears account number 45XXX9, covers property located at 6600 Ninth Avenue, Port Arthur, Texas, and was effective from March 1, 2017 to March 1, 2018. Doc. No. 1-9 at 7; Original Petition at 7. Plaintiff contends that Hurricane Harvey caused physical loss and damage to their Port Arthur location on or around August 25, 2017, and that they timely submitted their claim under the Policy. *Id.* Accordingly, Plaintiff requests $6,400,000 in damages and $2,000,000 in estimated business income loss for a total loss of $8,400,000. *Id.* Plaintiff argues that their total loss is less than the Policy's $10,733,028 limit of liability for the Port Arthur location. *Id.*

On November 14, 2017, after visiting and surveying the property, Defendants paid Plaintiff $2,500,000. *Id.* at 8. Defendants maintain that the Policy's $2,500,000 per occurrence flood sublimit applies to limit the Defendants' indemnity obligation for this loss. Doc. No. 7 at 3. Because Defendants paid the flood sublimit, Defendants argue that Plaintiff has been paid the Policy limits for loss or damage caused by the flood. *Id.* Plaintiff disputes that complete payment

has been made under the Policy. Pl.'s Original Petition, Doc. No. 1-9. On September 19, 2018, Defendants invoked their right to arbitrate and requested that Plaintiff join in a referral to arbitration, but Plaintiff rejected the request on September 28, 2018. Doc. Nos. 8-3, 8-4.

On October 5, 2018, Underwriters and Hannover removed this case from the 136th Judicial District Court for Jefferson County, Texas, pursuant to 28 U.S.C. §§ 1441, 1446. Doc. No. 1. Defendants argued that removal was based on a valid arbitration clause falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention), giving this court original jurisdiction under 9 U.S.C. §§ 202, 203, 205. But, Plaintiff argues that Defendants' added endorsements to the Policy—specifically service-of-suit clauses— that expressly conflict with and supersede the arbitration clause by vesting a "court of competent jurisdiction" with the power to resolve disputes between the parties. Doc. No. 14 at 1. Therefore, Plaintiff asks the Court to deny the motion to compel arbitration and remand this action to the appropriate court. *Id*. at 2.

II. LEGAL STANDARD

Congress's enactment of the Federal Arbitration Act (FAA) "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." *See Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006). Chapter One of the FAA makes written arbitration agreements in any maritime transaction or contract "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (West 2017). Simply put, the FAA creates substantive federal law regarding the enforceability of arbitration agreements, while background principles of state contract law control the interpretation of the scope of the agreements. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

A. Legal Standard Surrounding the New York Convention for Compelling International Arbitration

Chapter Two of the FAA, 9 U.S.C. §§ 201–08, implements the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.NT.S. 38, (Dec. 29, 1970), *reprinted in* 9 U.S.C. § 201. Commonly known as the "Convention," actions brought under this chapter are deemed to arise under the laws and treaties of the United States. 9 U.S.C. § 203. The FAA empowers district courts to compel arbitration in accordance with agreements, 9 U.S.C. § 206, and to enforce awards, 9 U.S.C. § 207, falling within the Convention. Importantly, due to the lack of conflict between Chapters One and Two of the FAA, both chapters apply to actions and proceedings brought under the Convention. *See* 9 U.S.C. § 208.

To determine whether to compel arbitration under the Convention, "courts conduct only a very limited inquiry." *Freudensprung v. Offshore Tech. Servs. Inc*., 379 F.3d 327, 339 (5th Cir. 2004). An arbitration agreement falls under the Convention if the agreement "arises out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in Section 2 of this title." 9 U.S.C. § 202 (1970). Accordingly, the Convention governs the enforcement of an arbitration agreement if (1) it is in writing, (2) the place of the arbitration is in a country that is a signatory to the convention, (3) the dispute arises out of a commercial relationship, and (4) at least one of the parties is not a citizen of the United States. *See Stemcor USA Inc. v. Cia Siderurgica do Para Cosipar*, 895 F.3d 375, 379 (5th Cir. 2018).

If the arbitration agreement satisfies these four requirements, the court must order arbitration unless it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed." *Freudensprung*, 379 F.3d at 339 (quoting New York Convention, art. II(3)).

"This challenge must be grounded in standard breach-of-contract type defenses—such as fraud, mistake, duress, or waiver—which defenses can be applied neutrally before international tribunals." *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1289 (11th Cir. 2015).

B. Legal Standard for Enforcing an Arbitration Agreement

The Fifth Circuit follows a two-step approach to analyzing whether the parties have agreed to arbitrate a dispute. *Kubala v. Supreme Prod. Servs.*, 830 F.3d 199, 201 (5th Cir. 2016); *see also Sherer v. Green Tree Serv., LLC*, 548 F.3d 379, 381 (5th Cir. 2008); *JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596, 598 (5th Cir. 2007). The first step involves contract formation—whether the parties entered into *any arbitration agreement at all*. *Kubala*, 830 F.3d at 201 (emphasis in original). This requires courts to apply the contract law of the particular state governing the agreement. *Wash. Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004). The second step involves contract interpretation to determine whether *this* claim is covered by the arbitration agreement. *Id.* Normally, both steps are questions for the court. *Id.* (citing *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir 2003)).

There is some debate between the parties over whether Texas or New York law should govern this dispute. Plaintiff contends that Texas law applies because the Policy was issued through a Texas program manager (AmRisc) to a Texas insured covering properties in Texas, and the Texas Insurance Code is expressly acknowledged in the insurance contract. *See* App. 001–002; Doc. No. 14 at 5. Defendants assert that New York law applies because the arbitration agreement designates New York law. Doc. No. 7 at n.5. Irrespective of the choice of law analysis, in this particular case, there is no significant difference in the relevant jurisprudence.

Insurance policies are contracts, and the rights and obligations arising from them are construed in accordance with the rules generally applicable to contracts. *Nassar v. Liberty Mut.*

Fire Ins. Co., 508 S.W.3d 254, 257 (Tex. 2017); *Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 N.Y.3d 675, 680 (N.Y. 2015). Therefore, the court must determine the parties' intent as reflected in the terms of the policy itself, and "examine the entire agreement and seek to harmonize and give effect to all provisions so that none will be meaningless." *Id.* (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010)). "Unless the policy dictates otherwise, [courts] give words and phrases their ordinary and generally accepted meaning, reading them in context and in light of the rules of grammar and common usage." *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015) (citing *Gilbert*, 327 S.W.3d at 126); *see also Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 10 N.Y.3d 170, 177 (N.Y. 2008) ("As with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court.'") (internal citations omitted).

III. ANALYSIS

Defendants urge the court to stay these proceedings and direct the parties to arbitration. Doc. No. 7. Plaintiff argues that the endorsement added to the Policy supersedes the arbitration clause, and that the case should be remanded because this court otherwise lacks jurisdiction due to the absence of a valid arbitration agreement. Because this court has jurisdiction pursuant to 9 U.S.C. § 205, the undersigned will first analyze whether the parties are bound by the Convention, and then analyze whether a valid arbitration agreement continues to exist and cover the dispute.

A. The Arbitration Agreement is Subject to the Convention

The Convention governs an arbitration agreement if (1) it is in writing, (2) the place of the arbitration is in a country that is a signatory to the convention, (3) the dispute arises out of a commercial relationship, and (4) at least one of the parties is not a citizen of the United States. *Stemcor USA Inc. v. Cia Siderurgica do Para Cosipar*, 895 F.3d 375, 379 (5th Cir. 2018). First,

as shown in the Policy, there is an agreement in writing to arbitrate the dispute. Doc. No. 1-9 at 49–50. The arbitration provision provides that the parties shall arbitrate "all matters in difference" between them. *Id.*

> C. ARBITRATION CLAUSE: All matters in difference between the Insured and the Companies (hereinafter referred to as "the parties") in relation to this insurance, including its formation and validity, and whether arising during or after the period of this insurance, shall be referred to an Arbitration Tribunal in the manner hereinafter set out.
>
> Unless the parties agree upon a single Arbitrator within thirty days of one receiving a written request from the other for Arbitration, the Claimant (the party requesting Arbitration) shall appoint his Arbitrator and give written notice thereof to the Respondent. Within thirty days or receiving such notice, the Respondent shall appoint his Arbitrator and give written notice thereof to the Claimant, failing which the Claimant may nominate an Arbitrator on behalf of the Respondent.
>
> Should the Arbitrators fail to agree, they shall appoint, by mutual agreement only, an Umpire to whom the matter in difference shall be referred.
>
> Unless the parties otherwise agree, the Arbitration Tribunal shall consist of persons employed or engaged in a senior position in Insurance underwriting or claims.

Second, the Policy dictates that "[t]he seat of the Arbitration shall be in New York and the Arbitration Tribunal shall apply the law of New York as the proper law of this insurance." Doc. No. 1-9 at 50.

> The Arbitration Tribunal shall have power to fix all procedural rules for the holding of the Arbitration including discretionary power to make orders as to any matters which it may consider proper in the circumstances of the case with regard to pleadings, discovery, inspection of documents, examination of witnesses and any other matter whatsoever relating to the conduct of the Arbitration and may receive and act upon such evidence whether oral or written strictly admissible or not as it shall in its discretion think fit.
>
> All costs of the Arbitration shall be in the discretion of the Arbitration Tribunal who may direct to and by whom and in what manner they shall be paid.
>
> The seat of the Arbitration shall be in New York and the Arbitration Tribunal shall apply the law of New York as the proper law of this insurance.
>
> The Arbitration Tribunal may not award exemplary, punitive, multiple, consequential, or other damages of a similar nature.
>
> The award of the Arbitration Tribunal shall be in writing and binding upon the parties who covenant to carry out the same. If either of the parties should fail to carry out any award the other may apply for its enforcement to a court of competent jurisdiction in any territory in which the party in default is domiciled or has assets or carries on business.

The United States is a signatory to the Convention (*see* New York Arbitration Convention, Contracting States, http://www.newyorkconvention.org/countries.), thereby satisfying the second element. Third, the dispute arises out of a commercial relationship, namely the parties' insurance

agreement. *See Port Cargo Serv., LLC v. Certain Underwriters at Lloyd's London*, 2018 WL 4042874 (E.D. La. Aug. 24, 2018) (Lemmon, J.). Lastly, multiple defendants are citizens of Contracting States other than the United States. *See* Doc. No. 7 at 8. For example, Hannover is organized under the laws of and has its principal place of business in Germany, and Underwriters is organized under the laws of and has its principal place of business in the United Kingdom of Great Britain and Ireland. *Id*; *see also Port Cargo*, 2018 WL 4042874. Thus, the final prerequisite is satisfied because at least one party is not a United States citizen. Therefore, the arbitration agreement falls under Chapter 2 of the FAA.

Because the arbitration agreement satisfies these four requirements, the court must order arbitration unless the agreement is "null and void, inoperative or incapable of being performed." *Freudensprung*, 379 F.3d at 339 (quoting New York Convention, art. II(3)). Plaintiff has not alleged any defenses regarding the validity of the arbitration agreement, as a whole, in the Policy. Yet, Plaintiff claims that the Defendants cannot compel arbitration because there is no longer an agreement to arbitrate due to the endorsements. Doc. No. 14. As a result, the undersigned will examine whether a valid agreement to arbitrate exists and whether the disputed claim is within the parameters of the agreement.

B. Service of Suit Provision

To determine whether a court should compel arbitration and impose a stay on the proceedings pending arbitration, the court must ascertain whether there is a valid agreement to arbitrate and, if so, whether the specific dispute falls within the substantive scope of that agreement. *Jones v. Halliburton Co.*, 583 F.3d 228, 234 (5th Cir. 2009); *Am. Std. v. Brownsville Indep. Sch. Dist*., 196 S.W.3d 774, 781 (Tex. 2006). Because neither party disputes the validity of the arbitration clause itself, the issues before the court are whether the parties' dispute of the

Policy's coverage falls within the scope of the arbitration clause, and whether the service-of-suit clause expressly conflicts with and supersedes the arbitration clause.

The service-of-suit clause states:

> It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured) will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States.

Doc. No. 8-2; App. 071; *see also* App. 077–82, 086–91, 092–95, 99–100. Plaintiff also points to the "Applicable Law" provision which expressly provides that the "Insurance shall be subject to the applicable law to be determined by the court of competent jurisdiction as determined by the provisions of the Service of Suit Clause (USA)." *Id.* Moreover, the Endorsement also expressly provides that it "changes the policy." *Id.* As a result, Plaintiff argues that through these quoted provisions, the arbitration provision has been expressly superseded and waived, including the New York venue and choice of law provision. Therefore, Plaintiff alleges that when Defendants failed "to pay any amount claimed to be due" under the contract, Defendants agreed to "submit to the jurisdiction of a Court of competent jurisdiction." *Id*; *see also* Doc. No. 14 at 8.

Defendants argue that the arbitration clause is not superseded because there is not a clear and unequivocal waiver of the arbitration clause. Doc. No. 15 at 3; *see Ensco Int'l Inc. v. Certain Underwriters at Lloyd's*, 579 F.3d 442, (5th Cir. 2009) (finding waiver under the Convention because the policies' forum selection clause fixed exclusive venue for litigation clearly and unequivocally); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1209–12 (5th Cir. 1991) (determining that under the Convention, there must be an explicit waiver of

Convention Act removal rights); *Louisiana Commerce & Trade Ass'n Self Insurers Fund v. Certain Underwriters at Lloyd's London*, Civ. A. No. 13-700-JJB, 2014 WL 3513396 *4 (M.D. La. July 15, 2014) ("A contractual waiver of the right to removal [under the Convention] must be 'clear and unequivocal.'").

Moreover, Defendants argue that existing case law supports their position and is contrary to Plaintiff's position, a point that Plaintiff concedes. *See* Doc. No. 14 at 6 ("Plaintiff recognizes that this question of whether a 'service of suit' endorsement supersedes an arbitration clause has been addressed by courts, and that the majority have concluded that the arbitration provision is enforceable."); *see e.g., Century Indem. Co. v. Certain Underwriters at Lloyds*, 584 F.3d 513, 554 (3d Cir. 2009) ("[S]ervice-of-suit clauses do not negate accompanying arbitration clauses; indeed, they may complement arbitration clauses by establishing a judicial forum in a party may enforce arbitration."); *McDermott*, 944 F.2d at 1204–05; *Gemini Ins. Co. v. Certain Underwriters at Lloyd's London*, No. H-17-1044, 2017 WL 1354149 (S.D. Tex. April 13, 2017); *Security Life Ins. Co. v. Hannover Life Reassurance Co. of America*, 167 F. Supp. 2d 1086, 1088 (D. Minn. 2001) (determining that "[i]t is well established that such service of suit clauses do not abridge an agreement to arbitrate all disputes arising out of a relationship" and citing cases finding the same); *W. Shore Pipe Line Co. v. Assoc. Elec. & Gas Ins. Servs., Ltd.*, 791 F. Supp. 200, 204 (N.D. Ill. 1992); *NECA Ins., Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*., 595 F. Supp. 955, 958 (S.D.N.Y. 1984).

Yet, Plaintiff attempts to distinguish this case from the contrary authority—in particular *McDermott* and *Gemini*—by alleging that because the arbitration clause already contains an enforcement provision, the Defendants intended for the enforcement provision in the service-of-suit clause to supersede the arbitration provision. Doc. No. 14 at 7. Plaintiff argues that courts

that have harmonized competing provisions have done so due to the arbitration clause not having an enforcement mechanism by itself. *Id.* Therefore, because the arbitration clause and the service-of-suit clause both provide for an enforcement provision, Plaintiffs allege the clauses at issue conflict. *Id.*

Plaintiff's attempt to distinguish *McDermott* and *Gemini* is unpersuasive. Defendants point out that Plaintiff did not cite to any authority that materially identical provisions create a conflict or require interpreting one provision to necessarily supersede the other. Doc. No. 15 at 5. Indeed, Defendants provide authority illustrating that "the harmonization of the service-of-suit and arbitration provisions is not just about the enforcement of the arbitration award; it is also about having a court to compel the matter to arbitration." *Id*; *see McDermott*, 944 F.2d at 1205; *New Jersey Physicians United Reciprocal Exch. v. Ace Underwriting Agencies Ltd.*, No. 12-04397 FLW, 2013 WL 1558716 *5 (D.N.J. April 11, 2013) ("Thus, the Arbitration Clause and Service of Suit clause can be read in harmony: the Arbitration Clause covers all disputes, but if either party should need to turn to the courts to compel arbitration or enforce an arbitration award, or the parties opt out of arbitration, the selection of a forum is governed by the Service of Suit clause.").

After reviewing the parties' arguments, the undersigned concludes that the Defendants' arguments are supported by the applicable law and the record in this case. Keeping in line with the canons of contractual construction, Defendants' interpretation of the Policy gives meaning to both the arbitration clause and the service-of-suit clause, whereas Plaintiff's reading renders the arbitration clause superfluous. The undersigned construes the service-of-suit provision as complementing the arbitration clause by providing a judicial forum for compelling or enforcing

arbitration. Therefore, there is not only a valid agreement to arbitrate, but the service-of-suit provision does not supersede the arbitration clause.

Further, Plaintiff's claim for payment under the Policy and their related arguments requires interpretation of the terms of the Policy. The arbitration clause applies to "all matters in difference." *See* Doc. No. 1-9 at 49–50. Giving the words "all," "matters," and "difference" their plain and ordinary meaning allows for the undersigned to conclude that the dispute over policy coverage and whether a flood sublimit applies falls within the purview of the arbitration clause. Therefore, the undersigned finds that the court should grant Defendants' motion to compel arbitration and stay the proceedings pending enforcement of an arbitral award, if any.

IV. RECOMMENDATION

The undersigned recommends that Defendants' "Motion to Compel Arbitration and Stay Proceedings" (Doc. No. 7) be **GRANTED** and that the parties be ordered to resolve the presented claim in an arbitration conducted in accordance with the terms of the Policy.

The undersigned further recommends that the action be **STAYED** and that the Clerk of Court administratively close the case.

V. OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(c) (Supp. IV 2011), each party to this action has the right to file objections to this report and recommendation. Objections to this report must (1) be in writing, (2) specifically identify those findings or recommendations to which the party objects, (3) be served and filed within fourteen days after being served with a copy of this report, and (4) be no more than eight pages in length. *See* 28 U.S.C. § 636(b)(1)(c); FED. R. CIV. P. 72(b)(2); LOCAL RULE CV-72(c). A party who objects to this report is entitled to a de novo determination by the United States District Judge of those proposed findings and recommendations to which a specific objection is timely made. See 28 U.S.C. § 636(b)(1)(c); FED. R. CIV. P. 72(b)(3).

A party's failure to file specific, written objections to the proposed findings of fact and conclusions of law contained in this report, within fourteen days of being served with a copy of this report, bars that party from: (1) entitlement to de novo review by the United States District Judge of the findings of fact and conclusions of law, *see Rodriguez v. Bowen*, 857 F.2d 275, 276–77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of any such findings of fact and conclusions of law accepted by the United States District Judge. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996).

SIGNED this 29th day of March, 2019.

Zack Hawthorn
United States Magistrate Judge