FILED
11-02-2020
CIRCUIT COURT
DANE COUNTY, WI
2020CV001563

BY THE COURT:

DATE SIGNED: November 2, 2020

Electronically signed by Julie Genovese
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 13 DANE COUNTY

L'Eft Bank Wine Company LTD., \

Plaintiff,

v. Case No. 2020CV1563

Bogle Vineyards, Inc. et al.

Defendants,

DECISION AND ORDER DENYING DEMAND FOR ARBITRATION

PROCEDURAL BACKGROUND

Plaintiff L'Eft Bank Wine Company Limited (L'Eft Bank), is a distributor of wine and does substantial business in Dane County. Defendant Bogle Vineyards, Inc. (Bogle) is a California corporation engaged in the production and distribution of various wine products through wholesale distributors. On July 29, 2020, L'Eft Bank sought a temporary

restraining order under the Wisconsin Fair Dealership Law [1](WFDL) to prevent Bogle from terminating its 30 plus year relationship and replacing L'Eft Bank with defendant Capitol-Husting. The TRO was granted *ex parte* by Judge Shelley Gaylord on July 30, 2020.

After a couple of substitutions of judge and the assignment of the case to the Dane County commercial docket, this court held a scheduling conference on August 13, 2020. After hearing from the parties, the court decided that an evidentiary hearing was necessary to determine whether the WFDL applied. Over the objection of Bogle, the court continued the TRO but agreed with Bogle that expedited discovery was appropriate with a fast track two-day evidentiary hearing scheduled to begin on September 17, 2020.

On September 9, 2020, just eight days before the evidentiary hearing, Bogle filed a letter motion seeking to stay the proceedings and demanding arbitration. L'Eft Bank objected. By order dated September 10, 2020, this court postponed the evidentiary hearing and set a briefing schedule on the arbitration issue on the theory that if in fact the parties were required to arbitrate, the evidentiary hearing was not necessary.[2]

FACTS RELEVANT TO ARBITRATION

For nearly 34 years, L'Eft Bank has served as the sole distributor of Bogle's wines for the entire state of Wisconsin. During that time, the parties never had a written distributor agreement. According to Bogle, during the course of discovery in this case, it realized that it had a binding arbitration agreement with L'Eft Bank through the Terms and Conditions (Terms) which Bogle affixed to the invoices provided to L'Eft Bank. According

[1] Chapter 135 of the Wisconsin Statutes.

[2] The court held another scheduling conference so that if the demand for arbitration were denied, the parties would have time on the court's calendar for the evidentiary hearing. That two day hearing is scheduled to for November 5.

to Bogle, those Terms have been affixed to invoices and credit memos since at least 2013. Those Terms include the following language:

> California law governs these Terms and Conditions. The term of Distributor's appointment is at-will, is renewable annually on thirty days notice, and may be terminated by BOGLE on thirty days notice at any time. Breach of any promise made by Distributor or failure of Distributor to meet depletion and account placement requirements mutually agreed to between the parties shall be "good cause" for the purposes of any state law**. In the event of any dispute related to BOGLE, BOGLE Products or Distributor's rights to continue distributing BOGLE Products, Distributor agrees that the same shall be resolved by arbitration in San Francisco in accordance with the Comprehensive Rules and Procedures of JAMS or its successor then in effect, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction therefore.** The decision of the arbitrator shall be final and binding on the parties. The arbitrators are not empowered to award damages in excess of compensatory damages, but shall include in the final award an allocation of attorneys' fees, costs and expenses incurred in the arbitration, whether or not such fees, costs and expenses would otherwise be recoverable under applicable statutes and rules of court. The arbitrator shall render the award in writing, explaining the factual and legal basis for decision as to each of the principal controverted issues. The parties and each of them expressly agree that any petition to confirm, modify or enforce the arbitral award, other than for non-payment of goods sold and delivered, shall be resolved in a State or Federal Court of competent jurisdiction in San Francisco, to which jurisdiction the parties hereby submit. (emphasis added)

In 2011, Bogle litigated in Illinois federal district court whether nearly identical Terms affixed to an Illinois distributor's invoices required arbitration. *Metro Premium Wines v. Bogle Vineyards, Inc.* No. 11C911, 2011 WL 2432957 (N.D. Ill.) Just five months after losing the issue, Bogle's National Sales Manager, Sam Bon, sent a letter to L'Eft Bank's CEO, Mark Johnston, requesting L'Eft Bank enter into a written distributor agreement. Bon included with his letter a proposed written distribution agreement.

Like Bogle's Terms, the written distribution agreement called for application of California law and contained provisions about when and how Bogle could terminate L'Eft

Bank. Section (g) of the proposed agreement contained the following arbitration clause, requiring the parties to arbitrate disputes in San Francisco:

> (g) Disputes: . . . Any disputes remaining unresolved after mediation shall be settled by binding arbitration conducted in San Francisco, California utilizing a mutually agreed arbitrator or arbitration service. The arbitration shall be conducted under the Commercial Arbitration Rules of the mutually agreed arbitrator or arbitration service. Both parties shall be entitled in any arbitration to conduct reasonable discovery, including document production and a reasonable number of depositions not to exceed five per party. The prevailing party shall be entitled to recover its costs and reasonable attorney's fees, as determined by the arbitrator. The arbitrator shall be required to follow the law.

This proposed arbitration clause was similar to the clause that the *Metro* court held to be unenforceable. L'Eft Bank's CEO, Mark Johnston, was aware of the *Metro* case and was wary of Bogle's proposed agreement. [3]He knew that he did not want to accept all of the terms in the written agreement, especially those that would have impaired L'Eft Bank's ability to bring a lawsuit under the WFDL. But he initially tried to negotiate with Bogle. Accordingly, on March 30, 2012, Johnston returned a signed version of the proposed agreement with a letter explaining that L'Eft Bank's agreement was contingent upon Bogle's acceptance of a proposed written Addendum, which he included. The Addendum would have controlled over conflicting provisions of the proposed distribution agreement (e.g., the arbitration clause in section (g)) and included numerous protections for L'Eft Bank. The Addendum ensured that L'Eft Bank could bring a lawsuit in Wisconsin court to protect its rights under the Wisconsin Fair Dealership Law:

[3] Johnston testified: "We received this letter shortly after Bogle's termination of Metro Wines in Chicago, and we thought it probably related to that . . . My supposition was that Bogle was trying to find a way to avoid this happening in the future."

> By entering into the Agreement and this Addendum, Distributor shall not be deemed to have given up or waived its rights under applicable law in the state where Distributor's business is located, including without limitation the ability to bring suit under such law.

Bogle declined to accept L'Eft Bank's counteroffer, but on April 19, 2012, Bon again wrote to Johnston. Bon acknowledged that L'Eft Bank had not accepted the proposed agreement and offered a counterproposal. Bon requested a copy of the proposed Addendum "in a Word file" so that Bogle could propose modifications. After that, Bogle had its attorneys at the law firm of Hinman & Carmichael (Hinman)[4] communicate with Johnston about a proposed written agreement.

On June 22, 2012, a Hinman attorney sent a written counterproposal from Bogle back to Johnston, by returning the Addendum with more proposed modifications. Bogle's attorney explained in an email that if L'Eft Bank agreed with this proposal, Johnston should sign the revised document and return it to the Hinman firm, which would then have Bogle sign and return a fully-executed copy to Johnston to signify that the parties had an agreement. By that time, however, Johnston had reconsidered the proposed distribution agreement and Addendum in totality and no longer viewed them as appropriate for L'Eft Bank. Johnston therefore declined to sign Bogle's modified Addendum. After that, communications about trying to enter into a mutually agreed written agreement ceased, there were no further discussions about these matters, and Bogle and L'Eft Bank continued doing business together without a written agreement.

In 2013, after Bogle lost the *Metro* case, was unable to secure a written distribution agreement with an arbitration clause, and knew that L'Eft Bank was unwilling to forego its rights under the WFDL, Bogle started to attach the Terms at issue to its invoices and

[4]Hinman is one of the firms representing Bogle in this case.

credit memos. Those Terms were sent by Bogle's distribution coordinator to the following L'Eft Bank employees: L'Eft Bank's purchasing coordinator; its accounts payable coordinator and its staff bookkeeper. None of these employees is an officer, director, manager or owner of L'Eft Bank. They are not involved in decision making or negotiation regarding L'Eft Bank's distribution rights or its relationship with Bogle. They had no actual or apparent authority to alter L'Eft Bank's relationship with Bogle.

DISCUSSION

As a preliminary matter, this court rejects L'Eft Bank's claim that Bogle waived its right to arbitration because it stayed silent during the course of expedited discovery and waited until eight days before the contested hearing to raise it. While the court agrees that Bogle's belated realization of its own arbitration provision is questionable, that issue would be decided by the arbitrator, not by this court. See *First Weber Group, Inc. v. Synergy Real Estate Group, LLC*. 2015 WI35, ¶37, 361 Wis. 2d 496, 860 N.W. 2d 498 (issues of procedural arbitrability, including waiver, delay or a like defense to arbitrability…are to be resolved during arbitration, rather than by a court").

The key issue then is whether there was an agreement to arbitrate. If so, this case must be stayed for binding arbitration. If not, then the case will proceed to an evidentiary hearing.

The Wisconsin Arbitration Act provides in relevant part:

> If any suit or proceeding be brought upon any issue referable to arbitration **under an agreement in writing** for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. Wis. Stat. § 788.02 (emphasis added)

The Wisconsin Supreme Court has comprehensively discussed the legal principles governing arbitration. *Midwest Neurosciences Associates, LLC. v. Great Lakes Neurosurgical Associates* 2018 WI 112, 384 Wis. 2d 669. These principles include:

- Individuals have the utmost liberty in contracting, and when entered into freely and voluntarily shall be held sacred and enforced by courts of justice. Thus, Wisconsin courts generally enforce rather than set aside contracts. ¶39
- Arbitration agreements are a matter of contract. Wisconsin law recognizes the need to defer to the parties' agreement to arbitrate and the policy of encouraging arbitration as an alternative to litigation. ¶¶40-41
- The court, not the arbitrator, decides the initial issue of arbitrability. The evidence of grant of authority must be clear and unmistakable. Silence or ambiguity affects the presumption of arbitrability. ¶42.
- The test is whether the parties consented to arbitrate the issue in question. In answering this question, the court applies state-law contract principles.[5] ¶¶44-45

There is no dispute that the parties did not sign a written agreement providing for arbitration. Rather, the issue is whether the Terms affixed by Bogle to the invoices requiring arbitration are binding on L'Eft Bank.

[5] Both sides argue Wisconsin law so there is no dispute that Wisconsin law controls whether the parties have such an agreement.

Wis. Stat. § 402.207(2) of Wisconsin's UCC provides:

> **Additional Terms in Acceptance or Confirmation**
>
> **(2)** The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> *****
>
> **(b)** They materially alter it;

This provision is meant to address the "battle of the forms" that often exists between merchants who routinely do business with each other. The Uniform Commercial Code acknowledges that invoices are a valid way to insert new terms into a contract, even if the other party does not read them, **unless the new terms material alter it.** *Converting/Biophile Laboratories, Inc. v. Ludlow Composites Corp.*, 2006 WI App 187, ¶16, 296 Wis. 2d 273, 722 N.W. 2d 633. Under subsection (b) of the UCC, then, the additional terms are construed as proposals and between merchants become part of the contract unless the additional terms materially alter the contract.

The Wisconsin Court of Appeals addressed whether an indemnification clause inserted in an invoice was a material alteration. *Resch v. Greenlee Bros. & Co*., 128 Wis. 2d 237(Ct. App. 1985). The court cited with approval the official comment to §2-207 of the UCC describing the considerations for deciding whether a clause "materially alters" a contract:

> Examples of typical clauses which would normally "materially alter" the contract and **so result in surprise or hardship if incorporated without express awareness** by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; ... a clause requiring that complaints be made in a time materially shorter than

> customary or reasonable. Official UCC Comment 4, Wis. Stat. Ann. § 402.207 (West 1964).
>
> Where exposure is great, such exposure should not become part of a contract by operation of law. There should be an express agreement between the parties concerning its inclusion or exclusion. [6](emphasis added)

The Seventh Circuit Court of Appeals recognized as well that the standard for material alteration is one that would have taken the other party by surprise if not expressly consented to. "An alteration is material if the party against whom it is sought to be enforced would be ambushed by its addition to the contract. In such circumstances, consent to the alteration cannot be presumed." *Waukesha Foundry, Inc. v. Industrial Engineering, Inc.*91 F.3d 1002, 1009 (7th Cir. 1996) citing *Union Carbide,* 947 F.2d at 1336.

While there is conflicting authority on whether an arbitration clause materially alters the parties' agreement, the majority of Courts hold that an arbitration clause contained in a purchase order confirmation materially alters the purchase order under UCC § 2-207. "Although there is authority to the contrary, the addition of an arbitration clause is generally found to be a material alteration." Lawrence's Anderson on the Uniform Commercial Code, 2 Anderson U.C.C. § 2-207:80 (3d. ed.).*See also Coastal Industries, Inc. v. Automatic Steam Products Corp.*, 654 F.2d 375, 31 U.C.C. Rep. Serv. 1566 (5th Cir. 1981); *Hitchiner Mfg. Co. v. Modern Indus., Inc.*, No. 09-CV-242-PB, 2009 WL 3643471 (D.N.H. Oct. 29, 2009); *Wilson Fertilizer & Grain, Inc. v. ADM Mill. Co.*, 654 N.E.2d 848, 27 U.C.C. Rep. Serv. 2d 801 (Ind. Ct. App. 1995); *Davidson*

[6] *See also Deminsky v. Arlington Plastics Machinery*, (an indemnification clause is a material alteration which only became part of the agreement because the buyer's agent promptly signed and returned the sales order thus expressly agreeing to the term) 2001 Wi App ¶15, 249 Wis. 2d 441.

Extruded Products, Inc. v. Babcock Wire Equipment Ltd., 138 Misc. 2d 118, 523 N.Y.S.2d 338, 5 U.C.C. Rep. Serv. 2d 943 (Sup 1987); *Diamond's Run Ltd. v. Rebel Fabrics, Inc.,* 134 Misc. 2d 568, 511 N.Y.S.2d 996, 3 U.C.C. Rep. Serv. 2d 499 (N.Y. City Civ. Ct. 1987). Furthermore, in the *Metro* decision, Bogle litigated a nearly identical clause in the Illinois federal court. That court, applying California law, found that the arbitration clause was indeed a material alteration because it deprived a party of the procedural protection to which it would otherwise be entitled.

I conclude that the mandatory arbitration clause is a material alteration under Wisconsin law. The decision to arbitrate is not minor term that can be inserted and become part of a relationship by affixing it to an invoice. The Wisconsin Supreme Court, while encouraging arbitration clauses, requires that the evidence of grant of authority must be **clear and unmistakable**. Silence or ambiguity affects the presumption of arbitrability. Both parties must consent to arbitration. *Midwest Neurosciences. Assoc,.,* 2018 WI 112, ¶¶42-45.

Here, the grant of arbitration is not clear or unmistakable. Rather, the arbitration term was affixed to invoices and credit memos that were only seen by lower level employees. There was no clear acceptance of the Terms by anyone at L'Eft Bank. At best, there was silence. Nor did the course of conduct between the parties suggest that L'Eft Bank ever accepted the term. Even Bogle's own vice-president and chief financial officer only became aware of the arbitration clause during discovery in this case. It is

undisputed that Bogle had attempted to obtain a clear and unmistakable agreement to arbitrate after it lost the *Metro* decision, and that proposal was rejected by L'Eft Bank. [7]

Holding L'Eft Bank to such a term would result in unreasonable surprise and undue hardship which is the standard recognized in the UCC and approved by the Wisconsin court of appeals in *Resch*. [8] Even though L'Eft Bank expressly rejected arbitration and Bogle knew of that rejection, Bogle slipped the Terms in invoices and credit memos that would not be seen by anyone with authority to bind L'Eft Bank. If the arbitration provision is enforced, L'Eft Bank loses its rights afforded by the WFDL, including the right to bring an action in Wisconsin State Court, have a Wisconsin court decide its case, and have a jury trial under Wisconsin law. This is just the kind of "ambush" to which the *Waukesha Foundry* court alluded. Under the circumstances, the court cannot find the clear and unmistakable grant of authority required by Wisconsin law. [9]

CONCLUSION

For the reasons discussed, the court denies the motion to stay this case, and the evidentiary hearing on November 5-6 will proceed as scheduled.

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[7] See also Wis. Stat. 402.207(2)(c)

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received. (emphasis added)

[8] Like *Resch*,, Illinois and Michigan cases have also applied the unreasonable surprise standard to determine whether the additional term is a material alteration. *Clifford-Jacobs Forging Company v. Capital Engineering & Mfg. Co.*, 107 Ill.App.3d 29, 33 (4th Dist. 1982); *ISRA Vision, AG v. Burton Indus., Inc.*, 654 F. Supp. 2d 638, 648 (E.D. Mich. 2009)

[9] In its Reply Brief, Bogle also tries to argue that it is standard industry practice to include arbitration clauses in the invoices. Since that argument was raised for the first time in its reply brief and is disputed by L'Eft Bank, it will not be addressed.