

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 9450

Speedway Motorsports International, Ltd.,)
)
 Plaintiff,)
)
 v.)
)
 Bronwen Energy Trading, Ltd., Bronwen)
 Energy Trading UK, Ltd., Dr. Patrick Denyefa)
 Ndiomu, BNP Paribas (Suisse) SA, BNP)
 Paribas S.A., Swift Aviation Group, Inc.,)
 Swift Air, LLC, and Swift Aviation Group,)
 LLC,)
)
 Defendants.)

**DEFENDANT BNP PARIBAS S.A.'S
BRIEF IN SUPPORT OF ITS MOTION
TO DISMISS CROSS-CLAIMS OF SWIFT
AVIATION GROUP, INC.**

On August 28, 2008, defendant Swift Aviation Group, Inc. ("Swift") filed cross-claims in this matter against defendant BNP Paribas, S.A. ("BNPP France"), alleging claims for breach of fiduciary duty and misrepresentation (the "Cross-claims"). Pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure, BNPP France has moved the Court for entry of an Order dismissing the Cross-claims on the following grounds:

1. Swift's alleged claims against BNPP France are subject to the following forum selection and choice of law provisions contained in the Third Party Letter of Credit Agreements attached to Swift's Cross-claims, designating Paris, France, as the exclusive forum for such claims, governed by French law: **"This Agreement is governed by and shall be construed in accordance with French Law. Any disputes arising hereunder or in connection herewith shall be exclusively submitted to the commercial court of Paris, France."**;
2. Litigation of the same documents and facts at issue in Swift's Cross-claims is currently pending in the Commercial Court of Paris, in accordance with the forum selection and choice of law provisions contained in the Third Party Letter of Credit Agreements.

PRELIMINARY STATEMENT

Exhibits 2, 3, 4, 5 and 6 to Swift's Cross-claims are Third Party Letter of Credit Agreements described by Swift as "a series of Third Party Agreements between Swift and

Bronwen, subject to the approval of BNP Paribas (Paris) and which were submitted to BNP Paribas (Paris)” (the “Third Party Letter of Credit Agreements” or the “Letter of Credit Agreements”). Cross-claims, ¶¶ 24-25. Each of these Agreements is directed to BNPP France, and contains an identical choice of law and forum selection clause that states:

This Agreement is governed by and shall be construed in accordance with French Law. Any disputes arising hereunder or in connection herewith shall be exclusively submitted to the commercial court of Paris, France.

Cross-claims, Ex. 2, 3, 4, 5, 6 (emphasis added). Similarly, Exhibit 15 to Swift’s Cross-claims, the Notice of Default issued from BNPP France to Swift on November 23, 2007, states: “**This letter is governed by French law.**” (emphasis added).¹

Moreover, the documents and facts at issue in the Cross-claims are currently the subject of the litigation between BNPP France, Swift, and Bronwen, instituted by BNPP France in the Commercial Court of Paris on April 17, 2008 (the “Paris Litigation”), in accordance with the forum selection and choice of law provisions in the Letter of Credit Agreements. Swift has attached fifteen exhibits to its Cross-claims. At least ten of those fifteen exhibits—Exhibits 2, 3, 4, 5, 6, 10, 11, 12, 13, and 15—are also exhibits in the Paris Litigation, and still bear the exhibit stamps and exhibit numbers from the Paris Litigation. See Cross-claims; compare Affidavit of Mays Charabati (submitted in support hereof). It is clear on the face of Swift’s Cross-claims and exhibits thereto that the claims asserted by Swift against BNPP France are based on the same documents and issues as the Paris Litigation instituted by BNPP France against Swift and Bronwen on April 17, 2008, prior to the filing of the original complaint in this matter.

¹ A subsequent Notice of Default issued from BNPP France to Swift on January 31, 2008, stated the following: “Please be advised that this letter is a final demand of payment, on the basis of article 1146 *et sequential* of the French Civil Code, reminding you that all your obligations towards our bank are governed by French Law and that any dispute arising or that may arise between us is submitted to the commercial Court of Paris, France.” (emphasis added).

FACTUAL BACKGROUND

Swift is a corporation organized and existing under the laws of the State of Arizona. Cross-claims ¶ 1. BNPP France is a French bank based in Paris, France. Id., ¶ 5. According to Swift's allegations, in 2007 "Swift contacted BNP Paribas (Suisse) for the purpose of establishing a credit facility for the purchase of petroleum from KPC and the required logistics to transport the petroleum from Kuwait for sale" and was ultimately directed to BNPP France. Swift's Amended Answer. Swift Answer, ¶ 24. Further according to the Cross-claims, Swift entered a series of contracts with Kuwait Petroleum Company involving various petroleum products, which contracts gave Swift the right to purchase, load and deliver such petroleum products. Cross-claims, ¶ 8.

Third Party Letter of Credit Agreements

As part of the financing of these petroleum transactions, Swift also executed a series of Third Party Letter of Credit Agreements with Bronwen, addressed to, and in favor of, BNPP France, which are attached to the Cross-claims as Exhibits 2, 3, 4, 5, and 6. Each one of these Letter of Credit Agreements is directed to BNPP France from Swift and Bronwen and is signed by Swift and Bronwen. After explaining on the first page of each Agreement that (i) Swift was retained by KPC to lift certain petroleum products pursuant to certain contracts, (ii) KPC required Swift to secure its performance with a Letter of Credit, (iii) Swift and Bronwen agreed that Bronwen opening said Letter of Credit on behalf of Swift and in favor of KPC, and (iv) Bronwen instructed BNPP France to issue said Letter of Credit, each Letter of Credit Agreement then sets forth Swift's and Bronwen's obligations and representations to BNPP France with regard to the letters of credit being requested from BNPP France, including, *inter alia*, the following:

- Now, in **consideration** of the foregoing, each of the Undersigned **hereby confirms** to you that it is unconditionally and irrevocably obligated to the Bank on a joint and several basis for any liabilities that may arise from the issuance by the Bank of the Letter of Credit.
- Without limiting in any way the joint and several liability of each Undersigned for all liabilities in respect of the Letter of Credit, each Undersigned **irrevocably request** and **irrevocably agree** that you may issue the Letter of Credit indicating the name of [Swift] alone as the applicant therein.....
- **Each of the Undersigned hereby acknowledges that you would not consider issuing the Letter of Credit in the absence of among other things, this letter.** Each of the undersigned **hereby jointly and severally holds you harmless** from, and **agrees to indemnify you** for any and all claims, liabilities, damages, losses, costs and reasonable expenses (including legal fees and expenses) which you may incur in respect of the Letter of Credit or the Transaction. This indemnity shall survive the expiration of the Letter of Credit. (emphasis added)

Cross-claims, Ex. 2, 3, 4, 5, 6 (emphasis added).

Each Letter of Credit Agreement also contains an identical forum selection and choice of law provision, stating:

This Agreement is governed by and shall be construed in accordance with French Law. Any disputes arising hereunder or in connection herewith shall be exclusively submitted to the commercial court of Paris, France.

Cross-claims, Ex. 2, 3, 4, 5, 6 (emphasis added).

Paris Litigation

On April 17, 2008, BNPP France instituted the Paris Litigation against Swift and Bronwen in the Commercial Court of Paris, in accordance with the forum selection provisions in the Third Party Letter of Credit Agreements. As described in the Writ of Summons filed by BNPP France in the Paris Litigation:

The BNP Paribas Company seeks to have the Dominican company Bronwen Energy Trading Limited and the American company Swift Aviation Group Inc. jointly ordered to pay the sum of 8,661,479.23 USD, in addition to the applicable contractual interests, for an overdraft facility granted to Bronwen and a payment

guarantee issued to its favor by Swift Aviation and Bronwen jointly.

See Affidavit of Mays Charabati, Ex. A.

The Writ of Summons then states the following:

- BNPP France granted to Bronwen an overdraft facility of up to 260 million USD in order to finance the purchase, through Swift, of six cargos of petroleum products from Kuwait Petroleum Corporation (§§ 3-4);
- In order to secure to KPC the payment for the petroleum products, BNPP France issued six stand-by letters of credit on behalf of Swift, in favor of KPC, with each letter of credit corresponding with one cargo of petroleum (§ 5);
- To secure BNPP France's financing through the letters of credit, several guarantees were executed in favor of BNPP France, including a first demand guarantee of 12 million USD issued by BNP Suisse at the request of SMIL, and **five Third Party Letters of Credit issued jointly by Swift Aviation and Bronwen, attached as exhibits to the Writ of Summons, "according to which [Swift and Bronwen] jointly undertook to guarantee BNPP for all and any damages and losses in respect of the issue of each of the above mentioned Stand By Letters of Credit and more generally, for the above mentioned purchasing and financing operations of petroleum products."** (§ 6, emphasis added);
- Delays in the sale of the petroleum caused major additional costs, which were paid through the overdraft facility provided by BNPP France, resulting in Bronwen's bank account being overdrawn by 21.6 million USD, and ultimately leaving BNPP France with no other choice than to call on the guarantees issued in its favor, by Swift, Bronwen and BNP Suisse (§§ 7-8);
- BNPP subsequently made several payment demands upon Bronwen and Swift, pursuant to the obligations and representations set forth in the Third Party Letter of Credit Agreements (§§ 9-15);
- In response, Swift refuted owing the claimed sum to BNPP France, and "alleged breaches, even fraudulent behaviour, that Bronwen had allegedly committed with the complicity of BNPP," to which BNPP France responded challenging the content of Swift's accusations against it (§§ 13-15);
- "Pursuant to the above mentioned *Third Party Letters of Credit*, Bronwen and Swift Aviation moreover jointly undertook toward BNPP, '***unconditionally and irrevocably***, to hold it harmless from and indemnify for '*any and all claims, liabilities, damages, losses, costs and reasonable expenses (including legal fees and expenses) which [BNPP] may incur in respect of the [six Stand By] Letter[s]*

of Credit or the Transaction[s]’, i.e. more generally, in respect of the six purchase transactions for petroleum products agreed with KPC. The above mentioned sum constitutes a loss pursuant to the above mentioned six *Third Party Letters of Credit*, for which Bronwen and Swift Aviation jointly owe guarantee.” (§ 18, emphasis in original);

- “As no payment has taken place to date, neither from Swift Aviation, nor Bronwen, BNPP has no other choice but to bring a claim before the Court, **pursuant to the choice of jurisdiction clauses agreed by the parties**, in order to have the defendants ordered to pay it their debt with provisional enforcement.” (§ 16, emphasis added);

See Writ of Summons, attached as exhibit to Affidavit of Mays Charabati.

A comparison of the Writ of Summons, and the exhibits thereto, with Swifts Cross-claims, and exhibits thereto, makes clear that Swift’s Cross-claims are based on the same facts, issues and documents as the Paris Litigation filed in the Commercial Court of Paris pursuant to the forum selection and choice of law provisions agreed upon by Swift, BNPP France and Bronwen.

ARGUMENT

I. SWIFT’S ALLEGED CLAIMS AGAINST BNPP FRANCE MUST BE LITIGATED IN PARIS, FRANCE, UNDER FRENCH LAW.

By their express terms, the Third Party Letter of Credit Agreements were required by BNPP France in order to issue the letters of credit to KPC for the purchase of the petroleum products. Each of these Agreements contains identical forum selection and choice of law provisions:

This Agreement is governed by and shall be construed in accordance with French Law. Any disputes arising hereunder or in connection herewith shall be exclusively submitted to the commercial court of Paris, France.

Cross-claims, Ex. 2, 3, 4, 5, 6 (emphasis added).

French law, applied by the Commercial Court of Paris, should govern the forum selection provisions in the Letter of Credit Agreements and Swifts alleged claims. North Carolina

recognizes and enforces such choice of law and forum selection provisions. See, e.g., Tanglewood Land Co. v. Bryd, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980) (“where parties to a contract have agreed that a given jurisdiction’s substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect.”); see also Mark Group v. Still, 151 N.C.App. 565, 566 S.E.2d 160 (2002) (regarding validity and enforceability of forum selection clauses). There is no reasonable argument that the language of the identical forum selection provisions in the Third Party Letter of Credit Agreements does not require that disputes arising out of the Agreements be filed and litigated exclusively in the Commercial Court of Paris, France.

BNPP France’s Signature Not Intended or Required

Apparently, in a desperate attempt to avoid this reality, Swift takes the position that BNPP France cannot force Swift to litigate its alleged claims in Paris because BNPP France was not a signatory to the Third Party Letter of Credit Agreements. See Cross-claims, ¶ 26. This argument is without merit. The Letter of Credit Agreements are directed from Swift and Bronwen to BNPP France, and state on their face that they were executed in favor of BNPP France in consideration for—and as a prerequisite to—BNPP France issuing the letters of credit necessary for Swift and Bronwen to participate in the petroleum transactions. Each of these Letter of Credit Agreements directed to BNPP France is fully executed, signed by both Swift and Bronwen, affirming the terms and commitments set forth in the Agreements. BNPP France’s signature is neither intended nor required on any of the Agreements. Accordingly, BNPP France can enforce the terms of the Letter of Credit Agreements against Swift.

Even under North Carolina’s statute of frauds, a requisite writing need be signed only by the party against whom enforcement is sought. See, e.g., N.C.G.S. §§ 22-1, et seq. (contracts

required to be in writing under North Carolina's statute of frauds must be "signed by the party to be charged therewith"). Consider the following discussion in Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C.App. 515, 519-520, 257 S.E.2d 109, 113 (1979), regarding the consistent, longstanding legal principle that a writing need only be signed by the party against whom enforcement is sought, and not the party seeking enforcement:

Plaintiff is correct in its contention that plaintiff's signature is not necessary to render enforceable the covenant not to compete. The sufficiency of the writing is controlled by G.S. 75-4. Its language is clear and unambiguous. Subject to the general restrictions as to reasonableness of ancillary restraints on competition, G.S. 75-4 establishes that contracts or agreements limiting the rights of persons to do business in this State may be enforceable if put in writing "duly signed by the party who agrees not to enter into any such business within such territory". G.S. 75-4 is consistent with the other "statute of frauds" provisions in our law which require only that the writing be "signed by the party charged therewith", G.S. 22-1 (29 Charles II (1676), ch. 3, sec. 4), or require that the writing be signed by "the party against whom enforcement is sought", G.S. 25-2-201(1) (Uniform Commercial Code). Our holding is consistent with the general view with respect to the necessary signatures to satisfy the Statute of Frauds. See generally 72 Am.Jur.2d, Statute of Frauds s 364. It is not necessary that the person seeking enforcement of the terms required to be in writing also sign the writing. Lumber Co. v. Corey, 140 N.C. 462, 53 S.E. 300 (1906).

In the present case, Swift is the party against whom enforcement is sought, and Swift signed the Third Party Letter of Credit Agreements that it addressed to BNPP France in consideration for BNPP France's provision of corresponding letters of credit. Swift would have the Court determine that BNPP France—having issued the letters of credit and made payments to KPC pursuant to them—cannot enforce the Letter of Credit Agreements that requested the letters of credit. It is misguided and incorrect to argue that BNPP France cannot enforce the terms of the Letter of Credit Agreements directed to it simply because it did not sign the Agreements.

In sum, Swift is bound by the terms of the identical forum selection and choice of law clauses in the multiple Third Party Letter of Credit Agreements it executed in favor of BNPP France. For this reason, Swift's Cross-claims against BNPP France should be dismissed.

II. LITIGATION OF THE SAME DOCUMENTS AND FACTS AT ISSUE IN SWIFT'S CROSS-CLAIMS IS CURRENTLY PENDING IN THE COMMERCIAL COURT OF PARIS.

Litigation between BNPP France and Swift is already pending in the Commercial Court of Paris, pursuant to the forum selection clause and choice of law provisions in the Third Party Letter of Credit Agreements. Paris is the requisite forum for Swift's alleged claims against BNPP France. Rather than trying to pursue its alleged claims as Cross-claims in this North Carolina litigation, Swift can and should assert its alleged claims as counterclaims in the Paris Litigation pending in the Commercial Court of Paris. That is the forum to which Swift agreed in the Letter of Credit Agreements, and is now trying to avoid.

Swift is asking this court to duplicate the efforts of the Commercial Court of Paris. As detailed above, a comparison of the documents submitted in the Paris Litigation and the documents submitted by Swift in its Cross-claims makes clear that the same documents, claims and issues are involved in both. See Swift Cross-claims, and Affidavit of Mays Charabati. At the heart of both the Paris Litigation and the Cross-claims—and attached as exhibits to both—are the Third Party Letter of Credit Agreements entered and executed by Swift and Bronwen in favor of, and addressed to, BNPP France. It is these Agreements that make it crystal clear that Swift's alleged claims belong in the Paris Litigation currently pending in the Commercial Court of Paris, France.

CONCLUSION

Swift's Cross-claims against BNPP France should be dismissed. On multiple occasions in multiple agreements attached as exhibits to the Cross-claims, Swift has agreed that its alleged claims against BNPP France "shall be construed in accordance with French law" and "shall be exclusively submitted to the commercial court of Paris France." Litigation on the same facts and issues is already pending in the Commercial Court of Paris pursuant to these provisions.

This 29th day of October, 2008.

/s/Edward B. Davis

William K. Davis (N.C. State Bar No. 1117)

Edward B. Davis (N.C. State Bar No. 27546)

Attorneys for defendant BNP Paribas S.A.

BELL, DAVIS & PITT, P.A.

227 West Trade Street, Suite 2160

Charlotte, NC 28202

Telephone: 704/227-0400

Facsimile: 704/227-0178

Email: wdavis@belldavispitt.com

ward.davis@belldavispitt.com

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 9450

Speedway Motorsports International, Ltd.,)
)
 Plaintiff,)
)
 v.)
)
 Bronwen Energy Trading, Ltd., Bronwen)
 Energy Trading UK, Ltd., Dr. Patrick Denyefa)
 Ndiomu, BNP Paribas (Suisse) SA, BNP)
 Paribas S.A., Swift Aviation Group, Inc., Swift)
 Air, LLC, and Swift Aviation Group, LLC,)
)
 Defendants.)
)

RULE 15.8 CERTIFICATION

Pursuant to B.C.R. 15.8, I hereby certify that Defendant BNP Paribas, S.A.'s brief in support of its motion to dismiss Swift's Cross-claims complies with B.C.R. 15.8.

This the 29th day of October, 2008.

/s/ Edward B. Davis
Edward B. Davis (N.C. State Bar No. 27546)
Attorney for Defendant BNP Paribas S.A.

OF COUNSEL:

BELL, DAVIS & PITT, P.A.
227 West Trade Street, Suite 2160
Charlotte, NC 28202
Telephone: 704/227-0400
Facsimile: 704/227-0178

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this brief in the above-entitled action upon the addressee(s) listed below by:

() Hand-delivering a copy thereof to the attorney(s);

or

(X) Depositing a copy hereof in a postpaid wrapper in a post office or official depository by first class mail under the exclusive care and custody of the United States Post Office Department properly addressed to the addressee(s) below;

or

() Facsimile.

This the 29th day of October, 2008.

/s/Edward B. Davis

Edward B. Davis

Addressee(s):

Michael G. Adams
Jami J. Farris
William L. Esser IV
Parker Poe Adams & Bernstein, LLP
Three Wachovia Center, Suite 3000
401 South Tryon Street
Charlotte, North Carolina 28202
(704) 372-9000
(704) 334-4706 facsimile
Attorneys for the Plaintiff

Dana C. Lumsden, Esq.
Hunton & Williams LLP
Bank of America Plaza, Suite 3500
101 South Tryon Street
Charlotte, North Carolina 28280
Counsel for BNP Paribas (Suisse) SA

Bronwen Energy Trading, Ltd.
c/o CCCP, Inc.
Cophallm, P.O. Box 2342
Roseau, St. George, 0012
Commonwealth of Dominica

James P. Cooney, III, Esq.
Debbie W. Harden, Esq.
Womble Carlyle Sandridge & Rice, PLLC
301 South College Street
One Wachovia Center, Suite 3500
Charlotte, North Carolina 28202-6037
Counsel for the Swift Defendants

Bronwen Energy Trading, Ltd.
Cophall, P.O. Box 2331
Roseau, St. George, 0152
Commonwealth of Dominica

Bronwen Energy Trading UK, Ltd.
Patrick Ndiomu, Director
46 Mt. Pleasant Road
London NW10 3EL, England

Dr. Patrick Denyefa Ndiomu
46 Mt. Pleasant Road
London NW10 3EL, England