NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

RD FOODS AMERICAS, INC., Plaintiff, v. DYCOTRADE HGH B.V., a Foreign Limited Liability Company, Defendant.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION – BERGEN COUNTY DOCKET NO. **BER-L-4059-20** Civil Action **OPINION**

Argued: **December 4, 2020**
Decided: **December 11, 2020**

HONORABLE ROBERT C. WILSON, J.S.C.

Bruce H. Snyder, Esq., appearing on behalf of Plaintiff RD Foods Americas, Inc. (from Lasser Hochman, LLC)

Gerd W. Stabbert, Jr., Esq., appearing on behalf of Defendant DycoTrade HGH B.V. (from Bressler, Amery & Ross, P.C.)

PROCEDURAL HISTORY

THIS MATER initially began on July 13, 2020, when RD Foods Americas, Inc. ("Plaintiff") filed a Complaint and designation of Trial Counsel against DycoTrade ("Defendant"). In the Complaint, Plaintiff alleged three claims for breach of contracts, declaratory judgment that it properly terminated the contracts, and claims for rescission. However, on August 14, 2020, Defendant communicated to Plaintiff that it intended to enforce the contract's alleged arbitration provision and Plaintiff then filed its First Amended Complaint and Designation of Trial Counsel. The First Amended Complaint alleges the same three claims but added a fourth claim seeking a declaration that the arbitration provision is unenforceable. Defendants now moves to compel arbitration and dismiss the First Amended Complaint.

FACTUAL BACKGROUND

THE FACTS OF THIS CASE arise out of Defendant DycoTrade, a company based in the Netherlands, and Plaintiff RD Foods Americas, a New Jersey company, engaging in the

purchase and sale of software services for commodity and trade companies, including modules to manage trading, logistics, risk, and accounting functions. Plaintiff is a supplier and manufacturer of canned seafood products and engages in the marketing of high-volume commodity items, such as canned fruits and vegetables, for the retail, food service, and industrial trades.

Between September 30 and October 4, 2019, Plaintiff's Chief Financial Officer visited the Netherlands and met with a representative of Defendant. During the visit, Plaintiff received two contracts from Defendant named "Contract Software/Services," and their accompanying terms and conditions—the Contracts also referenced another set of terms and conditions not provided to the Plaintiff at the time of signing.

Defendant agreed to provide certain software and services to Plaintiff and as per the contract the total implementation budget was 113 days at an amount of $153,840. The Defendant claims that Plaintiff, as "Customer," acknowledged Defendant's "General Terms and Conditions" and the contract stated that such "terms and conditions form an integral part of this contract for services and which are appended hereto." Defendant contends that the Terms and Conditions referenced are those it has provided to the Court appended to the certification of Defendant's Counsel's Certification. The "General Terms and Conditions" which Defendant asserts were part of the contract were never appended to the contract, never provided to Plaintiff, never made available for Plaintiff to review, and never discussed with Plaintiff or brought to its attention. The agreements at issue were originally proposed to Plaintiff in the form of two two-page documents calling for the installation and implementation by Defendant of certain financial software known as Microsoft Dynamics 365 Finance and Operations ("Microsoft Dynamics 365 F&O") offered as a bundled product together with its own software known as DycoTrade 365. Although the two contracts made mention of "DycoTrade's General Terms and Conditions," no such Terms and Conditions were attached to the proposals, nor were they identified in any way.

The only attached document was the "Microsoft Cloud Agreement" which Plaintiff assumed were the "Terms and Conditions" referred to. Plaintiff signed and executed the contracts with the attached Microsoft Cloud Agreement and Defendant did the same returning them via e-mail with the same documents. Plaintiff claims that a series of problems arose with the software and programs and following some attempts to resolve the disputes with Defendant, Plaintiff filed its Complaint on July 13, 2020. Attached to the Complaint, Plaintiff provided the Contracts as they were executed, and only after the Complaint was filed did the Defendant assert the existence of the alleged arbitration clause in the "General Terms and Conditions," and go on to send Plaintiff the Terms and Conditions it believed had been referenced.

Those Terms and Conditions were first seen by Plaintiff on or about August 6, 2020 in a wholly distinct document, and make reference to a product known as "Microsoft Dynamics AX," not Microsoft Dynamics 365 F&O. The referenced Arbitration Clause is found in small print on page four, column four, paragraph 23.4, and not only mandates arbitration, but also requires that it be conducted in the Netherlands, in accordance with the Rules of Arbitration set forth by the Dutch Arbitration Institute, and that arbitration be conducted in the Dutch language. The Arbitration Provision was not bolded, underlined, or highlighted, and was not separately signed or acknowledged by the Plaintiff. Following receipt of the alleged General Terms and Conditions, Plaintiff filed a First Amended Complaint adding a Count seeking to declare the purported arbitration agreement ineffective and precluding the Defendant from attempting to institute arbitration proceedings. Rather than answer, Defendant has filed the present Motion to Compel and Dismiss Complaint.

For the reasons set forth below, Defendant's Motion to Compel Arbitration and Motion to Dismiss the Complaint are hereby **DENIED**.

MOTION TO DISMISS STANDARD UNDER RULE 4:6-2(e)

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id. It is simply not enough for a party to file mere conclusory allegations as the basis of its complaint. See Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012); see also Camden Cty. Energy Recovery Assocs., L.P. v. New Jersey Dept. of Envtl. Prot., 320 N.J. Super 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.").

Under the New Jersey Court Rules, a complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

RULES OF LAW AND DECISION

Defendant's Motion to Compel Arbitration and Dismiss Plaintiff's Complaint must be denied because: (1) New Jersey Law controls and this Court has jurisdiction, (2) New Jersey Arbitration Case Law applies and requires Defendant's Motion be denied, and (3) the Terms and Conditions referenced by Defendant—containing the arbitration agreement—were not accepted and could not be readily disclosed or agreed to.

I. New Jersey Law Controls

Defendant argues that the issue of arbitrability is governed by Dutch Law, but the Contracts themselves contain no choice of law provision, and the Microsoft Cloud Agreement provides that it is governed by the Law of Washington State (See Paragraph 9(j)). The only Choice of Law provision relating to Dutch Law is contained in the purported "General Terms and Conditions" which were never produced to Plaintiff. Thus, the threshold issue is whether any of those provisions are even applicable to these Contracts. When a civil action is brought in New Jersey we use New Jersey Choice of Law rules to determine whether this State's or another state's legal framework should be applied. Continental Ins. Co. v. Honeywell Int'l, Inc., 234 N.J. 23, 32-33 (2018). According to the Supreme Court, the law of the place of Contract will govern the determination. See Continental Ins. Co. v. Honeywell Int'l, Inc., 234 N.J. 23, 40-41 (2018).

The present contractual dispute involved a contract which was: (1) originally sent to Plaintiff in New Jersey; (2) executed by Plaintiff in New Jersey; (3) returned in its executed form to Plaintiff in New Jersey; (4) involved Plaintiff's facilities in New Jersey; and, (5) was to be performed in New Jersey. New Jersey has the most significant relationship to the transactions and the parties. Significantly, for present purposes, these Choice of Law principles govern the determination as to whether an enforceable agreement to arbitrate exists. Under New Jersey Law the Arbitration Clause cannot stand.

II. New Jersey Arbitration Case Law Applies and Invalidates the Arbitration Clause

The New Jersey Arbitration Act, N.J.S.A. 2A:23b-1 to -32, enunciates policies favoring arbitration, but these policies do not indicate that every arbitration clause will be enforceable. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 440 (2014). An agreement to arbitrate, like any other contract "must be a product of mutual assent, as determined under customary principles of contract law." Atalese, 219 N.J. at 442. A legally enforceable agreement requires a "meeting of the minds" and parties are not required to arbitrate when they have not agreed to do so. Id. There are two questions that must be answered to determine the applicability of the arbitration agreement: (1) whether the Terms and Conditions furnished to Plaintiff for the first time on August 6, 2020, long after the Contracts were executed, are nevertheless incorporated into those Contracts; and, (2) if the Terms and Conditions were incorporated into the signed Contracts, whether the arbitration clause at issue is enforceable under New Jersey Law. The Court answers both questions in the negative.

a. The Terms and Conditions Containing the Arbitration Agreement Were Never Accepted and Could Not be Readily Disclosed or Agreed to

The Appellate Division has adopted the principles set forth in 4 Williston on Contracts, § 30:25 (Lord ed. 1999), stating that "[g]enerally, all writings which are part of the same transaction are interpreted together" and that "where the parties have expressed their intention to have one document's provision read into a separate document" it may do so as long as "the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt." Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 535 (App. Div. 2009) (hereinafter "Quinn"). It must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms. Id. In Quinn the Appellate Division found that a retainer agreement that claimed to incorporate other firm

policies—specifically the firm's master retainer—was unsuccessful in incorporating the additional documents because the reference was not specific enough to identify the policies sought to be incorporated, and because there was no indication that the terms of the proposed incorporated document were known or assented to. Quinn, 410 N.J. at 535-36. Furthermore, in Bacon v. Avis Budget Grp., Inc., the United States District Court for the District of New Jersey applied New Jersey Law—specifically Quinn—and found that the provisions to be incorporated must be described in terms such that their identity may be ascertained beyond doubt, and that the party to be bound had knowledge of and assented to the incorporated terms. 357 F. Supp. 3d 401, 416 (D.N.J. 2018), aff'd, 959 F. 3d 590 (3d Cir. 2020).

In this case, the signed contract contained no document dates or identifiable publication number for the General Terms and Conditions. Plaintiff was neither provided with the General Terms and Conditions, nor was it advised of their existence. Furthermore, Plaintiff was provided with a document entitled "Microsoft Cloud Agreement" which it mistook for the said General Terms and Conditions. Under the circumstances, it is not possible that General Terms and Conditions were described in such terms that their identity may be ascertained beyond a reasonable doubt. It is also not the case that Plaintiff had knowledge of and assented to the incorporated terms when it did not even know of the allegedly incorporated terms until after the contract was executed. For these reasons, the Motion to Compel Arbitration must be denied.

b. Even if the Arbitration Agreement was Agreed to, it is Unenforceable

In the alternative, even if the Court found the General Terms and Conditions incorporated into the contract, the Arbitration Clause would not be enforceable. In Atalese, the Supreme Court held that in order for a valid arbitration agreement to exist, there must be mutual assent, specifically including evidence of an effective waiver by each party including "full knowledge of his legal rights and intent to surrender those rights." 219 N.J. at 442 (quoting Knorr v. Smeal,

178 N.J. 169, 177 (2003)). The Court found that the clause before it failed to contain any explanation that the plaintiff was waiving her right to seek relief in court for a breach of her rights. Id. at 446. While no specific words were required, the words used must be "clear and unambiguous that a consumer is choosing to arbitrate disputes rather than have them resolved in a court of law." Id. at 447 (footnote omitted); see also Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 137 (2020) (stating that Atalese is broadly applicable to "any contractual 'waiver-of-rights provision,'" including arbitration clauses).

The Arbitration Clause in the General Terms and Conditions falls short of the requirements required by Atalese. First, the language of the provision does not indicate that Plaintiff is waiving its right to seek a determination of disputes in court—in fact other provisions within the General Terms and Conditions set timelines for when Plaintiff may bring suit in court. (See Paragraph 19.8) Not only does the provision conflict with others in the document, it is also not clear and unambiguous notice of such a waiver, as it is buried on the fourth page of the document, in column four, paragraph 23.4 in fine print. The Court has attached a copy of the Defendant's General Terms and Conditions to illustrate the furtive nature of the arbitration clause at issue. The Arbitration Clause is unenforceable and therefore, Defendant's Motion to Compel Arbitration and Dismiss Plaintiff's Complaint are hereby denied.

CONCLUSION

For the aforementioned reasons, Defendants' Motion to Compel Arbitration and Motion to Dismiss is **DENIED.**