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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BHP PETROLEUM (AMERICAS) INC.
BHP PETROLEUM (ECUADOR) INC.,
BHP PETROLEUM (NEW VENTURES) INC.
BHP POWER, INC., KING RANCH, INC.
KING RANCH SUDAMERICA, INC.
KING RANCH OIL AND GAS, INC.
KING RANCH POWER CORP.,

Plaintiffs,

vs. CIVIL ACTION NO. H-97-879

WALTER F. BAER REINHOLD,

Defendant.

ORDER COMPELLING ARBITRATION
STAYING PROCEEDINGS AND PRELIMINARY INJUNCTION

CAME ON for consideration the Plaintiffs' Application for Injunction and Motion to Compel Arbitration (Docket Entry #7) and the responses filed thereto. This matter was referred to the undersigned magistrate judge pursuant to 28 U.S.C. §636(b) and the Cost and Delay Reduction Plan under the Civil Justice Reform Act. (Docket Entry #8). The parties later consented to trial before the undersigned pursuant to 28 U.S.C. §636(c).

I.

Motion to Compel Arbitration

In this suit, Plaintiffs seek an order enforcing an arbitration clause of an agreement allegedly entered into between the parties, an order enjoining Defendant Baer from the continued prosecution of an action commenced in Ecuador, and alternatively, for a declaration of rights under the agreement. This lawsuit arises out of the parties' efforts to obtain a natural gas concession in Ecuador and to design, construct and finance an electric generation facility fueled by the gas concession.

According to the Complaint, in 1994, BHP Petroleum (New Ventures) Inc. and King Ranch Oil and Gas, Inc. (the Gas Concession Partners) entered into an agreement to study the feasibility of bidding for the right to explore certain natural gas reserves in the Gulf of Guayaquil, Ecuador, and to develop, construct and operate a natural gas-fired electrical generating facility fueled primarily from the gas concession. In June, 1994, the Gas Concession Partners were awarded the right to negotiate a gas concession with the government-controlled petroleum company, Petroecuador.

About the same time, BHP Power, Inc. and King Ranch Power Corp. began negotiating with the electric power authorities in Ecuador to develop and supply electric power to the government-owned utility or private companies. These companies entered into a memorandum of understanding regarding the negotiation and conclusion of agreements on the electric generation phase of the project.

Beginning in late 1994, BHP Power, Inc. and King Ranch Power Corp. attempted to conclude a consulting agreement with Defendant Baer. A proposed draft dated September 16, 1994, was sent to Baer attached to an October 7, 1994 letter.[1] That letter stated, "We refer to that draft Consulting Agreement, attached hereto as attachment 1, which has been negotiated between yourself ("Consultant") and BHP-King Ranch and, pending its finalization and execution in Houston, Texas within the next four weeks we will confirm the following basic understandings:" The draft outlined the scope of services to be provided by Baer and the amount and timing of the compensation. In the draft, the parties agreed that the Agreement would be construed and enforced under Texas law. The parties also agreed to submit themselves to the jurisdiction of any state or federal court located in the State of Texas. Defendant Baer signed the cover letter, acknowledging that the agreement was an acceptable basis for concluding an agreement.

The next document sent to Mr. Baer was a draft consulting agreement dated March 13, 1995.[2] It was similar to the September 16, 1994 draft, however it added a lengthy arbitration clause--Clause 16--which set forth the scope and procedures to be used in the arbitration of any dispute arising under the agreement.[3]

In a letter dated May 17, 1995,[4] addressed to Mr. Tom Mumford of King Ranch Power Corp., Baer stated, "I refer to the draft dated March 13, 1995, which you kindly handed over to me last week. In essence the content of the Agreement has not changed with the exception of Clause 11 [Consideration] which in its proposed form is not acceptable to me." Baer recounted the history of the negotiations on his compensation package. He concluded, stating, "Since the initial project has doubled in size the logical consequence must be that compensation reflects the new conditions. I have taken the liberty to include in the present a draft of a new Letter of Intent which I would like to execute without further delay."

[1] See Plaintiffs' Application for Injunction and Motion to Compel Arbitration, Docket Entry # 7, Exhibit A-1.

[2] See Plaintiffs' Application for Injunction and Motion to Compel Arbitration, Docket Entry # 7, Exhibit A-2.

[3] Clause 16(a) provided, in part: If . . . a dispute arises between the Parties in respect of any provision of this Agreement . . . then the Controversy in question shall, at the request of any party, be resolved by arbitration in accordance with this Section 16. * * *"

[4] See Plaintiffs' Application for Injunction and Motion to Compel Arbitration, Docket Entry # 7, Exhibit A-3.

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The parties remained at an impasse on the compensation issue until December, 1995, when Mr. Baer and David M. Jochnowitz, Senior Vice President and General Counsel of BHP Power Inc., met in Houston, Texas to resolve their differences. A December 16, 1995 letter memorialized the agreement between Baer, King Ranch Power Corp. and BHP Power, Inc.[1] Attached to that letter agreement were two documents: marked up and initialed pages of Clause 10 of the Consulting Agreement, and the entire March 13, 1995 Consulting Agreement. The letter stated as follows:

> This letter will confirm that the changes to the attached pages of the Consulting Agreement as initialed by you and me have been negotiated and agreed (the "Proposed Changes"), subject only to the approval of the respective management of King Ranch Power Corp. and BHP Power, Inc. All of the other terms and conditions of the Consulting Agreement have been accepted and agreed by the parties.
>
> If the respective management of King Ranch Power Corp. and BHP Power Inc. approve the Proposed Changes, I will prepare a revised draft of the Consulting Agreement to reflect the Proposed Changes for execution by King Ranch Power Corp., BHP Power Inc. and you. (Emphasis added).

The letter was signed by David Jochnowitz. The letter was "Accepted and Agreed" by Defendant Baer, as evidenced by his signature under that heading.

Weeks later, BHP Power and King Ranch Power Corp. decided to terminate their efforts to develop the electric generation project in Ecuador. Mr. Baer was advised of this decision. Because none of the contingent events had occurred, no money was due to Mr. Baer under the terms of the December 16, 1995 agreement.

In late 1996, Baer filed suit against "BHP Petroleum, Inc." and "King Ranch, Inc." in Quito, Ecuador, seeking to collect a fee for the consulting work done in connection with the electric generation project. In fact, BHP Petroleum, Inc. is a non-existent entity. King Ranch, Inc. is a Texas corporation which has never engaged in business in Ecuador with Mr. Baer. The current status of that lawsuit is disputed by the parties. Defendant Baer claims that the matter has been fully litigated in Ecuador. Plaintiffs claim that Baer has sued the wrong parties, that the judge who heard the matter has been recused, and a dispute currently exists over how the recused judge will be replaced.

On March 18, 1997, BHP Power, Inc. and King Ranch Power Corp. simultaneously filed an arbitration demand with the American Arbitration Association and this civil action seeking enforcement of the arbitration clause.

Under the Federal Arbitration Act, (the "FAA"), there is a "liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). Arbitration disputes involving international commerce are governed by the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, reprinted at 9 U.S.C. §201, et seq. Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1145 (5th Cir. 1985). In enacting enabling legislation for the Convention, Congress intended that the Convention be enforced according to its terms over all prior inconsistent rules of law. See 9 U.S.C. §201; Sedco, Inc., 767 F.2d at 1145. Here, it is undisputed that the United States and Ecuador are signatories to the Convention. Baer is a citizen of Germany, living in Ecuador.

In Sedco, Inc., 767 F.2d at 1145, the court set out four questions a court must resolve in determining whether to refer a case for arbitration:

(1) Is there an agreement in writing to arbitrate the dispute?

(2) Does the agreement provide for arbitration in the territory of a Convention signatory?

(3) Does the agreement to arbitrate arise out of a commercial legal relationship?; and

(4) Is a party to the agreement not a United States citizen?

If the court answers these questions in the affirmative, it must compel the action to arbitration. Id.

Article II, Sec. 2 of the Convention defines "an agreement in writing" to include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." See 9 U.S.C. §201.

Here, the December 16, 1995 letter, signed by Baer, expressly agreed that all other terms [except the compensation terms] of the March 13, 1995 draft were agreed by the parties. This included the lengthy agreement to arbitrate any dispute in Texas. Baer's signature on the December 16th letter under the heading "Accepted and Agreed" is sufficient to satisfy the agreement in writing requirement of the Convention. The remaining three elements under Sedco are not in dispute and must be answered in the affirmative.

The inquiry under the FAA is similarly limited: the court must determine (1) whether the parties agreed to arbitrate and (2) whether the dispute is within the scope of the agreement. The same facts recited above would satisfy the FAA's requirement of an agreement to arbitrate. The issues in dispute between the parties are clearly within the scope of the arbitration clause.

Baer has raised several defenses to arbitration. First he argues that he never signed the final consulting agreement and the compensation terms were never accepted by BHP Power Inc. and King Ranch Power Corp. However, a binding contract is not required in order to compel arbitration. Under the strong federal policy promoting arbitration, an arbitration clause is treated as a separate agreement severable from the contract in which it is found, the alleged illegality or vagueness of which cannot nullify the arbitration clause. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388

[1] See Plaintiffs' Application for Injunction and Motion to Compel Arbitration, Docket Entry #7, Exhibit A-6.

U.S. 395, 396-97 (1967). See also Neal v. Hardee's Food Systems, Inc., 918 F.2d 34, 37 (5th Cir. 1990).

Therefore, to the extent that Baer argues that there was no meeting of the minds as evidenced by the conduct of the Plaintiffs, or that Plaintiffs have "dirty hands" or have exhibited "bad faith" and should not be entitled to enforce any agreement due to their allegedly inequitable conduct, those arguments are not properly considered by the court in making a determination of whether there is an agreement to arbitrate.

Under Section 4 of the FAA, the court cannot examine on the merits the validity of the contract before it first determines whether the making of the arbitration agreement is in issue. If it is not, the court must compel arbitration and refrain from consideration of any defenses to the contract. Prima, 388 U.S. at 403-04. In essence, the defendant wishes to have a trial on the issue of contract formation in order to determine whether there is a contract containing an arbitration clause. As discussed above, the only issue is whether there is an agreement to arbitrate.

Based on Baer's signature on the December 18, 1995 letter, the court concludes that the parties agreed to arbitrate any disputes arising out of their agreement.

Defendant also complains that he did not intend to agree to arbitration and that language barriers prevented his complete understanding of the March 13, 1995 draft. However, the unambiguous language of the December 18, 1995 letter belies such a claim. Where the undisputed documentary evidence shows that the parties intended to be bound and there is no legally sufficient evidence to the contrary, the court can find, as a matter of law, that there was an agreement. Harry C. Beck Company v. Arrevis, Inc., 515 S.W.2d 712, 718 (Tex.Civ.App.--Dallas, 1974). Given King Ranch Power Corp.'s and BHP Power's reliance on Baer's express acceptance of all terms of the Consulting Agreement, and Baer's failure to ever object to the arbitration clause, Baer is estopped from denying his agreement to arbitrate. Laredo Nat'l Bank v. Gordon, 61 F.2d 906, 907 (5th Cir. 1932) cert. denied, 289 U.S. 726 (1933) ("[O]ne who keeps silent, knowing that his silence will be misinterpreted, should not be allowed to deny the natural interpretation of his conduct," citing Williston on Contracts, §91, 91a). Further, the parole evidence rule prohibits Baer from testifying to his alleged unilateral mistake of intent. Bottoms v. Lyons, 497 S.W.2d 813, 814 (Tex.Civ.App.--Amarillo, 1973). Therefore, Baer's demand for a jury trial on the issue of his intent to arbitrate is without merit.

Finally, Baer argues that only two of the Plaintiffs are signatories to the draft agreement. Baer is correct. Only Baer, BHP Power Inc. and King Ranch Power Corp. were named as parties to the agreement. Clause 16 of the March 13, 1995 Consulting Agreement states in pertinent part, "For greater clarity and certainty, arbitration shall not be available to anyone who is not a party." Thus, only BHP Power Inc. and King Ranch Power Corp. have standing to compel arbitration.

In light of the above discussion, Plaintiffs' Motion to Compel Arbitration is GRANTED. Defendant Baer shall proceed to arbitration with BHP Power Inc. and King Ranch Power Corp. as scheduled before the American Arbitration Association as provided in Clause 16 of the Consulting Agreement.

II.

Plaintiffs' Application for Injunction

The court has found that the parties to the Consulting Agreement agreed to arbitrate any disputes and has ordered them to proceed to arbitration. However, Baer has filed a civil action in Ecuador against non-parties to the Consulting Agreement over the dispute concerning his fees

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Based on the submissions of the parties, the court finds that the subject matter of the Ecuadoran lawsuit is the same as the matter compelled to arbitration.

The court has the inherent power to enjoin the prosecution of foreign suits. Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626 (5th Cir.), cert. denied, 117 S.Ct. 73 (1996). The Fifth Circuit has held that "[i]t is well settled among the circuit courts--including this one--which have reviewed the grant of an antisuit injunction that the federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits. Id. (citations omitted). The court's inherent power also extends to issue injunctive relief to enforce arbitration agreements. See Borden, Inc. v. Meiji Milk Products Co., Ltd., 919 F.2d 822 (2nd Cir. 1990), cert. denied, 500 U.S. 953 (1991)(holding that, where plaintiff had specifically sought to compel arbitration, "entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to [9 U.S.C.] § 206").

In Kaepa, Inc., the court stated that an injunction barring a foreign action was proper if the simultaneous prosecution of an action would result in "inequitable hardship" and "tend to frustrate and delay the speedy and efficient determination of the cause." Kaepa, Inc., 76 F.3d at 627. The focus of the inquiry is whether there exists a need to prevent vexatious or oppressive litigation. Id.

As discussed above, Baer agreed to submit himself to the jurisdiction of any state or federal court in Texas and agreed to arbitration of any disputes arising under the Consulting Agreement applying Texas law. If Defendant Baer is permitted to proceed with his action in Ecuador, he will defeat and circumvent the other parties' legitimate expectation of resolving any disputes through arbitration. It was never contemplated that the parties would resolve disputes in Ecuador under Ecuadoran law. Additionally, the confusion caused by Baer's prosecution of the dispute against the

wrong parties simply adds to the hardship on both the parties to the Consulting Agreement and to affiliated companies who have been, or may be, wrongfully sued in Ecuador.

While Baer argues that the Ecuadoran suit has been concluded and thus will result in the quickest resolution of the dispute, the court disagrees. According to the affidavits filed by both sides, the status of the litigation is far from clear. In any event, no final judgment has been rendered.

In light of the strong federal policy favoring arbitration, the court finds that Plaintiffs would be irreparably harmed if Baer were permitted to continue litigating in Ecuador while the same claims were being arbitrated. Therefore, the court GRANTS Plaintiffs' application for injunction. It is therefore ORDERED that Defendant Baer is ENJOINED from prosecuting his claims styled In the [illegible], No. 1193-96 GV, in the Twenty-First Civil Court of Pichincha in Quito, Ecuador or from filing any other action, in Ecuador or the United States, against any party arising out of matters within the scope of the agreement to arbitrate, without first obtaining permission of this court. No bond need be filed by Plaintiffs.

The court further ORDERS that this action is STAYED and ADMINISTRATIVELY CLOSED, pending the outcome of the arbitration proceedings.

Finally, the court ORDERS that all other pending motions are MOOT. Leave will be granted to any party to urge these motions if this case is re-opened and reinstated on the court's active docket.

DONE in Houston, Texas, this 28th day of April, 1997.

NANCY K. JOHNSON
UNITED STATES MAGISTRATE JUDGE

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