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MINUTE ENTRY
McNAMARA, J.
FEBRUARY 14, 1992

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

McDERMOTT INTERNATIONAL, INC.	*	CIVIL ACTION
VERSUS	*	NO. 91-841 AND CONSOLIDATED CAS
UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO MEMORANDUM OF INSURANCE NO. 104207	*	SECTION "D" (5)

Before the court are the following Motions:

1. Motion of Defendant John Richard Ludbrooke Youell, as representative of those certain Underwriters at Lloyd's, London, subscribing to Memorandum of Insurance No. 104207 ("Underwriters"), to Compel Arbitration and to Stay Litigation;

2. Motion of Plaintiff, McDermott International, Inc. ("McDermott"), for Summary Judgment; and

3. Motion of McDermott to Remand

Plaintiff, McDermott, has filed opposition to Underwriters' Motion to Compel Arbitration and to Stay Litigation. Defendants, Underwriters, have filed opposition to McDermott's Motion for Summary Judgment and Motion to Remand. These Motions are before the court on briefs, without oral argument.

BACKGROUND

This suit arises from a dispute over coverage of an "All Risks" Installation Floater insurance policy, No. 552/832127500, ("the policy"), issued in 1989 by Underwriters to McDermott. McDermott made a claim for losses under this policy for repair or replacement of two heat pipe air heaters supplied to Baltimore Gas & Electric Company by McDermott's subsidiary, the Babcock and

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Wilcox Company.[1] Underwriters have denied McDermott's claim.

On November 15, 1990, McDermott filed suit no. 90-22157 against Underwriters in Civil District Court, Orleans Parish, seeking a money judgment for sums allegedly due under the policy. On January 29, 1991, McDermott filed a First Amended and Supplemental Petition in 90-22157, and for the first time served Underwriters with the suit. On January 30, 1991, Underwriters demanded arbitration of the coverage and damage issues. On February 8, 1991, McDermott filed suit no. 91-2894 against Underwriters in Civil District Court, Orleans Parish, seeking declaratory judgment on the issue of arbitration. Underwriters removed both state court suits to this court pursuant to the Convention Act, 9 U.S.C. § 205 ("the Convention").[2] This court remanded the cases to Civil District Court. The Fifth Circuit vacated the remand order in McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199 (5th Cir. 1991).

MOTIONS PENDING BEFORE THIS COURT

The three Motions and related Memoranda in Opposition and Reply Memoranda pending before this court address, in some form, the question of the enforceability of the policy provisions requiring arbitration. While nonetheless providing a ruling on each individual Motion, this Minute Entry will address collectively

[1] Underwriters' Memorandum in Support of its Motion to Compel Arbitration and to Stay Litigation, at p.2-3; McDermott's Memorandum in Opposition to Defendant's Motion to Compel Arbitration and Stay Litigation, at p. 1-3.

[2] State Court suit no. 90-22157 became USDC no. 91-841, and State Court suit no. 91-2804 became USDC no. 91-871.

the issues raised by all the pending Motions.

PROVISION OF THE POLICY REQUIRING ARBITRATION

The issues raised in the pending Motions focus largely on the arbitration clause contained in the policy. It states

> ¶ Arbitration
>
> All differences arising out of this contract shall be referred to the decision of any arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, one to be appointed in writing by each of the parties and in case of disagreement between the two arbitrators to the decision of any umpire to be appointed in writing by the arbitrators or by a court of competent jurisdiction within the limits of the United States of America. It is agreed that the place of arbitration shall be designated by the Assured and the expenses in connection with the arbitration shall be borne equally between the parties in difference.

PRESUMPTION OF ARBITRATION

The United States Supreme Court has expressed a strong presumption favoring the enforcement of arbitration provisions whenever possible. "Section 2 [of the Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927, 941 (1983).[3] Further, "the Courts of Appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration

[3] The dispute in this case involved a construction contract containing an arbitration clause.

Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration..." Id. at 941 (emphasis added).

Citing its decision in Moses H. Cone, the Supreme Court explained that its liberal policy favoring arbitration agreements supports its policy guaranteeing the enforcement of private contractual arrangements. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346, 3353 (1985) (citation omitted).[4] More specifically, the Court "conclude[d] that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." Id. at 3355. (emphasis added).

Enforcing an arbitration clause in a dispute over certain contract modifications, our own Fifth Circuit acknowledged that "[a] presumption of arbitrability exists requiring that whenever the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration." Mar-Len of Louisiana, Inc. v. Parsons-Gilbane, 773 F.2d 633, 635 (5th Cir. 1985) (citation omitted).

Further, in a 1988 opinion, the Eastern District enforced an

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[4] The dispute in this case involved a sales agreement containing an arbitration clause.

arbitration agreement in Seafort Shipping Corp. v. The West of England Ship Owners Mut. Protection and Indem. Ass'n, 1988 U.S. Dist. LEXIS 14294 (E.D. La. 1988). In Seafort, Judge Sear explained that

> where a contract contains an arbitration clause, 'there exists a strong presumption that arbitration should not be denied "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue"'. Phillips Petroleum Co. v. Marathon Oil Co., 794 F.2d 1080 (5th Cir. 1986)(quoting Houston General Insurance Co. v. Realex Group, N.V., 776 F.2d 514 (5th Cir 1985)). The Fifth Circuit has gone so far as to hold that even when a contract containing an arbitration clause was void from its inception, the arbitration clause would still be enforceable. (see Lawrence v. Comprehensive Business Serv. Co., 833 F.2d 1159 (5th Cir. 1987)).

Id. at *14-15.

Article II of the Convention[3] contemplates a limited inquiry by the courts when considering whether or not to enforce an arbitration agreement, specifically: (1) Did the parties agree in writing to arbitrate the dispute; and (2) Is the arbitration agreement null and void, inoperative or incapable of being performed?. There is no doubt that the policy in this case contains a broad arbitration provision[4]. McDermott, however, has set forth arguments urging this court to find that the arbitration provision is null and void, inoperative or incapable of being

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[3] 9 U.S.C. § 201.

[4] McDermott Int'l., Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1206 (5th Cir. 1991).

performed. For reasons more fully explained below, this court disagrees and finds that controlling jurisprudence requires the enforcement of the policy's arbitration provision between McDermott and Underwriters. The policy between McDermott and Underwriters provides for all differences to be resolved through arbitration. This court is unpersuaded by arguments that the unique facts of this case require a different result.

ARBITRATION PROVISION IS VALID AND ENFORCEABLE UNDER THE CONVENTION

McDermott argues that the Convention "specifies that a Court shall not refer the parties to arbitration if the agreement to arbitrate is null and void... [or] when the law governing the contract makes the agreement invalid or when public policy requires."[7] To utilize this provision, McDermott further argues that the McCarran-Ferguson Act[8] requires the application of Louisiana law, specifically R.S. 22:629, which it argues prohibits the enforcement of compulsory arbitration.

However, in keeping with the strong policy of favoring enforcement of arbitration agreements, the courts have created a body of federal substantive arbitration law applicable in both federal and state courts. Southland Corp. v. Keating, 104 S. Ct. 852, 859 (1984) (citation omitted). Examining the legislative history, the Court noted that Congress "contemplated a broad reach of the [Arbitration] Act, unencumbered by state-law constraints."

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[7] McDermott's Memorandum in Opposition to Defendants' Motion to Compel Arbitration and Stay Litigation, at p.24.

[8] 15 U.S.C .§ 1011, et. seq.

Id. at 859. Citing Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 387 (2nd Cir. 1961), the Court found that "'the purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or...by state courts or legislatures.'" Id.

Accordingly, this court rejects argument that the McCarran-Ferguson Act mandates the application of Louisiana law in favor of applying federal arbitration law.

LOUISIANA STATUTORY LAW IS INAPPLICABLE

McDermott raises a two-part argument urging that arbitration is inappropriate. First McDermott argues that to order arbitration in this matter would be contrary to the McCarran-Ferguson Act which "provides that the states, and only the states, can regulate the substantive content of insurance contracts...."[9] Second, McDermott argues for application of Louisiana insurance law to this dispute, specifically R.S. 22:629(A)(2)[10], which it interprets as prohibiting arbitration agreements in the context of insurance.

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[9] McDermott's Memorandum in Opposition to Defendants' Motion to Compel Arbitration and Stay Litigation, at p.27.

[10] R.S. 22:629 states in pertinent part

> A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state...regardless of where made or delivered shall contain any condition, stipulation, or agreement...(2) Depriving the courts of this state of the jurisdiction of action against the insurer....

Because the McCarran-Ferguson Act is inapplicable here, this argument fails on both levels. The McCarran-Ferguson Act does not apply to contracts made under the Convention, as it was intended to apply only to interstate commerce, not to foreign commerce.[11] Likewise, the Convention makes clear that it does not apply to purely interstate disputes. [12]

Jurisprudence is clear that when state laws conflict with the Convention, the Supremacy Clause mandates the application of the Convention. In Southland Corp., the Supreme Court addressed a state law provision that directly conflicted with the Federal Arbitration Act. Southland Corp., 104 S. Ct. at 853. Finding that the conflicting state law provision violated the Supremacy Clause, the Court strongly stated "[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability

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[11] see Triton Lines, Inc. v. Steamship Mut. Underwriting Assoc., 707 F. Supp. 277, 278-79 (S.D. Tex. 1989), which provides:

> Triton urges that the Federal Arbitration Act does not apply to this contest since another federal statute [the McCarran-Ferguson Act] abandons the field of regulation of the business of insurance to the states....A disputed claim is not the business of insurance....The McCarran Act has never been held to have abrogated federal procedural practices in federal court cases....The anti-arbitration provision of the Texas Insurance Code, therefore, is countermanded by the Federal Arbitration Act. (See Life of America Ins. Co. v. Aetna Life Ins. Co., 744 F. 2d 409 (5th Cir. 1984).

[12] 9 U.S.C. § 202. ("An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention...).

of arbitration agreements." Id. at 861. (referring to the Arbitration Act).

Ruling in accordance with the Supreme Court, the Fifth Circuit, citing Southland Corp., stated

> "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."... Thus, the Court held that the Arbitration Act preempted a state law that purported to withdraw the power to enforce arbitration agreements....in a case involving actual conflict between state and federal regulation, "[a] holding of federal exclusion of state law is inescapable ...when compliance with both...is an impossibility"...Rather, federal preemption is, in such a case, automatic.

Commerce Park at DFW Freeport v. Mardian Construction Co., 729 F.2d 334, 338-340 (5th Cir. 1984) (citation omitted).

Accordingly, this court finds that federal arbitration law, not Louisiana statutory law is applicable to this case. To the extent that Louisiana law prohibits agreements to arbitrate in the context of insurance agreements, federal law favoring arbitration preempts it.[13]

"THE LETTER" DID NOT CREATE A SETTLEMENT CONTRACT

McDermott has constructed a tenuous argument to preclude

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[13] Because the court finds that Louisiana law is preempted, it is unnecessary to address the issues raised concerning the requirements of R.S. 22:629 that the insurance contract must be (1) delivered or issued for delivery in Louisiana; and (2) covering subjects located, resident or to be performed in Louisiana. See Underwriters' Motion to Compel Arbitration and to Stay Litigation, at p.18-23; and McDermott's Memorandum in Opposition to Defendants' Motion to Compel Arbitration and to Stay Litigation, at p.33-42.

arbitration based on a September 11, 1990 letter ("the letter") from Mike Donnelly of Maxon Young Associates, Inc. to John Bothman of McDermott.[14] McDermott argues that the letter itself creates a "new contract" or "settlement contract" between the parties, and that this "new contract" does not itself require arbitration.[15] In support of its position, McDermott asserts that Maxon Young, acting as Underwriters' agent, bound Underwriters to pay all of McDermott's damages, with the exception of the cost of replacing the working fluid. McDermott further asserts that Underwriters waived any right to arbitration through the creation of a new contract by the letter.[16]

To accept McDermott's arguments of waiver and settlement, the

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[14] The letter provides as follows

> This will serve to confirm that the above-referenced policy does provide coverage for the Design Error problem involving Heat Pipe Units Nos. 1 and 2 at the Baltimore Gas & Electric Crane Facility.
>
> The referenced policy does not respond to costs to correct the design error, i.e., the replacement of the working fluid; but does respond to the cost of damages due to such Design Error, which, in this case, would include demolition and replacement of the Heat Pipe units with a system no more expensive than the original installation.
>
> Please note, we have requested that the $26,666,000.00 estimate be correlated with the original installation costs of the Crane Facility Heat Pipe Units Nos. 1 and 2.
>
> Please feel free to call upon the undersigned, should you need further confirmation of coverage, or if we can be of additional assistance.

[15] McDermott's Memorandum in Opposition to Defendants' Motion to Compel Arbitration and to Stay Litigation, at p.8, 23.

[16] Id. at 5.

court would have to find that the letter itself is a separate contract between McDermott and Underwriters. The court finds that this argument is without merit. Even if - and the if is a big one - this court believed that the letter was "an offer", and if Maxon Young acted with actual or apparent authority[17] to bind Underwriters to a settlement agreement and, if McDermott was an "innocent" third person which reasonably believed that through the letter Maxon Young was making a binding offer on behalf of Underwriters for payment of a $36,000,000.00 claim - there would still be no separate contract. Even resolving all these "ifs" in favor of McDermott, there is no showing that McDermott accepted these supposed offers and thus created a new contract.

Logic dictates that the court's rejection of McDermott's argument that the letter created a settlement contract also defeats its claim of waiver of arbitration rights by Underwriters. Instead, the court finds that Underwriters did not, through action or inaction, waive their rights under the policy to arbitration.

Finally, in Moses Cone, the Supreme Court held

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to

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[17] La. Civ. Code art. 2997 states that an agent must have express power to compromise a matter or acknowledge a debt. Further, the judicially created doctrine of apparent authority requires that the principal put his agent in such a position or has acted in such a manner as to give an innocent third person the reasonable belief that the agent has authority to act for the principal. see AAA Tire & Export, Inc. v. Big Chief Truck, 385 So. 2d 426, 429 (La. App. 1st Cir. 1980).

arbitrability.

Moses Cone, 103 S. Ct. at 941 (emphasis added) (citation omitted). Clearly, any additional allegations or defenses addressing the enforceability the policy can and should be resolved through arbitration.

"SERVICE OF SUIT" CLAUSE DOES NOT DEFEAT ARBITRATION PROVISION

In its Memorandum in Support of its Motion to Remand, McDermott argues that "[t]his [c]ourt need not and should not decide whether the Convention properly applies or whether the arbitration provision is enforceable."[18] Instead, McDermott urges this court to remand "in light of [McDermott and Underwriters'] contractual agreement to submit to a court of McDermott's choosing."[19]

McDermott argues that by filing suit in state court, it exercised the "service of suit" or "forum selection" clause[20], therefore Underwriters right of removal was waived. However, the

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[18] McDermott's Memorandum in Support of its Motion to Remand, at p.2.

[19] Id.

[20] The policy provision, entitled "Service of Suit Clause" states

> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practices of such Court....

Fifth Circuit, construing the identical policy, held "[t]he service-of-suit clause does not explicitly waive Underwriters' removal rights." McDermott Int'l., Inc., 944 F.2d at 1206. The court found that the policy had two forum selection clauses, the arbitration clause and the service of suit clause, which apply to different types of disputes, and that alternate possible meanings for the service of suit clause existed. Id. at 1207. The court explained that it "will give effect only to explicit waivers of Convention Act removal rights." Id. at 1209. The court further noted that "[f]uture forum choice disputes in Convention cases will not languish in this court under our bright-line express waiver rule." Id. at 1213. In light of this ruling, McDermott's assertion that Underwriters had a duty to affirmatively reserve their removal rights is without merit.

The case before this court was properly removed pursuant to the Convention. Because the court finds that the service of suit clause does not preclude removal, and that Underwriters did not explicitly waive their removal rights in the policy, McDermott's Motion to Remand is denied.

REQUEST FOR JURY TRIAL DENIED

McDermott urges that should this court deny its demand that this case proceed at law, then it is entitled to a jury trial, pursuant to 9 U.S.C. § 4, which it claims reserves the right to a jury trial when either the making of the arbitration agreement, or the alleged failure, neglect, or refusal of the party to comply with an arbitration agreement is at issue.

9 U.S.C. § 4 states in pertinent part

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court...for an order directing that such arbitration proceed...If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

(emphasis added).

As the party resisting arbitration, McDermott has the burden of showing that it is entitled to a jury trial. Bhatia v. Johnston, 818 F.2d 418 (5th Cir. 1987). The court finds that McDermott has failed to meet its burden, and that neither the making of the arbitration agreement nor the refusal of McDermott to submit to arbitration are at issue in this matter. As the Supreme Court noted

> a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction by the courts.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 87 S. Ct. 1801, 1806 (1967). Accordingly, McDermott's request for a jury trial is denied.

REMAINDER OF SUIT STAYED PENDING ARBITRATION

In a case upholding a district court's order staying a portion of an action pending arbitration, the Fifth Circuit ruled that the district court had discretion to include in its stay order claims

of litigants not party to the contract containing the arbitration clause. Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976). (see also Seafort Shipping Corp., 1988 U.S. Dist. LEXIS 14294 at *15 - holding that the district court has discretion to stay the litigation of claims that are not within the scope of the arbitration agreement.)

This court finds it appropriate to stay the litigation of claims pending in this matter that are not subject to the arbitration provision of the policy.

CONCLUSION

IT IS ORDERED that McDermott and Underwriters must submit to arbitration pursuant to the provisions of the policy and 91-841 is stayed pending the resolution of arbitration. IT IS FURTHER ORDERED that this action is also stayed as to parties and claims not subject to arbitration[21]. Accordingly;

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[21] In addition to ordering arbitration in the suits nos. 91-871 and 91-3601, consolidated under no. 91-841, this action is stayed as to the following suits consolidated under no. 91-841:

1. 91-3469 "D" (5)
Orion Insurance Co. P.L.C., et al v. Maxon Young Associates, Inc.

This is an action by Plaintiffs, those certain Institute of London Underwriters Companies subscribing to Policy of Insurance No. 552/832127500, for indemnification by Maxon Young for any damages that may be assessed against the Plaintiffs in an action by McDermott.

2. 91-3842 "D" (5)
McDermott International, Inc. v. Maxon Young Associates, Inc. and Certain Underwriters at Lloyd's London, Subscribing to Policy No. ZKN90000144/C1053-1-90

This is an action for damages for reliance by McDermott on Maxon Young's representations, to recover from Maxon Young the

The following Motion is GRANTED:

1. Motion of Defendant John Richard Ludbrooke Youell, as representative of those certain Underwriters at Lloyd's, London, subscribing to Memorandum of Insurance No. 104207, to Compel Arbitration;

The following Motions are DENIED:

2. Motion of Plaintiff, McDermott International, Inc., for Summary Judgment; and

3. Motion of Plaintiff, McDermott International, Inc., to Remand.

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benefits of McDermott's contract with Underwriters, the proceeds of the insurance policy.

3. 91-3437 "D" (5)
John Richard Youell - Representing Certain Underwriters at Lloyd's London Subscribing to Memorandum of Insurance No. 104207 v. Maxon Young Associates, Inc.

This is an action for indemnification of Underwriters by Maxon Young for any damages that may be assessed against Underwriters in an action brought by McDermott.