

BLACK & VEATCH INTERNATIONAL COMPANY, Plaintiff, vs.  
WARTSILA NSD NORTH AMERICA, INC. and WARTSILA DIESEL OY,  
Defendants.

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1998 U.S. Dist. LEXIS 20732, \*

CIVIL ACTION No. 97-2556-CTV

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

1998 U.S. Dist. LEXIS 20732

December 16, 1998, Decided

December 17, 1998, Filed; December 18, 1998, Entered on the  
Docket

DISPOSITION:

[\*1] Defendant's motion to dismiss and compel arbitration (Doc. 41)  
granted.

CORE TERMS:

arbitration agreement, motion to dismiss, summary judgment, arbitration,  
beneficiary, third-party, subject to arbitration, answered, well-pleaded,  
generating, diesel, agreement to arbitrate, arbitration provision,

> null and void, inoperative, referenced, memorandum, converting, signatory,  
 > arbitrate, incapable, veracity, efficacy, negligent misrepresentation,  
 > construction project, contract containing, breach of contract,  
 > compel arbitration, arbitration clause, disputes arising  
 >  
 > COUNSEL:  
 > For BLACK & VEATCH INTERNATIONAL CO, plaintiff: J. Michael Grier,  
 Timothy  
 > W.  
 > Triplett, Blackwell Sanders Peper Martin LLP, Overland Park, KS.  
 >  
 > For WARTSILA NSD NORTH AMERICA, INC, WARTSILA DIESEL OY,  
 defendants: James  
 > S.  
 > Kreamer, Baker, Sterchi, Cowden & Rice, L.L.C., Kansas City, MO.  
 >  
 > For WARTSILA NSD NORTH AMERICA, INC, WARTSILA DIESEL OY,  
 defendants:  
 > Daphne P  
 > McNutt, John H Clegg, Chaffe, McCall, Phillips, Toler & Sarpy, L.L.P., New  
 > Orleans, LA.  
 >  
 > JUDGES:  
 > G. T. VanBebber, United States District Judge.  
 >  
 > OPINIONBY:  
 > G. T. VanBebber  
 >  
 > OPINION:  
 >  
 > MEMORANDUM AND ORDER  
 >  
 > Plaintiff brings this diversity action asserting claims of breach of  
 > contract, negligence, negligent misrepresentation, and fraud against  
 > defendant  
 > Wartsila Diesel Oy ("Vaasa") n1. The case is before the court on defendant  
 > Vaasa's motion to dismiss and compel arbitration (Doc. 41). For the  
 > reasons set  
 > forth below, defendant's motion is granted.  
 >  
 > -----Footnotes-----  
 > ...  
 >  
 > n1 This name is derived from the location of Wartsila Diesel Oy's  
 > corporate  
 > headquarters in Vaasa, Finland.  
 >  
 >  
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-----End Footnotes-----

[\*2]

I. Background

When considering a motion to dismiss, the court assumes the truth of all

well-pleaded factual allegations and makes all possible reasonable inferences in favor of the plaintiff. Thus, for purposes of defendant's motion to dismiss, the court takes the following allegations of facts from plaintiff's Second Amended Complaint.

In August 1994, defendant Wartsila NSD North America, Inc. ("Wartsila") contracted with Coastal Salvadorian Power, Ltd. ("Coastal"), to design, engineer, construct, and test a heavy fuel diesel generating power plant.

The court will refer to the contract between Wartsila and Coastal as the "prime

contract." Wartsila subcontracted a substantial portion of its design, engineer, and construction responsibilities under the prime contract to plaintiff Black &

Veatch, Inc. The court will refer to the contract between Wartsila and Black &

Veatch as the "subcontract." Also in August 1994, Vaasa entered into a contract

with Wartsila to provide diesel generating sets and detailed electrical and

mechanical design information for the construction project. The court will refer

to this contract as the "Wartsila-Vaasa contract."

Under the various contracts, [\*3] Vaasa was to provide design information

concerning the diesel generating sets to Wartsila, who, in turn, was to provide

this same information to Black & Veatch. Specifically, the subcontract required

Wartsila to provide technical design information to Black & Veatch in preliminary form within four weeks of the contract signing, and in final

form within eight weeks. The Wartsila-Vaasa contract imposed these same time requirements upon Vaasa's provision of detailed electrical and mechanical



> design  
> information to Wartsila. Vaasa failed to provide the final design  
> information to  
> Wartsila within the contractual deadline. As a result of Vaasa's failure  
> to meet  
> its obligations under the Wartsila-Vaasa contract, Black & Veatch, as a  
> third-party beneficiary, suffered damages in the form of expenditures of  
> unnecessary time, effort, and money, and the loss of profit otherwise  
> available  
> to Black & Veatch under its contract with Wartsila. In an effort to  
> redress  
> these damages, Black & Veatch filed suit in this court alleging breach of  
> contract, negligence, negligent misrepresentation, and fraud claims  
> against  
> Vaasa.

## > II. Legal Standards

### x > A. Conversion to Summary Judgment

> "A 12(b)(6) motion [\*4] must be converted to a motion for summary  
> judgment  
> if 'matters outside the pleading are presented to and not excluded by the  
> court'  
> and 'all parties . . . [are] given reasonable opportunity to present all  
> material made pertinent to such a motion by Rule 56.'" GFF Corp. v.  
> Associated  
> Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997) (quoting  
> Fed. R.  
> Civ. P. 12(b)). Defendant has attached a copy of the Wartsila-Vaasa  
> contract to  
> its motion to dismiss and has referenced the contract's arbitration  
> provision in  
> its memorandum in support of its motion. Although, the court will consider  
> the  
> arbitration agreement, it is not necessary to convert defendant's motion  
> to one  
> for summary judgment under Fed. R. Civ. P. 56.

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> When a plaintiff attaches a document to its complaint or incorporates a  
> document by reference, the document is part of the pleadings and the  
> court, upon  
> ruling upon a motion to dismiss, may consider such a document without  
> converting  
> the motion to one for summary judgment. This same rule applies if the

> document  
> in question "is referred to in the complaint and is central to the  
> plaintiff's  
> claim." Id. "If the rule were otherwise, a plaintiff with a deficient [\*5]  
> claim could survive a motion to dismiss simply by not attaching a  
> dispositive  
> document upon which the plaintiff relied." Id. at 1385.

>  
> In its second amended complaint, plaintiff makes numerous references to  
> the  
> Wartsila-Vaasa contract. In particular, plaintiff claims that it was an  
> intended  
> third party beneficiary of the promises made by Vaasa to Wartsila pursuant  
> to  
> the Wartsila-Vaasa contract." Because the Wartsila-Vaasa Contract and the  
> arbitration clause contained therein are referenced in the pleadings and  
> central  
> to plaintiff's claims, the court will consider them in deciding  
> defendant's  
> motion to dismiss without converting the motion to one for summary  
> judgment.

X > B. Motion to Dismiss

>  
> Defendant fails to move for dismissal under a specific federal rule.  
> However,  
> from defendant's motion and accompanying memorandum, the court concludes  
> that  
> defendant is seeking dismissal pursuant to Fed. R. Civ. P. 12(b)(6). In  
> ruling  
> on a motion to dismiss, the court accepts the veracity of all well-pleaded  
> facts  
> in the plaintiff's complaint and views both the facts and all reasonable  
> inferences in the light most favorable to the plaintiff. *Zinerman v.*  
> *Burch*, 494  
> U.S. 113, 118, 108 [\*6] L. Ed. 2d 100, 110 S. Ct. 975 (1990); *Swanson v.*  
> *Bixler*  
> 750 F.2d 810, 813 (10th Cir. 1984). The issue in reviewing the  
> sufficiency of  
> a complaint is not whether the plaintiff ultimately will prevail, but  
> whether  
> the plaintiff will be allowed to offer evidence to bolster the claims.  
> *Scheuer*  
> *v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). "The  
> court  
> may not dismiss a case for failure to state a claim unless it appears  
> beyond a  
> doubt that the plaintiff can prove no set of facts in support of his  
> claims

> which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46,  
> 2 L.  
> Ed. 2d 80, 78 S. Ct. 99 (1957); Fuller v. Norton, 86 F.3d 1016, 1020 (10th  
> Cir.  
> 1996).

> III. Discussion

> [1] Defendant moves the court to dismiss plaintiff's claims on the ground  
> that  
> they are subject to arbitration pursuant to the Convention <sup>[1958 New York]</sup> on the  
> Recognition  
> and Enforcement of Foreign Arbitral Awards ("the Convention"). See 9  
> U.S.C. @  
> 201 Historical and Statutory Notes. Defendant alleges that plaintiff's  
> claims  
> are based upon Vaasa's alleged breach of the Wartsila-Vaasa contract.  
> Because  
> plaintiff, by bringing this suit, seeks to enforce the Wartsila-Vaasa  
> contract,  
> [2] defendant claims that plaintiff is bound by the limitations and  
> liabilities of that contract. Specifically, defendant contends that  
> plaintiff is  
> bound by the express arbitration agreement found at section eight of the  
> Wartsila-Vaasa contract. [3] The arbitration agreement provides as follows:

> 8.2 All disputes arising between the Parties from or in connection with  
> this  
> Contract shall be settled through friendly consultations between the  
> Parties. In  
> case no agreement can be reached through consultation, the dispute shall  
> be  
> submitted to arbitration for final and exclusive settlement.

> 8.3 The arbitration procedure shall be governed by the Rules of  
> Conciliation

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> and Arbitration of the International Chamber of Commerce and shall be  
> conducted  
> by one or more arbitrators appointed in accordance with the said rules.  
> The  
> arbitration proceeding shall be in the English language and will take  
> place in  
> London, Great Britain.

> [3] Any discussion regarding the efficacy of an agreement to arbitrate in

> a  
> foreign country between citizens or entities of different countries must  
> begin [1958 New York  
> with a review of the Convention] on the Recognition and Enforcement of  
> Foreign  
> Arbitral Awards . . . ." Riley [\*8] v. Kingsley Underwriting Agencies,  
> Ltd.,  
> 969 F.2d 953, 958 (10th Cir. 1992). Under Article II of the Convention,  
> the  
> courts of a contracting state have a mandatory duty to recognize and  
> enforce an  
> agreement to arbitrate. Id. at 959 (citing 9 U.S.C. @ 201 Historical and  
> Statutory Notes). Following the language of the Convention, a district  
> court  
> should perform a limited inquiry to determine whether an arbitration  
> agreement  
> is enforceable. Id. The court's inquiry consists of four questions:  
>  
> 1. Is there an agreement in writing to arbitrate the subject of the  
> dispute?  
>  
> 2. Does the agreement provide for arbitration in the territory of the  
> signatory  
> of the Convention?  
>  
> 3. Does the agreement arise out of a legal relationship whether  
> contractual or  
> not, which is considered commercial?  
>  
> 4. Is a party to the agreement not an American citizen, or does the  
> commercial  
> relationship have some reasonable relation with one or more foreign  
> states?  
>  
> Id. (quoting Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir.  
> 1982)).  
>  
> The court concludes that all four questions are answered in the  
> affirmative.  
> First, the Wartsila-Vaasa contract contains an agreement [\*9] in writing  
> to  
> arbitrate the subject of dispute. The express arbitration provision in the  
> Wartsila-Vaasa contract provides that "all disputes arising . . . from or  
> in  
> connection with" the contract are subject to arbitration. This language is  
> broad  
> enough to cover all claims asserted in this case. See Baer v. Terminix  
> Int'l Co.  
> , 975 F. Supp. 1272, 1279-80 (D. Kan. 1997); see also Mitsubishi Motors

6 Reported  
in Yearbook  
(fill in)

7 Reported  
in Yearbook  
(fill in)

> Corp. v.  
> Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631, 87 L. Ed. 2d 444, 105 S.  
> Ct.  
> 3346 (1985) (indicating that federal policy favoring arbitration applies  
> with  
> special force in field of international commerce). Second, the agreement  
> provides for arbitration in London, Great Britain. Great Britain is a  
> signatory  
> to the Convention. See Riley, 969 F.2d at 958. Third, the contract at  
> issue in  
> this case is commercial in nature as it involves the rights and duties of  
> parties to a commercial construction project. Finally, Vaasa, a party to  
> the  
> Wartsila-Vaasa contract, is a Finnish Corporation with its principal place  
> of  
> business in Finland.

> [5] When these four questions are answered in the affirmative, the court is  
> required to order arbitration. Id. at 959. "Only if a court finds [\*10]  
> that  
> the agreement is null and void, inoperative or incapable of being  
> performed . .  
> . may it act to the contrary." Id. (internal quotations omitted).  
> Plaintiff does  
> not dispute that all four questions are answered in the affirmative, and  
> that  
> the arbitration agreement is neither null and void, inoperative, nor  
> incapable  
> of being performed. Nonetheless, plaintiff contends that the arbitration  
> agreement does not govern its claims against Vaasa.

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> [6] Plaintiff first argues that the arbitration agreement does not govern  
> its  
> claims because Wartsila and Vaasa, the parties to the contract containing  
> the  
> arbitration agreement, have not established their intent to enforce the  
> arbitration agreement against each other. Plaintiff cites no precedent for  
> this  
> novel argument. The court has reviewed the Convention and applicable case  
> law  
> and concludes that the efficacy of an arbitration agreement upon third  
> parties  
> is not contingent upon a showing by the parties to the contract containing  
> the  
> arbitration agreement that they intend to enforce the arbitration



> agreement  
> against each other.  
>  
> [7] Plaintiff next argues that the arbitration agreement cannot apply to  
> its  
> claims until the court determines that [\*11] plaintiff is, in fact, a  
> third-party beneficiary to the Wartsila-Vaasa contract. It appears that  
> plaintiff is requesting that the court grant partial summary judgment on  
> the  
> third-party beneficiary issue. This, the court need not and will not do.  
> In its  
> pleadings, plaintiff has asserted that it is a third-party beneficiary. X  
> Because  
> the court accepts the veracity of plaintiff's well-pleaded facts,  
> plaintiff is,  
> for purposes of this motion, a third-party beneficiary to the  
> Wartsila-Vaasa  
> contract and is bound by the arbitration clause contained therein.  
>  
> [8] Plaintiff's final argument is that the court, rather than dismissing  
> plaintiff's claims, should stay the action pending arbitration. The court  
> disagrees. Because the entire controversy between Black & Veatch and Vaasa  
> is  
> subject to arbitration, granting a stay in this situation would serve no  
> purpose. Accordingly, the court dismisses plaintiff's claims against Vaasa  
> without prejudice and refers the matter to arbitration as set forth in  
> Wartsila-Vaasa contract. 36  
>  
> IT IS, THEREFORE, BY THE COURT ORDERED that defendant's motion to  
> dismiss  
> and compel arbitration (Doc. 41) is granted.  
>  
> The clerk shall mail copies of this order to counsel of [\*12] record.  
>  
> IT IS SO ORDERED.  
>  
> Dated at Kansas City, Kansas, this 16 day of December 1998.  
>  
> G. T. VanBebber  
>  
> United States District Judge  
>  
>  
>