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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

INEOS PHENOL, INC.,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	CIVIL ACTION NO. 03-0455-CG-L
	*	
LURGI OEL GAS CHEMIE, GmbH;	*	
HIMA PAUL HILDEBRANDT GmbH	*	
& CO. KG; FISHER-ROSEMOUNT	*	
GmbH & CO.; FISHER-ROSEMOUNT	*	
SERVICES GmbH & CO. OHG,	*	
	*	
Defendants.	*	

OMNIBUS ORDER ON DEFENDANTS' MOTIONS TO COMPEL ARBITRATION

This cause is before the court on defendant Lurgi Oel Gas Chemie, GmbH's ("Lurgi") motion for a stay pending arbitration and motion to dismiss, memorandum in support, plaintiff Ineos Phenol, Inc.'s ("Ineos") response in opposition, and Lurgi's reply (Docs. 38, 39, 62, 74); defendant Fisher-Rosemount GmbH & Co.'s ("Fisher-Rosemount") motion for a stay pending arbitration, incorporated memorandum in support, notice of filing evidentiary materials, Ineos's response in opposition, and Fisher-Rosemount's reply (Docs. 51, 52, 75, 85); and defendant HIMA Paul Hildebrandt GmbH & Co. KG's ("HIMA") motion to compel arbitration and Ineos's response in opposition. (Docs. 79, 96). For the reasons set forth herein the court finds that defendants' motions to compel arbitration are due to be GRANTED.

I. BACKGROUND[1]

Ineos is an Alabama corporation in the business of producing phenol and acetone. Ineos maintains a plant in Theodore, Alabama ("the Plant"), for the production of these substances. At some point in the construction and/or design processes, each defendant named herein performed work in furtherance of the completion and/or maintenance of the Plant. A joint venture consisting of Brown & Root, Inc. and Process Systems Incorporated Construction Company (now Lurgi PSI) completed construction of the Plant in January 2000.

In the Plant there are two systems relevant to the instant lawsuit. The Distributive Control System ("DCS") is designed to monitor system parameters to ensure optimal plant operation and the Emergency Shutdown System ("ESD") is supposed to monitor the conditions of the Plant and ensure that unsafe operating conditions cannot occur. On September 9, 2002, there was a fire at the Plant. Plaintiff avers that this condition should have been prevented by the ESD. Plaintiff's complaint contains two counts, both sounding in tort. (Doc. 1).

Ineos executed a contract with the Joint Venture for construction of the Plant. (Doc. 39, Ex. D). This contract contained an arbitration provision. (Id. at ¶ 29.2). The defendants in this action, all subcontractors of the Joint Venture, were not signatories to this contract. Ineos argues that as non-signatories the defendants may not compel arbitration under the contract. Defendants argue that, under Eleventh Circuit precedent, Ineos is estopped from objecting to arbitration of this dispute.

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[1]Unless otherwise noted, the facts set forth herein are uncontroverted and are taken from plaintiff's complaint. (Doc. 1).

II. APPLICABLE LAW

The threshold question in this matter is to determine the applicable law. The parties seeking to compel arbitration urge the court to apply federal substantive law to the question of who may claim rights under the arbitration clause at issue, while Ineos argues that German law should apply in determining this issue. Both parties make well-framed arguments and agree that the Convention on the Recognition of the Foreign Arbitral Awards governs the *enforcement* of the arbitration clause at issue.

Ineos argues that this matter does not turn on the enforcement of the arbitration provision, but rather on the interpretation. Ineos argues that the court has jurisdiction under Chapter Two of the FAA to enforce agreements covered by the Convention, but that this enforcement power does not extend to determining the obligations created by the arbitration agreement. Ineos argues that in order to properly interpret the arbitration clause at issue, the court must look to the governing law of the contract and determine whether non-signatories may compel arbitration. In support of this contention, Ineos argues that the court should apply state law principles that govern the formation of contracts. However, Ineos cites no authority for the proposition that the law of a foreign sovereign which governs a contract containing an arbitration provision should be applied even in cases where at least some manner of the dispute is admittedly controlled by the FAA.

Lurgi cites two cases to support the contrary position, one of which this court finds persuasive. The first case, Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration International, Inc., 198 F.3d 88 (2nd Cir. 1999) is not on point because the parties in that case failed to argue that the law governing the contract at issue therein applied to determining the propriety of assignment. Therefore, as neither party argued that the law governing the contract, (Texas law), applied, the Court

applied federal substantive law.[2] In this case, Ineos argues strenuously that this court should apply the law governing the contract to the exclusion of federal substantive law, and therefore the cases are meaningfully different.

The strongest case cited by Lurgi in support of its argument that German law does not apply to the determination of rights under an arbitration clause, even when the law governing the contract containing the clause is stipulated, is Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH, 206 F.3d 411 (4th Cir. 2000). With admirable clarity, the Court held:

> The Supreme Court has directed that we "apply ordinary state law principles that govern the formation of contracts," First Options [v. Kaplan], 514 U.S. [938] at 944 [(1995)], and the "federal substantive law of arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). Thus state law determines questions "concerning the validity, revocability, or enforceability of contracts generally," Perry v. Thomas, 482 U.S. 483, 493 n. 9 (1987), but the Federal Arbitration Act, 9 U.S.C. § 2 (1994), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enforced by 9 U.S.C. §§ 201-208 (1994), "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Mem'l Hosp., 460 U.S. at 24. These statutes constitute "a congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Id. The policy applies "with special force in the field of international commerce." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985). Because the determination of whether International Paper, a nonsignatory, is bound by the Wood-Schwabedissen contract presents no state law question of contract formation or validity, we look to the "federal substantive law of arbitrability" to resolve this question.

Int'l Paper Co., 206 F.3d 411, 417 n. 4 (4th Cir. 2000) (emphasis added).

The parties have not cited any Eleventh Circuit precedent directly on point regarding this issue,

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[2]The court also noted that it doubted it would reach a different result even if it had looked to Texas law. Id, at 96, Fn.7.

and this court has found none. After due consideration, the court finds that the Fourth Circuit rule is well taken, and specifically adopts it herein. The question of whether Lurgi, a non-signatory, may claim rights under a contract does not present a state law question of contract formation or validity and therefore the court will apply the federal substantive law of arbitrability to the instant dispute.

III. EQUITABLE ESTOPPEL

At oral argument, Lurgi and Ineos spent almost the entirety of the hearing arguing whether the doctrine of equitable estoppel applies to prohibit Ineos from objecting to arbitration. Counsel for Lurgi admitted that the equitable estoppel argument was the lynchpin to his case, and that if the court did not accept the equitable estoppel theory that his motion would be denied. The parties agree that the Eleventh Circuit permits non-signatories to a contract to compel arbitration. The two cases upon which Lurgi primarily relies are McBro Planning and Development Co. v. Triangle Electrical Construction Co. Inc., 741 F.2d 342 (11th Cir. 1984) and Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993). In McBro, the plaintiff brought tort claims against a construction manager (McBro) and McBro sought to compel arbitration, despite the absence of a written agreement between McBro and plaintiff. The court found that the "very basis of the contractor's claim against the construction manager was that the manager breached the duties and responsibilities assigned it by the owner-contractor agreement" and allowed McBro to compel arbitration. McBro, 741 F.2d at 344. In Sunkist Soft Drinks, the Eleventh Circuit applied equitable estoppel to allow a non-signatory to an arbitration agreement to claim rights under the agreement and compel arbitration because the claims involved "were 'intimately founded in and intertwined with the underlying contract obligation.'" Sunkist

Soft Drinks, 10 F.3d 753, 757.

Ineos relies on In re Humana Inc. Managed Health Care Litig., 285 F.3d 971 (11th Cir. 2002) to distinguish the instant case from McBro and Sunkist. Ineos avers that under Humana, where a party is seeking to equitably estop another party from objecting to arbitration, the claims involved must be directly related to the contract containing the arbitration clause. As Ineos' claims sound in tort, and not in contract, it argues that the equitable estoppel should not apply to the facts of this case. In re Humana held the following:

> In all cases, " 'the lynchpin for equitable estoppel is equity,' and the point of applying it to compel arbitration is to prevent a situation that 'would fly in the face of fairness.' " *Id.* at ----, 2002 WL 206335, (quoting Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 527 (5th Cir.2000)). The purpose of the doctrine is to prevent a plaintiff from, in effect, trying to have his cake and eat it too; that is, from "rely[ing] on the contract when it works to [his] advantage [by establishing the claim], and repudiat[ing] it when it works to [his] disadvantage [by requiring arbitration]." Tepper Realty Co. v. Mosaic Tile Co., 259 F. Supp. 688, 692 (S.D.N.Y.1966). The plaintiff's actual dependance on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel.

In re Humana Inc. Managed Care Litigation, 285 F.3d 971, *976 (11th Cir. 2002).

At oral argument, the court questioned counsel for Ineos regarding how it intended to make out the "duty" component of its negligence claim without relying on the contract containing the arbitration clause. Counsel for Ineos stated that it was a close question, and that evidence of the contract would likely be admitted for the limited purpose of explaining the background of the litigation, but that the duties owed by defendants to Ineos would be defined through expert testimony regarding the standard of care of a reasonable contractor in the same industry.

The court finds that this close question is answered in favor of the defendants. The contract at

issue described in detail the obligations of the Joint Venture, which were assigned to the subcontracting defendants. Therefore the court finds that the contract would play an integral role in defining the duty element of any tort action. It was because of this contractual relationship that the work was performed, and it was because the work was not done as specified in the contract that plaintiff is now claiming the work was performed in a tortious manner.

In addition, the court finds that, under the Humana rule, it is equitable to compel arbitration in this instance. It appears to the court that the reason plaintiff sounded its claims in tort as opposed to contract, and one of the reasons the Joint Venture is not a party to this suit, is because plaintiff is seeking to avoid the arbitration it agreed to in the contract underlying the construction of the Plant. Requiring arbitration in this case is equitable and in accord with general public policy concerns, as allowing plaintiff to avoid the limitations of a contract action by bringing an action for the full amount of alleged damages by simply framing the claim in tort, where the action is based on performance under a contract, defeats the notions of contractual certainty that general contract law provides.

In summation, the court finds that Ineos' claims are dependant upon the underlying contract which contains an arbitration provision; that the rights of the subcontractor defendants are "intimately founded in and intertwined with the underlying contract obligation"; and that it is equitable to allow the subcontracting defendants to rely on the arbitration clause in this matter, in accord with Eleventh Circuit precedent and the general policy of enforcing arbitration agreements set forth in the FAA. Therefore, the court finds that Lurgi's motion to stay proceedings and compel arbitration is due to be granted. For the same reasons stated herein the court finds that the motions to compel arbitration filed by Fisher-Rosemount and HIMA are also due to be granted.

CONCLUSION

The defendants' motions to compel arbitration are due to be and hereby are **GRANTED**. Pursuant to 9 U.S.C. §§ 3 and 206 this matter is hereby **STAYED** pending completion of arbitration in accordance with the above-referenced arbitration provision.

DONE and ORDERED this 6th day of April, 2004.

/s/ Callie V. S. Granade
CHIEF UNITED STATES DISTRICT JUDGE