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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

GRYNBERG PRODUCTION CORP., et al.,	$	
Plaintiffs,	$	
v.	$	Case No.: 94-CV-485
	$	(Consolidated with 94-CV-486)
BRITISH GAS, P.L.C., et al.,	$	
Defendants.	$	

MEMORANDUM OPINION AND ORDER
GRANTING PLAINTIFFS' MOTION TO REMAND

Before this court is Plaintiffs' Motion to Remand, filed on September 8, 1994. After this court granted an agreed motion to seal the parties' exhibits, Defendants' response was timely filed on October 13, 1994.[1] A reply thereto was filed on November 3, 1994, and a "counter-reply" was filed on November 14, 1994. Upon consideration of the motion, responses, and attached exhibits and memoranda of law, the court is of the opinion that the motion should be GRANTED.

BACKGROUND

The case underlying this removal battle is an involved and complicated dispute between Western corporations over rights to develop mineral resources located in the Republic of Kazakhstan. The weapons in this removal fight are the mountains of briefs and affidavits. The ammunition includes fraudulent joinder, procedural hurdles for removal, Texas choice of law principles, Texas tort law, Kazakhi tort law (and translations thereof), federal question jurisdiction over state law claims presenting a federal issue, federal common law governing international relations, the "act of state doctrine," and the Erie doctrine.

Grynberg Production Corp. v. British Gas, P.L.C., 817 F.Supp. 1338, 1341-42 (E.D.Tex. 1993) (First Grynberg). The battle continues.

Plaintiffs, having lost the above-described skirmish, returned to the field shortly thereafter, with mixed results, in Grynberg Production Corp. v. British Gas, P.L.C., 149 F.R.D. 135 (E.D.Tex. 1993) (Second Grynberg). Again denied remand in that decision, Plaintiffs chose to voluntarily dismiss their complaint without prejudice. Id. at 139.

There was not much peace in the valley:

> This court has received four Grynberg cases (in two sets,) all based on the same facts. 1:93-CV-159 and 1:93-CV-195 were remanded.[2] 1:92-CV-496 and 1:93-CV-169 were successfully removed. [First Grynberg]. 1:92-CV-496 was voluntarily dismissed. [Second Grynberg]. After seeking a series of continuances in 1:93-CV-169, the parties informed the court that they had settled that case. An agreed judgment ordering dismissal with prejudice was entered in 1:93-CV-169.[3] One week later, Plaintiffs amended their pleadings in the two state court actions (the former 1:93-CV-159 and 1:93-CV-195), disposing of the old claims and alleging in their place claims for breach of the settlement agreement.
>
> The defendants removed again to this court. The alleged bases for removal jurisdiction are diversity jurisdiction and jurisdiction based on the court's "inherent power" to enforce the judgment entered in 1:93-CV-169.

[1] Although only the attorneys for Defendant British Gas P.L.C. have signed these pleadings, the court may safely assume that the arguments are advanced on behalf of all Defendants.

[2] On, respectively, June 9 and June 30, 1993.

[3] On October 22, 1993.

February, 1994 Memorandum Opinion Granting Plaintiffs' Motion to Remand Cases 1:93-CV-561 and 1:93-CV-562, at 1-2 (Third Grynberg) (attached hereto as Appendix "A").

Like the proverbial "bad penny", this dispute once again turns up in this court as Fourth Grynberg. Though military only through metaphor, the similarities continue -- for, as during the pendency of any protracted campaign, the passage of time has allowed the fabrication of different and more sophisticated weapons. Defendants' "heavy artillery" this time is the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, reprinted at 9 U.S.C. § 201 at seq.

FACTS

Critical to the so-called "settlement" which the parties announced in conjunction with 1:93-CV-169 is a certain six-page "settlement communication" dated July 19, 1993, and signed by Plaintiffs and British Gas ("BG"). Although the document has been placed under seal by this court, it may be fairly said that it is a multi-faceted agreement. Unlike some settlements -- which consist of little more than a core promise to pay a sum certain buried within paragraphs of release-type legal boilerplate -- the instant (single-spaced) agreement addresses a number of issues peculiar to the petroleum exploration and production industry.

The "settlement communication" is printed under Plaintiffs' letterhead,[1] and reads in part:

> Please acknowledge that this correctly reflects our entire agreement with respect to the subject matter hereof by signing this letter in the space provided below and returning a signed copy. Of course, if there are any changes you wish to discuss, please call me [Jack Grynberg] immediately or have your attorneys call ours. Meanwhile, your attorneys should commence drafting the necessary additional documents and submit them to our counsel for comment as soon as possible. We are hopeful that all the necessary paperwork can be completed and signed within the next thirty days.

"Settlement Communication" at 5. This agreement was indeed signed by the parties, and it is not disputed that there is no mention whatsoever of arbitration therein.

The first reference to arbitration appears in an unsigned revised "settlement communication" sent by BG to Plaintiffs on July 24, 1993.[2] This proposal adds to the previously agreed-to terms a suggestion that the following sentence be included: "All disputes arising under this letter agreement or the Settlement Agreement shall be settled by a mutually acceptable expert or submitted to arbitration." Unsigned Proposed Revised Settlement Agreement dated July 24, 1993, at 6. In its response, Plaintiffs

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[1] Although Grynberg Production Corporation and Pricaspian Development Corporation are the named Plaintiffs herein, they are functionally identical for the purposes of this motion. Jack Grynberg is the President of the two corporations; indeed, he signed the "settlement communication" on behalf of both.

[2] It is indeed curious that this document is also on Grynberg letterhead; there is no doubt, however, of the fact that the changes indicated therein were proposed by BG. See July 26, 1993 Letter from Plaintiffs' counsel to BG counsel at 1 ("Subject to a few matters noted below, I have no problem with the revisions to the settlement letter set forth in your red-line version dated 24 July.").

suggested that the parties concentrate on drafting a separate, global Final Settlement Agreement instead of attempting to amend the "settlement communication" in a piecemeal fashion.

Plaintiffs also wrote that:

> The arbitration idea is very sensible, although we'll wish to explore venue and applicable rules in the definitive agreement drafting.

July 26, 1993 Letter from Plaintiffs' counsel to BG counsel at 3.

By September 22, 1993, there existed a 55-page proposed Settlement Agreement drafted by BG. Sections 10.02 and 10.04 of that agreement included a broad-form arbitration provision looking to UNCITRAL Arbitration Rules and envisioning a Stockholm, Sweden site and the use of Swedish substantive law.[4] Plaintiffs agreed to review the document and submit any proposed changes. During this time, however, notes of dissention began to ominously appear within the parties' communications.[5]

On December 10, 1993, BG finally received a five-page memorandum which begins: "Grynberg Production Corporation has

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[4] "UNCITRAL" is the United Nations Commission on International Trade Law.

[5] See, e.g., November 3, 1993 letter from Jack Grynberg to Mike Alexander, Vice-President of BG:

> During the two and one half hour conference call we had three weeks ago, we could not obtain progress on even the smallest of my objections. It's true that I would like to give you additional comments and resolve the settlement agreement issues, and I will do my damndest to get my comments to you in writing before the 15th of November. The hang-up is not my additional comments, however, but instead the lack of progress upon any of my earlier comments.

the following thoughts in respect of the 22 September draft."

Regarding the arbitration section, the letter reads as follows:

> Section 10.02 We continue to believe that the appropriate governing law is the law of Texas.
>
> Section 10.04 We continue to believe that the appropriate arbitration site is Texas.

December 10, 1993 Letter from Plaintiffs' counsel to Defendants' counsel, at 4.

Subsequent events relating to §§ 10.02 and 10.04 may be summarized as follows:

> 12/20/93: In a document entitled "Package Proposal", BG proposes a Bermuda forum at which English law would be applied.
> 1/21/94: In a suggested "package resolution", Plaintiffs propose a Calgary forum and Alberta law.
> 3/21/94: BG sends a 73-page draft Settlement Agreement which reflects a Calgary forum, Alberta law, and use in arbitration of the Model Law on International Commercial Arbitration as adopted by Alberta.
> 4/1/94: Plaintiffs send six pages of comments on the March 21 draft. None of the comments pertain to the arbitration provisions.
> 4/25/94: BG sends a 72-page draft Settlement Agreement. No change is made to the arbitration provisions.
> 5/3/94: Three pages of comments and proposed changes, unrelated to the arbitration provisions, sent by Plaintiffs.
> 5/4/94: Five pages of comments and proposed changes, unrelated to the arbitration provisions, sent by BG.
> 5/4/94: Plaintiffs' counsel FAXes a two-page letter to BG in anticipation of a final "hammering-out" session to have been held in London shortly thereafter. No mention is made of the arbitration provisions.[6]

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[6] A redacted copy of the letter reads as follows:

> Many thanks for your fax memorandum of May 4, which clears up a number of my misunderstandings. Based on your explanations, we can remove from the list:

Hopes of an amicable resolution quickly unraveled, however. Later during the day on May 4th, BG drafted and sent to Plaintiffs a one page letter -- with copies of the Alberta Arbitration Act and the UNCITRAL Arbitration Rules attached -- suggesting two essentially non-substantive revisions to Section 10.04.[9]

By the end of the month, the dispute over arbitrability appears to have taken center stage, with each side carefully staking out its positions.[10] Needless to say, the vigorously-

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[Omitted].

This would leave, as London issues,

[Omitted].

Jack [Grynberg] is leaving on Friday morning for London, so I'll be trying to get him a final issue list late Thursday afternoon. If there's anything you think should be added or subtracted to the foregoing, just let me know before Thursday afternoon.

Absent that, I wish you a good trip and resolution of all outstanding issues in a manner that makes all parties happy.

[9] The revisions attempted to precisely clarify the interrelationship between Alberta substantive law, the UNCITRAL Model Law, and the UNCITRAL Arbitration Rules.

[10] See, e.g.:
5/17/94 Letter/memo from Plaintiffs' counsel to BG ("My understanding is that BG and GPC agreed that the disputed points would be resolved by the court in Texas under some sort of submission agreement or motion prepared by the parties' litigation counsel. Mr. Grynberg indicates that the points GPC would like to have included in this judicial resolution are . . ."); 5/18/94 FAX from BG to Plaintiffs' counsel ("I was surprised to read [the above excerpt], as it reflects a fundamental misunderstanding . . ."); 5/18/94 FAX from Plaintiffs' counsel to BG ("If these points are not secured, then GPC wishes to have

negotiated "Final Settlement Agreement" never came to pass; no agreement was signed by the parties.

On July 19, 1994, Plaintiffs filed a motion in state court to enforce the "settlement communication", contesting arbitration and insisting on a hearing. On August 12, 1994, shortly before that hearing was to have been held, the instant Notices of Removal and Arbitration were filed.

DISCUSSION

Defendants' argument is, essentially, as follows:

> This is not a case without a "completed, underlying contract." Under well-settled contract law, parties may agree to additional terms after the signing of a contract, such as the 1993 Settlement Letter. The exchange of promises to arbitrate is sufficient independent consideration.
> The separability doctrine is clearly established for domestic arbitration disputes.[11] An agreement to arbitrate [under UNCITRAL] is broadly defined to include -- as here -- an agreement "contained in an exchange of letters or telegrams."

Opposition at 7-11. BG concludes that Grynberg, having "agreed to arbitration" during the negotiations, is now bound by that agreement as it attempts to prosecute its action for breach of the original signed "settlement communication" agreement.

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all three issues considered by the court."); 5/20/94 FAX from BG to Plaintiffs' counsel ("Our records show that choice of law and arbitration provisions in the most recent drafts of the Definitive [Settlement] Agreement have long since been placed in the 'agreed upon' box.").

[11] See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (claim that entire contract induced by fraud did not prevent arbitration).

Grynberg's reply neatly exposes the key flaw in BG's argument:

> If this Court accepts BG's proposition, then the ultimate trap for the unwary in commercial negotiations will be created. When negotiations over fundamental issues bog down, one party may simply propose agreement on a minor matter[:] the inclusion of dispute resolution language providing for arbitration. If the other party does not immediately object, then the first party may shut down the negotiations and submit the remaining issues to an arbitrator.

Reply at 13.

The fallacy of BG's argument is that it fails to distinguish between two critically different situations. Both begin with the parties executing a contract, and both end with a disagreement over whether arbitration is appropriate as regards a subsequent dispute relating to the first (executed) contract. In the numerous cases cited by BG, however, the arbitration provisions are contained in the original executed contract -- here, the arbitration provision is in the unexecuted agreement.

This is best demonstrated by an examination of the conclusion of BG's brief, which claims that "Grynberg's argument is little different from the plaintiff's claim rejected in" David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245 (2d Cir.), cert. dism'd, 501 U.S. 1267 (1991).

In 1987, the Threlkeld parties signed a preliminary agreement relating to the purchase and sale of certain metals forward contracts. As with the instant "settlement communication", the preliminary agreement contemplated a more formal agreement in the future. That signed preliminary

agreement stated that the final agreement would be subject to arbitration under English law. Id. at 247. Moreover, subsequent written confirmations exchanged between the parties made specific reference to the rules and regulations -- which included arbitration provisions -- of the London Metal Exchange. Id. Based on these prior agreements, the Second Circuit ruled that a lawsuit brought regarding an agreement relating to the valuation of the forward metals contracts should be subject to arbitration even though the sued-on agreement was silent regarding arbitration.

In this case, however, the claimed arbitration agreement is derived only during the negotiations over the unexecuted Final Agreement. The preliminary "settlement communication" in this dispute makes no mention of arbitration, and the Final Agreement was never agreed to. Timing may not be everything in life -- but it is decisive in this court's ultimate resolution of Plaintiff's motion.

BG's brief is littered with cases which follow the Threlkeld paradigm.[11] It has cited no Fifth Circuit authority which would compel denial of the motion, and this court is therefore free to

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[11] See, e.g., Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1406 (9th Cir. 1989) (arbitration language included in document which, although stating "DRAFT" on front page, was signed by both parties and governed relationship immediately thereafter); Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 349 (7th Cir. 1983), cert. denied, 464 U.S. 1070 (1984) (arbitration language included in distributorship agreement signed by both parties; lawsuit based on alleged repudiation of distributorship contract); Oriental Commercial and Shipping v. Rossel, N.V., 609 F.Supp. 75, 77 (S.D.N.Y. 1985) (arbitration language included in telex containing terms of the agreement sued upon).

disagree with those courts which have endorsed BG's argument.[13]

CONCLUSION

This order disposes of the fourth generation of removed Grynberg causes, and it appears (for the time being) that this court will not be called on to address the merits -- buried, fittingly, far below the layers of jurisdictional squabbles which have frequently occupied this court's time and attention. That is perhaps fortunate; the titanic battles over the mile-or-so which separates the Federal Building from the Jefferson County Courthouse hint at litigational resources so nearly unlimited that they threaten to overwhelm a mortal judge's docket.[14] The court further questions whether the perceived tactical benefits of these eleventh-hour removals and short-lived federal-suit-terminating settlements outweigh their costs.

Having found no "agreement to arbitrate" as required to invoke the provisions of 9 U.S.C. §§ 1 et seq. and 9 U.S.C. §§ 201 et seq., Plaintiffs' Motion to Remand is hereby GRANTED. As this court has no subject-matter jurisdiction over these consolidated actions, they are ordered REMANDED pursuant to 28 U.S.C. § 1447(c) to the state district court from which they were removed.

SIGNED this the 15th day of November, 1994.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

[13] See, e.g., Matter of Arbitration between Norlofson Nat. A/S and Kingdom of Jordan, 765 F.Supp. 78, 85 (S.D.N.Y. 1991) ("Drafts of a contract, reflecting an agreement to arbitrate, can provide the requisite writing.") (citing Marion Coal Co. v. Marc Rich & Co., 539 F.Supp. 903, 907 (S.D.N.Y. 1982)).

[14] One can only conjecture, for instance, at the time, cost, and effort involved in rousing Howard M. Holtzmann -- the U.S. delegate to the U.N. Commission which drafted the UNCITRAL Model Law -- from his Midtown Manhattan doings to execute in London a sixteen-page opinion attached to BG's Opposition.