IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

MISSISSIPPI PHOSPHATES CORPORATION — PLAINTIFF

VS. — CIVIL ACTION NO. 5:95cv49-Br-N

UNITRAMP LTD. and UNITRAMP S.A. — DEFENDANTS

MEMORANDUM OPINION AND ORDER

Before the Court is the motion of the Defendants, Unitramp Ltd. and Unitramp S.A., to dismiss or stay this action pending arbitration. After reviewing the memoranda submitted by the parties, the applicable and statutory case law, and being otherwise fully advised in the premises, the Court finds as follows:

The plaintiff, Mississippi Phosphates Corporation ("MPC"), entered into a contract of affreightment, sometimes referred to as a charter party, with Unitramp Ltd., by which Unitramp Ltd. was to provide vessels to carry MPC's phosphate rock from abroad to MPC's facility in Pascagoula, Mississippi. Count One of the complaint alleges Unitramp Ltd. breached the contract of affreightment by failing to make vessels available for the loading and shipping of phosphate rock as required by the agreement.

Purportedly, a second contract was consummated between the parties whereby Unitramp Ltd. and Unitramp S.A. agreed to pay one-half of the construction costs for storage facilities to be constructed by MPC. Count two alleges that upon construction of said facilities, Unitramp Ltd. and Unitramp S.A. failed to make payment as provided for in the alleged contract.

Count three of MPC's complaint seeks damages against Unitramp Ltd. for bad faith breach of both contracts at issue.

Center to the dispute at issue in this motion is an arbitration clause contained in paragraph

32 of the contract of affreightment. The provision provides as follows: "Arbitration -- Any disputes concerning the present Charter to be settled by arbitration in New York in the ordinary manner." The purpose of Unitramp Ltd.'s motion is to stay or dismiss this action by invoking the arbitration clause.

I. Contract of Affreightment

MPC agrees that its dispute with Unitramp Ltd. under the contract of affreightment, the subject of Count One, is arbitrable. In addition, MPC agrees that Count Three, to the extent it involves the contract of affreightment, is arbitrable. MPC disputes Unitramp Ltd.'s position that the dispute concerning the payment of construction costs is likewise arbitrable. This aspect is discussed below.

II. Purported Contract Regarding Costs of Construction

The primary dispute surrounding the second contract concerns whether said contract and the contract of affreightment constitute a single series of transactions which are subject to the arbitration clause contained in the latter. Simply stated, is the second contract a collateral or separate agreement?

The enforceability of this arbitration clause is governed by 9 U.S.C. § 201 - 208, commonly known as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The language of the convention contemplates a very limited inquiry by the courts in determining the enforceability of arbitration clauses found in international commercial agreements. *Sedco v. Petroleos Mexicanos Mexican National Oil Co.*, 767 F.2d 1140, 1144 (5th Cir. 1985). The adoption of the Convention evinces an even stronger presumption in favor of arbitration where foreign nationalities are concerned. *Tennessee Imports,*

Inc. v. Filippi, 745 F. Supp. 1314, 1321 (M.D. Tenn. 1990). The parties have conceded the issue of whether the arbitration clause is enforceable. Therefore, our task is to determine the breadth of such clause.

The presumption in favor of arbitration is strong. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983). When determining the scope of an arbitration agreement, the court must first distinguish between broad and narrow arbitration clauses. *In Re Hornebeck Offshore Corp. v. Coastal Carriers Corp.*, 981 F.2d 752, 754 (5th Cir. 1993).

> If the clause is broad, the action should be stayed and the arbitrators permitted to decide whether the dispute falls within the clause. On the other hand, if the clause is narrow, the matter should not be referred to arbitration or the action stayed, unless the court determines that the dispute falls within the clause. "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." Moreover, "[t]he weight of presumption is heavy."

Hornbeck, 981 F.2d at 754 (citing *Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985) (citations omitted); *Sedco*, 767 F.2d at 1145 n.10.

A review of Fifth Circuit precedent illustrates that arbitration clauses containing the "any dispute" language are of the broad type. *See Hornbeck*, 981 F.2d at 755; *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 36 (5th Cir. 1990); *Sedco*, 757 F.2d at 144; *Mar-Len*, 773 F.2d at 634; *Neal*, 918 F.2d at 38. The arbitration clause involved in *Mar-Len* contained the following language: "any dispute . . . with respect to the interpretation or performance of this Subcontract . . . ." *Mar-Len*, 773 F.2d 633. Specifically, Mar-Len challenged certain contractual modifications on the grounds they were obtained through economic duress. *Id.* at 636. The court found that the dispute was subject to arbitration emphasizing that "only the most forceful evidence of a

purpose to exclude the claim from arbitration can prevail." *Id.* (citation omitted). The court in *Neal* faced an arbitration agreement which included "any and all disputes between them." *Neal*, 918 F.2d at 36. *Neal* involved a dispute concerning a purchase agreement not containing an arbitration clause. *Id.* at 37. However, licensing agreements executed between the parties contained the above arbitration clause. *Id.* The *Neal* court found the arbitration clause sufficiently broad to encompass disputes involving either. *Id.* at 37-38.

MPC's argument focuses primarily on the language contained in the arbitration clause, *sub judice*. MPC points out that the agreement is limited to any dispute "concerning the charter." We agree that this agreement is narrower than the agreement involved in *Neal*. However, this agreement is noticeably broader than the agreement involved in *Mer-Len*. The Court is mindful of the fact that the *Mer-Len* court went on to analyze whether the dispute fell within the ambit of the arbitration clause. Nonetheless, the arbitration clause which was the subject of *Mer-Len* has been characterized as broad, arguably placing the matter of arbitrability in the hands of the arbitrator. *Hornbeck*, 981 F.2d at 752-53. As demonstrated, the scope of the arbitration agreement is fairly debatable. Under such circumstances, *Hornebeck* instructs the Court to decide the question of construction in favor of arbitration. *Hornebeck*, 981 F.2d at 754.

Even if this Court were to construe this agreement narrowly, the evidence creates sufficient doubt to require this court to submit the disagreement to arbitration. . . .

As to the correspondence between Patrick Chapel and Joe Ewing dated January 10, 1994, Mr. Chapel wrote "[y]ou will probably understand that UNITRAMP could not support even partially the cost of any improvement of the plant facility which is not in direct connection with the transportation and the discharge operations of the phosphate." The storage facilities were

clearly constructed for the purpose of better accommodating the charter agreement. (Plt.'s Response Exh. 1). The record before the court suggests that the catalyst behind the purported second agreement was the possibility of a shortage of phosphate should a vessel be delayed. The parties apparently discussed enlarging MPC's storage facilities to accommodate such a contingency.[1]

In short, without the charter agreement, the parties would have no reason to enter into a contract to build additional storage facilities. The cornerstone of the agreement was to facilitate the transportation of phosphate to MPC's plant in Pascagoula, Mississippi. By aiding MPC in acquiring additional storage facilities, Unitramp would be able to ship larger quantities of phosphate reducing the possibility of a shortage and potential breach of the charter. Moreover, the court has not found forceful evidence that would convince us that the purported second contact did not "concern the charter" or that the parties intended to exclude the purported second agreement from arbitration. Accordingly, it is the opinion of this Court that Count II as well as Count III as they pertain to Unitramp Ltd. should be submitted to arbitration.

The only remaining claims in the complaint involve Unitramp S.A. The record before the court suggests that an employee of Unitramp S.A. was involved in the discussions regarding the

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[1]MPC has contemporaneously filed a motion to strike the unsworn declaration of Grondin. This Court has found it unnecessary to rely upon the unsworn declaration except for paragraph five. MPC argues that Grondin has no personal knowledge of the negotiations surrounding the formation of the alleged second contract. Moreover, MPC avers that Grondin never participated in the negotiations. On August 2, 1995, Grondin executed another unsworn declaration in which he stated he had personal knowledge of the substance of the negotiations by virtue of his position as Director of Operations. While the individuals who participated in the negotiations may provide more competent testimony, we are of the opinion that Grondin had personal knowledge of the circumstances surrounding the alleged contract. Moreover, this information is not being used to resolve the merits of MPC's claim but merely to determine whether such claims are arbitrable.

additional storage facilities. Because we have determined that both issues should be submitted to arbitration, a stay of the claims against Unitramp S.A. is appropriate as well. Resolution of Count II against Unitramp Ltd. will likely involve the same witnesses, same factual disputes, and may negate any need of pursuing a claim against Unitramp S.A. Accordingly, the above action shall be stayed and placed on the Court's inactive docket. *Moses H. Cone Memorial Hospital*, 460 U.S. at 20 n. 23, 103 S.Ct. at 939 n. 23; *Hornbeck*, 981 F.2d at 755; *Matter of Talbott Big Foot, Inc.*, 887 F.2d 611, 614 (5th Cir. 1989); *Tennessee Imports, Inc.*, 745 F. Supp. at 1323-324. The parties are directed to advise the court of the status of this case upon the completion of arbitration. Accordingly, it is

ORDERED AND ADJUDGED that the above styled cause and action is hereby stayed pending arbitration. Upon completion of arbitration, the parties are instructed to promptly inform the Court of the status of this case so that appropriate action can be taken. It is further

ORDERED AND ADJUDGED that MPC's motion to strike the unsworn declaration of Grondin is DENIED.

SO ORDERED AND ADJUDGED, this the 16th day of January, 1996.

David Bramlette
UNITED STATES DISTRICT JUDGE