27 Feb. 1999

> J.A. JONES, INC. and KVAERNER a.s., Petitioners, v. THE BANK OF TOKYO-MITSUBISHI, LTD., NEW YOUR BRANCH, as Agent on behalf of itself, BARCLAYS BANK PLC, NEW YORK BRANCH; BAYERISCHE VEREINSBANK AG, NEW YORK BRANCH; CREDIT SUISSE FIRST BOSTON, NEW YORK BRANCH; DAI-ICHI KANGYO BANK, LIMITED, NEW YORK BRANCH; and THE FUJI BANK, LIMITED, Respondent. No. 5:98-CV-308-BO(3)

PAGE 482 1999 U.S. Dist. LEXIS 5284, * UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION 1999 U.S. Dist. LEXIS 5284 February 11, 1999, Decided February 11, 1999, Filed DISPOSITION: [*1] Jones and Kvaerner's Petition to Compel Arbitration GRANTED. Respondent's "Motion for Order Staying Arbitration Pending Determination of Petition to Compel Arbitration and Application for Temporary Restraining Order" DENIED. CORE TERMS: construction contract, arbitration, guaranty, notice of default, arbitrable, arbitrate, guarantor, arbitration clause, conjunction, subsidiary, arbitrator, agreement to arbitrate, arbitration agreement, arbitration provision, directing, lifted, subject to arbitration, following language, reasons discussed, waste-to-energy, financing, reserved, testing, moot COUNSEL: For KVAERNER ASA, J.A. JONES, INC.: Douglas R. Ghidina, Moore & Van Allen, Raleigh, NC. For J.A. JONES, INC.: Gregory J. Murphy, Moore & Van Allen, Charlotte, NC. For THE BANK OF TOKYO-MITSUBISHI, LTD., NEW YORK BRANCH, BARCLAYS BANK PLC, NEW YORK BRANCH, BAYERISCHE VEREINSBANK, AG, NEW YORK BRANCH, CREDIT SUISSE FIRST BOSTON, NEW YORK BRANCH, DAI-ICHI KANGYO BANK, LTD., NEW YORK BRANCH, THE FUJI BANK, LTD.: L. Neal Ellis, Jr., Albert Diaz, Hunton & Williams, Raleigh, NC. JUDGES: TERRENCE W. BOYLE, CHIEF UNITED STATES DISTRICT JUDGE. OPINIONBY: TERRENCE W. BOYLE OPINION: ORDER This matter is before the Court on Respondent's "Motion for Order Staying Arbitration Pending Determination of Petition to Compel Arbitration and Application for Temporary Restraining Order." The underlying matter is the Petition to Compel Arbitration filed by J.A. Jones, Inc. ("Jones") and Kvaerner ASA ("Kvaerner"). For the reasons discussed below, the Court will grant the underlying [*2] Petition to Compel Arbitration, and accordingly will deny Respondent's motion seeking a Temporary Restraining Order. JURISDICTION The Court has subject matter jurisdiction over this action pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. @@ 201-208. As discussed below, this Court finds that an agreement to PAGE 483 1999 U.S. Dist. LEXIS 5284, *2 arbitrate does exist among the parties. As the arbitration agreement at issue arises out of a commercial contract and relationship and is not entirely between citizens of the United States, the Court has original jurisdiction over this matter pursuant to 9 U.S.C. @ 203. It is appropriate for a party seeking enforcement of an arbitration agreement to file a petition to compel arbitration before any United States District Court which would otherwise have jurisdiction over the matter. See 9 U.S.C. @ 4. BACKGROUND The roots of this case are found in the construction of a waste-to-energy facility ("the Project") in Fayetteville, North Carolina. On April 8, 1993, BCH Energy, L.P. ("BCH") entered into a Turnkey Design and Construction Agreement (" Construction Contract") with Metric/Kvaerner Fayetteville (the "JV") for the [*3] purpose of constructing this waste-to-energy facility. The JV was a joint venture formed by Metric Contractors, Inc., a subsidiary of Jones, and Kvaerner

1 9 U.S.C. Sect. 203 reads
fill in full text 203.

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Environmental Technologies, Inc., an indirect subsidiary of Kvaerner. Project financing was provided by a consortium of banks ("the Banks"), including the Bank of Tokyo, Barclays Bank PLC, New York Branch, Bayerische Vereinsbank AG, New York Branch, Credit Suisse First Boston, New York Branch, Dai-Ichi Kangyo Bank, Limited, New York Branch, and the Fuji Bank, Limited. On November 16, 1993, Kvaerner and Jones executed certain Guaranty Agreements, pursuant to which they guaranteed performance of the Construction Contract by the JV. These Guaranties were provided to the Bank of Tokyo as the agent for the banks and signed by the Bank of Tokyo on behalf of the Banks. The Guaranties were also provided to BCH, the owner of the Project. Construction of the Project began in November 1993, and construction and acceptance testing were completed in early 1996. After a dispute between BCH and the JV, and additional testing, BCH took possession of the Project. A few months later, in September 1996, BCH sent the JV a notice of default under the [*4] Construction Contract. The Construction Contract includes a broad arbitration clause: Any dispute, controversy or claim arising out of or relating to this Agreement, or any breach thereof, shall be settled by arbitration held in Raleigh, NC, in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator (s) may be entered in any court having jurisdiction thereof. Construction Contract, Article 15, Section 15.1. In October 1996, after receiving BCH's September 1996 notice of default, the JV started an arbitration with BCH (the "BCH arbitration") pursuant to the arbitration clause in the Construction Contract. This was only the first of many actions that would be filed before various courts and arbitrators relating to this matter. On November 12, 1997, the Banks filed a Chapter 7 Bankruptcy Proceeding against BCH in the District of Delaware (Case No. 97-2339 (PJW)). The BCH arbitration was stayed pursuant to the automatic stay provision of 11 U.S.C. @ 362. On November 25, 1998, the U.S. Bankruptcy Court for the District of Delaware entered an order directing that the automatic [*5] stay of the BCH arbitration be lifted "upon the occurrence of either of the following two PAGE 484
1999 U.S. Dist. LEXIS 5284, *5 conditions: (a) the Supreme Court of the State of New York . . . issues a new order directing that the Kvaerner Lawsuit be stayed and that the Banks proceed with the BCH arbitration, or the United States District Court for the Eastern District of North Carolina . . . issues an order compelling the banks to arbitrate against the guarantors and consolidating that arbitration with the BCH arbitration."

On January 14, 1997, the Banks filed an action relating to this matter in the Supreme Court of New York County in the State of New York. The Banks prevailed on certain motions at the trial level. On appeal, the Appellate Division of the Supreme Court of New York (First Department) ruled that New York had no personal jurisdiction over Jones. The Appellate Division further ruled that the Banks' dispute with Jones and Kvaerner was arbitrable under the Construction Contract, and stayed the New York lawsuit pending the outcome of the BCH arbitration. See Bank of Tokyo-Mitsubishi, Ltd. v. Kvaerner A.S., 243 A.D.2d 1, 671 N.Y.S.2d 905 (April 7, 1998). The day after the Appellate Division handed down [*6] its ruling, the Banks filed suit against Jones in the United States District Court for the Southern District of New York. On May 29, 1998, the Southern District stayed that suit pending a decision on the Petition to Compel Arbitration now before this Court. See Bank of Tokyo-Mitsubishi, Ltd. v. J. A. Jones, Inc., 1998 U.S. Dist. LEXIS 7950, 1998 WL 283355 (S.D.N.Y.). On April 13, 1998, Jones and Kvaerner filed a Demand for Arbitration with the American Arbitration Association, seeking to arbitrate the Banks' disputes with Jones and Kvaerner in Raleigh, North Carolina, pursuant to the arbitration clause of the Construction Contract. The

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Banks have consistently argued that their disputes with Jones and Kvaerner are not subject to arbitration. On April 14, 1998, Kvaerner and Jones filed the Petition to Compel Arbitration currently at bar. The Bank of Tokyo filed a motion seeking dismissal of the Petition to Compel Arbitration. Incorporated in that motion was a request to stay this action pending action by the Southern District of New York; or alternatively to transfer this action to the Southern District of New York. Those requests were made moot by the May 29, 1998 order issued by the Southern District of [*7] New York. The Petition to Compel Arbitration has been fully briefed and is ripe for ruling. Meanwhile, the American Arbitration Association ("AAA") informed the parties that they were facing a February 8, 1999 deadline to respond to the AAA's proposed list of arbitrators. In response, Respondent filed the "Motion for Order Staying Arbitration Pending Determination of Petition to Compel Arbitration and Application for Temporary Restraining Order" now before the Court. This Court issued an Order on February 5, 1999, staying the arbitration in this matter pending a hearing. That hearing was held on February 9, 1999. As the Court will address the underlying Petition to Compel Arbitration on the merits, there is no need to address the "Motion for Order Staying Arbitration Pending Determination of Petition to Compel Arbitration and Application for Temporary Restraining Order," which will be denied as moot. ANALYSIS The Banks argue that their dispute with Jones and Kvaerner arises not under the Construction Contract, but under the respective Guaranties Jones and PAGE 485

1999 U.S. Dist. LEXIS 5284, *7 Kvaerner delivered to the Banks. Both Guaranties contain the following language: This Guaranty shall be construed [*8] in accordance with and governed in all respects by the laws of the State of New York. . . . For the purposes of this Guaranty only and for no other purposes, Guarantor hereby irrevocably submits to the jurisdiction of any Federal court sitting in the State of New York, United States of America in any action or proceeding arising out of or relating to this Guaranty . . . The Banks argue that this language demonstrates that the dispute between the Banks and Petitioners is not arbitrable, and must be resolved through litigation or other means. However, the Guaranties also contain the following language relating to the resolution of disputes: Upon receipt of notice of default, Guarantor shall have the same rights and remedies of Contractor under the [Construction Contract] . . . Petitioners argue that this demonstrates that the parties intended that Construction disputes would be handled as described in the Construction Contract -- by arbitration. It appears to the Court that among the potential issues of contention between the parties, one looms over all others. That issue is whether the Project has been substantially completed. This is not an issue about financing; [*9] rather it is an issue about construction and the quality of construction. Because the Banks forced BCH into Chapter 7 bankruptcy, and have been assigned BCH's rights under the Construction Contract, the Banks, for all practical purposes, assume the position of owner as well as financier of the Project. Therefore, if, as the Respondent argues, any dispute between the Banks and Petitioners must be litigated and is not subject to arbitration, the arbitration clause of the Construction Contract would be rendered nugatory. There is no evidence that the parties intended such a result. The Construction Contract and the Guaranties should be read in conjunction with one another. n1 - - - - - - - - - - - - - - - - - -Footnotes- n1 In its Order of April 7, 1998, the Supreme Court of New York, Appellate Division, First Department, discussed the arbitrability of the dispute between the parties at great length. This Court agrees with and adopts the First Division's reasoning that "because of the nature of the right advanced by [the Banks] herein and because of the reciprocal language contained in the contract and the

guaranties, it is clear that the instruments are intended to be read together with the construction contract, notwithstanding language to the contrary contained in the guaranties." Bank of Tokyo-Mitsubishi, Ltd. v. Kvaerner A.S., 243 A.D.2d at 7. - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - - [*10] The Guaranties are, in essence, surety bonds. A surety bond attaches to the principal contract and must be read in conjunction with that contract. See United States Fidelity & Guar. Co. v. West Point Const. Co., Inc., 837 F.2d 1507 PAGE 486 1999 U.S. Dist. LEXIS 5284, *10 (11th Cir. 1988). In the same way, the Fourth Circuit has held that when a subsidiary contract without an arbitration provision is read in conjunction with a primary contract with an arbitration provision, a dispute arising under the secondary contract may be arbitrated. See Maxum Foundations, Inc. v. Salus Corp. , 779 F.2d 974, 978 (4th Cir. 1985). The Federal Arbitration Act demonstrates a strong federal policy in favor of arbitration. Respondent correctly argues that in the absence of an agreement to arbitrate, such a policy preference is irrelevant. However, there is an agreement, contained in the underlying Construction Contract, to arbitrate certain disputes between the parties – the question is the scope of this agreement. "The Arbitration Act established that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, [*11] Inc., 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985). Because the Petitioners specifically reserved the "rights and remedies" of the JV in case of notice of default, they reserved the right to arbitrate claims that are essentially claims of default under the Construction Contract. Petitioners are entitled to resolve their disputes with the Banks through arbitration. Therefore, the Petition to Compel Arbitration will be granted. CONCLUSION After full consideration of the parties' arguments, and for the reasons discussed above, Jones and Kvaerner's Petition to Compel Arbitration is GRANTED. As this disposes of this matter on the merits, Respondent's "Motion for Order Staying Arbitration Pending Determination of Petition to Compel Arbitration and Application for Temporary Restraining Order" is DENIED. The stay of arbitration entered by this court on February 5, 1999 is hereby lifted. SO ORDERED. This 11TH day of February, 1999. TERRENCE W. BOYLE CHIEF UNITED STATES DISTRICT JUDGE

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