United States District Court for the Western District of Washington, 19 May 2000, No. 99-5642 (FDB)

Parties: Plaintiffs: (1) Richard Bothell, (2) Justin Bothell doing business as Atlas Technologies; (3) Atlas Bimetals Labs, Inc. (US)
Respondents: (1) Hitachi Zosen (Japan); (2) Northwest Technical Industries (US); (3) K. Shimotsuma Associates (nationality not indicated)

Published in: 97 F.Supp.2d 1048; 2000 U.S. Dist. LEXIS 10401; 2000 U.S. Dist. LEXIS 10361

Articles: II(2); V(1)(a)

Subject matters:
- existence of a valid arbitration agreement
- no agreement in writing
- improper motion to remand
- grounds for awarding expenses and attorneys' fees

Commentary Cases:

Facts

INTERTEC CONTRACTING A/S, INTERTEC (GIBRALTARA) LTD., and INTERTEC OVERSEAS LIMITED, Plaintiffs, -against- TURNER STEINER INTERNATIONAL, S.A.; TURNER STEINER EAST ASIA LIMITED; AND THE TURNER CORPORATION, Defendants.

98 Civ. 9116 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2000 U.S. Dist. LEXIS 7413

May 30, 2000, Decided

May 31, 2000, Filed

DISPOSITION:
[*1] Defendants' motion to compel Plaintiffs to arbitrate their claims against
Defendants denied and Court's Order staying pre-trial discovery vacated.

COUNSEL:
For Plaintiffs: P. Jay Wilker, Esq., Barry M. Benjamin, Esq., Joseph Petersen,

Esq., Of Counsel, OPPENHEIMER, WOLFF & DONNELLY, LLP., New York, NY.

For Defendants: Roger S. Markowitz, Esq., Gerard J. Onorata, Esq., Of Counsel,
PECKAR & ABRAMSON, P.C., New York, NY.

JUDGES:
CHARLES S. HAIGHT, JR., SENIOR UNITED STATES DISTRICT JUDGE.

OPINIONBY:
CHARLES S. HAIGHT, JR.

OPINION:

MEMORANDUM OPINION AND ORDER

HAIGHT, Senior District Judge:

This case is before the Court on a contested petition to compel arbitration of disputes arising out of a construction subcontract. In this litigation, two groups, each comprised of three corporations, are pitted against each other. On the one hand, there stand arrayed the Plaintiffs, Intertec Contracting A/S, a Danish Corporation; Intertec (Gibraltar) Ltd., apparently a Gibraltar corporation; and Intertec Overseas Limited, also apparently a Gibraltar corporation. These corporations confront defendants Turner Steiner International, S.A. (now know as Turner Steiner International,
[*2] LLC), a Delaware corporation; Turner Steiner East Asia Limited ("TSEAL"), a Hong Kong corporation; and The Turner Corporation, a Delaware corporation with principal offices located in New York.

Although the record indicates the presence of certain disputes as to the rights, obligations, and relationships of these several corporations vis-a-vis each other and their corporate adversaries, I will for the present refer to the corporate parties collectively: "Intertec" as the Plaintiffs, and "Turner" as the Defendants.

The case has its origin in a contract to construct twin 39-story high rise office towers in Colombo, Sri Lanka (formerly Ceylon). These structures, named with no particular originality the "World Trade Center," were designed by a Hong

Kong architectural firm for a Sri Lankan real estate developer, Overseas Realty (Ceylon) Ltd. ("ORCL"). In January 1993, ORCL entered into a written contract with Turner, pursuant to which Turner agreed to provide the labor, materials and services to construct the World Trade Center. I will refer to that agreement as "the General Contract."

Subsequently, Turner subcontracted to Intertec that portion of the General Contract consisting [*3] of mechanical/ventilation, air conditioning, electrical, building automation, site lighting, fire protection installation, plumbing and drainage work. I will refer to that agreement as "the Subcontract."

The project encountered difficulties. In December 1998 Intertec commenced an action against Turner in New York State Supreme Court, New York County. Intertec complained that Turner had not paid amounts owing to Intertec under the Subcontract.

Turner removed Intertec's action against it to this Court, citing as the basis for removal the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), made a part of domestic legislation by Chapter Two of the Federal Arbitration Act ("FAA"), 9 U.S.C. @@ 201 et. seq. The factual premise for removal is Turner's assertion that Intertec is bound by contract to arbitrate with Turner the underlying claims which form the subject matter of Intertec's state court action against Turner. Intertec denies that it is bound to submit those claims to arbitration.

The case is now before the Court on Turner's motion to compel Intertec to proceed to arbitration. Intertec opposes that motion. Alternatively, [*4] should the Court compel arbitration, Intertec seeks by cross-motion an order compelling all three Turner corporate entities to participate in it. Discovery with respect to the underlying claims has been stayed pending resolution of these motions.

II. Factual Background

It is common ground that the Subcontract to which Intertec is a party does not contain a provision requiring Intertec to arbitrate any disputes with Turner. But Tuner contends that a provision in the Subcontract between Turner and Intertec incorporates by reference an arbitration agreement found in the General Contract between ORCL and Turner, so that Intertec becomes bound to arbitrate its disputes with Turner.

Initially, Turner relies upon the following provisions contained in the written subcontract made as of March 19, 1993 between Turner, referred to as " contractor," and Intertec, referred to as "Subcontractor":

The Subcontractor shall perform and furnish all work...as shown described in and in strict accordance with the Specifications, General and Particular Conditions of Contract (hereinafter called the Contract Documents)***forming the Contract (hereinafter called the General Contract, all provisions [*5] of which are included in this Subcontract) between Contractor and Overseas Realty (Ceylon) Limited (hereinafter called the Employer.")

The Subcontract identifies the General Contract as one of the writings comprising the "contract documents" expressly listed in the Subcontract. The Subcontract further provides:

The Subcontractor acknowledges that he has carefully examined and understands this Agreement and the Contract Documents which are considered apart of this Subcontract and that the Subcontractor's price includes all labour, services, materials, plant, equipment, scaffolds and all other things, including the importation of tools and equipment and workmanship necessary for the execution of the work.

The Subcontractor agrees to be bound to the Contractor by each and all the terms and provision of the General Contract and the other Contract Documents and to assume toward the Contractor all of the duties, obligations and

responsibilities that the Contractor by those Contract Documents assumes toward the Employer.

It is these provisions which Turner says incorporate by reference the arbitration agreement contained in the General Contract between ORCL and Turner.

[*6] That assertion requires examination of the relevant provisions of the General Contract.

Unlike the typical maritime contract of charterparty, the General Contract does not contain a simple and unadorned arbitration clause. Rather, the General Contract sets forth a relatively elaborate regimen for the resolution of disputes between ORCL, referred to in the General Contract as "Owner," and Turner, referred to as "Contractor." Turner alleges in its petition to compel arbitration that the General Contract "consists of, among other things, the Agreement between Turner and ORCL and the General Conditions of Contract." Turner attaches copies of these two documents to its motion to compel arbitration and marks them collectively as Exhibit 2. I will refer to them as "the Agreement" and "the General Conditions." These are the documents which must be examined in order to identify and comprehend the General Contract's arbitration agreement, which Turner contends the previously quoted provisions in the Subcontract incorporated by reference.

The preamble to the Agreement recites that the Agreement is between "the Contractor, Turner Steiner East Asia Ltd...and the Owner, Overseas Realty (Ceylon) [*7] Ltd."

The analysis of the relevant contractual provisions begins with Article 11 of the Agreement, which provides as follows:

ARTICLE 11. DISPUTE RESOLUTION

11.1 Any dispute or difference arising out of or relating to this Contract, or the breach thereof, (including any matter or thing left, by the Contract, to the discretion of the Architect) whether during the progress of the Work or after it's [sic] completion, shall, prior to either party exercising such rights or remedies as they may possess under this Contract or in Law, be referred to

the
Project Review Committee as designed elsewhere in these Contract Documents for
resolution.

11.2 Any dispute not resolved by the Project Review Committee will be presented
to The Dispute Resolution Committee as designated elsewhere in these Contract
Documents.

11.3 The firm or any of the corporations named in the attachment to this
Agreement may at any time and from time to time appoint a substitute
representative to the Project Review Committee and/or the Dispute Resolution
Committee in place of its representatives named therein subject to mutual
consent.

Article 11's references to "the Project Review Committee" [*8] and "the
Dispute Resolution Committee" are not further clarified by the exhibits
presented on these motions, except to the extent that the list of contents of
the General Contract between the Owner (ORCL) and the Contractor (Turner)
contains a reference to the "Schedule of Members of the Project Review Committee
and Dispute Resolution Committee (one page). That one-page document does not
appear to be included in the present record. One may reasonably infer that the
members were drawn from the ranks of the parties identified in the General
Contract. Presumably that did not include Intertec.

Article 12 of the Agreement contains the first of several references to
arbitration. Article 12 provides:

ARTICLE 12. ARBITRATION

12.1 Any controversy arising out of or relating to this Contract, or the breach
thereof which has not been resolved to the satisfaction of either of the parties
to the Contract by the Dispute Resolution process contemplated in Article 11 of
this Agreement, shall be settled by arbitration as provided for elsewhere in the
Contract Documents.

We must now turn to the General Conditions, which constitute one of the
contract documents under the Agreement [*9] and comprise part of Exhibit 2

to
Turner's motion to compel.

The first relevant provision in that document appears in Clause 21, which provides in part as follows:

21. Claims & Disputes

21.1 A Claim is demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be made by written notice the responsibility to substantiate Claims shall rest with the party making the Claim.

21.2 Claims including those alleging an error or omission by the Architect, shall be referred initially to the Architect for action as provided in subclause 21.10...

Subclause 21.10, incorporated by reference in subclause 21.2 provides:

21.10 The Architect will review Claims and take one or more of the following preliminary actions within ten days of receipt of a Claim: (1) request additional supporting data from the claimant, (2) submit a schedule to the parties indicating [*10] when he expects to take action, (3) reject the Claim in whole or in part, stating reasons for rejection, (4) recommend approval of the Claim by the other party or (5) suggest a compromise.

The "Architect" referred to in these provisions is defined in Clause 5 as "the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number." Subclause 5.1.

Subclauses 21.13 and 21.14 provide:

21.13 If a Claim has not been resolved after consideration of the foregoing and of further evidence presented by the parties or requested by the Architect,

the
Architect will notify the parties in writing that his decision will be made within seven days, which decision shall be final and binding on the parties but
subject to dispute resolution or arbitration, as provided for in the Agreement.
Upon expiration of such time period, the Architect will render to the parties
the written decision relative to the Claim, including any change in the Contract
Sum or Contract Time or both.

21.14 In the event that either of the parties are dissatisfied [*11] with the
decision rendered in subclause 21.13, they may apply for Dispute Resolution as
provided for in clause 30 of these Conditions.

This brings us to Clause 30 of the General Conditions, which provides in part
as follows:

30. Dispute Resolution

30.1 In the event of any dispute or difference arising out of or relating to this Contract as referred to in Article 11 of the Agreement, which, having previously been presented as a claim per clause 21 of these Conditions remains
in dispute, the Owner and Contractor agree to abide by the following provisions.

30.2 A dispute will be deemed to have arisen upon the date of notification by
one party to the other, in writing (a Notice of Dispute), stating the nature of
the dispute.

30.3 Within twenty eight days of the Notice of Dispute the Project Review Committee, as identified in the Contract, shall use their reasonable endeavors
to resolve the dispute.

30.4 In the event that the difference or dispute cannot be resolved by the Project Review Committee, or that a mutually acceptable schedule of actions to
achieve resolution cannot be agreed upon, than [sic] any member of the Project
Review Committee may [*12] require that the dispute or difference shall be referred to the Dispute Resolution Committee identified in the Contract.

30.5 Within thirty days of notification from the Project Review Committee that a dispute or difference cannot be resolved by them, the Dispute Resolution Committee shall use their reasonable endeavors to resolve the dispute.

30.6 In the event that the Dispute Resolution Committee cannot resolve any difference or dispute referred to them by the Project Review Committee, then either the Owner or the Contractor may require that the dispute or difference shall be referred to arbitration, as provided for in clause 31 of these Conditions, by so notifying the other party in writing.

And so, at the end of this lengthy contractual pilgrimage, we come at last to the detailed provisions for arbitration in the General Contract, which appear in Clause 31 of the General Conditions. That clause provides in part:

31. Arbitration

31.1 Any dispute, difference or controversy arising out of or relating to this Contract, having previously been addressed as a claim as provided for in clause 21 of these Conditions or as a dispute under clause 30, and remaining [*13] unresolved, shall be referred to arbitration.

31.2 Notice of the demand for arbitration of a dispute shall be filed in writing with the other party to the Contract and in a copy filed with the Architect.

31.3 When reference to arbitration is opened a Board of Arbitration shall be formed in the following manner. The Owner and the Contractor shall each appoint one member of this board and these members shall appoint a third member (the neutral) who shall act as chairman. If either of the parties refuses, or if either of the parties neglects to appoint its Arbitrator within thirty days after the receipt of the notice by post of the appointment by the other of its Arbitrators, or if the Arbitrators appointed fail or neglect to appoint a third Arbitrator within thirty days of the appointment of second of the Arbitrators so appointed, then the President of the Institution of Engineers, Shri [sic] Lanka,

shall have the power at the request of either party, to make the appointment or appointments which has to be made or have not been made in accordance with the foregoing provisions...

Clause 31 further provides:

31.5 The award of such Arbitrators shall be final [*14] and binding on the parties. The making of an award upon a reference to arbitration shall be a condition precedent to any right of legal action that either party may have against the other in respect of such dispute or difference referable to arbitration under this clause.

31.6 All arbitration proceedings shall be conducted in the English language and be held in Colombo or such other place as the parties hereto agree in writing and the arbitration award shall be made in accordance with the laws of Shri Lanka. The arbitration award shall be binding on the parties hereto.

31.7 The arbitrators shall decide upon the procedure to be followed in the arbitration proceedings and the parties hereto shall abide by such decisions. In deciding the procedure as aforesaid, however, the arbitrators shall endeavor to adopt to the extent it is relevant and practicable to do so the Arbitration Rules of the United Nations Commission of International Trade Law (UNCITRAL).

31.8 Whatever the nationality, residence or domicile of the Owner, the Contractor, any sub-contractor or supplier or the Arbitrators, and wherever the Works, or any part thereof, are situated, the laws of Shri Lanka shall [*15] be proper law of this Contract and in particular to any arbitration under this Contract wherever the same, or any part of it, shall be conducted.

As noted, the case for Turner is that the provisions in PP 1 and 2 of its Subcontract with Intertec incorporate by reference the arbitration agreement in the General Contract between ORCL and Turner, so that Intertec is obligated to arbitrate the claims against Turner which Intertec has asserted in the state court. While the briefs for Turner in support of that motion neither refer to nor quote many of the provisions in the General Contract to which I have just

10

referred and quoted, it seems to me clear that all those closely interrelated and interdependent provisions must be considered in determining whether or not Turner's theory of incorporation by reference is sound.

III. Discussion

A. Subject Matter Jurisdiction

[2] While Intertec does not challenge Turner's removal of the case to this Court, the Court is obligated to consider the existence of subject matter jurisdiction sua sponte.

The Convention, as implemented by Chapter Two of the FAA, provides at 9 U.S.C. @ 203:

An action or proceeding [*16] falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. @ 205 provides:

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purpose of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it was removed.

In addition to these [*17] provisions, Turner relies upon that specific provision in the Removal Statute, 28 U.S.C. @ 1441(b), which says:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

"The Convention and the implementing provisions of the FAA set forth four basic requirements for enforcement of arbitration agreements under the Convention: (1) there must be a written agreement; (2) it must provide for arbitration in the territory of a signatory of the Convention; (3) the subject matter must be commercial; and (4) it cannot be entirely domestic in scope."
Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration International, Inc., 198 F.3d 88, 92 (2d Cir. 1999).

[52] The case at bar satisfies all four requirements: (1) there is a written agreement to arbitrate, contained in the General Contract between ORCL and Turner (the dispute between Turner and Intertec as to whether Intertec is bound by that agreement does not negate its existence); (2) [*18] The agreement provides for arbitration in Sri Lanka, which is a signatory to the Convention, see List of Signatories to the Convention, following 9 U.S.C. @ 201 (West's 1999) at 515; (3) the subject matter of the underlying contract is commercial; and (4) there is nothing domestic in the scope of those contracts.

Accordingly I conclude that this Court has subject matter jurisdiction by reason of the Convention and the FAA. It follows that Turner's removal of the case from state court was proper.

B. Choice of Law

The Second Circuit has said that "when we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable." Smith/Enron, 198 F.3d at 96. In the circumstances of this case, the fact that this Court sits within New York plays no part in the selection of the governing law. See Smith/Enron, 198 F.3d at 96 ("as this is a federal

question case under 9 U.S.C. @ 203 and not a diversity case, we see no persuasive reason to apply the law of New York simply [*19] because it is the forum of this litigation"). n1

----------Footnotes----------

n1 In a case arising under Chapter One of the FAA, 9 U.S.C. @ 2, where diversity of citizenship formed the only basis for subject matter jurisdiction in the district court, the Second Circuit said that "as a federal court sitting in a diversity case, we must apply the choice of law rules of the state in which the action was brought." Progressive Casualty Insurance Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 46 n.6. Even in such a case, the FAA preempts the requirement in New York law that parties will not be held to have chosen arbitration "in the absence of an express, unequivocal agreement to that effect," Marlene Industrial Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327, 408 N.Y.S.2d 410, 413, 380 N.E.2d 239 (1978), substituting therefor the less onerous "ordinary preponderance of the evidence standard." Progressive Casualty, 991 F.2d at 46. These considerations do not arise in the case at bar because Turner does not invoke the diversity statute as a separate basis for federal subject matter jurisdiction, and could not have done so. See, Field v. Volkswagenwerk AG, 626 F.2d 293, 296 (3d Cir. 1980) "That diversity jurisdiction exists under this statute only when there is complete diversity between the parties is a firmly rooted principle.... This requirement pertains to suits between aliens as well as to suits between citizens. Thus, the principle has been applied to deny jurisdiction in an action by an alien against citizens of a state and another alien.") (citations omitted). These are the circumstances of the case at bar.

----------End Footnotes----------

[*20]

It follows that the law governing this case is to be found in the federal cases, notably those of the Second Circuit, which define the manners in which a nonsignatory party to an arbitration agreement may nonetheless be bound by its terms.

C. The Merits

"Arbitration is contractual by nature – a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Thomson-CSF, S.A. v. American Arbitration Association, 64 F.3d 773, 776 (2d Cir. 1995) (citation and internal quotation marks omitted). In the case at bar, it is common ground that Intertec is not a signatory to a written agreement obligating it to submit to arbitration disputes arising out of the Subcontract between Intertec and Turner. But that is not an end to the inquiry. In cases arising under the FAA, the Second Circuit has consistently held that "a nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency." Id. (citation and internal quotation marks omitted). Expanding upon that theme, the Second Circuit stated in Thomson-CSF:

This Court has recognized a number of theories under [*21] which nonsignatories may be bound to the arbitration agreements of others. Those theories arise out of common law principles of contract and agency law. Accordingly, we have recognized five theories for binding nonsignatories to arbitration agreements; 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.

Id.

The arbitration agreement in the case at bar is found in the General Contract, to which ORCL and Turner are the signatories. While, as Thomson-CSF notes, the Second Circuit cases identify a number of theories "under which nonsignatories may be bound to the arbitration agreements of others," that case also holds that Second Circuit jurisprudence does not "indicate that a nonsignatory can be bound to an arbitration agreement with a less than full showing of some articulable theory under contract or agency law." 64 F.3d

at
780. Thus in Thomson-CSF the Second Circuit reversed the district court's order
compelling arbitration because, in the view of the court of appeals, the district court's "hybrid approach" to the issue "improperly extended the limited
theories upon which this Court is willing to [*22] enforce an arbitration agreement against a nonsignatory." Id.

In the case at bar, Turner principally relies upon the first of the theories
articulated by the Second Circuit, namely, incorporation by reference. Specifically, Turner contends that the quoted provisions in the Subcontract incorporated by reference the arbitration agreement contained in the General
Contract between ORCL and Turner.

Progressive Casualty, 991 F.2d 42, is the leading recent Second Circuit opinion on the incorporation by reference theory. Both parties at bar rely upon
Progressive Casualty, although counsel in their briefs are too polite to remind
me that the court of appeals' opinion reversed a judgment of my own. See Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela 802 F.
Supp. 1069 (S.D.N.Y. 1992) Progressive Casualty contains a comprehensive analysis of when a contract incorporates by reference an arbitration agreement
in another contract, and when it does not. Judge Lumbard's analysis of the cases
is sufficiently instructive to justify quoting it at length:

Finally, the FRA's arbitration clause is not so restrictively worded that it does not bind the American Reinsurers as a matter of law. As the [*23] district
court recognized, we have held that "an arbitration agreement restricted to the
immediate parties does not bind a non-party, notwithstanding words of incorporation or reference in a separate contract by which that non-party is
bound." Progressive Cas., 802 F. Supp. at 1079 (collecting cases). For example
in Import Export Steel Corp. v. Mississippi Valley Barge Line Co., 351 F.2d 503
(2d Cir. 1965), we refused to compel arbitration on the basis of a charter party
clause which provided for arbitration of disputes "between the Disponent Owners
and the Charterers," even though the charter party had been incorporated by

reference into a bill of lading. We reasoned that "it would be unduly stretching the language of this arbitration clause to say that [a non-party] is one of the 'Disponent Owners' or 'Charterers.'" Id. at 506. Accord Continental U.K. Ltd. v. Anagel Confidence Compania Naviera, S.A., 658 F. Supp. 809, 814-16 (S.D.N.Y. 1987); General Authority for Supply Commodities v. S.S. Capetan Costis I, 631 F. Supp. 1488, 1489 (S.D.N.Y. 1986); Production Steel Co. v. S.S. Francois L.D., 294 F. Supp. 200, 201-02 (S.D.N.Y. 1968). [*24]

On the other hand, we have held that a broadly-worded arbitration clause which is not restricted to the immediate parties may be effectively incorporated by reference into another agreement. In Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966, 973 (2d Cir. 1975), cert. denied, 426 U.S. 936, 96 S. Ct. 2650, 49 L. Ed. 2d 387 (1976), we ruled that a clause in a charter party which provided for arbitration of "any and all differences and disputes of whatsoever nature arising out of this Charter" was binding on parties to a bill of lading which incorporated the charter party by reference. Accord Lowry & Co. v. S.S. Le Moyne D'Iberville, 253 F. Supp. 396, 398 (S.D.N.Y. 1966), appeal dismissed, 372 F.2d 123 (2d Cir. 1967): Lowry & Co. v. S.S. Nadir, 223 F. Supp. 871 (S.D.N.Y. 1963).

991 F.2d at 47-48.

Progressive Casualty involved disputes arising out of a policy of reinsurance. The policy stated that it was "Subject to Facultative Reinsurance Agreement," which the Court referred to as the FRA. The FRA was a prior agreement between other insurers and reinsurers, and contained [*25] an arbitration clause which provided:

Any question or dispute arising between the contracting parties concerning the interpretation of this Reinsurance Agreement, which cannot be otherwise arranged shall be settled by arbitration in London, England.

The plaintiff American Reinsurers in Progressive Casualty were not

signatories to the FRA, and accordingly argued that they were not bound by the arbitration clause in the FRA. The Second Circuit disagreed giving its reasons in a discussion immediately following the analysis which I have quoted:

Like the clause in Nereus Shipping, we believe the FRA's arbitration clause is worded broadly enough to allow its effective incorporation by reference into other contracts. Unlike the clause in Import Export, the FRA's clause is not restrictively worded by referring to the immediate parties to that contract by name. Rather, the FRA merely provides for arbitration of disputes between "the contracting parties." We do not think it would be "unduly stretching" the language of the clause to term the American Reinsurers and RNV "contracting parties."

991 F.2d at 48.

I conclude that the case at bar clearly [*26] falls on the other side of the line which the Second Circuit drew in Progressive Casualty. That is because a rational reading of the General Contract demonstrates that the arbitration agreement contained therein is restricted to the immediate parties to that contract, namely, ORCL and Turner.

Unlike the free-standing arbitration clauses found in a charterparty in Nereus Shipping and a reinsurance agreement in Progressive Casualty, which the Second Circuit held were binding upon nonsignatories, the arbitration clause in the General Contract between ORCL and Turner forms the final step in a complex dispute resolution regimen, whose prior steps must be taken before arbitration may be demanded. Clause 31, the arbitration clause in the General Conditions of the contract at bar, provides that only those disputes "having previously been addressed as a claim as provided for in clause 21 of these Conditions or as a dispute under clause 30, and remaining unresolved, shall be referred to arbitration." In the parlance of contract law – an appropriate reference, since arbitration is contractual in nature – two conditions precedent must be

satisfied before arbitration of a dispute [*27] may be demanded: the failure of the Architect to resolve the dispute under clause 21, and the failure of the Project Review Committee and the Dispute Resolution Committee to do so under clause 30. In the parlance of croquet, one would say that a dispute must pass through three wickets (the Architect, the Project Committee, and the Dispute Resolution Committee) before arriving at the post of arbitrability.

This regimen stands in stark contrast to cases like Progressive Casualty and those cited therein, where any dispute arising between the parties to a contract is immediately subject to arbitration upon demand, unencumbered by the necessity of first passing through preliminary and quite different procedures for dispute resolution.

The difference is material because there is no basis for suggesting that the mandated preliminary submissions of a dispute to the Architect and the Project Review Committee (and, at that Committee's option, to the Dispute Resolution Committee) have anything to do with or apply to a subcontractor such as Intertec. Given the structure of the General Contract, those provisions can apply logically only to its "immediate parties," using Progressive Casualty [*28] 's phrase, namely ORCL and Turner. The briefs for Turner do not contend otherwise. Turner simply uproots the references to arbitration in Article 12.1 of the General Contract and Clause 31.1 of the General Conditions from the contractual soil in which they were planted, and transplants them in its motion papers as freestanding, independent provisions. See, e.g., Main Brief for Turner at 3-4.

But the General Contract must be read in its entirety. I think that when the arbitration clause is considered in the light of its surrounding contractual provisions, the obligation to arbitrate disputes is restricted to the General Contract's immediate parties, a universe that does not include Intertec. As

Progressive Casualty's review of Second Circuit cases at 991 F.2d at 47 notes,
in Import Export Steel Corp. v. Mississippi Valley Barge Line Co., 351 F.2d 503,
506 (2d Cir. 1965), where a charterparty provided for arbitration of disputes
"between the Disponent Owners and the Charterers," the Second Circuit held that
the incorporation of the charterparty in a bill of lading did not bind the bill
of lading holder to the arbitration clause because it would be "unduly
[*29]
stretching" the language of the arbitration clause to say that a non-party "is
one of the 'Disponent Owners' or 'Charterers.'" In the case at bar, it would be
"unduly stretching" the General Contract's mandatory pre-arbitration dispute
resolution procedures to include a subcontractor such as Intertec; and, if
Intertec is not subject to those procedures, it cannot be subject to an
arbitration clause that requires their exhaustion before arbitration can be
demanded. n2

----------Footnotes----------

n2 The only reference to sub-contractors in the General Contract's arbitration clause appears in subclause 31.8 of the General Conditions, which
provides that the laws of Sri Lanka shall be the "proper law of this Contract,"
whatever "the nationality, residence or domicile of the Owner, the Contractor,
any sub-contractor or the Arbitrators," wherever "the Works, or any part
thereof, are situated," and wherever the arbitration "or any part of it, shall
be conducted." The plain purpose of this subclause is to ensure that Sri Lankan
law governs the General Contract and arbitration of disputes thereunder. The
reference to "sub-contractors" in that limited context is insufficient to bind
a nonsignatory subcontractor to the arbitration agreement in the General Contract.

----------End Footnotes----------

[*30]

That is so, notwithstanding Intertec's assumption in the Subcontract of the duties, obligations and responsibilities Turner owed to ORCL under the General Contract, to the extent that the Subcontract covers work called for by the General Contract. Turner makes much of these unsurprising back-to-back provisions in respect of performance, but they are beside the point in determining whether Intertec agreed to arbitrate any resulting disputes with Turner.

For these reasons, I hold that the Subcontract between Turner and Intertec does not incorporate by reference the arbitration clause in the General Contract between ORCL and Turner.

Turner also relies upon letters written at various times by Intertec officers or their attorneys which indicate a willingness to arbitrate. While estoppel is a recognized ground for binding a nonsignatory to an arbitration agreement, see Thomson-CSF, 64 F.3d at 776, the correspondence in this case does not support application of that equitable principle.

The most pointed exchange occurred in March, April, and May, 1997. In a letter dated March 17, 1997, Kai S. Madsen, Intertec's project manager, complained to Robert V. Simons, the Turner [*31] project executive, about Turner's failure to pay Intertec's invoices in full. Madsen Declaration dated May 14, 1999, Ex. G. That letter, captioned "Notice of Dispute," purported to invoke on Intertec's behalf the dispute resolution procedures found in clause 30 of the General Contract. Having received no response, Madsen wrote again to Simon on April 21, 1999, stating that "the 28 days given under Clause 30.3 of the contract has now expired and you are therefore in dispute." Id., Ex. H. Simon replied on Turner's behalf in a letter dated May 13, 1997, to Madsen and Erik Martinussen, Intertec's president. Simon began by stating bluntly that "Intertec is in error in attempting to invoke clause 30.5, Dispute Resolution, of the Main contract between TSEAL and ORCL, in matters arising under the Subcontract between TSEAL and Intertec," and ended his letter as follows:

Lastly, a complete review of the language concerning dispute resolution in

MISSING

the
Agreement between TSEAL and ORCL (including the schedule of members of the Dispute Resolution Committee) as well as the Conditions of Contract will reveal
that the members of said committee are fixed and composed of senior TSEAL and
ORCL [*32] management. Frankly, it is unclear what benefit might possibly be
forthcoming to Intertec through reference to that body.

We hope that the above clarifies the intent of the documents.

Id., Ex. Ex I. That analysis of the contracts, by which Turner rebuffed Intertec's effort to invoke the dispute resolution provisions of the General
Contract, presages this Court's analysis as expressed in this opinion.

In consequence, the present motion presents the entertaining spectacle of both Intertec and Turner executing 180-degree course changes with respect to the
applicability to Intertec of the dispute resolution provisions in the General
Contract. Turner, having refused to participate with Intertec in the clause 30
dispute resolution procedures which the General Contract provides must be exhausted before arbitration can be demanded under clause 31, now seeks to compel arbitration by invoking clause 31 in isolation. Intertec, which expressed
an earlier willingness to subject itself to the General Contract's dispute resolution provisions, now resists arbitration. In circumstances such as these,
the equitable doctrine of estoppel cannot be invoked by either party. Turner's
motion [*33] to compel Intertec stands or falls upon the proper construction of
the contracts. For the reasons previously stated, that motion falls. n3

----------Footnotes----------

n3 It follows that I need not consider the parties' contentions about which
corporate entities, on either side of the controversy, should be required to
participate in an arbitration.

----------End Footnotes----------

IV. Conclusion

I have concluded that Turner's sole factual predicate for its removal of Intertec's state court action, the existence of an arbitration agreement binding upon Intertec, is not well founded.

Ordinarily this would result in an order remanding the case to the state court. But I do not wish to take any action which might prejudice Turner's right to appeal this Court's denial of its petition to compel arbitration.

The issue of appealability is complicated by the seeming tension between two statutes. The FAA was amended in 1988 and 1990 to provide that an appeal may be taken from an order "denying a petition under section 4 of this title [the FAA] to order arbitration to proceed, [*34] " and from an order "denying an application under section 206 of this title [the Convention] to compel arbitration." 9 U.S.C. @ 16(a)(1)(B), (C). However, the Removal Statute provides that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," with the sole exception, not applicable here, of civil rights actions. 28 U.S.C. @ 1447(d).

The appealability of a District Court's order is, of course, for the Court of Appeals to determine, and I do not presume to address that issue, except to note my concern that Turner's right to appeal not be prejudiced by the form of my order. That concern militates against an order of remand at this time.

But it is no longer fair to Intertec to stay pre-trial discovery, whose fruits will presumably be useful in the state court action if my opinion is affirmed on appeal, leading to an inevitable remand. The Order I have drafted is intended to be fair to both parties, given the conclusion on the merits that I have reached.

For the foregoing reasons, it is

ORDERED, that the Defendants' motion to compel the Plaintiffs to arbitrate their claims against [*35] Defendants be, and the same hereby is, denied;

and
it is further

ORDERED, that an Order remanding this action to the Supreme Court of the State of New York, New York County, will be deferred pending the filing by Defendants, if so advised, of a timely notice of appeal from this Opinion and
Order, and the Court of Appeals' decision on that appeal; and it is further

ORDERED, that if Defendants do not file a timely notice of appeal, or the Court of Appeals affirms this Court's Opinion and Order, Plaintiffs may apply on
three (3) days' notice for an Order of remand; and it is further

ORDERED, that this Court's Order staying pre-trial discovery be, and the same
hereby is, vacated.

Dated: New York, New York

May 30, 2000

CHARLES S. HAIGHT, JR.

SENIOR UNITED STATES DISTRICT JUDGE