IN THE SUPREME COURT OF THE STATE OF NEVADA

KVAERNER U.S. INC.; KVAERNER ASA; AND KVAERNER HOLDINGS INC.,
Appellants,
vs.
EQUATORIAL TONOPAH, INC.; EQUATORIAL MINING LIMITED; AND EQUATORIAL MINING NORTH AMERICA, INC.,
Respondents.

No. 39571

FILED

OCT 21 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Kvaerner U.S. Inc., Kvaerner ASA, and Kvaerner Holdings Inc. (collectively referred to as Kvaerner) appeal the district court's order denying in part their motion to compel arbitration.

Equatorial Mining Limited (EML) and Equatorial Mining North America (EMNA) entered into an agreement with Kvaerner to conduct a feasibility study for building a copper heap leach mining plant near Tonopah. Thereafter, Equatorial Tonopah, Inc. (ETI) and Kvaerner entered into an engineering, procurement, and construction (EPC) contract, which contained an arbitration clause. Following the Tonopah plant's poor recovery, respondents EML, EMNA, and ETI jointly filed a complaint against Kvaerner alleging fraud, breach of contract, breach of the covenant of good faith and fair dealing, negligent misrepresentation, and negligence. Although respondents maintained that their claims arose from the feasibility study performed by Kvaerner, Kvaerner moved to compel arbitration under the EPC contract's arbitration clause. The district court denied Kvaerner's motion to compel arbitration of the feasibility study contract claims, but ordered that all of ETI's claims

predicated upon the EPC contract and subsequent performance thereof be arbitrated.

Because a dispute covered by an arbitration clause is essentially a question of contract construction, we must review this appeal de novo.[1] In deciding whether arbitration is mandatory, we have to (1) determine whether a valid arbitration agreement exists; (2) determine the scope of the provision; and (3) decide whether the agreement encompasses the disputes at issue.[2] The parties do not dispute that the EPC contract, not the feasibility study contract, contains an arbitration clause requiring arbitration of all claims that arise under or are related to the EPC contract. However, the parties disagree about whether the arbitration clause encompasses the dispute at issue.

Kvaerner argues that despite respondents' contention that their claims are based on the feasibility study contract, their claims are arbitrable because they touch matters covered by the EPC contract.[3] We agree that any claims related to the EPC contract should be arbitrated, a conclusion that is in line with the district court's ruling. Indeed, the

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[1]Clark Co. Public Employees v. Pearson, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990).

[2]United Computer Systems, Inc. v. AT & T Corp., 298 F.3d 756, 766 (9th Cir. 2002).

[3]See Medtronic Ave. v. Advanced Cardiovascular Systems, 247 F.3d 44, 55 (3rd Cir. 2001) (observing that when determining whether a claim is governed by an arbitration clause, the court should focus on the factual allegations underlying those claims); American Recovery v. Computerized Thermal Imaging, 96 F.3d 88, 94 (4th Cir. 1996) (stating that test for a broad arbitration clause is not whether a significant relationship exists between the claims and the agreement containing an arbitration clause).

district court ordered that any claims predicated upon the EPC contract must be arbitrated. Kvaerner, however, argues that the district court erred by ordering only ETI, not EMNA and EML, to arbitrate such claims.

A party cannot be compelled to arbitrate a dispute unless it has agreed to do so.[4] It is undisputed that EMNA and EML are not signatories to the EPC contract containing the arbitration clause. However, nonsignatories to an arbitration agreement may be bound under any of the following circumstances: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, or (5) estoppel.[5] The record before us is devoid of evidence to support any theories for binding EMNA and EML to the EPC contract's arbitration clause. While EMNA, EML, and ETI appear to be corporate affiliates, there is no indication in the record that ETI acted as the agent or alter ego of EMNA or EML when it entered into the EPC contract, or that either EMNA or EML received any benefits from the EPC contract.[6] Therefore, we conclude that the district court did not err in limiting arbitration under the EPC contract to ETI.

We note, however, that it is unclear from the record before us whether the district court's arbitration order was properly applied.[7] Thus,

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[4]EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002).

[5]Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (2nd Cir. 1995).

[6]See id. at 777-78 (recognizing that a corporate relationship alone is not sufficient to bind a nonsignatory to an arbitration agreement under an agency or alter ego theory, and that a nonsignatory must receive a direct benefit via an arbitration agreement under an estoppel theory).

[7]See Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 854 (2nd Cir. 1987) (concluding that an arbitration clause stating that "'all claims and disputes of whatever nature arising under this contract'" was

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we may need to re-examine this issue when we consider Kvaerner's appeal of the verdict in the underlying action.

In summary, we conclude that only ETI is bound to arbitrate its claims related to the EPC contract, and EMNA and EML cannot be compelled to arbitrate their claims under the feasibility study because they did not expressly intend to do so.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Leavitt

_____, J.
Maupin

. . . *continued*
sufficiently broad to encompass a common law fraud claim); N.D. Fashions, Inc. v. DHJ Industries, Inc., 548 F.2d 722, 728 (8th Cir. 1976) (concluding that claims of misrepresentation and fraud in the inducement of a contract fall under the arbitration clause at issue).

cc: Hon. Michael P. Gibbons, District Judge
Beckley Singleton, Chtd./Las Vegas
Gordon & Silver, Ltd.
Smith, Pachter, McWhorter & Allen PLC
Rowe & Hales
Woodburn & Wedge
Yetter & Warden
Nye County Clerk