IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: ESSAR STEEL MINNESOTA LLC and ESML HOLDINGS INC. Debtors.	Chapter 11 Case No. 16-11626 (BLS) Jointly Administered
BRADLEY E. SCHER, solely in his capacity as Litigation Trustee for Mesabi SC Litigation Trust, Plaintiff, v. ESSAR GLOBAL FUND LIMITED, *et al.* Defendants.	Adv. Proc. No. 17-50001 Re: AP Docket No. 77

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MEMORANDUM ORDER[1]

Upon consideration of the Motion to Compel Arbitration (the "Motion")[2] filed by Essar Projects Limited, Essar Projects USA, LLC, and Essar Projects Middle East FZE (collectively, the "Defendants") and the accompanying memorandum of law[3]; the opposition to the Motion filed by the Plaintiff Bradley Scher, solely in his capacity as Litigation Trustee for the Mesabi Litigation Trust (the "Trustee")[4]; the Defendants' Reply[5]; the Court hereby FINDS and CONCLUDES as follows:

1. Prior to filing its Chapter 11 petition, Debtor Essar Steel Minnesota LLC ("ESML") entered into a Lump Sum Turn Key Contract (the "LSTK Contract") with Essar Projects Limited ("Essar Projects"). The LSTK Contract required Essar Projects to construct and deliver a fully functional iron ore pellet plant (the "Plant") to ESML in exchange for a lump sum payment of about $1.2 billion.

2. Simultaneously with the execution of the LSTK Contract, Essar Projects assigned a portion of its obligations under the LSTK Contract to Essar Projects USA, LLC and Essar Projects-Middle East FZE, its co-Defendants in this matter. LSTK Contract at Sch. 15 & 16.

3. The LSTK Contract defined the procedure for resolving disputes related to the construction of the plant. It stipulated that "[a]ny dispute arising out of or in relation to the [LSTK Contract], which can not be settled amicably by the

[1] This Memorandum Order constitutes the Court's findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure.
[2] AP Docket No. 77.
[3] AP Docket No. 78.
[4] AP Docket No. 83.
[5] AP Docket No. 89.

Parties or the [Dispute Adjudication Board], shall be finally settled by arbitration in accordance with the UNCITRAL Arbitration Rules." LSTK Contract at Sch. 1.

4. On July 8, 2016, ESML and ESML Holdings Inc. filed their chapter 11 petitions and on June 13, 2017 this Court confirmed their Chapter 11 Plan ("Plan").[6] As is typical with reorganization plans in large chapter 11 filings, the Plan contained a general retention of jurisdiction clause. In relevant part, it provided:

> "The Bankruptcy Court shall retain and have exclusive jurisdiction over any matter . . . that relates to the following:
>
> . . .
>
> (ii) to determine any and all adversary proceedings, applications, motions or contested or litigated matters that may be pending on the Effective Date or that, pursuant to the Plan, may be instituted by the Debtors, the Disbursing Agent or the Liquidation Trustees after the Effective Date."

Plan at Art. XIII.

5. ESML filed this adversary proceeding on January 11, 2017 and it remained pending before this Court on the Effective Date. On September 12, 2018, the Defendants filed the instant Motion to Compel Arbitration as to Counts One, Two, and Three, the parties then filed briefs, and the Court took the matter under advisement.

THE PARTIES' POSITIONS

6. The Trustee opposes the Motion and argues that, pursuant to the terms in the Plan, this Court—and only this Court—has jurisdiction to adjudicate

[6] Docket No. 990.

this matter. In the alternative, the Trustee argues the Defendants waived their right to arbitrate the claims when they failed to demand arbitration during the two years that this case has been pending and that he will be prejudiced if compelled to proceed to arbitration.

7. In response, the Defendants argue the LSTK Contract controls and, despite the language in the Plan, the parties must resolve this dispute through arbitration. The Defendants also argue they did not waive their right to arbitrate and that the Trustee will not be prejudiced by arbitration or a stay of Counts One through Three while the arbitration proceeds, particularly as no discovery has taken place in this adversary proceeding.

JURISDICTION

8. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and § 1334(b) and (e). This adversary proceeding is a core proceeding within the meaning of § 157(b)(2)(A), (B), (F), (H), and (O). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

ANALYSIS

9. The LSTK Contract is governed by the Federal Arbitration Act ("FAA"), which provides in relevant part that a "written provision in any contract . . . evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The first question raised by the

Trustee is whether the retention of jurisdiction provision in the Plan constitutes "grounds" for the revocation of the arbitration provision under the FAA.

10. Based on the undisputed facts, the Court finds the Plan is not grounds to decline to enforce the arbitration agreement. The record reflects that these sophisticated parties negotiated the LSTK Contract at arm's length and expressly agreed to settle any disputes though the arbitration process. The Plan contains a general retention of jurisdiction provision, but it does not specifically reference this adversary proceeding or the LSTK Contract. When faced with similar questions, the Supreme Court has repeatedly held in favor of arbitration and noted that principles of public policy strongly favor honoring arbitration agreements.[7] This Court is therefore persuaded that the retention of jurisdiction clause in the Plan did not vitiate the clear and express arbitration provision in the LSTK Contract.

11. The Trustee argues the Plan must control and cites to various cases that stand for the principle that a confirmed plan is binding on creditors who have notice of the plan and disclosure statement. But those cases are distinguishable. In particular, the Trustee emphasizes the ruling in *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, where the Seventh Circuit determined an arbitration provision was "superseded by the terms of the confirmed plan." 304 F.3d 753, 755 (7th Cir. 2002). However, in reaching that conclusion the Seventh Circuit stressed that the creditor had participated in the plan confirmation process, had filed an

[7] *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *At&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272, 2019 WL 122164 (U.S. Jan. 8, 2019). *See also Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997).

objection to the plan, but had failed to contest the retention of jurisdiction clause. *Id*. On those facts, the court reasoned that the creditor's failure to raise the issue during the plan confirmation process constituted a waiver of its right to arbitrate and, therefore, it declined to honor the arbitration agreement. *Id*. at 756.

12. In contrast to *Ernst & Young*, the Defendants did not actively participate in the Plan confirmation process. The Defendants neither objected to the Plan nor manifested an intent to abandon their arbitration rights. Without a clearer demonstration that the parties understood and intended that the retention of jurisdiction clause in the Plan would supersede the arbitration provision, this Court declines to find the Plan erased the parties' contractual obligation to arbitrate.

13. The Trustee's separate argument, that the Defendants have waived their right to arbitrate through their conduct, is also unavailing. The Trustee correctly notes that a party may waive its right to arbitrate if it "[s]ubstantially invoke[s] the litigation machinery before asserting its arbitration right." *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1090 (8th Cir. 2007). The Trustee argues the Defendants waived their right to arbitrate (1) when they failed to state their intent to arbitrate for two years while this adversary was pending and (2) because the Trustee will be prejudiced by litigating these claims before this Court and also in arbitration.

14. The Court finds the Defendants' conduct does not rise to the level of a waiver of their right to arbitrate. The Complaint was filed on January 11, 2017 and served on April 7, 2017. Originally, the Complaint contained claims asserted by

ESML that were eventually transferred to two separate litigation trusts by operation of the confirmed Plan. The parties then stipulated to extend the deadline for Defendants to file an answer. Pursuant to the Plan, the trustees for the litigation trusts inherited this matter from ESML and became the Plaintiffs. They then moved to segregate the Complaint into separate actions to correspond to the claims held by the SC Litigation Trust and the UC Litigation Trust. AP Docket No. 55. Defendants opposed that motion, and the parties eventually stipulated to segregate the actions, but to consolidate them for pre-trial discovery to avoid "burden[ing] the Essar Affiliates." Trustee's Brief, AP Docket No. 83 at 25. The parties have not yet engaged in any meaningful discovery. Thus, as to the merits of the dispute, this litigation is in its infancy notwithstanding the considerable period of time that has elapsed since the Complaint was filed.

15. The standard for determining when a party has waived its right to arbitrate is "whether the party objecting to arbitration has suffered *actual prejudice*." *In re Kaiser Grp. Int'l, Inc.*, 307 B.R. 449, 456 (D. Del. 2004) (internal citations omitted) (emphasis in original). Based on the procedural history recited above, the Court concludes that the Trustee will not suffer actual prejudice as a result of arbitration. As noted, the parties have not conducted discovery, and the record does not suggest that the Defendants have gained any tactical advantage by requesting arbitration at this stage. As a result, the Court concludes that the Trustee will not suffer prejudice as a result of the Defendants' delay in exercising their arbitration rights.

16. The Defendants have also moved for a stay of Counts One through Three pending the arbitration pursuant to 9 U.S.C. § 3. The Defendants do not seek to stay those counts in their entirety. Rather, they wish to stay them only as to themselves, but leave them pending before this Court as to Essar Global, which is not a signatory to the LSTK Contract and which the Trustee has alleged is an alter ego of the Defendants. The Trustee opposes the granting of that relief and proposes instead that the Court stay arbitration until the other non-arbitrable claims are resolved.

17. In relevant part, 9 U.S.C. § 3 provides that when a court determines that an issue is subject to an arbitration agreement, it "shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

18. Pursuant to 9 U.S.C. § 3 and Third Circuit precedent, this Court will grant the Defendants' requested relief and stay Counts One, Two, and Three. The issues are plainly subject to the arbitration agreement and, as discussed above, the Defendants are not "in default" in their request to arbitrate.

19. The Trustee argues that granting a stay on this proceeding will result in prejudice. The Court is unpersuaded by the Trustee's argument. First, the fact that Counts One through Three apply to the Defendants and Essar Global is not sufficient reason to stay the arbitration. The Supreme Court has addressed this argument and concluded "an arbitration agreement must be enforced

notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (U.S. 1983).

20. Second, even if there were some risk of an adverse impact on the litigation, such as duplicative proceedings or collateral estoppel, the Trustee has not shown that it would be substantial enough to overcome the strong policy favoring arbitration. Indeed, the Supreme Court has held that the FAA requires even "piecemeal resolution when necessary to give effect to an arbitration agreement." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). In addition, the Third Circuit has consistently rejected arguments "concerning both the possible inefficiencies resulting from bifurcated proceedings, and any possible collateral estoppel effects [of the arbitration]." *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1158 (3d Cir. 1989) (citing *Dean Witter*, 470 U.S. at 222).

21. The potential adverse impacts on the adversary proceeding that the Trustee has articulated are not significant enough to justify overriding the clear federal policy in favor of arbitration. The Trustee may be correct that the underlying facts related to Counts One through Three will overlap with the numerous other claims in the Complaint. However, "[w]hile factually intertwined claims may benefit from a stay of litigation, that one element alone does not suffice to require a stay." *In re Paragon Offshore PLC*, 588 B.R. 735, 761 (Bankr. D. Del. 2018) (internal citations omitted).[8] Consistent with precedent from this Court and

[8] In addition, the Third Circuit has observed that the collateral estoppel effect of an arbitration on a federal interest is insufficient to stay the arbitration proceedings. "As to the collateral estoppel issue,

the Third Circuit, the Court declines to stay the arbitration simply because those matters are factually intertwined with other matters before this Court.

22. For the foregoing reasons, the Court will grant Defendants' Motion to Compel Arbitration. The parties are requested to confer and provide a written form of order to the Court within 7 days of the date hereof in accordance with this ruling.

Dated: February 15, 2019
Wilmington, Delaware

Brendan Linehan Shannon
United States Bankruptcy Judge

the [Supreme] Court reasoned that 'a stay of [arbitral] proceedings . . . is [not] necessary to protect the federal interest in the federal-court proceeding, . . . the formulation of collateral-estoppel rules affords adequate protection to that interest.'" *Hays*, 885 F.2d at 1158 (3d Cir. 1989) (quoting *Dean Witter*, 470 U.S. at 222).