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OF THE
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Re: Preferred Sands of Genoa, LLC v. Outotec (USA) Inc.
C.A. No. 6011-VCN
Date Submitted: April 18, 2011

Dear Counsel:

Defendant Outotec (USA) Inc. ("Outotec") has moved to dismiss this action under Court of Chancery Rules 12(b)(1) and (12)(b)(3).

Plaintiff Preferred Sands of Genoa, LLC ("Preferred") seeks a declaratory judgment regarding the validity of, and specific performance of, a putative settlement agreement (the "Settlement Agreement"), which, if enforced, would end its arbitration (by a team of arbitrators from the American Arbitration Association (the "AAA")) of a dispute with Outotec that arose out of a commercial contract,

the Professional Services and Procurement Agreement (the "PSPA"). Outotec contends that the Settlement Agreement was never formally executed because Preferred failed to deliver, before a deadline Outotec had set, a signed counterpart of the Settlement Agreement to Outotec. Preferred contends that its signing of the Settlement Agreement, though it occurred after Outotec's deadline, made the agreement binding on both parties, and thus resolved the underlying dispute.

Outotec further contends that the Court lacks the subject matter jurisdiction to consider whether the Settlement Agreement was properly executed because the AAA arbitrators whom the parties engaged to resolve their dispute must first decide whether the validity of the Settlement Agreement is an arbitrable issue. Outotec argues that, because the arbitrators were delegated the authority to determine the scope of their own authority, only they have the power to decide whether the validity of the Settlement Agreement is an arbitrable question, and, if they determine it is arbitrable, to provide the answer to that question. In the alternative, Outotec contends that Preferred's claims should be dismissed on *forum non conveniens* grounds in light of the parties' choice to resolve the dispute in the forum of arbitration instead of in the court system. Preferred contends that this

forum is not inconvenient and that the Court should deny Outotec's motion to dismiss for lack of subject matter jurisdiction[1] because that the parties did not agree to empower the arbitrators to decide questions of arbitrability. Preferred also argues that the Settlement Agreement, which contains no arbitration clause, is distinct from the PSPA, and that the Court, therefore, has jurisdiction to resolve Preferred's claims because the parties never agreed to submit disputes concerning the Settlement Agreement to arbitration.

To the extent that Outotec argues that Preferred's claims should be dismissed on grounds of *forum non conveniens*, Outotec's motion is denied. Both

[1] Preferred casts Outotec's motion as a motion to dismiss for failure to state a claim. *See* Pl.'s Answering Br. in Opp. to Def.'s Mot to Dismiss and Reply Br. in Supp. of Pl.'s Mot for a Prelim. Inj. ("Pl.'s AB") at 5 (reciting the standard for a motion to dismiss under Court of Chancery Rule 12(b)(6)). Further, it argues that, for purposes of Outotec's motion to dismiss, the Court is required to accept the legal conclusion that "the PSPA Agreement and all of its provisions, including the arbitration provision, were terminated when the Parties executed the Settlement Agreement." *Id.* at 8.

In addressing Outotec's motion, the Court does not consider the sufficiency of Preferred's allegations to state a claim. Instead, it considers whether it has jurisdiction to hear Preferred's claims at all. Even if this were a motion to dismiss under Rule 12(b)(6), the Court would only be required to view the facts, as opposed to legal arguments, in the light most favorable to the non–moving party.

Therefore, at this stage, the Court considers only those of Preferred's arguments that relate to the jurisdictional question. *See* Pl.'s AB at 6, n.1 (addressing Outotec's argument regarding delegation of authority to decide questions of arbitrability to the arbitrators).

Outotec and Preferred are Delaware entities,[2] and, despite the time and resources the parties have invested in the ongoing arbitration proceedings in New York, Outotec has provided no basis upon which the Court could conclude that litigating in the Delaware courts would cause it "overwhelming hardship."[3]

The Court now turns to the question of whether the PSPA grants the arbitrators the authority to decide the scope of the arbitration in which the parties have been engaged. If so, it must decide whether a dispute over the validity of a settlement agreement purporting to resolve a matter that is currently being arbitrated is sufficiently related to underlying dispute to fall within that grant of authority.

The Court has jurisdiction over an application to enjoin an arbitration proceeding under 10 *Del. C.* § 5703 on the basis that no valid arbitration agreement

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[2] PSPA Preamble, appearing at Appx. to Def.'s Opening Br. in Supp. of its Mot. to Dismiss for Lack of Subj. Matter Juris. And Forum Non Conveniens and Its Answering Br. on Pl.'s Mot for a Prelim. Inj. ("Appx. to Def.'s OB") at A-11-15.

[3] *See, e.g., Aveta, Inc. v. Colon*, 942 A.2d 603, 608 (Del. Ch. 2008) ("despite linguistic appearance to the contrary, *forum non conveniens* is not a doctrine of convenience; it is a doctrine of significant, actual hardship. Thus, the Court need not, and should not, compare Delaware to the alternative forum to determine which is the more appropriate location for this dispute to proceed. The Court's search must remain for overwhelming hardship.") (citations and quotation omitted).

exists or that such an agreement has been violated,[4] but it lacks subject matter jurisdiction over any matter that that the parties have contractually agreed to submit to arbitration.[5] The PSPA itself is governed by Nebraska law,[6] but, because the PSPA involves interstate commerce,[7] the Federal Arbitration Act applies when interpreting the PSPA's arbitration clause.[8]

Under federal law, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."[9] Nonetheless, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[10] Under the majority federal view, an "arbitration provision's incorporation of the AAA Rules or other rules giving arbitrators the authority to determine their own jurisdiction is a clear and unmistakable expression

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[4] *See generally* 10 Del. C. §§ 5701 et seq. (the Delaware Uniform Arbitration Act).
[5] *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 429 (Del. Ch. 2007).
[6] PSPA Preamble and § 8.1.
[7] Outotec and Preferred have their offices in Florida and Pennsylvania, respectively. PSPA Preamble.
[8] *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996); *Aramark Unif. & Career Apparel, Inc. v. Hunan, Inc.*, 757 N.W.2d 205, 209 (Neb. 2008); 9 U.S.C § 1 et seq. (the Federal Arbitration Act, or the "FAA").
[9] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995) (quotations and citation omitted).
[10] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

of the parties' intent to reserve the question of arbitrability for the arbitrator and not the court."[11] More specifically, however, as a federal court considering the same issue, wrote, "[where parties] attempt to settle [a dispute], otherwise arbitrable, by agreement, any disagreement as to the existence or effect of that settlement agreement would itself be a matter for the arbitrator to decide."[12]

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[11] *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (citing *Qualcomm Inc. v. Nokia Corp.,* 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Terminix Int'l Co. v. Palmer Ranch LP,* 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co.,* 398 F.3d 205, 208 (2d Cir. 2005); *Apollo Computer, Inc. v. Berg,* 886 F.2d 469, 472-73 (1st Cir. 1989); *and comparing Riley Mfg. Co. v. Anchor Glass Container Corp.,* 157 F.3d 775, 780 (10th Cir. 1998) (finding that the parties did not specifically intend to submit the question of arbitrability to an arbitrator despite a reference to the AAA Rules in the arbitration provision)).

This standard is consistent with Delaware case law. *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006) ("[W]e adopt the majority federal view that reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator."). The Delaware Supreme Court clarified that the federal standard applies "in those cases where the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability." *Id.* (citing language that met this test from, *e.g.*, *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1333 (11th Cir. 2005) ("any controversy or claim . . . arising out of or relating to the agreement.")).

Although the parties have not cited any Nebraska cases, the Court's cursory review found no indication that Nebraska arbitration law varies substantially from this standard.

[12] *Empl. Prot. Ass'n v. Norfolk & W. Ry. Co.,* 571 F.2d 185, 193 (4th Cir.1977) (interpreting an arbitration clause referring any "dispute or controversy . . . with respect to the interpretation or application of a provision of this agreement" to arbitration) (considering the Court's jurisdiction under the Railway Labor Act, 45 U.S.C. § 151 et. seq.); *Norfolk S. Ry. Co. v. Trasp. Commc'n Int'l Union*, 2004 WL 724548, at *5 (E.D. Va. Feb. 16, 2004) (exercising its jurisdiction under the Railway Labor Act to review an arbitration award and citing *Empl. Prot. Ass'n* in agreeing that the arbitrators "had authority to decide whether the settlement and waiver was valid").

The Court is satisfied that clear and unmistakable evidence demonstrate that the parties intended to grant the arbitrators the authority to determine questions of arbitrability. The PSPA both incorporates the AAA rules[13] and, through broad language encompassing "[a]ny claim, dispute or controversy arising out of or related to this Agreement,"[14] generally refers all controversies to arbitration.[15] Thus, the arbitrators chosen to resolve disputes arising out of the PSPA are empowered to determine the bounds of their own authority.

Guided by *Employees Protective Association*, the Court next concludes that the question as to whether the Settlement Agreement is valid at least arguably arises out of, or relates to, the PSPA. That is, a controversy over the validity of a settlement agreement purporting to settle an underlying dispute "relates to" the underlying dispute. Therefore, the parties here contractually agreed to grant the arbitrators the authority to determine whether the controversy is arbitrable, and, as a result, the Court lacks subject matter jurisdiction to address Preferred's claims.

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[13] PSPA §§ 8.3-8.4.
[14] *Id.* at §§ 8.1-4.
[15] *See Willie Gary, LLC*, 906 A.2d at 80 n.9 (citing cases incorporating language similar to, if slightly narrower than, that employed in the PSPA).

Accordingly, this action is dismissed without prejudice pending resolution of the arbitration process.[16]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[16] The Court notes that, should the arbitrators determine that the validity of the Settlement Agreement is arbitrable and if they ultimately find the agreement enforceable, the arbitrators' authority would terminate under §§ 6-7 of the Settlement Agreement. *See* Appx. to Def.'s OB at A-4. Enforcement of the Settlement Agreement, which contains no arbitration clause, would then be within the Court's subject matter jurisdiction.

Similarly, if the arbitrators were to determine that the validity of the Settlement Agreement is not an arbitrable question, the Court would then have subject matter jurisdiction to resolve the dispute.