UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6276

FRED PARKS, INC.,

Plaintiff-Appellant,

VERSUS

TOTAL COMPAGNIE FRANCAISE DES PETROLES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H-90-3058)

(December 15, 1992)

Before WILLIAMS, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Fred Parks, Inc. ("Parks"), appeals from its claims being referred to arbitration pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") and the Federal Arbitration Act, 9 U.S.C. §§ 201-208. Parks also challenges both this action being dismissed with prejudice, and the district court's award of attorneys' fees to the appellees concerning a motion for rehearing. On the arbitration

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

issue, we **AFFIRM**; we **VACATE** the dismissal with prejudice and the fees award.

I.

In April 1988, Parks entered into a Joint Operating Agreement ("JOA") with CSX Oil & Gas (Ecuador) Corporation ("CSX"), Clyde Petroleum (Ecuador), Ltd. ("Clyde"), and Hadson Ecuador, Inc. ("Hadson"), concerning an oil and gas exploration and development project in the Republic of Ecuador. The JOA incorporated the terms of a draft Service Contract that Parks had negotiated with Ecuador's state petroleum corporation, Corporacion Estatal Petrolera Ecuatoriana ("CEPE").[2]

The Service Contract, however, had not been executed at the time the JOA was executed. Moreover, the Ecuadorian government objected to the draft Service Contract because of the inclusion of a "take or pay clause", which apparently violated Ecuadorian law.[3] CEPE refused to execute the Service Contract; and, Clyde, Hadson, and CSX (and, eventually, defendant-appellee Total Compagnie Francaise des Petroles, purported successor to CSX's interests)[4] began negotiations with CEPE intended to resolve this dispute.

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[2] The draft Service Contract is not included in the record.

[3] The record does not reflect whether the objection was made before or after execution of the JOA, but it was apparently made in proximity to the JOA's execution.

[4] The parties dispute which entity assumed responsibility for CSX's obligations in this matter. Parks maintains that Total Compagnie "acquired CSX and succeeded to all [of its] rights and obligations". On the other hand, the appellees contend that CSX was acquired by Total Equateur, a wholly owned subsidiary of Total Compagnie.

Negotiations were unsuccessful; and, in June 1989, Parks was informed that the Service Contract would not be executed.

In August 1990, Parks filed suit in Texas state court against Total Compagnie, Clyde, Hadson, and Michael Phelan, former CSX Vice President. Parks alleged that the defendants had: (1) breached fiduciary obligations owed to it; (2) conspired to avoid their financial obligations under the JOA; conspired, through Phelan, to cover up their attempts to avoid those obligations; and, negotiated with CEPE in bad faith. Parks sought recovery of $26,000,000 in anticipated profits from the venture.

That September, the defendants removed this case to district court, asserting diversity jurisdiction and that Phelan (a Texas citizen, as is Parks) had been fraudulently joined for the sole purpose of defeating diversity. Parks moved to remand that October. In February 1991, the defendants supplemented their original removal notice, contending that the district court had original jurisdiction under 9 U.S.C. § 203, because Parks' complaint was subject to the JOA's arbitration provision, which fell under the Convention. In April 1991, the district court denied remand, concluding that the case had been properly removed under 9 U.S.C. §§ 202 and 205.

The defendants moved the district court, in June 1991, to refer the parties to arbitration under both 9 U.S.C. § 206 and the Convention, and to dismiss Parks' claims for lack of subject matter jurisdiction. The district court did so; and final judgment was entered on July 12, 1991. On July 23, Parks' moved for rehearing

on its motion for remand, but, in August, filed a notice of appeal. In November 1991, this court dismissed the appeal for lack of jurisdiction, because the district court had not ruled on the post-judgment motion. Later that month, the district court denied the motion for rehearing, and ordered Parks' to pay the defendants $1,000 for attorneys' fees associated with it. This appeal followed.

II.

At issue is whether the district court erred in (1) determining that it had subject matter jurisdiction under the Convention and the Arbitration Act, and, as a consequence, denying the motion to remand; (2) determining that Parks' claims were within the scope of the JOA's arbitration clause (included within the preceding issue); and (3) referring the parties to arbitration and dismissing Parks' claims with prejudice.[5]

A.

Congress, through the Arbitration Act, has implemented enabling legislation requiring federal courts to enforce the Convention. 9 U.S.C. § 201; *see* ***Sedco, Inc. v. Petroleos Mexican***

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[5] Parks also urges that the district court abused its discretion in awarding the attorneys' fees. In their brief, Total Compagnie, Clyde, and Hadson concede this issue "in the interests of judicial economy and in order to expedite this appeal" and "waive any claim for attorney fees awarded by the District Court". Accordingly, we **VACATE** the award.

Further, the defendants contend that Phelan is not a proper party to this appeal, because he was not served with process until after the district court had entered final judgment. Because we affirm the dismissal of Parks' claims, we do not reach this issue.

Nat'l Oil Co., 767 F.2d 1140, 1145 (5th Cir. 1985).[6] And, because actions falling under the Convention are deemed to arise under federal law, district courts have original jurisdiction over them. 9 U.S.C. § 203. Parks' contention that the Convention does not apply, and, therefore, that the district court lacked subject matter jurisdiction, is subject to *de novo* review. *E.g.*, ***Stena Rederi Ab v. Comision de Contratos del Comite***, 923 F.2d 380, 386 (5th Cir. 1991).

In considering the Convention's application, we are limited to the following inquiries:

> (1) is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;
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> (2) does the agreement provide for arbitration in the territory of a Convention signatory;
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> (3) does the agreement to arbitrate arise out of a commercial legal relationship;
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> (4) is a party to the agreement not an American citizen?

Sedco, 767 F.2d at 1144-45 (footnote omitted). Parks acknowledges that this is the requisite inquiry, and contends only that the first element is lacking.

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[6] The Convention is published as a note following § 201. "The Convention was passed in order to secure the right of arbitration in a commercial context among foreign and domestic parties." ***Sedco***, 767 F.2d at 1149. Its goal is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." ***Scherk v. Alberto-Culver Co.***, 417 U.S. 506, 520 n.15 (1974).

Regarding ***Sedco***'s first query, we must determine whether the arbitration provision in question is "broad" or "narrow". If the provision is broad -- one that appears to refer any or all disputes arising out of a contract to arbitration -- then the court compels arbitration, and the arbitrator determines whether the dispute falls within the provision. ***Id.*** at 1145 n.10; *see also* ***McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.***, 858 F.2d 825, 832 (2d Cir. 1988). If, on the other hand, the clause is narrow -- one that limits arbitration to specific types of disputes -- the court will not compel arbitration unless it concludes that the dispute at issue falls within the provision. ***Sedco***, 767 F.2d at 1145 n.10; *see also* ***McDonnell Douglas***, 858 F.2d at 832.

Article 14.3 of the JOA provides:

> In the event of a dispute or disagreement arising between any of the Parties with respect to one or more of the provisions of this Agreement which cannot be resolved by the agreement of Parties, or by a referee as provided for in this Agreement, the issue may be submitted by any concerned party to binding arbitration for settlement, with arbitration proceedings to be held in Houston, Texas, U.S.A. ....

Although the issue is a close one, we conclude that this clause is "narrow". It does not purport to send any and all disputes arising out of the JOA to arbitration, but, instead, only those "with respect to one or more provisions of" the JOA; words of limitation reflecting a narrower scope. As such, we must consider whether Parks' claims fall within the scope of article 14.3. The issue of whether an arbitration clause applies to a dispute "is a matter of contract interpretation and therefore is subject to *de novo* review

by this court." ***Neal v. Hardee's Food Systems, Inc.***, 918 F.2d 34, 37 (5th Cir. 1990).

Because of the "strong federal policy favoring arbitration", doubts concerning the scope of coverage of an arbitration clause are resolved in favor of arbitration. ***Id.*** "[W]hen confronted with arbitration agreements, we presume that arbitration should not be denied `unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue....'" ***Sedco***, 767 F.2d at 1145 (quoting ***Commerce Park of DFW Freeport v. Mardian Construction Co.***, 729 F.2d 334, 338 (5th Cir. 1984)). Moreover, "the emphatic federal policy in favor of arbitral dispute resolution ... applies with special force in the field of international commerce." ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.***, 473 U.S. 614, 631 (1985).[7]

The thrust of Parks' complaint is that the defendants damaged it by failing to negotiate the Service Contract with CEPE in good faith. In contending that its claims are not within the scope of article 14.3, Parks maintains that:

> The obligation to negotiate the Service Contract was separate and apart from any obligation arising under the Joint Operating Agreement. In fact, the JOA was subject to and contingent upon the finalization of the Service Contract. *There is no complaint at this time regarding the provisions of the Joint Operating Agreement.* Parks' claims are based upon Total's breach of its fiduciary duty to proceed with the negotiations of the Service

[7] In addition to Ecuador's state petroleum corporation, this matter involves corporations from France (Total Compagnie), Bermuda (Clyde), and the United States (Parks and Hadson).

> Contract with CEPE. Total also tortiously interfered with the bid guaranty contract which Parks had with CEPE by not proceeding with the negotiations on the Service Contract.

(Emphasis added.) (Record citations omitted.)[8]

Notwithstanding these contentions, however, the allegations in Parks' complaint that the defendants owed it fiduciary obligations expressly rest on the JOA:

> *By virtue of the JOA* and the assurances by Defendants, [Parks] entrusted to them the responsibility for proceeding diligently on the service contract. *Because of the provisions of the JOA that gave complete control to Defendants*, and because of the control over negotiation with CEPE also entrusted by [Parks] to Defendants, and the confidential relationship that existed between [Parks] and Defendants, they owed fiduciary obligations to [Parks] to use their best efforts to avoid loss of the tremendous opportunity represented by the service contract.

(Emphasis added.) Parks' complaint also alleges that the Defendants negotiated with CEPE in bad faith and engaged in a "conspiracy" to "kill the venture" which was "motivated by a desire to avoid the financial obligations they had undertaken pursuant to the JOA."

For example, JOA article 3.1j provides that the operator (CSX)

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[8] We find no merit in Parks' contention that "the JOA was subject to and contingent upon the finalization of the Service Contract." As noted, the JOA incorporated, and was subject to, the terms of the draft Service Contract. Further, the JOA provided that no changes could be made to the draft Service Contract without the written consent of all parties. Parks has pointed to no provision of the JOA that states it is "subject to and contingent upon" a finalized Service Contract, nor does a review of the JOA reflect any such limitation. In any event, the JOA provides that it became effective on the date of its execution, April 14, 1988.

> [had] full authority to do all things deemed necessary or desirable by it in the conduct of the business of the Venture, including, but not limited to, ... the following:
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> * * *
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> j. Take all appropriate steps to obtain, maintain in force, relinquish, renew and/or extend rights under the Service Contract, as directed by the Operating Committee ....

However, JOA article 9.6 states, in part:

> Parks further agrees never to challenge, in any manner, in any form, or otherwise claim damages relative to:
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> ...
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> (b) The good faith decisions, actions or in actions [sic] of the Operator and/or the other Parties relative to their performance under this Agreement and the Service Contract, including ... termination of the Service Contract (whether by Operator or by a government authority).

Parks' challenge to the defendants' good faith relative to CEPE's (a government authority) refusal to execute the Service Contract is a disagreement "with respect to" JOA article 9.6. Moreover, its claim for $26,000,000 in anticipated profits from the venture is, as noted in its complaint, subject to the JOA's provisions concerning the percentage of revenues to which Parks would have been entitled.

As noted, arbitration will not be denied unless we can say "with positive assurance" that JOA article 14.3 is not susceptible of an interpretation that would cover Parks' claims; we cannot. The dispute constitutes a disagreement "with respect to one or more" of the JOA's provisions. Because there is a written agreement to arbitrate the claims, the district court correctly

found that they fell under the Convention.[9] The district court, therefore, had original jurisdiction under 9 U.S.C. § 203; the motion to remand was properly denied. *See* 28 U.S.C. § 1441(a).

B.

Because the district court had jurisdiction under § 203, it also properly referred the parties to arbitration under § 206, which provides that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for". Parks contends that, even assuming arbitration is proper, this case should have been stayed pending arbitration, rather than dismissed with prejudice.

The Arbitration Act provides that, if a dispute in a pending lawsuit is subject to arbitration, the district court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement". 9 U.S.C. § 3. However, Parks' did not make such an application in district court. (Indeed, in its motion for rehearing, filed after entry of final judgment, Parks did not request a stay or object to the dismissal with prejudice.) Absent the application, we find no error in the district court's decision not to stay Parks' claims pending arbitration, but hold that the dismissal should be without prejudice.

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[9] As noted, Parks' does not dispute the other ***Sedco*** requirements. They are plainly met: the JOA provides for arbitration in the United States, a Convention signatory; it arises out of a commercial legal relationship; and, at least one of its parties (Clyde) is not an American citizen. 767 F.2d at 1144-45.

III.

For the foregoing reasons, we **AFFIRM** the judgment referring the parties to arbitration and dismissing Parks' claims. But, the dismissal is to be without prejudice; in that regard, the judgment is **VACATED**. And, the award of attorneys' fees associated with the motion for rehearing is **VACATED**. This case is **REMANDED** for entry of a judgment consistent with this opinion.

AFFIRMED IN PART; VACATED IN PART; REMANDED