UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1585
Summary Calendar

BOX CEMENT COMPANY,

Plaintiff/Counter-
Defendant-Appellant,

versus

HOLNAM, INC.,

Defendant/Counter-
Plaintiff-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(92-CV-2064-R)

(December 15, 1993)

Before POLITZ, Chief Judge, DAVIS and SMITH, Circuit Judges.

PER CURIAM:*

Box Cement Company appeals judgment and orders of the district court compelling arbitration of its dispute with Holnam, Inc. We affirm.

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*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Box Cement Company, a Texas corporation, and Crow Cement Company, a Texas limited partnership, were the two substantial limited partners in Box-Crow Cement Company, L.P., a Texas limited partnership. Box-Crow owned a multi-million dollar cement manufacturing plan in Midlothian, Texas. In May 1989 Holnam, Inc., a Delaware corporation, entered into four agreements with Box Cement, Crow Cement, and Box-Crow whereby Holnam agreed to make loans and advances to the partnership in return for an option to purchase the assets of the partnership, a share in proceeds received, and management authority over partnership operations. In addition to the Holnam loans the partnership secured financing from several banks.

The present dispute arises out of these agreements, primarily the management agreement. Holnam undertook operation of the Midlothian plant in May 1989. In September 1991 it gave notice of its intent to release its option to purchase. Under the agreements, the option release and termination of operations would become effective one year after notice.

In the intervening year Holnam communicated with the lending banks, seeking to purchase the partnership assets for significantly less than the option price. These communications allegedly suggested an imminent default by the partnership. Box Cement views these communications as violative of the management agreement and motivated by Holnam's desire to acquire the Midlothian plant for millions less than the option price.

Following Box Cement's complaint about the communications, Holnam initiated arbitration proceedings in New York. Box Cement filed the instant declaratory proceedings in which Holnam countered for an order compelling arbitration. The matter was referred to a magistrate judge whose recommendations were adopted by the trial court. The demands of Box Cement were rejected and the trial court ordered arbitration. Box Cement timely appealed.

Analysis

The essential issue on appeal is whether the agreements entered into by the parties compel arbitration over the dispute arising out of Holnam's communications with the lending banks. The district court answered this inquiry in the affirmative. We agree.

The parties recognize, as they must, that the national policy enunciated by the Congress, as approved and enforced by the courts, favors arbitration when the parties contractually agree to such.[1] This policy is manifested, in part, by the presumption of validity routinely assigned to arbitration provisions.

Box Cement asserts a conflict between the arbitration and jurisdiction clauses of the management agreements which purportedly vitiates the arbitration requirement. Box Cement maintains that the arbitration clause is trumped by the language of the jurisdiction clause which provides in relevant part that each party "irrevocably submits to the jurisdiction of any state or federal

[1] See, e.g., 9 U.S.C. §§ 2, 4; **Southland Corp. v. Keating**, 465 U.S. 1, 7 (1984); cases cited at **Speedee Oil Change Sys., Inc. v. State Street Capital, Inc.**, 727 F.Supp. 289, 290-91 (E.D.La. 1989).

court" in Dallas County "over any suit, action or proceeding arising out of or relating to this agreement." Box Cement places great stress on the word "irrevocably" in its vigorous contention that the jurisdiction clause requires that the arbitration clause be taken for naught.

Holnam reminds us that Texas precedents require the harmonizing of apparently inconsistent clauses whenever possible.[2] In doing so we give force and effect to both clauses. The parties, at the request of either, first must arbitrate disputes arising out of the agreements. Should litigation result therefrom, that litigation may be conducted in the state and federal courts in Dallas County, Texas. These two provisions are easily harmonized.

Box Cement alternatively contends that if we find the arbitration clause valid we should hold that by its terms[3] it bars arbitration of the dispute herein because it concerns the purchase price under the option agreement. We are not persuaded. The

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[2]See **Southland Royalty Co. v. Pan American Petroleum Corp.**, 378 S.W.2d 50, 57 (Tex. 1964) (requiring "a court to harmonize and thus to give meaning to all apparently conflicting provisions of a contract when this reasonably may be done"); **Coker v. Coker**, 650 S.W.2d 391, 394 (Tex. 1983).

[3]The agreement provides in paragraph XIV entitled "Remedies" in pertinent part as follows:

> At the discretion of [any of the parties], any dispute, controversy or claim arising out of or relating to the Holnam Agreements (except for any dispute relating to determination of the Purchase Price under the Option Agreement, shall be resolved in the manner set forth in Section 4(b) of such Option Agreement) may be settled promptly by arbitration conducted in the City of New York. . . .

agreement provides that disputes about the determination of the purchase price are to be decided by a designated accounting firm.[4] Were we to conclude that the allegedly impermissible communications between Holnam and the lender banks constituted such a dispute we would be bound to hold that a referral to the outside accounting firm was mandated. It cannot be gainsaid that an accounting firm is not an appropriate forum for the resolution of legal rights resulting from allegedly improper communications and dealings between Holnam and the lender banks. The instant dispute does not fall within the parameters of the exception to the arbitration agreement.

The judgment and orders of the district court are AFFIRMED.

[4]Section 4(b) designates the accounting firm of Ernst & Whinney.