**IN THE COURT OF CHANCERY OF THE STATE OF DELAWA
IN AND FOR NEW CASTLE COUNTY**

DELTA AND PINE LAND COMPANY, D&PL INTERNATIONAL TECHNOLOGY CORP. and D&M INTERNATIONAL, LLC,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 1970-N**
MONSANTO COMPANY,	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: April 4, 2006
Date Decided: May 24, 2006

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NOBLE, Vice Chancellor

I.

Defendant Monsanto Company ("Monsanto") owns or controls patents for the production of genetically-modified cotton plants that are resistant to certain insects (the "Technology"). Through the Option Agreement, Monsanto granted Plaintiff Delta and Pine Land Company ("D&PL") the option to acquire an exclusive license for its Technology in certain countries outside the United States, including Brazil.[1] By the License Agreement,[2] Monsanto granted an exclusive license to D&PL for use of the Technology in Brazil.

The Brazilian government did not approve use of cottonseed produced with the Technology until March 2005. Before then, however, cottonseed produced with the Technology had been brought into Brazil without authorization. Because one seed can yield 100 seeds and those seeds produce plants with the beneficial characteristics conferred by the Technology, Monsanto's intellectual property rights in the Technology are threatened by the "bootleg" seed.

In an effort to protect those rights, Monsanto developed its indemnity collection system ("ICS"), which involves the testing of harvested cotton at cotton gins and the collection of a penalty from growers who lack evidence of an appropriate license for the Technology.

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[1] Option Agreement effective as of the 2nd day of February, 1996, between Monsanto Company and Delta and Pine Land Company. Compl. Ex. A. References to D&PL include its related entities, Plaintiffs D&PL International Technology Corp. and D&M International, LLC. For present purposes, there is no reason to distinguish among the D&PL entities.

[2] Bollgard ® Gene License Agreement, dated as of June 7, 2002. Compl. Ex. B.

D&PL objects to implementation of the ICS out of a fear that the ICS would become an alternative for growers who would then not acquire the seed (or the necessary license) from D&PL. In essence, according to D&PL, the ICS will deny it the benefits of its exclusive license agreement in Brazil because it will not share in the funds collected under the ICS. Before the Court is the question of whether the parties have agreed to resolve their dispute over implementation of the ICS through binding arbitration. D&PL maintains that it is entitled to arbitrate its dispute; Monsanto asserts that it is under no duty to arbitrate the dispute and, instead, is entitled to have it resolved in the courts.

II.

The License Agreement, at § 14.11, provides in part:

> 14.11 DISPUTE RESOLUTION:
>
> (a) Any claim, dispute, difference or controversy between the parties arising out of, or relating to, this Agreement which cannot be settled by mutual understanding between the parties (a "DISPUTE") shall be submitted within thirty (30) days of such DISPUTE to a panel consisting of a senior executive nominated by each party (the "PANEL"). Such PANEL shall meet and use reasonable efforts to resolve said Dispute.
>
> (b) If the DISPUTE cannot be resolved within thirty (30) days of submission to the PANEL, then the DISPUTE shall be finally settled by binding arbitration in accordance with the provisions of Section 10.11 of the OPTION AGREEMENT.

The Option Agreement, at § 10.11, provides in part:

> 10.11 DISPUTE RESOLUTION:
>
> (a) Any claim, dispute, difference or controversy between the parties not relating to issues involving patent rights arising out of, or relating to, this Agreement which cannot be settled by mutual understanding between the parties (a "Dispute") shall be submitted within thirty (30) days of such Dispute to a panel consisting of a senior executive nominated by each party (the "Panel"). Such Panel shall meet and use reasonable efforts to resolve said Dispute.
>
> (b) If the Dispute cannot be resolved within thirty (30) days of submission to the Panel, then any party may invoke the following arbitration rights:
>
> (1) The Dispute shall be referred to arbitration under the rules of the American Arbitration Association (AAA) to the extent that such rules are not inconsistent with the provisions of this Subsection 10.11. Judgment upon the award of the arbitrators may be entered in any court having jurisdiction thereof or application may be made to such court for a judicial confirmation of the award and an order of enforcement, as the case may be. . . .
>
> (2) The independent arbitration panel shall consist of three (3) independent arbitrators, one (1) of whom shall be appointed by each party involved in the Dispute. In the event that one (1) party does not designate an arbitrator, the other party(ies) may request the Executive Secretary of the AAA to designate an arbitrator for such party. The two (2) arbitrators thus appointed shall choose an additional arbitrator so that the arbitration panel shall consist of three (3) arbitrators; provided, however, that, if the arbitrators selected are unable to agree on the appointment of such additional arbitrator, any of the selected arbitrators may petition the Executive Secretary of the AAA to make the appointment of the additional arbitrator; and
>
> (3) The place of arbitration shall be Memphis, Tennessee.

> (c) Pending resolution of any Dispute, each party involved in the dispute shall make every reasonable effort to minimize adverse economic consequences to the parties under this Agreement and the other RELATED AGREEMENTS which would result from any delays caused by attempts to resolve the Dispute. Such reasonable effort shall include, without limitation, continued performance of relevant obligations under a reservation of rights in lieu of termination and nonperformance, and nothing contained in this Subsection 10.11 shall serve to preclude any party from its right to seek any other remedy at law.[3]

III.

On February 17, 2006, D&PL demanded that Monsanto "cease and desist" from implementing the ICS. Monsanto, in turn, filed suit on February 22, 2006, in the Circuit Court for St. Louis County, Missouri, seeking, *inter alia*, declaratory relief confirming that it is entitled to implement the ICS and that the ICS would not violate the License Agreement. On March 1, 2006, D&PL filed its action in this Court.[4] It sought an order compelling the parties to arbitrate their dispute and an injunction against implementation of the ICS until the dispute could be resolved in the arbitration forum. On March 17, 2006, this Court stayed, under the *McWane* doctrine,[5] that portion of this action by which D&PL sought injunctive relief against implementation of the ICS, but it allowed the effort to secure an order

[3] Both the License Agreement (at ¶ 14.9) and the Option Agreement (at ¶ 10.9) provide for interpretation under Delaware law.

[4] The License Agreement (at § 14.11) provides for submission of any dispute for resolution to a panel consisting of a senior executive from each side prior to arbitration. D&PL sought to satisfy this requirement by its letter to Monsanto, dated March 10, 2006. *See* Def.'s Ans. Br. in Opp. to Pls.' Mot. for Summ. J. at Ex. 2.

[5] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng. Co.*, 263 A.2d 281 (Del. 1970).

compelling arbitration to proceed because of its prediction that Missouri courts would decline to exercise subject matter jurisdiction over that claim. Thereafter, D&PL gave notice to Monsanto of its intent to seek a preliminary injunction against the ICS in the Missouri litigation, but it has not pursued that effort. On March 27, 2006, D&PL filed its demand for arbitration of the dispute with the American Arbitration Association.[6]

IV.

D&PL has moved for summary judgment; the granting of that motion would require the parties to arbitrate their dispute. By Court of Chancery Rule 56(c), summary judgment may be granted if the moving party meets its burden of establishing "that there are no genuine issues of material fact and . . . [it] is entitled to judgment as a matter of law."[7]

V.

Although public policy favors resolution of disputes through arbitration,[8] "[a]rbitration is a matter of contract, and a party cannot be required to submit to

[6] D&PL's demand for arbitration requests the arbitrators to resolve the question of the arbitrability of the dispute. Neither side, however, has urged this Court to defer to the arbitrators the question of arbitrability.

[7] *See Newtowne Village Serv. Corp. v. Newtowne Rd. Dev. Co.*, 772 A.2d 172, 175 (Del. 2001). No material facts are in dispute.

[8] *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *James & Jackson, LLC v. Willie Gary, LLC*, 2006 WL 659300 (Del. Mar. 14, 2006).

arbitration any dispute which [it has] agreed not to submit."[9] The question of whether parties have agreed to submit their dispute to arbitration is governed by "basic principles of contract interpretation."[10] "The primary goal of contract interpretation is to 'attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they contracted.'"[11] The Court's first task is to determine, after a review of the entire agreement, whether the intent of the parties can be ascertained from the expressed words they chose or, in the alternative, whether the agreement is ambiguous.[12] If the terms of the agreement are "clear on their face," the Court will give them the meaning that would be ascribed by a reasonable third party. If the language is ambiguous, then the Court may consider extrinsic evidence. Language is ambiguous if it is "fairly susceptible of different interpretations . . . ."[13]

VI.

The License Agreement, under which the differences between the parties over the ICS have arisen, plainly evidences the parties' intent that their disputes

[9] *Willie Gary, LLC v. James & Jackson, LLC*, 2006 WL 75309, at *5 (Del. Ch. Jan. 10, 2006) (quoting *Bonham v. HBW Holdings, Inc.*, 2005 WL 3589419, at *9 (Del. Ch. Dec. 23, 2005)), *aff'd*, 2006 WL 659300 (Del. Mar. 14, 2006).
[10] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 156 (Del. 2002).
[11] *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003) (quoting *U.S. West, Inc. v. Time Warner, Inc.*, 1996 WL 307445, at *9 (Del. Ch. June 6, 1996)).
[12] *See, e.g., In re Explorer Pipeline Co.*, 781 A.2d 705, 713 (Del. Ch. 2001).
[13] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). Monsanto argues that the agreements unambiguously make arbitration discretionary with the parties. Alternatively, Monsanto argues that the agreements are ambiguous as to whether arbitration is mandatory. Monsanto, however, has not identified any extrinsic evidence that would be helpful in resolving any ambiguity which may exist.

would be resolved in the arbitration forum. It provides that any Dispute[14] "shall be finally settled by binding arbitration . . . ." To this point, the language is unequivocal. The parties, however, did not stop there. Instead, they also agreed that the dispute "shall be finally settled by binding arbitration in accordance with the provisions of § 10.11 of the Option Agreement." Thus, it is necessary to look beyond the License Agreement, to the Option Agreement, which provides the grounds for Monsanto's arguments that it is not obligated to submit to arbitration any dispute that it may have with D&PL regarding implementation of the ICS.[15]

VII.

First, the Option Agreement limits its definition of "dispute" to any controversy "not relating to issues involving patent rights." Monsanto argues that the ICS will protect its patent rights and, thus, the dispute necessarily addresses "issue[s] involving patent rights." In a sense, every disagreement among the

[14] The parties, in the License Agreement (at § 14.11), defined a "Dispute" as "[a]ny claim, dispute, difference or controversy between the parties arising out of, or relating to [the license] agreement which cannot be settled by a mutual understanding between the parties." Monsanto does not dispute that the dispute over implementation of the ICS is a Dispute as defined in the License Agreement.

[15] The interplay between the Option Agreement and the License Agreement is significant. The binding arbitration of the License Agreement is to be "in accordance with" the provisions of § 10.11 of the Option Agreement. Monsanto, citing *Penn Mutual Life Ins. Co. v. Oglesby*, 695 A.2d 1146 (Del. 1997), a matter involving the interpretation of an insurance policy, seeks to equate the phrase "in accordance with" to "subject to." Monsanto then suggests that the arbitration provision of the License Agreement is subordinate to and controlled by the Option Agreement. The drafters could have chosen the phrase "subject to"; they did not. Instead, they chose "in accordance with," a phrase instructing readers to read the agreements together and not with one controlling the other. More importantly, "in accordance with" is a phrase that, by its plain meaning in this context, links the duty to arbitrate set forth in the License Agreement with the process for arbitration set forth in the Option Agreement.

parties under the License Agreement or the Option Agreement involves patent rights because, but for those patent rights, there would be no agreements. The relationship of the parties was established for the purpose of marketing seeds created with the use of the Technology. Accordingly, a broad reading of the patent rights exclusion would subsume the parties' intent to arbitrate any issue. D&PL does not contest the validity of any of Monsanto's patent rights. Instead, D&PL seeks protection of its commercial rights under the License Agreement. As such, the exclusion of disputes relating to issues involving patent rights from the scope of the arbitration obligation does not restrict D&PL's right to seek arbitration of the dispute involving implementation of the ICS.[16]

Second, Monsanto directs the Court to § 10.11(c) of the Option Agreement which provides that "nothing contained in this Subsection 10.11 shall serve to preclude any party from its right to seek any other remedy at law," and argues that this provision eviscerates D&PL's right to mandatory arbitration otherwise apparently established in the License Agreement. Initially, the License Agreement refers to the Option Agreement in order that the "binding arbitration" may be "in accordance with the provisions of § 10.11 of the Option Agreement." The duty to arbitrate is established through the License Agreement. It is not necessarily any

[16] It may be worth noting in passing that this distinction is consistent with the broad understanding that disputes involving patent claims are within the exclusive jurisdiction of the federal courts, *see* 28 U.S.C. § 1338(a), but that state courts have jurisdiction to resolve disputes arising out of licensing agreements.

provision of the Option Agreement that would require arbitration here. Thus, the limiting language in § 10.11(c), while it might limit other requirements of the Option Agreement, does not necessarily limit the scope of the arbitration provision in the License Agreement. Moreover, to read the exclusionary language as Monsanto does would deprive the arbitration provision of the License Agreement of any substance. It is, of course, a familiar principle that contracts must be interpreted in a manner that does not render any provision "illusory or meaningless."[17] The exclusion allows a party "to seek any other *remedy* at law." There are remedies to which a party may be entitled and which cannot be provided—either substantively or in timely fashion—by the arbitration process. Attachment and comparable procedural devices, such as lis pendens (a device not likely to benefit the parties here), may be within the scope of the exclusionary language.[18] In short, it is possible to have a mandatory arbitration provision and, at the same time, give some meaning to the exclusionary language. The obverse, however, is not true. If the exclusionary language is to be read as suggested by

[17] *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001). This also captures the notion that courts must consider the contract "in its entirety" and seek to reconcile all of the provisions of the agreement. *In re Cencom Cable Income Partners, L.P. Litig.*, 2000 WL 640676, at *5 (Del. Ch. May 5, 2000).

[18] *Cf. Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 429 (Mo. 2003). Monsanto contends that its application for declaratory relief in the Missouri action seeks a comparable, specific remedy. The determination which Monsanto hopes to obtain in those proceedings, however, could be accomplished through the arbitration process. Moreover, almost any dispute can be characterized in a fashion that would allow for declaratory relief, a proposition that would vitiate any provision calling for mandatory arbitration.

Monsanto, the mandatory arbitration provision of the License Agreement would be of no moment. To read the License Agreement, which clearly anticipates mandatory arbitration, as incorporating a dangling exclusionary clause from the Option Agreement and, thus, depriving all parties of any right to mandatory arbitration would not, and could not, be consistent with the parties' shared expectations when they entered into the License Agreement several years after entry into the Option Agreement.[19] Thus, the exclusionary language of § 10.11(c) of the Option Agreement does not preclude D&PL from insisting upon mandatory arbitration of its dispute with Monsanto over implementation of the ICS.[20]

Finally, Monsanto notes differences in the words chosen by the drafters of the arbitration provisions of the two agreements. Both agreements require (by

[19] This analysis may be more complicated than necessary. The exclusionary language only limits the range of § 10.11 of the Option Agreement; the duty to arbitrate at issue here emanates from the License Agreement.

[20] This conclusion is supported by two well-established principles, neither of which conflicts with the Court's function to apply basic contract principles in determining whether or not the parties agreed to arbitrate their dispute: (1) "the policy in favor of arbitration requires that doubts regarding whether a claim should be arbitrated, rather than litigated, be resolved in favor of arbitration," *Willie Gary LLC*, 2006 WL 75309, at *5, and (2) "[i]n the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960); *see also Worthy v. Payne*, 1998 WL 82992, at *1 (Del. Ch. Feb. 12, 1998).

The Court need not resolve the question of whether the initial clause of § 10.11(c) of the Option Agreement—"[p]ending resolution of any Dispute"—modifies the exclusionary language of the final clause of the last sentence of that subsection. The Court notes, however, that a reasonable interpretation of the language and structure of subsection (c) would suggest that the subsection was intended only to set forth the rights of parties while resolution of a dispute is pending—*i.e.*, during arbitration.

using the word "shall") that disputes initially be submitted for senior executive review. If that fails, the next step, arbitration, is implemented under different language. Under the License Agreement, the "dispute shall be finally settled by binding arbitration," but, under the Option Agreement, "any party *may* invoke the . . . arbitration rights." This distinction, Monsanto argues, gave it the choice of whether to arbitrate or not. In essence, Monsanto contends, that as the first to file for either arbitration or judicial relief, it had the choice of forum for dispute resolution.[21] If the parties had addressed arbitration only through the Option Agreement, Monsanto's argument might have had some heft. The Option Agreement, however, should not be read in isolation. As with application of § 10.11(c) of the Option Agreement, the use of "may" in § 10.11(b) of the Option Agreement cannot be read to defeat the clear intent of the parties to submit disputes under the License Agreement to binding arbitration. Moreover, by § 10.11(b) of the Option Agreement, "any party" is entitled to arbitration.[22] Monsanto's reading of § 10.11(b) denies this choice to D&PL. Furthermore, that "any party" may invoke arbitration refutes Monsanto's contention that it is entitled to litigate the dispute because it filed first.

[21] Monsanto does not explain why it could file the Missouri action in compliance with § 10.11 of the Option Agreement without first having gone through the process of senior executive review envisioned by § 10.11(a) of that agreement.

[22] By § 10.11(b)(1) of the Option Agreement, once a party exercises its right to "invoke" arbitration, "[t]he dispute shall be referred to arbitration . . . ."

In summary, the License Agreement and the Option Agreement express the parties' shared intention that disputes under the License Agreement, such as their dispute involving the ICS, be submitted to binding arbitration.[23]

VIII.

A party who has "actively participated in a lawsuit or taken other action inconsistent with the right to arbitration"[24] will be deemed to have waived its right to insist upon binding arbitration. The "public policy favoring arbitration," however, results in a "strong presumption against waiver."[25] Monsanto argues that D&PL waived its right to arbitration through its conduct both in this Court and in the Missouri action. In this action, it sought a preliminary injunction against implementation of the ICS pending arbitration. Although expedited proceedings are available in the arbitration forum,[26] the seeking of interim injunctive relief from a court may be necessary in order to allow for a viable arbitration remedy. Indeed, D&PL's intentions were clearly set forth in the "Wherefore" clause of its complaint: "to preserve its rights pending arbitration . . . until such time as the Dispute is resolved by the alternative dispute resolution proceedings provided in

[23] Monsanto contends that any such conclusion would be in conflict with this Court's decision in *Willie Gary LLC*. *See* 2006 WL 75309. There, unlike here, the Court was confronted with claims that fell within the scope of the carve-out from the arbitration obligation that affirmatively allowed and authorized parties to seek injunction, specific performance, and dissolution in the courts.

[24] *Falcon Steel Co. v. Weber Eng'g Co., Inc.*, 517 A.2d 281, 288 (Del. Ch. 1986).

[25] *Town of Smyrna v. Kent County Levy Court*, 2004 WL 2671745, at *3 (Del. Ch. Nov. 9, 2004).

[26] *See* American Arbitration Association Rules R-34(a), -43(a)-(b).

the Agreements." This express purpose is inconsistent with the notion of waiver of a right to arbitrate and, in effect, disclaims litigation as the final pathway. In the Missouri action, D&PL gave notice of its intent to seek interim injunctive relief and went as far as scheduling an opportunity to be heard.[27] Such preliminary efforts, however, simply do not constitute the "active participation" or "inconsistent action" required to demonstrate a waiver of the right to arbitrate. Therefore, D&PL has not waived its right to arbitrate its dispute with Monsanto.

IX.

Accordingly, for the foregoing reasons, D&PL is entitled to summary judgment on its claim that Monsanto is bound to arbitrate the dispute involving implementation of the ICS. Counsel for the parties are requested to confer and to submit an order to implement this memorandum opinion.[28]

[27] *See* Mo. R. CIV. P. 92.02(c).

[28] Because there is no reason to believe that Monsanto will not comply with the terms of this Court's order, there is no current need to enjoin it from proceeding with the Missouri action.