IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KERR-McGEE CHEMICAL, LLC, a Delaware limited liability company, and KERR-McGEE CHEMICAL WORLDWIDE, LLC, as successor to KERR-McGEE CORPORATION, a Delaware Corporation, Plaintiffs, v. KEMIRA PIGMENTS OY, a Finnish private limited liability company and KEMIRA OYJ, a Finnish public limited liability company, Defendants.	CIVIL ACTION FILE NO. 03-191-GMS

Allen M. Terrell, Jr., and Anne Shea Gaza of RICHARDS, LAYTON & FINGER, Wilmington, Delaware, and Peter J. Nickles, Steven J. Rosenbaum and Elie Honig of COVINGTON & BURLING, Washington, D.C., Attorneys for Plaintiffs.

Edward M. McNally and Michael A. Weidinger of MORRIS, JAMES, HITCHENS & WILLIAMS, Wilmington, Delaware, and Daniel J. King and Brian A. White of KING & SPALDING, Atlanta, Georgia, Attorneys for Defendants.

MEMORANDUM OPINION

October 7, 2003
Wilmington, Delaware

SLEET, District Judge.

I. INTRODUCTION

Presently before this court is the defendants' motion to compel arbitration. The question presented is whether the court has jurisdiction over a fraud claim purportedly excluded from the coverage of an arbitration agreement between the parties. For the reasons expressed below, the court will grant the defendants' motion to compel arbitration and dismiss the plaintiffs' claims.

The plaintiffs Kerr-McGee Chemical LLC and Kerr-McGee Chemical Worldwide (collectively, "Kerr-McGee") filed a complaint with the court the day after they initiated arbitral proceedings at the London Court of International Arbitration (LCIA). They asserted breach of contract and indemnity claims. The plaintiffs later amended their complaint to include an additional count alleging fraud (the "fraud claim"). In the present motion, filed on July 11, 2003, the defendants Kemira Pigments OY and Kemira OYJ (collectively, "Kemira") asked the court to compel arbitration pursuant to an arbitration agreement and to dismiss or stay the immediate action. (D.I. 25 and 26). The plaintiffs opposed the motion. (D.I. 34). The court concludes that the fraud claim is arbitrable. Consequently, the court will issue a separate order granting the defendants' motion to compel arbitration and dismissing the pending action.

I. BACKGROUND.

The present action arose out of a stock purchase transaction of a chemical plant in Savannah, Georgia, between the plaintiffs as purchasers and the defendants as sellers. (See Stock Purchase Agreement, D.I. 27). The contract, memorialized by a Stock Purchase Agreement (the "Agreement"), was dated February 13, 2000, and signed by both parties. The Agreement contained, inter alia, a broad arbitration clause, a "Jurisdiction and Consent to Service" clause, and an

"Exclusive Remedies" clause. (Da53, 57, 58).[1] In dispute is the interpretation of these provisions, and their effect on the scope of the arbitration clause.

Before addressing this issue, it is necessary to recap the events that led up to it. As stated above, the parties entered into the agreement to purchase the chemical plant on February 13, 2000, and closing took place shortly thereafter. (T4-1 to -5).[2] Almost one-and-one-half years later,[3] on September 28, 2001, the plaintiffs Kerr-McGee, then represented by both in-house counsel and an outside law firm, sent a letter to the defendants alleging various breaches of warranties and representations. *Id.*; Da287 to 290. The parties attempted to resolve the dispute and engaged in an informal exchange that took place over the course of the next year-and-one-half. (T5-10 to -11).

The informal negotiations were unsuccessful and, ultimately, on February 11, 2003, Kerr-McGee initiated arbitral proceedings against Kemira alleging claims for indemnification and breach of contract at the LCIA pursuant to the arbitration clause. (Da549 to 553). On February 12, 2003, fearful that the statute of limitations would preclude any breach of contract claims, Kerr-McGee also filed a complaint in this court alleging substantially the same. (D.I. 1). However, Kerr-McGee's then counsel acknowledged that it filed the complaint merely as a precaution to avoid the running of the statute of limitations, and, out of courtesy and a genuine desire to resolve the dispute amicably, indicated that Kerr-McGee would not effectuate service at that time. (Da545). Continued

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[1]Da = Defendants' appendix. Da53 means defendants' appendix, page 53. Defendants' appendix is contained in D.I. 27.

[2]T = transcript of scheduling conference on September 5, 2003, in which the parties argued the motion to compel arbitration. The citation refers to transcript, page 4, lines 1 through 5.

[3]The eighteen-month time period is significant because the agreement provided an eighteen month limitation on bringing certain indemnification claims. Da49, ¶ (I).

negotiations proved unsuccessful and the parties began to discuss how to proceed with the arbitration. (T6-12 to -22).

Then, on June 4, 2003, Kerr-McGee, under new representation, filed an amended complaint. (D.I. 3). In the amended complaint, Kerr-McGee reaffirmed its claims for indemnification and of breach of contract, and added an additional count alleging fraudulent misrepresentation. (D.I. 3, p. 20). This time, the plaintiffs served the complaint. (D.I. 3).

The defendants filed the present motion to compel arbitration and to dismiss or stay the case. (D.I. 26). The plaintiffs conceded that it is proper to arbitrate the breach and indemnification claims, but asserted that this court must retain jurisdiction over the fraud claim. (D.I. 34).

II. DISCUSSION.

The issue before the court is whether to compel arbitration of the fraud claim. Pursuant to the plain language of the Agreement, the court concludes that the fraud claim is arbitrable. The Agreement contained three clauses relevant to this dispute. They include an arbitration clause, an exclusive remedies clause, and a jurisdiction and consent to service clause.

The arbitration clause reads,

> Any controversy, claim or question of interpretation arising out of or relating to this Agreement or the breach thereof shall be finally settled under the Rules of the London Court of International Arbitration (the "Rules") by three arbitrators appointed in accordance with the Rules and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction. The award rendered by the arbitrators shall be final and binding on the parties and not subject to further appeal. The arbitrators shall have the authority to award any remedy or relief available under applicable laws, including, without limitation, specific performance of any obligation created under this Agreement, the awarding of punitive damages, the issuance of injunctive or other provisional relief, or the imposition of sanctions for abuse or frustration of the arbitration process. The place of arbitration shall be London and the proceedings shall be conducted

> in the English language.

(Da58, Section 9.16).

The exclusive remedies or "carve out" provision reads,

> If the Closing occurs, the provisions of this Article III [entitled "Indemnification"] and Sections 9.11 [regarding the specific performance remedy] and 9.16 [the arbitration clause] set forth the exclusive rights and remedies of the parties hereto to seek or obtain damages or maintain equitable remedies with respect to matters arising under or in connection with this Agreement and the transactions contemplated hereby; provided, however, that notwithstanding anything in this Section 8.7 to the contrary, *this provision shall not prevent or constitute a waiver of any claim based on the fraud or willful intentional misconduct* or gross negligence of any of the Seller, Kemira, the Parent, the Company, the Buyer or any of their respective Employees, Affiliates, or representatives.

(Da53, Section 8.7 (emphasis added)).

The jurisdiction and consent to service provision reads,

> Each of the parties hereto (a) agrees that any suit, action or proceeding with respect to this Agreement or the transaction contemplated hereunder may be brought solely in the state or federal courts of Delaware; (b) consents to the exclusive jurisdiction of each such court in any suit, action or proceeding; (c) waives any objection which it may have to the laying of venue in any such suit, action or proceeding in any such court; and (d) agrees that service of any court paper may be made pursuant to the provisions of Section 9.3 ["Notices"] or in such a manner as may be provided under applicable laws or court rules governing service of process.

(Da57, Section 9.8).

In brief, Kemira, the proponent of the motion to compel arbitration, argues that (1) the arbitration provision is valid and encompasses all of Kerr-McGee's claims, (2) Kerr-McGee re-affirmed its consent to arbitrate when it initiated the proceedings at the LCIA, and (3) the court should stay or dismiss the present action pending the outcome of the binding arbitration. (D.I. 26,

page 3). Kerr-McGee counters that (1) the progression of negotiations leading up to the final draft of the agreement reveals that the parties intended to "carve out" fraud claims through the exclusive remedies provision, Section 8.7 of the Agreement, from the scope of the arbitration clause, (2) Kemira's assertion that the exclusive remedies provision simply preserved the parties' right to bring fraud claims at all is inconsistent with the language in the agreement and the intent of the parties, (3) Kemira's argument that Kerr-McGee waived its right to object to the arbitration because it initiated the proceedings is unsupported by the law, and (4) the request to stay the proceedings pending the outcome of arbitration should be denied.

Before a court can compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2003), the court must determine (1) whether the parties entered into a valid arbitration agreement and (2) whether the relevant dispute is arbitrable, meaning that it falls within the language of the arbitration agreement. *See John Hancock Mutual Life Insurance Co. v. Olick*, 151 F.3d 132, 137 (3d Cir. 1998) (stating that where a dispute regarding an arbitration agreement is brought before a district court, the scope of the court's authority to become involved is defined by the FAA. *Id.* at 136-37).

Kerr-McGee does not attack the validity of the arbitration agreement, but it does assert that the fraud claim falls outside the contours of that agreement. Because the scope of the arbitration agreement is at issue, the court may "'engage in a limited review to ensure that the dispute is arbitrable'" and, if appropriate, enter an order to compel or enjoin arbitration. *Id.* (quoting *Painewebber v. Hartman*, 921 F.3d 507, 511 (3d Cir. 1990)). The court concludes that the Agreement and the within arbitration clause reflect the parties' intention to submit fraud claims to arbitration.

A. Is the fraud claim arbitrable?

The arbitrability issue turns on the meaning of the exclusive remedies provision (Section 8.7) of the Agreement. The plaintiffs stipulated that the breach and indemnity claims fall within the scope of the arbitration agreement, but they contend that Section 8.7 exempts the fraud claim from the coverage of the arbitration clause. To the contrary, Kemira argues that Section 8.7 articulated the parties' intention to preserve their right to assert fraud claims, but did not remove fraud claims from the domain of the arbitration clause. The court finds Kemira's interpretation to be consistent with the objective intent of the parties. Kerr-McGee's assertion is unsupported by the language of the Agreement and this circuit's policy favoring arbitration.

1. It is well settled that federal and Delaware public policy favor arbitration where the scope of an arbitration agreement is ambiguous and in dispute.

To determine "whether the parties agreed to arbitrate a certain matter . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."[4] *First Options of Chicago v. Kaplan* 514 U.S. 938, 945 (1995). Here, the parties designated Delaware state law to govern the contract.[5] Delaware state law provides that if the contract is unambiguous it should be given effect as written and the court need not interpret it or explore the parties intent. *Gentile v. Single Point Financial, Inc.*, 788 A.2d 111, 113 (Del. 2001); *See also Continental Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1236 (Del. Ch. 2000) ("Where the parties have created an unambiguous integrated written statement of their agreement the clear meaning rule instructs courts

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[4]In *First Options*, the applicable state law required "the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration." 514 U.S. 938, 944 (1995).

[5] *See* Stock Purchase Agreement, Section 9.10 (entitled "Governing Law").

to enforce the plain meaning of contractual language as understood by a hypothetical third party"). But, where an ambiguity exists concerning the arbitrability of a dispute, it should be interpreted in favor of arbitration. *See Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability"). The Third Circuit follows the maxim that all doubts should be resolved in favor of arbitration. *See Sharon Steel Corporation v. Jewell Coal & Coke Co.*, 735 F.2d 775, 778 (1984), and *Stateside Machinery Co. v. Alperin*, 591 F.2d 234, 240 (3d Cir. 1979) ("doubtful issues regarding the applicability of an arbitration clause are to be decided in favor of arbitration"); *see also Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 186 (3d Cir. 1998) (adopting the language of the Tenth Circuit in *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 798 (10th Cir. 1995): "'to acknowledge the ambiguity is to resolve the issue, because all ambiguities must be resolved in favor of arbitrability'").

In *Sharon Steel* the Third Circuit reversed the district court's denial of a motion to compel arbitration. There, the district court interpreted the contract between the parties and found that the disputed issue was outside the scope of the arbitration clause. *Sharon Steel*, 735 F.2d at 778. On appeal, the Third Circuit held that although the district court's interpretation of the contract was reasonable, it was inappropriate for the court to make it. *Id.* The Third Circuit reasoned that where the proponent of the motion to compel arbitration has stated a "plausible" claim that the dispute is arbitrable, "interpretation [of the contract] should [be] passed on to the arbitrator." *Id.* Further, the court espoused the standard that "'an order to arbitrate . . . should not be denied unless it may be said *with positive assurance* that the arbitration clause is not susceptible of an interpretation that covers

the asserted dispute.'" *Id.* (emphasis added) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). Moreover, if there is ambiguity, "a court should construe ambiguous language against the interest of the party that drafted that language." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *see Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 912 (Del. 1989) (stating "If there is an ambiguity in the terms of the contract, that ambiguity will be resolved against the party who drafted the contract").

Delaware public policy also favors arbitration. *See Karish v. SI Int'l, Inc*, C.A. No. 19501, 2002 Del. Ch. LEXIS 77, at *12 (Del. Ch. June 24, 2002) (quoting *Bayless v. Davox Corp*., C.A. No. 17560, 2000 Del. Ch. LEXIS 35, at *35 (Del.Ch. Mar. 1, 2000)).

a. The Agreement presents no ambiguity on its face.

The plain language of the integrated Agreement is unambiguous in its mandate that the parties arbitrate claims based on fraud.[6] Section 8.7 clearly states that the parties retain the right to raise fraud claims, not that they retain the right to raise fraud claims outside the arbitral forum. Further, given that Section 8.7 is situated within Article VIII of the Agreement entitled "Indemnification," and its purpose is to limit available remedies, it makes sense that the parties would insert language that preserves their ability to assert claims based on fraud and other types of misconduct.

Kerr-McGee has acknowledged the breadth of the arbitration clause. Thus, Kerr-McGee submits that given its all-encompassing scope, it would have been understood that fraud claims were arbitrable. As a result, Kerr-McGee maintains that Kemira's interpretation renders the fraud claim

[6]The integration clause limits the court's review to the four corners of the document. (Da 57, Section 9.9).

language superfluous. The court rejects this contention. Language preserving the rights of the parties to raise claims based on fraud is not superfluous when situated, as here, within an exclusive remedies provision. Moreover, this conclusion is consistent with the sentiment conveyed by the plain language of Section 8.7.

b. At best, in a light most favorable to Kerr-McGee, the Agreement is ambiguous and, therefore, still must be interpreted in favor of arbitration.

An examination of the exchange between the parties and the drafting progression of the relevant contract and provisions would not change the instant outcome. Even if the court were to consider and accept Kerr-McGee's recitation of the drafting history, it would only serve to confuse what appears clear on its face. Simply put, the interpretation proposed by Kerr-McGee at best creates an ambiguity, thereby, resolving the issue in favor of arbitration. This is so for two reasons: one, because doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration; and, two, because ambiguous language is to be construed against the drafter.

A "plausible" argument that the arbitration clause covered a particular claim constituted sufficient doubt to compel arbitration in *Sharon Steel*. 735 F.2d at 778. Here, Kemira's argument that the fraud claim is arbitrable is at least "plausible." It certainly cannot be said "with positive assurance" that the Agreement "is not susceptible of an interpretation that covers the asserted" fraud claim. *Id.* Additionally, any perceived ambiguity must be construed against Kerr-McGee as the self-proclaimed drafters of the language that creates this ambiguity. (Pb8 to 11).[7]

[7]Pb refers to Plaintiffs Kerr-McGee's opposition brief to the motion to compel arbittration.

As such, all credible interpretations of the Agreement lead the court to conclude that the fraud claim is arbitrable.

2. The policy favoring arbitration is even stronger where the parties are international.

The policy favoring the enforcement of arbitration agreements is especially strong where the parties come from different countries. This is justified because international contracts are inherently uncertain. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) ("uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules"). Contractually predetermined methods of settling potential disputes serve to alleviate some of that uncertainty, *id.* ("[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction"), particularly where there is a risk that a dispute may be brought before a forum hostile to the interests of one of the parties or unfamiliar with the subject area at issue. *Id.* (an arbitration provision "obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interest of one of the parties or unfamiliar with the problem area involved"). A policy that favors the enforcement of arbitration agreements promotes greater certainty in international transactions and discourages parties from pursuing underhanded litigation tactics to attain a regional advantage. *Id.* at 516-17 ("[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages . . . . [T]he dicey atmosphere of such a legal no-man's-

land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements"). Here, Kerr-McGee is a Delaware corporation and Kemira is a Finnish company. The international nature of the contract is but one more reason to compel arbitration.

Finally, Kemira argued that Kerr-McGee waived its right to litigate the fraud claim because it "reaffirmed its consent to arbitrate this particular dispute when it initiated the pending arbitration before the LCIA." (Db23).[8] Kemira also argued that arbitration should be compelled if only becuase the LCIA has the preliminary authority to decide who should decide whether the fraud claim is arbitrable. It is unnecessary to reach these arguments since the court has granted Kemira's motion to compel arbitration on the grounds that the fraud claim is arbitrable.

In sum, Kerr-McGee properly initiated the proceedings before the LCIA and should have submitted the fraud claim there as well. The court will return the dispute to the LCIA and decline to get involved unless and until there is a determination by the arbitral body that a particular issue is outside the scope of the arbitration agreement. Until the arbitrators so decide, or some other turn of events properly returns this matter to this forum, the court concludes that the parties have contractually endowed the LCIA with control over the resolution of the dispute between them.

B. Dismissal is appropriate.

Dismissal is appropriate because all of Kerr-McGee's claims are arbitrable. "If a party to a binding arbitration agreement is sued in a federal court on a claim that the plaintiff has agreed to arbitrate, it is entitled under the FAA to a stay of the court proceeding pending arbitration . . . and

[8]Db = the defendants opening brief (D.I. 26).

to an order compelling arbitration. If all the claims involved in an action are arbitrable, a court may dismiss the action instead of staying it." *Seus*, 146 F.3d at 179 (citing 9 U.S.C.S. §§ 3-4).

III. CONCLUSION.

In conclusion, the court will defer to the apparent contractual expectations of the parties and compel arbitration.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KERR-McGEE CHEMICAL, LLC, a Delaware limited liability company, and KERR-McGEE CHEMICAL WORLDWIDE, LLC, as successor to KERR-McGEE CORPORATION, a Delaware Corporation,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	FILE NO. 03-191-GMS
KEMIRA PIGMENTS OY, a Finnish private limited liability company and KEMIRA OYJ, a Finnish public limited liability company,	)	
Defendants.	)	

ORDER

For the reasons stated in its Opinion of this date, IT IS HEREBY ORDERED that:

1. The defendants' motion to compel arbitration and dismiss the immediate action is GRANTED.

Dated: October 7, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE