RENDERED: AUGUST 17; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002523-MR

PILKINGTON PLC — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 05-CI-00656

AFG INDUSTRIES, INC. — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Pilkington PLC (Pilkington) brings this appeal from a November 17, 2005, Order of the Madison Circuit Court denying its motion to dismiss and to compel arbitration. We affirm in part, reverse in part and remand.

Pilkington is a foreign corporation organized under the laws of the United Kingdom with its registered office in St. Helens, Merseyside, England. AFG Industries, Inc. (AFG) is a Delaware corporation with its principal place of business in Kingsport,

Tennessee. AFG owns and operates a glass manufacturing plant in Richmond, Kentucky.

The controversy in this appeal surrounds "3R Technology" developed by Pilkington and utilized by AFG in its Richmond facility. 3R Technology was promoted by Pilkington to reduce Nitrogen Oxygen Emissions (NOx) in float glass or regenerative glass melting furnaces. In 1997, Pilkington and AFG entered into a license agreement; therein, Pilkington granted AFG a nonexclusive license to use the 3R Technology in its facilities located in the United States and Canada.

The 3R Technology was eventually utilized by AFG in its facility in Richmond, Kentucky. On May 25, 2005, AFG filed a complaint against, *inter alois*, Pilkington. Therein, AFG alleged that the 3R Technology was flawed and caused damage to the furnaces at its Richmond facility. Specifically, AFG asserted the claims of fraudulent misrepresentation and negligent misrepresentation. In particular, AFG alleged that Pilkington or its agents misrepresented that the 3R Technology would not cause damage to its furnaces and/or failed to disclose that the 3R Technology could damage its furnaces. In an amended complaint, AFG also alleged that Pilkington engaged in unfair competition in violation of Kentucky Revised Statutes (KRS) 367.175. Basically, AFG asserted that Pilkington made false representations that enabled it to obtain "a monopolistic market share . . . in the market for NOx emissions reduction technology for float glass furnaces . . . ."

Pilkington filed a motion to dismiss the complaint and to compel arbitration of the controversy. In support thereof, Pilkington argued that the 1997 license agreement

contained an arbitration clause. Under this clause, Pilkington claimed that all disputes arising under the license agreement between it and AFG were to be resolved in accordance with the International Arbitration Rules of the London Court of International Arbitration and that the arbitration would take place in London, England. By order entered November 17, 2005, the circuit court denied Pilkington's motion to dismiss the complaint and to compel arbitration. This appeal follows.[1]

Pilkington contends that the circuit court erroneously denied its motion to dismiss the complaint and to compel arbitration. Upon review of a motion to compel arbitration, our task is essentially to determine whether the parties agreed to arbitrate the disputes involved in the controversy. To do so, we must initially determine whether a valid arbitration agreement exists and if so, whether the parties' dispute is within the scope of such agreement. *General Steel Corp. v. Collins*, 196 S.W.3d 18 (Ky.App. 2006). In this Commonwealth, the issue concerning the validity of the arbitration agreement and the scope thereof are issues of law for the court to determine. *Id.* Where the arbitration agreement involves an interstate dispute, the provisions of the Federal Arbitration Act (FAA) are controlling. Kentucky has enacted the Uniform Arbitration Act (KUAA), which is codified in KRS Chapter 417. The KUAA and the FAA are substantively identical. *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850 (Ky. 2004). Generally, when interpreting an arbitration agreement, both the FAA and KUAA

[1] This interlocutory appeal is authorized by Kentucky Revised Statutes (KRS) 417.220(1)(a), which grants the right of interlocutory appeal from an order denying a motion to compel arbitration.

recognize that all doubts concerning the scope of an arbitration agreement should be resolved in favor of arbitration. *See id.*

The 1997 license agreement contained the following arbitration clause in Section 13.1:

> Any dispute or difference arising out of or in connection with this Agreement or its subject matter or involving the meaning, interpretation, application or violation of the provisions of this Agreement, including any question regarding its existence, termination or validity or any question relating to patent validity or infringement or to any anti-trust or competition law considerations, that cannot be settled by mutual accord will be referred to and finally resolved by arbitration under the International Arbitration Rules of London Court of International Arbitration ("the Court"). In the absence of an agreement by the parties that it is appropriate to submit the dispute to a single arbitrator, the dispute will be determined by three (3) arbitrators of whom one will be nominated by Pilkington, one by Licensee and the third by the Court. If a party fails to nominate its arbitrator within thirty (30) days after the reference to arbitration the Court shall nominate the missing arbitrator. In the case of arbitration before three (3) arbitrators the award shall be made by the majority. The seat of the arbitration will be in London, England and the language of the arbitration will be English. No arbitrator will have the power to alter, amend or add to the provisions of this Agreement except to order corrections as provided by Article 13.1(b) of the Rules (effective from 1st January 1985) of the Court.

Under the terms of the above arbitration clause, any dispute arising out of the license agreement or its subject matter must be submitted to arbitration. This specifically includes disputes concerning the interpretation or violation of any provision of the license agreement. Also, the arbitration clause specifically provides that antitrust or competition claims must be submitted to arbitration.

In its complaint and amended complaint, AFG brought three claims against Pilkington – (1) fraudulent misrepresentation, (2) negligent misrepresentation, and (3) unfair competition in violation of KRS 367.175.

Under the first two claims of fraudulent and negligent misrepresentation, AFG essentially alleged that Pilkington or its agents misrepresented to AFG that 3R Technology would not cause damage to its furnace and/or failed to inform AFG that 3R Technology would cause damage to its furnace. Importantly, the alleged misrepresentations and/or omissions apparently occurred both before and after the parties entered into the 1997 license agreement. The primary object of the 1997 license agreement was undisputedly to provide AFG with 3R Technology for use in its manufacturing facilities, including the facility in Richmond, Kentucky. The 1997 license agreement primarily set forth the particularities of the transfer of 3R Technology to AFG. However, the 1997 license agreement did not include any provisions concerning whether 3R Technology would damage AFG's furnaces. And, the 1997 license agreement did not contain a provision concerning the effect of past or future representations made by Pilkington or its agents concerning whether 3R Technology would damage AFG's furnaces. Upon the whole, we do not interpret the 1997 license agreement so broadly so as to include within its ambit AFG's claims of intentional and negligent misrepresentation.

As to AFG's last claim of unfair competition in violation of KRS 367.175, we refer to the plain language of the arbitration clause contained in the 1997 license

agreement. Thereunder, the parties agreed to arbitrate any dispute concerning "any anti-trust or competition law." AFG's claim of unfair competition centers upon its allegation that Pilkington made false representations that enabled it to obtain a monopoly in technology for reduction of NOx emissions from float glass furnaces. Considering the above language contained in the arbitration clause – to arbitrate any dispute concerning anti-trust or competition laws, we hold that AFG's claim of unfair competition in violation of KRS 367.175 clearly comes within the scope of the arbitration clause contained in the 1997 license agreement.

In sum, we are of the opinion that AFG's claims of fraudulent and negligent misrepresentation as set forth in the complaint are not within the scope of the arbitration clause contained in the 1997 license agreement; however, we also conclude that AFG's claim of unfair competition in violation of KRS 367.175 set out in the amended complaint is within the scope of such arbitration clause. As such, AFG's claim of unfair competition must be submitted to arbitration under the terms of the 1997 license agreement.

For the foregoing reasons, the Order of the Madison Circuit Court is affirmed in part, reversed in part and remanded for further proceedings not inconsistent with this Opinion.

ALL CONCUR.

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