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Case No. 5063-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ORIX LF, LP, Plaintiff, v. INSCAP ASSET MANAGEMENT, LLC, ISM ADVISORS, LLC, LIFE INSURANCE FUND ELITE LLC, AND HARISH RAGHAVAN, Defendants.	)	C.A. No. 5063-VCS

MEMORANDUM OPINION

Date Submitted: January 14, 2010
Date Decided: April 13, 2010

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STRINE, Vice Chancellor.

I. Introduction

This matter involves a dispute between the defendants — an investment fund, Life Insurance Fund Elite LLC (the "Fund"), and its management — and the investors who contributed the Fund's capital. The parties even dispute whether they are now feuding because the market in which the Fund must invest soured during the recent financial crisis, shortly after the Fund was formed, or because two of the Fund's investors, ORIX LF, LP ("Orix") and Swiss Re Financial Products Corporation ("Swiss Re") have themselves suffered during the capital markets crisis. In any event, according to the defendants, Orix and Swiss Re allegedly want to find a way out of their investments in the Fund, which cannot dissolve for ten years, and have therefore neglected their duties by (1) removing the co-CEO they originally appointed to manage the Fund and refusing to name a successor, and (2) rejecting the defendants' requests to change the Fund's investment model to adapt to new market conditions.

Rather than bringing a derivative claim alleging breach of duties against Orix and Swiss Re, the defendants have instead brought two arbitrations directly against them, apparently using the Fund's resources to pay for the cost of the proceedings. In response, Orix has filed a complaint requesting that this court enjoin those arbitrations because the defendants failed to obtain Swiss Re's consent to initiate the arbitrations, which Orix claims is required under one of the contracts the parties executed when forming the Fund. The defendants, on the other hand, have pointed to a different contract, which includes a broad arbitration

provision, as the agreement they are seeking to enforce and as support for their argument that their claims were properly committed to arbitration. Therefore, this case is a fight over the forum in which the parties' dispute will be adjudicated.

For the reasons set forth below, I find that the issue of whether the defendants' claims were appropriately committed to arbitration is a question for the arbitrator to decide. The applicable arbitration provision clearly provides that "any" disputes "arising under or relating to" the agreement will be arbitrated under the rules of the American Arbitration Association (the "AAA"). Per the Delaware Supreme Court's *Willie Gary* decision[1] and its progeny,[2] that language is a clear indication that the parties intended that any issue of substantive arbitrability is to be decided by an arbitrator. And, as required under this court's *McLaughlin* decision, so long as the defendants have a colorable argument that their claims are arbitrable, the arbitrator — not this court — must determine the ultimate question of substantive arbitrability.[3] Furthermore, under Delaware law, issues of

[1] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006).
[2] *See, e.g.*, *Lefkowitz v. HFW Holdings, LLC*, 2009 WL 3806299 (Del. Ch. Nov. 13, 2009); *Julian v. Julian*, 2009 WL 2937121 (Del. Ch. Sept. 9, 2009); *Carder v. Carl M. Freeman Cmtys., LLC*, 2009 WL 106510 (Del. Ch. Jan. 5, 2009); *McLaughlin v. McCann*, 942 A.2d 616 (Del. Ch. 2008); *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *10 (Del. Ch. Dec. 4, 2007); *Nutzz.com, LLC v. Vertrue, Inc*., 2006 WL 2220971 (Del. Ch. July 25, 2006).
[3] *McLaughlin*, 942 A.2d at 625-27; *see also Carder*, 2009 WL 106510, at *6-7 (following *McLaughlin* and deferring to the arbitrator where there is a non-frivolous argument regarding substantive arbitrability); *Lefkowitz*, 2009 WL 3806299, at *10 (concluding that "to the extent there is any basis for doubt about the above findings, I conclude that, consistent with the holding in *McLaughlin*, this Court 'should defer to arbitration, leaving the arbitrator to determine what is or is not before her'").

procedural arbitrability are to be decided by arbitrators, not courts.[4] Delaware courts consider the satisfaction of conditions precedent, such as the consent purportedly required here, to be issues of procedural arbitrability.[5] Therefore, the question of whether Swiss Re's consent was required before the arbitrations could be brought is a procedural question for the arbitrator to decide. Thus, whether one views the interpretive issues here as questions of substantive or procedural arbitrability, Orix's arguments are for the arbitrator to consider, and I therefore dismiss Orix's complaint without prejudice under Rule 12(b)(1).

II. Factual Background

These are the facts as drawn from the complaint and the documents it incorporates.

A. Orix, Swiss Re, And InsCap Form A Fund To Invest In Life Insurance New Issues

On August 10, 2007, Orix, Swiss Re, and InsCap Asset Management, LLC ("InsCap") created ISM Advisors, LLC ("ISM"), which was formed by an LLC Agreement (the "ISM Agreement"). ISM was formed for the purpose of owning an interest in and managing the Fund, which was created contemporaneously with the formation of ISM through the execution of another LLC Agreement (the "Fund Agreement"). Since its inception, the Fund has invested in the life insurance new issues market.

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[4] *Willie Gary*, 906 A.2d at 79; *see also T-Ink*, 2007 WL 4302594, at *10.
[5] *See SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 762 (Del. 1998); *Burton v. PFPC Worldwide, Inc*., 2003 WL 22682327, at *2-3 (Del. Ch. Oct. 20, 2003).

Orix and Swiss Re contributed $170 million of the Fund's $180 million in total equity commitments. In return for these contributions, Orix and Swiss Re were given minority stakes in ISM. Orix has a 6% equity interest in ISM and no voting interest. Swiss Re has a 49% voting interest and approximately 46% economic interest in ISM. InsCap has a 51% voting interest in ISM.

B. A Number Of Related Contracts Were Executed Simultaneously With The Formation Of ISM And The Fund

1. The ISM Agreement

The ISM Agreement, which is dated August 10, 2007, contains a number of provisions relevant to the dispute at hand. First, Section 3.1(b) of the ISM Agreement provides that InsCap and Swiss Re each have the right to appoint one CEO under the ISM Agreement,[6] and Section 3.1(a) of the ISM Agreement provides that "management and control of the business and affairs of [ISM] shall be vested exclusively with the CEOs." If the CEOs deadlock, the tie is broken by InsCap.[7] Section 3.1(d) of the ISM Agreement further provides that "[t]he CEOs will have no authority" without the approval of Swiss Re to, among other things: "(v) [make] any determination *to initiate any litigation or other proceeding or to settle litigation with third parties, or other regulatory inquiries,* in excess of $1.0 million or that could significantly and adversely affect the regulatory standing, as

[6] Pursuant to this provision, Swiss Re appointed Jamshid Ehsani as its co-CEO, and InsCap appointed defendant Harish Raghavan as its co-CEO.
[7] Compl. Ex. A. at § 3.1(c) (the "ISM Agreement").

determined by such party in good faith, or industry reputation of the affected party."[8]

Second, the ISM Agreement also contains a merger clause, which provides the following:

> This Agreement, *together with the separate written agreements referenced herein*, embodies the entire agreement and understanding of the parties hereto in respect to the subject matter contained herein. There are no restrictions, promises, representations, warranties, covenants or undertakings, other than those expressly set forth or referred to herein. Except as expressly provided herein, this Agreement and such separate written agreements supersede all prior agreements and understandings between the parties with respect to such subject matter.[9]

And, the ISM Agreement makes explicit reference to the Fund Agreement, which the ISM Agreement dubs the "Operating Agreement."[10] Therefore, the Fund Agreement is one of the "separate written agreements" mentioned in the merger clause.

Finally, and perhaps most importantly, the ISM Agreement does not include an arbitration provision. But, it does include a provision that provides in relevant part as follows:

> The parties agree that any process or notice of motion or other application to a court, and any paper *in connection with any arbitration*, may be served by certified mail, return receipt requested, or by personal service or in such manner as may be permissible under the rules of the applicable court or *arbitration tribunal*, provided a reasonable time for appearance is allowed.[11]

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[8] *Id*. at § 3.1(d) (emphasis added).
[9] *Id*. at § 10.8 (emphasis added).
[10] *Id*. at § 1.1.
[11] *Id*. at § 10.2 (emphasis added).

Therefore, the ISM Agreement contemplates service of process upon the parties in connection with an arbitration initiated by one of the parties.

2. The Fund Agreement

The Fund was created contemporaneously with ISM, pursuant to an LLC agreement also dated August 10, 2007 (the aforementioned "Fund Agreement"). The Fund Agreement provides that the Fund will have a ten-year life,[12] members have no right to seek to dissolve the Fund,[13] and members' ability to transfer their interest in the Fund is severely circumscribed.[14] Day-to-day management of the Fund is vested in ISM,[15] and Orix and Swiss Re's participation in management is limited to their membership in the Fund's Advisory Committee.[16]

ISM can be removed as the Fund's manager only after a 75% vote of the Fund's members following a "special arbitration" proceeding outlined in Section 16.11 that establishes that ISM committed at least one of six enumerated forms of misconduct.[17] That special arbitration is a simplified proceeding to be completed within 60 days of the Advisory Committee's written request for arbitration.[18] Before such special arbitration is to commence, the Advisory Committee and ISM

[12] Fotak Aff. Ex. 1 at Art. IV (the "Fund Agreement").
[13] *Id*. at §§ 10.6, 15.1.
[14] *Id*. at § 11.2.
[15] *Id*. at §§ 5.3(a), 9.1(a), 10.2, 10.10(a), 12.1.
[16] *Id*. at § 9.8.
[17] *Id*. at § 16.11.
[18] *Id*.

are to agree on a particular set of procedures to govern the adjudication (*e.g.*, procedures regarding the timeframe for discovery, number of witnesses, etc.).[19]

For other types of disputes, the Fund Agreement includes the following provision, which states in relevant part:

> Except for matters subject to Section 16.11, *any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or validity thereof, shall, on the demand of any party, be finally settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association* ("AAA") then in effect (the "Rules") . . . . There shall be three arbitrators, one of whom shall be appointed by [ISM] within 45 days after the receipt of the demand for arbitration, one of whom shall be appointed by the party or parties (which may include Members in their capacity as such) bringing such action (or if the Managing Member or the Company is bringing such action, the party or parties against whom such action is brought) and the third of whom, who shall chair the arbitral tribunal, shall be appointed by the AAA.[20]

The Fund Agreement states no conditions before any party may invoke this section.

Finally, Appendix D to the Fund Agreement sets forth the Investment Guidelines that the Fund is to follow. The Fund is permitted to invest in two types of instruments:

> 80% to 100% of the committed capital of the Company will be invested in the life insurance new issues market, including, without limitation, premium finance programs and structured premium finance programs. Each distinct new issues investment program (or any material variation of a prior program) in which the Company may invest is referred to herein as a "Program." These percentages will be adjusted on an opportunistic basis based on opportunities in

[19] *Id.*
[20] *Id.* at § 16.15 (emphasis added).

> the Life Settlement Market in line with Company Investment Guidelines at the discretion of the Advisory Committee.[21]

The structured premium finance program involved "Collateral Support Arrangements," or CSAs. CSAs are complex instruments, entered into in connection with the issuance of new life insurance policies, under which the provider supplies collateral to secure a premium finance loan. CSAs, it is alleged, generally have a projected probable internal rate of return of 9-10%.[22]

C. A Dispute Arises, And ISM And The Fund Commence Arbitration

Although the parties differ on the precise causes of the Fund's troubles, both parties agree that the financial crisis that erupted in 2008 has complicated the Fund's investment strategy. Orix argues that, since the crisis set in, ISM has not successfully marketed the Fund's products, and that the Fund's business model is no longer economically viable.[23] The defendants argue that the real problem is Orix and Swiss Re's financial health, which led to their decision to pull their appointed CEO from ISM and not replace him with a successor,[24] as well as their unwillingness to adjust the Fund's investment strategy in light of the changes in the market.[25] In any event, a standoff has occurred.

On October 21, 2009, ISM commenced an arbitration proceeding against Swiss Re and Orix, and on November 4, 2009 the Fund commenced another

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[21] *Id*. at Appendix D.
[22] Fotak Aff. ¶ 9.
[23] Compl. ¶ 28.
[24] On December 22, 2008, Swiss Re removed the co-CEO of ISM that it had appointed. Fotak Aff. Ex. 8. Swiss Re has not appointed a successor. *Id*.; Fotak Aff. ¶ 6.
[25] Fotak Aff. ¶¶ 13-23.

arbitration proceeding against Swiss Re and Orix. Both arbitrations, which are functionally identical, seek to recover compensation through 2017 that ISM and the Fund were deprived of by Swiss Re and Orix's alleged breach of their obligations to adjust the Investment Guidelines to take advantage of market opportunities that have emerged since the advent of the credit crisis. The brief arbitration demands that were attached to the parties' briefs indicate that the arbitrations are brought for breaches of the Fund Agreement:

> THE NATURE OF THE DISPUTE: Breach of contract for failure to comply with the requirements of the terms of the Life Insurance Fund Elite LLC Agreement [the Fund Agreement] between the parties, including but not limited to Sections 5.3, 9.1, 9.3, 9.8, 10.2, 10.6, 10.10, 12.1, and 15.1, as well as breach of fiduciary duty.[26]

That is, the arbitrations allege breach of specific provisions of the Fund Agreement, and clearly fall under the "arising under" or "relating to" language of the arbitration provision in Section 16.15 of the Fund Agreement.

D. The Present Proceedings

In response to these arbitrations, Orix filed a complaint in this court requesting that this court enjoin the arbitration proceedings (Count I), alleging that InsCap and its appointee Raghavan breached the ISM Agreement by initiating the arbitrations (Count II), seeking a declaratory judgment that all of the defendants have breached the ISM Agreement by initiating the arbitrations without Swiss Re's approval (Count III), and alleging that InsCap and Raghavan breached their

[26] Compl. Exs. B (Demand of Arbitration (Oct. 21, 2009)), C (Demand of Arbitration (Nov. 4, 2009)).

fiduciary duties (Count IV). Orix then filed a motion for a temporary restraining order and preliminary injunction. Following a scheduling conference with the court, the parties converted Orix's motion for a temporary restraining order and preliminary injunction into a motion for summary judgment.[27] On December 2, 2009, defendants ISM, Life Insurance Fund Elite, LLC, and Raghavan filed a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(6), and 23.1, and to 6 *Del. C.* §§ 18-1001 and 18-1003. That same day, defendant InsCap filed a motion to dismiss pursuant to the same rules.[28]

On January 12, 2010, two days before the oral argument that was scheduled for January 14, 2010, Orix filed a new motion for a temporary restraining order and preliminary injunction. In that motion, Orix requested that this court enjoin the defendants from initiating or enforcing any capital drawdowns,[29] and that this court compel the defendants to participate in a special arbitration proceeding, which Orix commenced under Section 16.11 of the Fund Agreement on January 11, 2010. For the reasons stated in the hearing transcript, I denied Orix's

[27] *See ORIX LF, LP v. InsCap Asset Mgmt., LLC*, C.A. 5063-VCS (Nov. 25, 2009) (ORDER).

[28] InsCap's briefing largely adopted the argumentation that ISM presented in its briefs supporting its motion to dismiss, differing primarily in respect to the application of Rule 12(b)(6) in this case. *See* InsCap Op. Br. 1, n.1. The Fund's briefing did the same. *See* Fund Op. Br. 2.

[29] On December 29, 2009, the defendants issued a drawdown notice of $2.5 million from Orix by January 13, 2010. Orix Mot. for Temp. Rest. Order 3.

motion.[30] Therefore, this opinion addresses Orix's remaining motion for summary judgment and the defendants' motions to dismiss.

III. Legal Analysis

A. Standard Of Review

I set forth below only the standard for determining this court's subject matter jurisdiction. Because I am dismissing this case under Rule 12(b)(1), and therefore need not assess the movants' other grounds for disposing of this matter, I do not discuss the standards under Rules 56, 12(b)(6), and 23.1.

In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), "the court must address the nature of the wrong alleged and the remedy sought to determine whether a legal, as opposed to an equitable, remedy is available and adequate."[31] The court is "confine[d] . . . to the allegations of the complaint and exhibits thereto, which must be accepted as true

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[30] *ORIX LF, LP v. InsCap Asset Mgmt., LLC*, C.A. No. 5063-VCS, at 102-07 (Del. Ch. Jan. 14, 2010) (TRANSCRIPT). There appears to be some confusion among the parties about whether my ruling applied only to Orix's request to enjoin the capital drawdown or also applied to Orix's request that this court compel the defendants to participate in the special § 16.11 arbitration. *Compare* Letter from R. Judson Scaggs, Esquire to the Hon. Leo E. Strine, Jr. (Mar. 24, 2010) *with* Letter from William D. Johnston, Esquire to the Hon. Leo E. Strine, Jr. (Mar. 26, 2010). As I stated in the transcript, Orix's entire motion, which requested equitable relief as to both the capital drawdown and the Section 16.11 arbitration, was denied because Orix had an adequate remedy at law — namely, the AAA arbitrator could provide Orix the relief it sought. *ORIX LF, LP v. InsCap Asset Mgmt., LLC*, C.A. No. 5063-VCS, at 102-07 (Del. Ch. Jan. 14, 2010) (TRANSCRIPT). In any event, recent letters from the parties indicate that they have reached an agreement regarding the Section 16.11 arbitration. *See* Letter from William D. Johnston, Esquire to the Hon. Leo E. Strine, Jr. (Apr. 9, 2010); Letter from R. Judson Scaggs, Esquire to the Hon. Leo E. Strine, Jr. (Apr. 9, 2010).

[31] *Carder*, 2009 WL 106510, at *3.

for purposes of the motion to dismiss."[32] The Court of Chancery "will not 'accept jurisdiction over' claims that are properly committed to arbitration since in such circumstances arbitration is an adequate legal remedy."[33] Delaware law favors the enforcement of arbitration clauses.[34] As to whether a dispute is covered by the scope of an arbitration clause, Delaware courts "ordinarily resolve any doubts in favor of arbitration."[35]

B. The Issue Of Arbitrability Is For The Arbitrator To Decide

The threshold issue in this matter is whether this controversy was properly committed to arbitration, precluding this court from exercising subject matter jurisdiction. Orix contends that the arbitrations were improperly brought because InsCap's appointed CEO, Raghavan, violated Section 3.1(d)(v) of the ISM Agreement, which requires Swiss Re's consent before ISM's CEOs can decide "to initiate any litigation or other proceeding or to settle litigation with third parties, or other regulatory inquiries,"[36] by unilaterally causing ISM to bring an arbitration

[32] *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 287 (Del. 1999).
[33] *Dresser Indus. v. Global Indus. Techs., Inc*., 1999 WL 413401, at *4 (Del. Ch. Jun. 9, 1999); *see also Carder*, 2009 WL 106510, at *3 ("If a claim is arbitrable, *i.e.*, properly committed to arbitration, this Court lacks subject matter jurisdiction because arbitration provides an adequate legal remedy.").
[34] *See Graham v. State Farm Mut. Auto Ins. Co*., 565 A.2d 908, 911 (Del. 1989) ("In short, the public policy of this state favors the resolution of disputes through arbitration."); *Julian*, 2009 WL 2937121, at *3 (noting that "Delaware's public policy strongly favors arbitration"); *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001) ("Delaware public policy . . . favors resolving disputes through arbitration.").
[35] *Parfi Holding AB v. Mirror Image Internet, Inc*., 817 A.2d 149, 155-56 (Del. 2002); *see also SBC Interactive*, 714 A.2d at 761 ("Any doubt as to arbitrability is to be resolved in favor of arbitration.").
[36] *See supra* pages 4-5.

without Swiss Re's approval. Orix argues that this court, rather than an arbitrator, should decide that issue because determining whether Swiss Re's consent was required only implicates the ISM Agreement, which lacks an arbitration clause, and not the Fund Agreement. Orix further argues that the none of the defendants' underlying claims implicate the Fund Agreement. That is, Orix claims that the defendants dressed up disputes arising solely under the ISM Agreement as matters implicating the Fund Agreement in order to take advantage of the latter agreement's arbitration clause.

In responding, the defendants point out that they believe that Orix's position is weak on the merits. Thus, the defendants note their view that: (1) according to the plain language of the contract, Section 3.1(d)(v) only applies to arbitrations initiated against third parties, not against other parties to the contract; and (2) even if Section 3.1(d)(v) did apply, ISM and the Fund are excused from seeking Swiss Re's consent because (a) doing so would be futile, and (b) because Swiss Re has acquiesced to unilateral decisions made by InsCap's CEO by removing its own appointed CEO and failing to name a replacement. The defendants also argue that it is clear that their substantive claims arise under the Fund Agreement, not the ISM Agreement.

But the defendants argue that this court cannot address the merits of these arguments because these are issues of substantive and procedural arbitrability that must be determined by an arbitrator, not this court. In this regard, the defendants contend that, because the Fund Agreement's arbitration clause broadly provides

that *any* disputes not only *arising out of* but also *relating to* the Fund Agreement are to be arbitrated, and because that clause calls for AAA arbitration, the parties clearly intended that any question of substantive arbitrability is for the arbitrator, not this court, to decide. Furthermore, the defendants argue that Section 3.1(d)(v) of the ISM Agreement is a condition precedent to Section 16.15 of the Fund Agreement. And, because the satisfaction of a condition precedent to an arbitration clause is an issue of procedural arbitrability, any question of whether Swiss Re's consent was required is to be decided by an arbitrator.

In analyzing the question of whether this dispute should be committed to arbitration, I am of course guided by the Delaware Supreme Court, whose recent *Willie Gary* decision addressed the issues of whether substantive and procedural arbitrability are to be decided by an arbitrator, rather than the court.[37] As to "procedural arbitrability" issues, the court re-affirmed its long-standing position that those issues are presumptively for the arbitrator to decide:

> The [United States Supreme Court] distinguished between issues of substantive arbitrability and procedural arbitrability. Substantive arbitrability issues are gateway questions about the scope of an arbitration provision and its applicability to a given dispute. The court presumes that parties intended courts to decide issues of substantive arbitrability. The opposite presumption applies to procedural arbitrability issues, such as waiver, or satisfaction of conditions precedent to arbitration.[38]

[37] 906 A.2d at 78.
[38] *Id*. at 79; *see also T-Ink*, 2007 WL 4302594, at *10 ("Unlike substantive arbitrability, questions of procedural arbitrability are presumptively for the arbitrator, and not the court, to decide.").

Likewise, as the quote indicates, on the issue of substantive arbitrability, the Delaware Supreme Court has held that the presumption is just the opposite — namely, that the court, not the arbitrator, is to decide.[39] But, where there is "clear and unmistakable evidence that the parties intended otherwise," that presumption does not apply, and an arbitrator should decide the issue of substantive arbitrability.[40] The Delaware Supreme Court continued in *Willie Gary* to explain that the clear and unmistakable standard can be met even when the agreement does not explicitly state that the arbitrator should decide issues of substantive arbitrability if two conditions are satisfied. Those conditions are: (1) the contract generally refers all disputes to arbitration; and (2) the contract refers to a set of rules that would empower arbitrators to decide arbitrability.[41]

Here, the record demonstrates to my satisfaction that not only issues of procedural arbitrability but also of substantive arbitrability are for the arbitrator to decide. First, Section 16.15 of the Fund Agreement clearly evidences that the parties intended the arbitrator to determine the issue of substantive arbitrability because it provides (1) that "*any* dispute" arising out of or relating to the Fund Agreement is to be arbitrated; and (2) that such arbitration will be held under the

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[39] *See also DMS Props.-First, Inc. v. P.W. Scott Assoc., Inc.*, 748 A.2d 389, 391-92 (Del. 2000) ("When an action is commenced under Section 5703 of the Delaware statute to either compel or enjoin arbitration, a question of substantive arbitrability is decided by the Court of Chancery.").

[40] *Willie Gary*, 906 A.2d at 78-79.

[41] *See id*. at 79-80 (finding a "clear and unmistakable" intention for an arbitrator to decide issues of substantive arbitrability "where the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability").

AAA's rules.[42] Therefore, Section 16.15 meets the "clear and unmistakable" standard set forth in *Willie Gary*.[43]

Seeking to escape the rule of *Willie Gary*, Orix argues that the dispute here only implicates the ISM Agreement, and not the Fund Agreement. But, despite Orix's arguments to the contrary, the arbitration demands clearly allege that Orix and Swiss Re breached the Fund Agreement.[44] And, Section 16.15 of the Fund Agreement is broad — it requires "*any* dispute, controversy or claim *arising out of or relating to* this Agreement" to be arbitrated.[45] Delaware courts have found the use of both "arising out of" and "relating to" language in an arbitration provision to be a broad mandate.[46] Therefore, even if I accept Orix's argument — which I do not — that ISM and the Fund have cast disputes relating only to the ISM Agreement as disputes arising under the Fund Agreement, the broad "relating to" language in the Fund Agreement's arbitration provision seems to encompass such disputes. That conclusion seems in order when one considers that (1) the ISM Agreement was executed on the same day as the Fund Agreement;[47] (2) the ISM Agreement provides that the ISM Agreement "together with the separate written agreements referenced herein, embodies the entire agreement and understanding of

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[42] *See supra* page 7.
[43] *See supra* note 42.
[44] *See supra* page 9.
[45] Fund Agreement § 16.15 (emphasis added).
[46] *See, e.g.*, *State v. Philip Morris USA, Inc*., 2006 WL 3690892, at *4 (Del. Ch. Dec. 12, 2006) (finding provision requiring arbitration of any dispute "arising out of or relating to" language to be a "broad arbitration clause"), *aff'd*, 925 A.2d 504 (Del. 2007).
[47] *See supra* page 4.

the parties hereto;"[48] (3) the ISM Agreement expressly refers to the Fund Agreement as the "Operating Agreement;"[49] and (4) the ISM Agreement provides for service of process for proceedings including arbitrations, even though the ISM Agreement does not itself include an arbitration provision, and thus appears to contemplate that disputes among the parties would be resolved by the arbitration provisions of the Fund Agreement executed that same day.[50] That close interdependence between the contracts suggests that any dispute under the ISM Agreement necessarily "relates to" the Fund Agreement. In other words, Section 16.15 of the Fund Agreement seem clearly broad enough to sweep in disputes under the ISM Agreement. But, I should not, and therefore do not, reach a final determination regarding that issue.

Orix's argument that the claims brought by ISM and the Fund have nothing to do with the Fund Agreement is also problematic because it is essentially an argument about the scope of the Fund Agreement's arbitration clause, Section 16.15. In other words, Orix is making an argument about *how* the issue of arbitrability should be decided. But, at this stage of the analysis, when the court is examining predicate issues such as procedural and substantive arbitrability, making a final determination on the scope of Section 16.15 would be improper. In this procedural posture, the burden on defendants is not to *conclusively* prove that

[48] *See supra* page 5.
[49] *See supra* page 5.
[50] *See supra* pages 5-6.

their claims are within the scope of Section 16.15, but rather that their claims are *arguably* arbitrable. As this court has noted:

> A signatory to an agreement vesting questions of substantive arbitrability to the arbitrator must resolve disputes about arbitrability . . . before the arbitrator, unless the signatory can show that the [opposing party's] contention is 'wholly groundless.' In other words, *absent a clear showing that the party desiring arbitration has essentially no non-frivolous argument about substantive arbitrability to make before the arbitrator, the court should require the signatory to address its arguments against arbitrability to the arbitrator*.[51]

That is, unless Orix can show that the defendants' position on arbitrability is "wholly groundless" or "frivolous," the arbitrator and not the court must determine the question of substantive arbitrability. To do otherwise and to resolve good faith disputes about substantive arbitrability, would conflate the substantive arbitrability analysis with the arbitrability analysis proper, and usurp the role *Willie Gary* says belongs to the arbitrator. Orix must address its arguments about substantive arbitrability to the arbitrator.[52]

Moreover, in my view, the question of whether Swiss Re's consent was required under Section 3.1(d)(v) of the ISM Agreement for ISM and the Fund to bring the arbitrations is a question of procedural, not substantive, arbitrability for

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[51] *McLaughlin*, 942 A.2d at 626-27 (emphasis added); *see also Carder*, 2009 WL 106510, at *6-7 (following *McLaughlin* and deferring to the arbitrator where there is a non-frivolous argument regarding substantive arbitrability); *Lefkowitz*, 2009 WL 3806299, at *10 (concluding that "to the extent there is any basis for doubt about the above findings, I conclude that, consistent with the holding in *McLaughlin*, this Court 'should defer to arbitration, leaving the arbitrator to determine what is or is not before her'").

[52] If I am incorrect in my analysis and the merits of the substantive arbitrability issue are committed to me, I would find that the defendants have demonstrated that this dispute implicates not only the ISM Agreement but also the Fund Agreement, and Orix's argument would be rejected on its merits.

the arbitrator to decide. To argue that Section 3.1(d)(v) precludes ISM and the Fund from initiating proceedings against their contractual partners Orix and Swiss Re without Swiss Re's consent is to argue that a condition precedent to commencing arbitration has not been met. The question of whether the requirements of Section 3.1(d)(v) have been either met or excused because Swiss Re has abdicated its right to appoint its own co-CEO is analogous to a trial court's decision on whether to allow a derivative suit to proceed. Under our Supreme Court's jurisprudence, such procedural questions are clearly for the arbitrator.[53] Therefore, the question of whether Section 3.1(d)(v) applies, and, if so, the related issue of whether demand would be excused because Swiss Re would not rationally consent to being sued, are for the arbitrator, not this court, to decide.

IV. Conclusion

For the reasons stated above, plaintiffs' motion for summary judgment is DENIED and defendants' motions to dismiss are GRANTED. The plaintiffs' complaint is therefore dismissed without prejudice under Rule 12(b)(1). IT IS SO ORDERED.

[53] *See SBC Interactive*, 714 A.2d at 762 (finding that application of a condition precedent was a procedural issue for the arbitrator to decide); *Burton*, 2003 WL 22682327, at *2-3 (same).