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Reversal of Arbitration Awards: A Potpourri of Cases
By Sheila J. Carpenter – August 29, 2017

It is not easy to persuade a court to vacate an arbitration award, but it does happen. Here are a few recent cases where a court did just that, and one where that attempt was rejected. The causes for the courts’ actions range from arbitrators behaving badly to simple mistakes by an arbitration panel.

Arbitrator Misconduct: Lying about Credentials
Section 10 of the Federal Arbitration Act (FAA), 9 U.S.C. § 10, provides that an arbitration award procured by fraud may be vacated.

In Move, Inc. v. Citigroup Global Markets, 840 F.3d 1152 (9th Cir. 2016), the arbitrator himself was a fraud. Move, Inc., claimed that Citigroup Global Markets had mismanaged its substantial funds. The arbitration agreement between the parties provided that the chairperson had to be an attorney. The person chosen to chair the panel was only masquerading as an attorney, using the credentials of an attorney with the same name to participate in Financial Industry Regulatory Authority (FINRA) arbitrations. His fraud was discovered more than four years after the final award in favor of Citigroup.

The FAA requires that a motion to vacate be filed within three months of an award. 9 U.S.C. § 12. The question before the Ninth Circuit was whether equitable tolling is available under the FAA, a question of first impression in that circuit, and, if so, whether it was available to the claimant. The court answered both questions in the affirmative, finding that the structure, language, and purpose of the FAA do not suggest that tolling should be unavailable. In balancing the need for finality in arbitration while preserving due process, the court ruled, "the arbitral process will not be disrupted if parties are permitted to satisfy the high bar of equitable tolling in limited circumstances. More importantly, permitting equitable tolling will enhance both the accuracy and fairness of arbitral outcomes." Move, Inc., 840 F.3d at 1158. Although the court said that the issue of whether Move, Inc., was entitled to equitable tolling was not before it because neither party had briefed it, the court nonetheless assumed that Move, Inc., had acted with due diligence and that respondent had not been prejudiced.

Having decided that the motion to vacate was timely, the court held that Move, Inc., had not received what it contracted for—an arbitration before a panel of qualified arbitrators. With the panel chair an imposter and thus not qualified to be a FINRA arbitrator, the award was vacated.
Arbitrator Misconduct: Improper Ex Parte Communication

In Star Insurance Co. v National Union Fire Insurance Co. of Pittsburgh, Pa., App. Nos. 15-1403, 15-1490 (6th Cir. Aug. 18, 2016), a reinsurer disputed claims submitted by a group of ceding companies. As is common in reinsurance contracts, the arbitration clause provided for each party to appoint an arbitrator, and those arbitrators were to choose the umpire. The arbitrators could not agree, so the umpire was chosen by lot. As has also been common in reinsurance arbitrations, the parties were permitted ex parte contact with their respective arbitrators until they filed their first prehearing brief. After the panel entered an interim award in favor of the reinsurer, counsel for the reinsurer started talking with his party-appointed arbitrator again. The panel entered a final award that greatly increased the damages awarded the reinsurer. The ceding companies challenged the award based in part on the ex parte contacts between the interim and final awards.

The reinsurer asserted that while the panel's scheduling order had an effective date for the no contact rule, it had no specified end date, and thus it was reasonable to assume that contact was permitted after the initial decision on the merits had been made. "You didn't say I couldn't" is not a phrase judges want to hear, though; and in an unpublished opinion, the Sixth Circuit held that the ex parte contact was "misconduct prejudicing a party's rights" under the Michigan equivalent of the FAA, not because ex parte contact itself is always misconduct but because in this case it violated the scheduling orders agreed to by the parties and the panel. Further, because the parties' agreement had been violated, the aggrieved party did not need to show prejudice.

Practice Tip: Interim awards are not unusual. In Star Insurance, the interim award called for additional substantive consideration and not merely the additional calculations that are common reasons for interim awards. Once an arbitrator or panel issues a final award, it is functus officio—its duties are complete, and it can no longer take any action. An interim award, however, is issued because there is further work to do. Because an interim award means there will be another award issued, unless the parties agree otherwise, it will almost always be improper for a party to contact an arbitrator ex parte prior to the final award.

Arbitrator Overreach: Rewriting the Parties' Contract

Nappa Construction Management v. Flynn, 152 A.3d 1128 (R.I. 2017), involved a troubled construction contract for a commercial building. The contract provided that the owners could terminate the contract for convenience. However, they never did. Instead, they issued a stop work order due to defective work on the building floor. The construction company then billed the owners for its work to date, including the work on the defective floor. When the owners refused to pay, the construction company terminated the contract for nonpayment. The arbitrator found the construction company's actions in terminating the contract to be improper as the owners had not violated the contract. However, the arbitrator viewed continuing the
contract as hopeless and treated it as if it had been terminated for convenience by the owners. The Supreme Court of Rhode Island, by a 3-2 vote, held it improper for the arbitrator to engage in the fiction of termination for convenience because while an arbitrator can misconstrue a contract, it cannot construe it in a way that the court views as irrational.

**Arbitrator Overreach: Rewriting the Misconduct Charges Against an Employee**

In *Bound Brook Board of Education v. Ciripompa*, 153 A.3d 931 (N.J. 2017), a teacher was accused of conduct unbecoming a teacher, conduct that included inappropriate comments to and about female staff members, asking them out in front of students, sending and receiving nude photos on school computers, and other obviously bad behavior. The board of education's decision to terminate the teacher was reviewed by an arbitrator. The arbitrator construed one of the two counts against the teacher as being a sexual harassment claim even though the original charge did not specifically state that it was for sexual harassment. The arbitrator then applied the strict standards of proof that would have been applied to such a claim. He found that the teacher's conduct did not meet this standard and changed the discipline from dismissal to a 120-day suspension without pay.

The case made its way to the Supreme Court of New Jersey. The grounds for overturning an arbitration award in New Jersey are essentially the same as those in the FAA. Citing authority from the Third Circuit, the court held that a "claim that an arbitrator decided a legal question not placed before him or her by the parties is tantamount to the claim that the arbitrator 'imperfectly executed [his or her] powers' as well as a claim that the arbitrator exceeded his or her authority." *Bound Brook*, 153 A.3d at 937. In this case, by converting the board's claim of "conduct unbecoming" into a sexual harassment claim, the arbitrator "erroneously tasked the Board with substantiating charges it did not file." *Id.* at 940. In doing so, he imperfectly executed his powers and exceeded his authority. The court vacated the award and remanded the case to be heard by a different arbitrator.

**Arbitrator Mistake: Occasional Grounds for Vacatur**

In most circumstances, a mistake by an arbitration panel is not grounds to vacate its award. But in New Hampshire, the state's arbitration statute provides that "plain mistake" is a permitted ground for seeking relief from an award.

The language in section 10 of the FAA does not mention "plain mistake":

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either
of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.


In comparison, New Hampshire Revised Statutes § 542:8 reads thus:

At any time within one year after the award is made any party to the arbitration may apply to the superior court for an order confirming the award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers. Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may in its discretion, direct a rehearing by the arbitrators or by new arbitrators appointed by the court.

(2016) (emphasis added). The "plain mistake" language in this New Hampshire statute has been broadly construed by the New Hampshire courts to include mistakes not apparent on the face of the award.

In Finn v. Ballentine Partners, 143 A.3d 859 (N.H. 2016), the Supreme Court of New Hampshire discussed the plain mistake standard versus the stricter standards of the FAA at length. In Finn, a founding shareholder (Finn) was squeezed out of her company and her shares repurchased. An arbitration panel found in her favor on her wrongful termination claim, awarding her several million dollars for the value of her shares and $720,000 for lost wages. The company later restructured and received a substantial payment from another entity. Finn then brought a second claim in arbitration for additional monies for her shares pursuant to a clawback provision in the shareholder agreement providing that a founder was entitled to recover a higher price for shares resold within eight years. The second arbitration panel rejected her breach of contract claim because the first panel had resolved that claim. However, it awarded her $600,000 in damages for unjust enrichment. On cross-motions, the trial court vacated the award because res judicata barred the unjust enrichment claim on account of the damages.
received from the first arbitration. The trial court applied the "plain mistake" standard of review.

Finn unsuccessfully moved for reconsideration, arguing that the FAA applied to the case because the agreement affected interstate commerce. She also argued that the FAA preempted the looser state law.

The Supreme Court of New Hampshire held that the FAA was not the exclusive method for reviewing arbitration awards in New Hampshire. The FAA would have applied had review been sought in federal courts, but in the state courts of New Hampshire, the state law allowing review for plain mistake applied. The court reasoned that in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 590 (2008), the Supreme Court had noted that other avenues for judicial enforcement of awards exist besides the FAA. It noted that the parties' choice of law clause specified New Hampshire law without reference to the FAA. The court held that a plain mistake of law occurs "when the panel clearly misapplied the law to the facts." *Finn*, 143 A.3d at 873. In this case, because the injury claimed in the second arbitration was the same as that claimed in the first—the shareholder's improper termination—and only the damages were different, the arbitration panel should have applied res judicata and denied her claim.

In New Hampshire state courts, there does not appear to be much difference between the "plain mistake" standard of review and the standards of review that appellate courts apply to the decisions of trial courts.

**Reasonable Arbitrator Action: Refusing to Postpone a Hearing**

*CM South East Texas Houston, LLC v. CareMinders Home Care*, App. No. 16-11054 (11th Cir. Oct. 7, 2016), is an unpublished decision that considers the meaning of the portion of 9 U.S.C. § 10(a)(3) allowing vacatur: "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown . . ."

The arbitration in this case was originally scheduled for December 2014, but the parties requested two postponements due to scheduling conflicts. The third set of hearing dates was in early March 2015. Shortly before the hearing, a key witness advised that his mother was severely ill, and he would need to be in Chicago with her during her health crisis. Because it was not known how his mother's health would progress, but it was known that she would not be better in the short term, the party affected suggested putting off the arbitration some months.

The arbitrator refused. While sympathetic to the witness, and offering to allow him to testify via video, the arbitrator believed that it would be improper to put off the hearing months past the original hearing date since arbitration is supposed to be a quick and efficient process. The arbitrator did grant a short postponement and shortened the scheduled hearing days from five to four.
The witness's mother died less than a week after the hearing ended. The party represented by this witness lost the arbitration and sought to vacate the award on that basis that the arbitrator's refusal to postpone the hearing, despite both parties' consent, was misconduct. It argued that the witness was unable to concentrate on the hearing and his performance suffered.

The Eleventh Circuit held that the arbitrator's decision was not misconduct under the FAA. The arbitrator tried to accommodate the witness's situation but also had an obligation to the competing interest of expeditious resolution of the case. The court rejected the argument that refusal to grant a postponement when both parties agree is per se unreasonable. An arbitrator is entitled to consider not only the convenience of the parties and witnesses but also the arbitrator's convenience and may "take into consideration the need to ensure the expeditious resolution of the case." *Id.*

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A Primer for International Arbitration Specialists: 28 U.S.C. Section 1782

By Nicole Silver, Christine Orlikowski, and Jeff Johnson – August 29, 2017

Section 1782 of the U.S. Code, "Assistance to foreign and international tribunals and to litigants before such tribunals," states in relevant part:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. . . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person. . . .


Parties are increasingly using this statute to obtain discovery in the United States for use in foreign proceedings and, in particular, for use in investment treaty disputes. Indeed, in our view, for better or for worse, section 1782 discovery has already changed the landscape of investor-state arbitration forever by availing the protagonists infinitely greater access to evidence than they ever had before.

Because section 1782 actions are still a relatively new phenomenon in investor-state arbitration, there are several issues that parties will likely confront if they choose to rely on this provision. This article describes some of the issues that Winston & Strawn faced in litigating section 1782 actions in connection with the Chevron v. Ecuador arbitration. Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23 (U.S.-Ecuador Bilateral Investment Treaty).

Specifically, this article will address (1) whether international investment treaty arbitrations (BIT arbitrations) should qualify as foreign proceedings under the statute, (2) whether a sovereign state can be considered an "interested person," and (3) what the scope of discovery is for a testifying expert. It is our hope that summarizing how the parties and the courts addressed these issues will be instructive to attorneys who may be considering bringing their own section 1782 actions in aid of a foreign proceeding.

Investor-State Treaty Arbitrations: Proceedings in a Foreign/International Tribunal?

Numerous courts have determined that investment treaty arbitrations are covered by section 1782. For example, in In re Application of Chevron Corp., the Third Circuit found that investor-state treaty arbitration is "not . . . an arbitral tribunal established by private parties" but is instead an arbitration "established by an international treaty, the BIT between the United
States and Ecuador, and pursuant to UNCITRAL rules," holding that "international arbitral bodies operating under UNCITRAL rules constitute 'foreign tribunals' for purposes of Section 1782." 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010), aff'd sub nom., Chevron Corp. v. Berlinger, 629 F.3d 297 (2d Cir. 2011). Chevron obtained discovery under the statute in several courts by arguing that investor-state arbitration satisfied the requirements of section 1782. See, e.g., In re Chevron Corp., 753 F. Supp. 2d 536, 539 (D. Md. 2010) ("To be clear, because arbitral bodies are created by treaty and not by private parties, they do in fact constitute 'foreign tribunals for purposes of the statute.' Therefore, this element of Section 1782 is satisfied.").


In the Southern District of Texas, however, Chevron opposed Ecuador's application for section 1782 discovery of one of its environmental experts on the ground that Fifth Circuit precedent established that investor-state arbitration is private arbitration and thus not covered under section 1782. In support, Chevron relied upon Republic of Kazakhstan v. Biedermann International, 168 F.3d 880 (5th Cir. 1999), and El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa, 341 F. App'x 31 (5th Cir. 2009). Biedermann held that "§ 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations." 168 F.3d at 883; see also El Paso Corp., 341 F. App'x at 34 ("Because we cannot overrule the decision of a prior panel unless such overruling is unequivocally directed by controlling Supreme Court precedent, we remain bound by our holding in Biedermann." (internal quotations omitted) (emphasis in original)). Chevron claimed that the BIT arbitration at issue was a private international arbitration because private parties had the option under the BIT to resolve their disputes either through foreign courts or through arbitration under whatever rules and conditions the private party chose.

Ecuador opposed these arguments and asserted instead that the BIT arbitration was a public arbitration. Ecuador noted that the BIT arbitration was constituted pursuant to the express terms of a bilateral treaty between the United States and the Republic of Ecuador, both acting in their sovereign capacities to further sovereign interests. They alone agreed upon the available dispute resolution mechanisms that could be invoked. The BIT arbitration, moreover, satisfied the Supreme Court's test in Intel Corp. v. Advanced Micro Devices, Inc. because, like the European Commission's Directorate General for Competition in Intel, the BIT tribunal is (1) a first-instance decision maker (2) whose decisions are subject to court review (in this case, a set-aside action in the Dutch courts under Dutch law). Intel, 542 U.S. 241, 255, 258 (2004). The

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Eleventh Circuit has noted that since *Biedermann* "the Supreme Court has decided *Intel* . . . , where it applied a functional analysis focusing on whether a body acts as a first-instance adjudicative decision maker, permits the gathering and submission of evidence, has the authority to determine liability and impose penalties, and issues decisions subject to judicial review." *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 n.4 (11th Cir. 2014).

The district court sided with Chevron and concluded that Fifth Circuit precedent compelled it to deny Ecuador's request. *Republic of Ecuador v. Connor*, 708 F.3d 651, 653 (5th Cir. 2013). On appeal, the Fifth Circuit reversed the district court's denial of Ecuador's application but did so on an alternative basis, finding that Chevron was estopped from asserting that the BIT arbitration was not covered under section 1782. In support, the Fifth Circuit noted that "[i]n numerous district courts, and on appeal in other circuits, Chevron asserted that the BIT arbitration is an international proceeding. Chevron explicitly distinguished this court's *Biedermann* decision as involving a purely 'private' international arbitration between the Republic of Kazakhstan and an investor company." *Id.* at 654. As such, the court concluded, "Chevron should be judicially estopped from asserting its legally contrary position here. Consequently, we need not and do not opine on whether the BIT arbitration is in an 'international tribunal.'" *Id.* at 658. It thus remains an open question in the Fifth Circuit whether section 1782 discovery is available for a party in an investor-state treaty arbitration in the aftermath of the Supreme Court's 2004 decision in *Intel*.

**Sovereign States: Interested Persons?**

In Ecuador's first offensive section 1782 action, Diego Borja, a former Chevron employee living in California, argued that a sovereign was not a person within the meaning of the statute and that the court therefore lacked jurisdiction to grant Ecuador's request for discovery for use in the investment arbitration.

In this particular section 1782 action, Ecuador sought discovery from Borja, who had provided surreptitiously recorded videotape to Chevron in support of its allegations in the underlying arbitration. Among other things, Ecuador sought (1) a deposition of the former employee regarding his own recorded statements in which he suggested that Chevron acted inappropriately and (2) documents evidencing financial benefits provided to him by Chevron.

Borja attempted to quash the subpoena on the basis that Supreme Court precedent establishes a presumption that the term *person* does not include a sovereign. See, e.g., *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000); *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Cnty. of the Bishop Colony*, 538 U.S. 701, 712 (2003). This presumption, Borja argued, could be disregarded only upon some showing of statutory
intent to the contrary, *Vt. Agency of Natural Res.*, 529 U.S. at 781, which Borja claimed was absent here. In support, he relied on the legislative history of the statute; the fact that Congress omitted sovereigns from the definition of *person* in the Dictionary Act (1 U.S.C. § 1); and the D.C. Circuit decision in *Al Fayed v. CIA*, 229 F.3d 272, 277 (D.C. Cir. 2000), which examined a different provision of section 1782 and held that *person* excludes a sovereign.

Ecuador, too, relied on the statute's legislative history, observing that Congress enacted section 1782 specifically to afford foreign sovereigns the right to obtain discovery in aid of foreign proceedings and to promote reciprocal accommodations to U.S. litigants in foreign courts. *In re Letter Rogatory from the Justice Court, Dist. of Montreal, Can.*, 523 F.2d 562, 564 n.5 (6th Cir. 1975) (discussing the precursor to section 1782 in the context of criminal proceedings). Ecuador also noted that excluding a sovereign from the definition of *interested person* would not only defeat the purpose of section 1782 but also lead to absurd results. If a sovereign were found to lack standing as an interested person under section 1782, Chevron (and other investors) would be permitted to file section 1782 actions throughout the United States and obtain vast amounts of evidence in the form of documents and deposition testimony, but Ecuador (and similarly situated respondent states) would have no reciprocal right to take comparable (or any) discovery in the United States. This asymmetrical treatment would undermine precisely what section 1782 was intended to protect and simultaneously contradict U.S. public policy, which requires all litigants to be treated fairly. *Wardius v. Oregon*, 412 U.S. 470 (1973) (requiring equal access to discovery for accused and accuser as requirement of due process).

The district court sided with Ecuador, finding that the state "does qualify . . . as an 'interested person' for purposes of § 1782." *See Order Granting in Part and Denying in Part Diego Borja's Motion to Quash; and Granting Applicant's Motion to Join at 9, In re Ecuador, Case No. C-10-80225 MISC CRB (EMC) (Dec. 1, 2010).* While there is a "longstanding interpretative presumption that 'person' does not include [a] sovereign," the court held that the presumption is not a "'hard and fast rule of exclusion.'" *Id. at 3* (citing *Vt. Agency of Natural Res.*, 529 U.S. at 780, 781). In particular, the court found the legislative history of section 1782 instructive, agreeing with Ecuador that the 1964 addition of the "interested person" provision to the statute "was designed to *broaden*, not narrow, the scope of those who could seek judicial assistance—i.e., not just a foreign government." *Id. at 5* (emphasis in original). The court also noted the importance of context, finding that the *Al Fayed* case that Borja relied on was of limited value because the court there was interpreting *person* to "define those subject to discovery, not those *seeking* discovery." *Id. at 5* (emphasis added).

To avoid risking defeat on a hypertechnical reading of the statute, Ecuador also joined its attorney general—a "person" who even Chevron acknowledged could satisfy the definition of *interested person*—to its application for discovery. On this basis, too, Ecuador was granted the
discovery it requested. Practitioners need identify only one eligible "interested person" as an applicant.

Testifying Experts: Scope of Discovery?
Section 1782 actions are effective tools in receiving American-style discovery from experts testifying in foreign proceedings. Although it was unsettled when the Republic of Ecuador and Chevron prosecuted these actions, all federal courts that have addressed the issue now agree that expert discovery "encompass[es] any material considered by the expert, from whatever source, that contains factual ingredients, but [] excludes the theories or mental impressions of counsel." Republic of Ecuador v. Mackay, 742 F.3d 860, 870 (9th Cir. 2014). As a result, parties may depose these experts and obtain documents necessary to determine the factual basis for those opinions.

Federal courts have also rejected calls to narrow discovery under the 2010 amendments to the Federal Rules of Civil Procedure. In 2010, the Advisory Committee changed the "facts or other information" standard for expert reporting to a "facts and data" standard in Rule 26(a)(2). Chevron argued that this change, and those in Rule 26(b)(4), "restored broad work-product protection to expert materials." Republic of Ecuador v. For Issuance of a Subpoena under 28 U.S.C. § 1782(a), 735 F.3d 1179, 1185 (10th Cir. 2013). However, the courts of appeals have unanimously found that the "purpose of the 2010 revision was to return the work-product doctrine to its traditional understanding." For Issuance of a Subpoena, 735 F.3d at 1187. Thus, the work-product privilege has been limited to two narrow categories: draft expert reports and attorney-expert communications. In re Application of Republic of Ecuador v. Douglas, 153 F. Supp. 3d 484, 491 (D. Mass. 2015) (collecting cases).

Such broad discovery for expert materials can be used to great effect. In part because expert communications have traditionally not been the source of discovery in arbitration, their sudden availability through section 1782 holds the potential of revealing more candid—and useful—assessments and admissions than would otherwise be expected. Indeed, using section 1782 actions to subject adverse experts to American-style depositions and discovery can help your clients obtain material information for use in investment treaty arbitrations, which just might be what gives your clients the edge that they need to discredit the expert on whom your adversary relies.

Nicole Silver is of counsel and Christine Orlikowski and Jeff Johnson are associates at Winston & Strawn LLP in Washington, D.C. They are all members of the team representing the Republic of Ecuador in Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23. This team brought and defended more than 20 section 1782 actions in connection with that proceeding.
**Gomes v. Karnell: Attorney's Email with Essential Terms Binds Client to ADR**
*By Quinton M. Herbert – August 29, 2017*

Under the Federal Arbitration Act (FAA), an arbitration agreement shall be enforced unless it can be invalidated upon such grounds that exist at law or in equity for the revocation of any contract. A fundamental part of judicial review under that standard is ascertaining whether the parties have expressly intended that the contract would bind them, whether the terms of the contract are sufficiently definite, and whether the parties exchange legal consideration.

In *Gomes v. Karnell*, No. 11814-VCMR (Del. Ch. Nov. 30, 2016), the Delaware Court of Chancery made clear that absent sufficient grounds for revocation at law or equity, courts should enforce arbitration agreements containing the essential elements that manifest parties' mutual assent to be bound. In *Gomes*, the court granted the defendants' motion to compel arbitration, holding that email communications between counsel for parties to a contractual dispute formed a valid arbitration agreement under the FAA and are thus binding on the parties provided that the emails included the essential terms of an arbitration agreement.

**Facts of the Case**
The plaintiff, Mark Gomes, is an investment analyst in the technology sector. He provided stock picks on a crowdsourced investment website that garnered thousands of followers. In 2013, the plaintiff and one of the defendants, Ian Karnell started a subscription service that circulated Gomes's stock picks. Shortly thereafter, the parties founded a separate venture that would own the web-based subscription service as well as a new subscription service.

In 2015, the parties executed an operating agreement for yet another new entity, Montext, which they planned to use to build a web-based platform to help other investment analysts monetize their own stock picks. The operating agreement for Montext contained an arbitration clause. Shortly after the formation of Montext, disputes arose regarding the ownership of the web-based platform that impacted all of the parties' business ventures.

In efforts to resolve the issues, the parties' respective counsel discussed potential dispute-resolution alternatives and ultimately verbally agreed to arbitrate any dispute if mediation was not successful. In fact, Gomes's counsel sent the Karnells' counsel an email titled "Agreement to mediate and arbitrate," which stated in pertinent part:

> This will memorialize our agreement as to how to move this matter forward.
The parties (Mark Gomes, Jeremi Karnell, and Ian Karnell) agree to mediate all disputes between the three of them related to PTT and Montext. The parties, through counsel, agrees [sic] to use their best efforts to select a mediator by September 11.

The parties further agree that if an impasse is declared by the mediator, the parties will immediately initiate the binding arbitration process in an effort to resolve these disputes.

Id. The Karnells' attorney then responded: "I am happy to call this an agreement on the core point of mediating/arbitrating in lieu of litigation. That said, let's move on nailing down some particulars, including items already discussed such as location, at the same time we continue to discuss interim and final settlement terms." Id.

Thereafter, the parties engaged in suggesting possible mediators. Ultimately, the parties selected a mediator, set a date for mediation, agreed to the scope of the mediation, and engaged in limited discovery pursuant to the terms in the email communications.

Gomes suddenly cancelled the mediation days before the mediation was scheduled to begin. One month after canceling the mediation, Gomes filed a complaint alleging inter alia breach of fiduciary duty, waste, and aiding and abetting breach of fiduciary duty.

The Karnells filed a motion to dismiss for lack of subject matter jurisdiction and to compel arbitration under the arbitration agreement created by the email communications. Gomes contended that the email communications reflected preliminary negotiations and were missing "essential terms" to create a binding arbitration agreement.

**Delaware Court of Chancery's Ruling**
The court granted the defendants' motion to compel arbitration after examining several angles.

**FAA rules govern interstate commerce disputes.** Initially, the court noted that once parties agree to arbitrate a dispute involving interstate commerce, the rules of the FAA are applicable and govern the dispute. The FAA, **9 U.S.C. §§ 1 et seq.**, mandates that arbitration agreements be shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Accordingly, a party seeking to avoid arbitration bears the burden of establishing facts evidencing that the terms or conditions of the arbitration agreement can be invalidated due to grounds that exist at law or in equity for the revocation of any contract.

**Essential terms are necessary to bind the parties.** The court next focused on the plaintiff's contention that the arbitration agreement lacked essential terms to bind the
parties. More specifically, the plaintiff argued that the following essential terms were lacking: "the identity of the arbitrator, the means of selecting an arbitrator, the location of the arbitration, the applicable rules/procedures, the effect of the arbitration, the governing law, the type of relief available, the scope of permissible discovery, and the payment of arbitration fees." Consequently, the plaintiff averred that there was no meeting of the minds that would allow valid contract formation. However, the plaintiff conceded that there was no consensus among the courts with respect to what constitutes "essential terms" for an arbitration agreement.

_Gomes is distinguishable from Ramone and Leeds._ Under Delaware law, it is well settled that a valid contract exists "when the parties intended that the contract would bind them, the terms of the contract are sufficiently definite, and the parties exchange legal consideration." In arguing against arbitration, the plaintiff relied primarily on two cases—_Ramone v. Lang_, 2006 WL 905347 (Del. Ch. Apr. 3, 2006), and _Leeds v. First Allied Connecticut Corp._, 521 A.2d 1095, 1102-03 (Del. Ch. 1986)—that found no valid contract existed.

In _Ramone v. Lang_, the parties disputed whether an email exchange formed an agreement that created a limited liability company. The court held that the email exchange did not form a binding agreement. The court reasoned that there was never a manifestation of objective assent to the essential contract terms. In that case, emails from the plaintiff evidenced a lack of understanding of certain details, expressed potential disagreement with other details, and in one instance suggested that the parties meet to "finalize the details." All of these facts illustrated quite clearly that there was no manifestation of objective assent to the essential contract terms or meeting of the minds. Consequently, there was no intent by the parties to be bound by the terms.

Likewise, in _Leeds v. First Allied Connecticut Corp._, the court held that although a number of terms and issues were agreed to in a letter, no contractual agreement was formed between the parties. The dispute in _Leeds_ involved the sale of a nursing home business and its associated real estate. The court noted that "there are myriad topics and terms utterly conventional when a commercial seller in a significant transaction takes back a note" that were not present in the purported agreement. _Id._ at 1103. Furthermore, the court focused on the subsequent conduct of the parties. After drafting the one-page letter, the parties met a month later for the purpose of additional negotiations. Moreover, the parties "never seemed to discuss" a financing requirement that "would probably have been a deal breaker even had agreement been reached on the other points." _Id._ at 1101. As a result, the court held that the behavior of the parties after drafting the letter showed that they did not intend the letter to be the completion of all negotiations or reflect a final agreement.
In the instant case, the court held that *Ramone* is distinguishable because the parties' counsel expressed a mutual commitment to arbitrate "that was unconditional and without variation," despite the fact that certain specifics were still being "nailed down." *Gomes*, No. 11814-VCMR. In fact, the relevant email sent by Gomes' counsel used the following language: *agreement, agree to mediate all disputes between the three of them related to PTT and Montext, parties further agree that if an impasse is declared by the mediator, and the parties will immediately initiate the binding arbitration process in an effort to resolve these disputes. Id.* And the relevant response from the Karnells' attorney included similar language: *I am happy to call this an agreement on the core point of mediating/arbitrating in lieu of litigation. Id.*

Furthermore, the court noted that "[a]ll three parties acted with the understanding that 'an agreement on the core point of mediating/arbitrating in lieu of litigation' controlled their behavior." *Id.* The parties selected a mediator, chose a time and place for the mediation, and engaged in limited discovery—all pursuant to the arbitration agreement. In short, the overt actions of the parties in accordance with the arbitration agreement evidenced their intent to be bound.

Moreover, unlike in *Leeds*, the court found that no "extraordinary" terms were missing from the parties' arbitration agreement. Despite the fact that remaining issues like location were not final, the parties explicitly agreed to mediate and arbitrate disputes related to the parties' business ventures. They also agreed that arbitration was binding if mediation was unsuccessful. As such, the plaintiff failed to meet his burden of proving that terms or conditions of the arbitration agreement should be invalidated due to grounds that exist at law or in equity for the revocation of any contract.

**Legal Significance**

In short, the Delaware Chancery Court solidified its intent to enforce arbitration agreements where it is clear even from email communications that the parties intend to be bound, the terms of the agreement are sufficiently definite, and the parties exchange legal consideration. Counsel should thus take care to craft language sufficiently specifying that email communications to solidify certain provisions are not final and binding and are subject to final approval by the client.

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Exercise Caution When Relying on Electronic Arbitration Agreements

By Joel M. Everest – August 29, 2017

In this digital age, it is not surprising that businesses are increasingly relying on electronic communications for all manner of transactions. Businesses must exercise caution, however, when attempting to utilize electronic means to provide employees or customers with arbitration agreements. Courts across the country have taken vastly different approaches in addressing the sufficiency of electronic notice of an arbitration agreement.

Courts Finding Electronic Notice Sufficient

In Grant v. Morgan Stanley Smith Barney LLC, 2017 U.S. Dist. LEXIS 39515 (S.D. Fla. Mar. 19, 2017), the plaintiff asserted an age-discrimination claim against his brokerage firm employer. Prior to 2015, the relevant employment agreement included a mandatory arbitration program for some claims and a voluntary arbitration program for other claims. In September 2015, the employer altered the agreement to make arbitration mandatory for all claims. The employer notified its employees, including the plaintiff, of this change via email. The plaintiff argued that the new agreement was unenforceable because he never opened or read the email in question. In compelling the matter to arbitration, the court held that "plaintiff's decision not to open and read an email does not render the arbitration agreement invalid and unenforceable." Id. at *7.

Courts in jurisdictions such as Connecticut and the District of Columbia have taken an approach similar to that of the Grant court in Florida. See, e.g., Ferrie v. DirecTV, LLC, 2016 U.S. Dist. LEXIS 5081 (D. Conn. Jan. 12, 2016) (concluding that the plaintiff was on inquiry notice of an arbitration provision that was emailed to him where the only evidence offered was that the email had been sent but the plaintiff stated that he did not recall having ever seen it); Selden v. Airbnb, Inc., 2016 U.S. Dist. LEXIS 175162 (D.D.C. Dec. 19, 2016) ("Mutual arbitration provisions in electronic contracts—so long as their existence is made reasonably known to consumers—are enforceable.").

Courts Requiring Heightened Proof of Electronic Notice

On the other hand, an emerging number of courts appear to be applying greater scrutiny to the exact means of the electronic notice. Some courts have even gone as far as to require proof of actual notice for electronic agreements. In Moore-Dennis v. Franklin, 201 So. 3d 1131, 1139 ( Ala. 2016), the Alabama Supreme Court established a rule that a party relying on electronic notice must demonstrate that the web page containing the arbitration provision was actually
viewed by the individual it seeks to compel to arbitration. Notably, this is in direct contradiction
to a long line of holdings by the same court with respect to hard-copy arbitration agreements. 
See, e.g., Am. Bankers Ins. Co. v. Tellis, 192 So. 3d 386 (Ala. 2015) (compelling arbitration where
"the policyholders did not execute stand-alone arbitration agreements or necessarily even read
or receive the [] policies containing the arbitration provisions" because they manifested their
assent to those policies by continuing a business relationship with the company after the
arbitration provision became effective).

Alabama is not alone in its stance. Courts in New York, California, and other states have also
adopted heightened standards regarding the level of notice required to enforce electronic
*12–14 (S.D.N.Y. Mar. 6, 2017) ("without evidence that [plaintiff] ever followed the link
contained in [the emails referencing the arbitration agreement], continuing to work after the
date that those emails were received cannot constitute the kind of 'conduct which evinces the
intention of the parties to contract' contemplated under New York law"); Schnabel v. Trilegiant
Corp., 697 F.3d 110 (2d Cir. 2012) (sending an e-mail containing the arbitration provision did
not constitute sufficient notice); Hines v. Overstock.com, Inc., 380 F. App'x 22, 24–25 (2d Cir.
2010) (passive acceptance of a website's terms and conditions by virtue of using the website
was insufficient to compel arbitration); Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1179 (9th
Cir. 2014) (applying California law and holding that provision of the agreement on the
company's website was insufficient notice).

Conclusion
Businesses in jurisdictions such as New York, California, and Alabama should certainly consult
with an attorney regarding the sufficiency of their specific notification method. For jurisdictions
where no clear rule has been adopted, businesses should consider erring on the side of caution
by providing hard-copy agreements where feasible. In the alternative, requiring some type of
affirmative acknowledgement for electronic arbitration agreements should provide the
evidence that many courts now require.

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PRACTICE POINTS

Lack of Subject-Matter Jurisdiction Dooms Appeal

By Karl Bayer – August 8, 2017

Ruling that there was no subject-matter jurisdiction, the Fifth Circuit dismissed an appeal from an order confirming the selection of a panel of arbitrators. Bordelon Marine, LLC v. Bibby Subsea ROV, LLC, No. 16-30847 (5th Cir. Apr. 14, 2017).

In Bordelon, Bordelon and Bibby, were ordered to arbitrate a contract dispute related to the charter of an offshore vessel. The two companies disagreed over the appointment of the arbitrators who would consider the case. Bordelon filed a “Motion to Re-Open Case to Enforce the Method of Appointment of Arbitrators,” with the trial court and Bibby responded by asking the court to confirm the arbitrability of the matter and compel Bordelon to engage in arbitration before the arbitrators were selected. The trial court granted Bibby’s request and denied Bordelon’s. Bordelon appealed.

The Fifth Circuit focused on whether it had jurisdiction to consider the case. Bordelon unsuccessfully argued that the court had jurisdiction because the lower court’s order was a final decision. Bordelon also argued that its motion in the trial court was an appealable petition to compel arbitration under section 4 of the Federal Arbitration Act (FAA). The appellate court disagreed with that argument as well:

The district court resolved the dispute under section 5 . . . [W]e reject Bordelon’s attempt to re-characterize the district court’s section 5 order appointing arbitrators as an order denying Bordelon’s motion under section 4. Indeed, the district court unquestionably did not deny arbitration; it ordered arbitration in this case. Bordelon’s argument is not based on a failure of the district court to order arbitration but on a failure, in Bordelon’s view, to select arbitrators in a way Bordelon views as correct—a section 5 issue. Section 16(a)(1)(B) does not provide for an appeal of an interlocutory order granting or denying a motion under section 5. Because the order that Bordelon appeals is not a “den[ial of] a petition under section 4,” appellate jurisdiction does not exist under section 16(a)(1)(B).

Because nothing in 28 U.S.C. §§ 1291 or 1292 permits an appeal, and there was no certification by the district court under either section 1292 or Federal Rule of Civil Procedure 54(b), the court dismissed Bordelon’s appeal for lack of subject-matter jurisdiction.

Karl Bayer is the founder of Karl Bayer Dispute Resolution in Austin, Texas.
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