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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GULF LNG ENERGY, LLC and GULF LNG PIPELINE, LLC,	)	
	)	No. 22, 2020
Plaintiffs Below, Appellants,	)	
	)	CASE BELOW:
v.	)	
	)	COURT OF CHANCERY
ENI USA GAS MARKETING LLC,	)	OF THE STATE OF DELAWARE
	)	C.A. No. 2019-0460-AGB
Defendant Below, Appellee.	)	

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal presents an important question of first impression in this Court concerning the sanctity of a final arbitration award, duly confirmed by the Court of Chancery with all parties' consent. The Court of Chancery committed legal error in permitting Defendant Eni USA Gas Marketing LLC ("Eni") to attack that award by prosecuting a second arbitration which seeks to claw back the very damages Eni was required to pay under the prior award. Although the Court of Chancery recognized the important policies underlying the collateral attack doctrine, which holds that the controlling Federal Arbitration Act ("FAA") bars such "do overs," it erred by applying an overly narrow interpretation that allows Eni to attempt to undo the prior award in a second round of arbitration.

The FAA's principles of finality and efficiency warrant a wider view of what constitutes a collateral attack than the decision below allows. Indeed, while Eni claims that its pursuit of a second arbitration advances the FAA's pro-arbitration policies, that proceeding has the opposite effect by undermining Congressional intent and the exclusivity of the FAA review process for challenging arbitral awards.

* * *

The contours of this dispute and the legal issue presented are undisputed. In March 2016, Eni commenced an arbitration against Gulf LNG Energy, LLC and

Gulf LNG Pipeline, LLC (together, "Gulf"), seeking to terminate the parties' twenty-year Terminal Use Agreement ("TUA") by which Gulf had built, and Eni had purchased capacity at, a liquefied natural gas import facility in Pascagoula, Mississippi. A591–618. Eni alleged that the TUA's essential purpose had been frustrated and further that Gulf had breached the agreement. A594–95. On June 29, 2018, the tribunal issued a final award (the "Final Award"), terminating the TUA on frustration of purpose grounds, requiring Eni to pay substantial restitution to Gulf in recognition of Gulf's capital investment, future decommissioning costs, and the benefits gained by Eni in entering the TUA and further requiring Gulf to refund certain of Eni's contractual payments. A136; A138–39; A146–47; A151; A155–56. The panel found Eni's breach of contract termination grounds were "academic" and "deserv[ing] [of] no further consideration" in light of the tribunal's overall resolution of the dispute. A133.

Eni did not timely challenge the Final Award under the FAA or the governing arbitration rules. On the contrary, when Gulf promptly sought confirmation of the Final Award in the Court of Chancery, Eni both counter-claimed for confirmation of the Final Award and cross-moved for judgment on the pleadings. A382–422; A425–38. While Eni initially opposed including in the judgment the net amount owed Gulf under the Final Award, it capitulated and affirmatively told the Court that no grounds existed to challenge the Final Award.

A035–37; A269. By Judgment dated February 1, 2019, the Court of Chancery confirmed the Final Award, and ordered Eni to pay Gulf approximately $371 million. A050–51.

Eni paid this amount in full, but then, on June 3, 2019, commenced a second arbitration (the "Second Arbitration"), to be heard by a different panel of arbitrators, to claw back the amounts it had paid, asserting negligent misrepresentation and breach of contract claims against Gulf. A331–56; A447. Lest there be any doubt about the purpose of the Second Arbitration, Eni claimed as damages the monies it had paid to Gulf under the Final Award. And the asserted contract claim is identical to the one that Eni had previously asserted. *See infra* at nn. 4–5.

Gulf promptly filed suit in the Court of Chancery to enjoin Eni from proceeding with the Second Arbitration. A014–48. Eni answered the complaint, and Gulf moved for judgment on the pleadings. A012–13. On December 30, 2019, the Court of Chancery issued a "split decision," enjoining Eni's negligent misrepresentation claim as an impermissible collateral attack on the Final Award, but permitting Eni's breach of contract claim to proceed to the new arbitration. Opening Br. Ex. A (the "Opinion" or "Op.") at 29–35.

Gulf appeals from the Court of Chancery's Opinion and paragraph 2 of the January 10, 2020 Order and Final Judgment (Opening Br. Ex. B) denying Gulf's motion for judgment on the pleadings.

SUMMARY OF ARGUMENT

1. The Court of Chancery erroneously held that Eni's renewed breach of contract claim in the Second Arbitration is not an impermissible collateral attack on the Final Award. In determining whether a claim is a collateral attack on a prior arbitral award, a court must assess whether the party is seeking: (1) to rectify any alleged harm suffered in the earlier arbitration, or (2) to challenge misconduct occurring in the prior arbitration. Eni's breach of contract claim is a quintessential impermissible collateral attack under this standard: it expressly seeks to recover from Gulf, as damages in the Second Arbitration, amounts it was required to pay to Gulf, and which it did in fact pay to Gulf, pursuant to the Final Award and outside of the exclusive FAA review scheme. Accordingly, as Eni failed to timely pursue its remedies under the FAA for vacating, modifying, or correcting the Final Award, its contract claim in the Second Arbitration is now barred. The Court of Chancery's ruling, allowing Eni's contract claim to proceed, is moreover at odds with the fundamental pro-arbitration policies of finality and efficiency, which underlie the FAA and preclude parties from challenging arbitration awards other than through the exclusive avenues and timeline established by the FAA.

STATEMENT OF FACTS

A. The Parties

Plaintiff Gulf LNG Energy, LLC is a Delaware limited liability company, which owns and operates a liquefied natural gas ("LNG") terminal facility near Pascagoula, Mississippi (the "Pascagoula Facility" or the "Facility"). A023; A056. The terminal provides unloading, storage, and regasification capability for the import of LNG by ship into the United States. *Id*.

Plaintiff Gulf LNG Pipeline, LLC is a Delaware limited liability company, which owns and operates a five-mile long, 36-inch diameter "send-out" pipeline for the delivery and distribution of natural gas from the LNG terminal at the Pascagoula Facility to downstream inland pipelines. *Id*.

Defendant Eni is a Delaware limited liability company established to market natural gas products and perform related services in the United States. A056. Eni is a United States subsidiary of Eni S.p.A., an Italian corporation which is one of the largest oil and gas companies in the world, engaging in oil and gas exploration, field development and production, as well as the supply, trading, and shipping of natural gas, LNG, electricity, and petrochemicals. A023; A056.

B. The Terminal Use Agreement

On December 8, 2007, the parties entered into the TUA, requiring Gulf to construct, maintain, and operate the Pascagoula Facility for the receipt, storage,

regasification, and domestic distribution of LNG. A024–25; A055. The TUA required Eni to pay fixed monthly fees over twenty years to reserve a certain amount of the Pascagoula Facility's capacity, along with additional, variable fees based on its actual use. *Id.*; Op. at 4.

In parallel with the TUA, on December 10, 2007, Gulf and Eni's parent company, Eni S.p.A., entered into a Guarantee Agreement under which Eni S.p.A. guaranteed Eni's obligations under the TUA. A031. Eni is not a party to the Guarantee Agreement. Op. at 7.[1]

As promised under the TUA, and in reliance on the fixed monthly payments to be paid by Eni and guaranteed by Eni S.p.A., Gulf raised the necessary debt and equity capital, constructed the Pascagoula Facility (at a cost of over $1 billion) and provided Eni with its reserved capacity at the terminal. A055; A025. The Facility became operational on October 1, 2011. *Id*. However, despite Gulf and the Facility having always been ready, willing, and able to receive and regasify Eni's LNG, Eni did not thereafter use its reserved capacity to import LNG into the United States. A025; A453. Except for the initial commissioning cargo, neither Eni nor Gulf's only other customer has ever shipped LNG to the Pascagoula

[1] On September 28, 2018, Gulf filed a complaint in New York state court against Eni S.p.A., seeking to hold Eni S.p.A. liable for the full scope of its obligations under the Guarantee Agreement. A031; A460–61; Op. at 7–8. The Final Award did not address Eni S.p.A.'s obligations under the Guarantee Agreement.

Facility. *Id*. Although not using the Pascagoula Facility, Eni remained obligated under the TUA to pay, and in fact paid, the monthly fees to maintain the option to bring in cargoes at its sole election.

C. The First Arbitration and Award

On March 1, 2016, Eni filed a Notice of Arbitration under the TUA's dispute resolution provisions, which provide for arbitration administered by the American Arbitration Association's International Centre for Dispute Resolution ("ICDR"), pursuant to its International Arbitration Rules (the "ICDR Rules"). A590–618; A250. This is the exclusive and definitive forum for any dispute arising out of, relating to, or connected with the TUA. A250.[2] The parties agreed that any award obtained "shall be final and binding," and further to "waive any right to appeal from or challenge any arbitral decision or award . . . except with respect to the limited grounds for modification or non-enforcement provided by any applicable arbitration statute or treaty." A251–52 (TUA §§ 20.1(h), (o)).

In the arbitration, Eni claimed that the TUA should be terminated and sought release from its obligations under the TUA to pay the fixed monthly fees for the rest of the TUA's twenty-year term. A617; A057. As grounds for termination, Eni argued that: (1) the TUA's purpose had been frustrated by increased production of

[2] Specifically, Section 20.1(a) provides that "[a]ny Dispute . . . shall be exclusively and definitively resolved through final and binding arbitration, it being the intention of the Parties that this is a broad form arbitration agreement designed to encompass all possible disputes." A250.

domestic shale gas, rendering the importation of LNG into the United States uneconomical, and (2) "[i]n the alternative," Gulf breached the TUA by exploring the development of a liquefaction and export project at the Pascagoula Facility. A060–61; A072–73; A594–95; A057.

Eni presented both claims and requested that the tribunal sort out the economic consequences of termination, including by seeking "reimbursement of the amounts it paid [to Gulf] under the TUA on an ongoing basis since December 1, 2015 or—at the latest—since the filing of the Notice of Arbitration." A057; *see also* A617. Gulf opposed both of Eni's grounds for termination, each of which was fully litigated during the arbitration.

On June 29, 2018, the tribunal issued the Final Award, declaring the TUA terminated (as of March 1, 2016) because its essential purpose had been frustrated. A151. However, in recognition of Gulf's capital investment and future decommissioning costs and the benefits realized by Eni in signing the TUA, the tribunal ordered Eni to pay equitable restitution to Gulf together with pre- and post-award interest. A136; A138–39; A146–47; A151; A155–56. Specifically, it found that Gulf was "entitled to be compensated . . . for the expenses incurred and to be incurred by [Gulf] in the context of the partial performance of the TUA (based on the total costs to dispose of the Pascagoula Facility and wind down the TUA based on the 'decommissioning scenario')" with a setoff for all fixed fee

payments Eni made after December 31, 2016. A136; A155–56. This resulted in a net award payable from Eni to Gulf, which the parties later agreed amounted to $371,577,849. A050; Op. at 9.

In light of the comprehensive relief the Final Award fashioned, the panel determined that Eni's breach of contract claim had "become academic and deserves no further consideration." A133. The tribunal thus considered, but ultimately declined, to award Eni any further setoffs to the restitution it required Eni to pay owing to Gulf's alleged contractual breaches. Accordingly, the net payment required by the Final Award resolved Eni's claims for compensation and setoffs arising from the termination and alleged breach of the TUA.

On July 26, 2018, less than a month after the Final Award was issued, Eni sought modification of one paragraph contained in the disposition section of the award, Section IX, seeking confirmation that Gulf was required to reimburse Eni for all fees it paid since December 31, 2016, plus interest. A155–56. Eni filed its motion under ICDR Rule 33(1), which grants parties thirty days after a final arbitration award to ask "the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award." A156; ICDR Rule 33(1). Describing the correction as a "purely ministerial act," the panel granted Eni's request on July 31, 2018. A155–56.

Eni did not, however, apply under Rule 33(1) for an interpretation or a correction in any other respect, such as for "an additional award" on its breach of contract claims. Nor did Eni contend that the first panel failed to reach any issues or otherwise failed to perform its arbitral duties.

D. Confirmation of the Final Award

On September 25, 2018, Gulf sought confirmation of the Final Award in the Court of Chancery. A358–79. Although the FAA permitted Eni to challenge the Final Award if it believed that the arbitrators had "so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made,"[3] Eni made no such challenge. On the contrary, Eni counter-claimed for confirmation of the Final Award "in its entirety," cross-moved for judgment on the pleadings, and acknowledged both that the Final Award was "final and binding" and that "no grounds for challenging the Award have been raised (*and none exists*)." A419–21; A269 (emphasis added); A432. Eni moreover assured the Court of Chancery that it "has no intention to collaterally attack or re-litigate any issues decided in the Award." A276. As the Court of Chancery stated during the confirmation hearing, "[s]ignificantly, none of the parties in their pleadings have asserted a claim to modify, correct, or vacate the [Final Award]. The sole relief sought is to confirm the [F]inal [A]ward." A323.

[3] 9 U.S.C. § 10(a)(4).

By a Final Order and Judgment entered on February 1, 2019, the Court of Chancery confirmed the Final Award. A050–51. The Court's Judgment provided that:

> 1. The arbitration award dated June 29, 2018 (with the correction issued by the Tribunal on July 31, 2018) . . . is confirmed in its entirety.
>
> 2. The LNG Terminal Use Agreement between the parties, dated December 8, 2007 . . . is terminated as of March 1, 2016 pursuant to the Final Award.
>
> 3. Judgment is entered in favor of Gulf LNG and against ENI USA in the amount of $371,577,849 pursuant to the Final Award.

Id. Neither party appealed the Judgment. Three weeks later, Eni paid Gulf in full. A021; A447. At no point did Eni avail itself of the procedures created by the FAA to challenge, modify, or vacate arbitral awards.

E. The Second Arbitration

Despite having represented to the Court of Chancery that it had neither the intention nor any grounds on which to challenge the Final Award, Eni did precisely that four months after the Court entered its Judgment. On June 3, 2019, Eni commenced the Second Arbitration, to be heard by a new panel, seeking to claw back the monies it paid to satisfy the Final Award. A331–56; A040–41. Eni asserted two causes of action: a negligent misrepresentation claim and the same breach of contract claim it had alleged in the first arbitration.

In its negligent misrepresentation claim, Eni asserted that Gulf made false representations to the first tribunal "[t]o secure the award of equitable

compensation for Decommissioning Costs of the Pascagoula Facility" in the Final Award. A354. Eni claimed that if Gulf had not made the alleged misrepresentations, "the compensation amount paid by Eni for decommissioning costs would have been greatly reduced, or reduced to zero." *Id*. To remedy this purported harm, Eni sought "declaratory and other relief, in the form of damages and/or restitution, together with interest at the contractual rate, in an amount to be proven at the hearing on the merits, as a result of Gulf's wrongful conduct." A355.

In its breach of contract claim, Eni simply reasserts the same allegations it litigated in the prior arbitration, which the tribunal found "academic" and "deserv[ing] [of] no further consideration."[4] A133. In particular, Eni once again asserts that "Gulf has breached numerous provisions of the TUA in pursuit of its LNG liquefaction and export project" and even cites the same TUA provisions it relied upon in the First Arbitration.[5] A350.

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[4] *Compare* A350 (Second Notice of Arbitration: "Gulf has breached numerous provisions of the TUA in pursuit of its LNG liquefaction and export project" and that "[t]he TUA precludes Gulf from engaging in any activities or undertakings that have a 'purpose and object' other than the importation/regasification of LNG in the United States"), *with* A057 (Final Award: Eni argued in the First Arbitration that Gulf "breached the TUA by pursuing a gas liquefaction and export project at the Pascagoula Facility, in contravention of the express terms of the TUA which, by [Eni's] account, among other things limit the purpose of the Pascagoula Facility . . . to the importation and regasification of LNG").

[5] *Compare* A614–15 (First Arbitration, seeking a declaration that Gulf "breached the warranties and covenants set forth in at least Articles 22.4(a) and 22.4(e)" of the TUA), *with* A353 (Second Arbitration: Gulf allegedly "breached the TUA by

Moreover, as with its negligent misrepresentation claim, Eni links the damages it purports to have suffered from Gulf's alleged contract breach to the overall amount of restitution the first tribunal ordered Eni to pay in the Final Award. Specifically, Eni contends that Gulf's alleged "breaches have caused substantial injury and damages to Eni," including "*the amounts that Eni has had to pay to Gulf for Gulf's purported decommissioning of the Pascagoula Facility*" as required by the Final Award. A353 (emphasis added).

F. The Court of Chancery Proceedings and Decision

On June 17, 2019, Gulf brought this action to enjoin Eni from proceeding with the Second Arbitration. All parties agreed that the matter could and should be determined "on the papers" in the context of a motion for judgment on the pleadings under Court of Chancery Rule 12(c) and agreed to stay the Second Arbitration pending the Court of Chancery's decision on that motion. On December 30, 2019, after briefing and oral argument, the Court of Chancery issued the Opinion granting in part and denying in part Gulf's motion.

The Court of Chancery held that the negligent misrepresentation claim constituted an impermissible collateral attack on the Final Award for two reasons. First, the Court concluded that Eni's "ultimate objective in the Second Arbitration" was to recoup "decommissioning costs it was required to pay to satisfy the Final

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engaging in LNG liquefaction- and export-related activities in direct contravention of the express terms of at least Articles 22.4(a) and 22.4(e) of the TUA").

Award," and that it was improperly seeking to "claw back some or all of the damages that were awarded to Gulf in an arbitration proceeding that is supposed to be concluded." Op. at 30. The Court reasoned that "[i]f Eni had its way, for all practical purposes, the finality of the Final Award would be undone and the monetary recovery Gulf obtained in the First Arbitration would be nullified," a result that would be "the epitome of a collateral attack." *Id*. Second, the Court found that "the essence of Eni's negligent misrepresentation claim is that Gulf procured damages in the First Arbitration by engaging in misconduct that tainted the Final Award." *Id*. at 31. Because "Eni made no effort to seek to vacate the Final Award on this ground," the Court ruled that Eni had "no right to bring a collateral attack now to 'challenge the very wrongs affecting the award for which review is provided under section 10 of the Arbitration Act.'" *Id*. (citation omitted).

However, the Court of Chancery concluded that Eni's breach of contract claim was not a collateral attack, stating that "the First Tribunal never ruled on [the contract claim], which it found to be academic in view of its ruling that the TUA had been terminated for frustration of purpose." *Id*. at 32. The Court reasoned that "given that the First Tribunal never reached the merits of the claim for breaches of Articles 22.4(a) and 22.4(e) of the TUA and never granted any relief based on that claim, it cannot be said that Eni's contract claim in the Second Arbitration seeks to rectify 'harm' allegedly suffered in the First Arbitration." *Id*. at 33. As a result,

the Court concluded that "it is up to the tribunal in the Second Arbitration to determine whether the contract claim is arbitrable and, if so, whether that claim would be precluded based on the First Arbitration." *Id*.

The Court entered the Final Judgment on January 10, 2020. This appeal followed. Eni subsequently cross-appealed from the part of the Final Judgment barring its negligent misrepresentation claim. Dkt. 15.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN HOLDING THAT ENI'S BREACH OF CONTRACT CLAIM IN THE SECOND ARBITRATION IS NOT A COLLATERAL ATTACK ON THE FINAL AWARD.

A. Question Presented

Did the Court of Chancery commit legal error by permitting Eni to proceed in the Second Arbitration with its breach of contract claim, which seeks to claw back amounts it was required to pay in a prior arbitration, where Eni failed to challenge the prior award as required by the FAA and the parties' agreement?[6]

B. Scope of Review

The standard for this Court's review of the Court of Chancery's judgment is *de novo*. A trial court's decision on a motion for judgment on the pleadings necessarily "presents a question of law" that this Court "'review[s] *de novo*,' to determine whether the court committed legal error in formulating or applying legal precepts."[7] Moreover, "[a]lthough [this Court] generally review[s] a denial of a permanent injunction for an abuse of discretion, [it] do[es] not defer to the trial court on embedded legal conclusions and review[s] them *de novo*."[8]

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[6] A017–48, A487–501, A505–42, and A571–79.

[7] *W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC*, 12 A.3d 1128, 1131 (Del. 2010) (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993)).

[8] *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 380–81 (Del. 2014) (footnote omitted).

C. Merits of the Argument

1. The FAA Bars Collateral Attacks That Attempt to Circumvent the FAA's Exclusive Means of Reviewing Arbitration Awards.

The FAA reflects the congressional declaration of a national policy favoring arbitration.[9] This policy incorporates two equally significant and intertwined mandates: the prompt enforcement of agreements to arbitrate, and the subsequent finality of the resulting arbitral awards.[10] In agreeing to arbitrate, parties seek the twin efficiencies that come with both ready access to arbitration at the outset of the dispute *and* the finality and unappealability of an arbitral tribunal's award that resolves the dispute once and for all, subject to limited review under the FAA. Indeed, these are the hallmark features that make arbitration attractive to commercial parties.

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[9] *Hall St. Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) ("Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts . . . ."); *Arrowood Indem. Co. v. Equitas Ins. Ltd.*, 2015 WL 4597543, at *5 (S.D.N.Y. July 30, 2015) ("[T]he FAA expresses a national policy favoring arbitration.") (citation omitted).

[10] "The purpose of arbitration is to provide a fast, inexpensive resolution of claims." *Quintana v. Morgan Stanley DW, Inc.*, 2005 WL 8155929, at *3 (S.D. Fla. Dec. 8, 2005).

To ensure finality and advance efficiency, the FAA grants parties only limited recourse to challenge an arbitration award once it is rendered.[11] Under Section 10 of the FAA, a party may seek to vacate an arbitral award where (i) "the award was procured by corruption, fraud, or undue means," (ii) "there was evident partiality or corruption in the arbitrators," (iii) "the arbitrators were guilty of . . . misbehavior by which the rights of any party have been prejudiced," or (iv) "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."[12] Likewise, Section 11 permits a party to seek to modify an arbitration award only where (i) "there was an evident material miscalculation of figures or an evident material mistake", (ii) "the arbitrators have awarded upon a matter not submitted to them," or (iii) "the award is imperfect in matter of form not affecting the merits of

[11] *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 911 (6th Cir. 2000) ("This strong federal policy in favor of arbitrating claims governed by an arbitration contract, however, also provides that arbitration awards may only be subject to limited judicial review under the FAA."); *Arrowood*, 2015 WL 4597543, at *7 ("The FAA mandates judicial deference to arbitration awards to further the 'twin goals of arbitration, namely settling disputes efficiently and avoiding long and expensive litigation.'") (citation omitted).

[12] 9 U.S.C. § 10.

the controversy."[13] These provisions provide "the exclusive remedy" for challenging arbitration awards within the FAA's purview.[14]

Under Section 12 of the FAA, a party must bring its challenge to an arbitral award "within three months after the award is filed or delivered."[15] "Failure to comply with this statutory precondition of timely service of notice [under Section 12] forfeits the right to judicial review of the award."[16] In other words, unless one of the FAA's limited grounds for vacating or modifying the award is successfully pursued within the time allowed, an arbitral award is final and unappealable.[17] Indeed, "the strictures of section 10 and section 12 are designed to afford an arbitration award finality in a timely fashion, promoting arbitration as an expedient method of resolving disputes without resort to the courts."[18]

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[13] 9 U.S.C. § 11.

[14] *Decker*, 205 F.3d at 909; *see also Arrowood*, 2015 WL 4597543, at *5; *Phillips Petroleum Co. v. Arco Alaska, Inc.*, 1988 WL 60380, at *6 (Del. Ch. June 14, 1988) (Jacobs, V.C.).

[15] 9 U.S.C. § 12.

[16] *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1212 (6th Cir. 1982).

[17] *Prudential Sec. Inc. v. Hornsby*, 865 F. Supp. 447, 450 (N.D. Ill. 1994) ("Under the [FAA], an arbitration award is final unless either party moves to vacate or modify the award under section 10 within the three month time period prescribed by section 12.") (footnote omitted). As the United States Supreme Court explained in *Hall Street*, these provisions advance the "national policy favoring arbitration" by providing "just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." 552 U.S. at 588.

[18] *Prudential Sec.*, 865 F. Supp. at 450–51.

In the TUA's arbitration clause, upon which Eni relies to launch its impermissible Second Arbitration, Eni and Gulf expressly recognized and endorsed these statutory principles of finality. Specifically, the TUA provides both that "[t]he award of the arbitral tribunal shall be final and binding," and that "[t]o the extent permitted by Applicable Law, the Parties hereby waive any right to appeal from or challenge any arbitral decision or award, or to oppose enforcement of any such decision or award before a court or any governmental authority, except with respect to the limited grounds for modification or non-enforcement provided by any applicable arbitration statute or treaty"—*i.e.*, the FAA. A251–52 (TUA §§ 20.1(h), (o)).[19]

To protect this congressionally created scheme and advance the underlying policies of the FAA, both Delaware and federal courts have repeatedly barred proceedings (including arbitrations) that seek to upset a prior award outside of the FAA process.[20] This "collateral attack" doctrine protects and enforces Congress's

[19] Here, because the parties did not expressly provide for the Delaware Uniform Arbitration Act, 10 *Del. C.* §§ 5701–25, to apply, the FAA is the "applicable arbitration statute." A252.

[20] *See, e.g.*, *Pryor v. IAC/InterActiveCorp.*, 2012 WL 2046827, at *6–7 (Del. Ch. June 7, 2012) (Strine, C.); *Phillips Petroleum*, 1988 WL 60380, at *4–6; *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742, 749–50 (5th Cir. 2008); *Sander v. Weyerhaeuser Co.*, 966 F.2d 501, 502–03 (9th Cir. 1992); *Corey*, 691 F.2d at 1211–13; *Nazar v. Wolpoff & Abramson, LLP*, 530 F. Supp. 2d 1161, 1168–70 (D. Kan. 2008); *Quintana*, 2005 WL 8155929, at *3–4; *Pisciotta v. Shearson Lehman Bros., Inc.*, 629 A.2d 520, 524–25 (D.C. 1993).

determination that the FAA review process is the exclusive means of challenging arbitral awards.[21] Sections 10, 11, and 12 of the FAA are "meaningless if a party to the arbitration proceedings may bring an independent direct action asserting such claims outside of the statutory time period provided for in section 12."[22] Accordingly, as the policies behind these sections "would be eviscerated if it were only an *optional* way to modify an arbitration award, an attempt to modify an award by a route or mechanism other than section 10 must be enjoined."[23]

As such, while Eni cloaked its argument below in pro-arbitration rhetoric by citing cases that concern only agreements to arbitrate (and not second arbitrations), its position actually undermines the nation's FAA-based pro-arbitration policy with regard to arbitrations that have run their course and resulted in final arbitration awards.[24] Contrary to Eni's position, there is simply no national policy allowing a

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[21] *See Decker*, 205 F.3d at 910–11.

[22] *Corey*, 691 F.2d at 1212–13.

[23] *Prudential Sec.*, 865 F. Supp. at 451 (emphasis added); *see also Arrowood*, 2015 WL 4597543, at *7 ("[A]llowing boundless relitigation" would "call all arbitral awards into doubt and subvert the FAA."). Parties "may not bypass the exclusive and comprehensive nature of the FAA by attempting to arbitrate [their] claims in a separate second arbitration proceeding." *Decker*, 205 F.3d at 911.

[24] Eni's reliance below on cases like *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), that "enforce[] the contractual intent of parties on questions of arbitrability" (Op. at 1) is irrelevant as those cases do not involve collateral attacks on a prior arbitration award. *See Arrowood*, 2015 WL 4597543, at *5 (citing *Decker*, 205 F.3d at 910–11); *Oppenheimer & Co. v. Pitch*, 15 N.Y.S.3d 307, 308 (N.Y. App. Div. 2015) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002)).

party disappointed with an arbitration award to attack it in a second arbitration rather than through the exclusive mechanism that the FAA itself provides.

2. Eni's Breach of Contract Claim is an Impermissible Collateral Attack on the Final Award.

In light of this legal framework, the Court of Chancery committed reversible error by failing to recognize that Eni's breach of contract claim—like its negligent misrepresentation claim—constituted a collateral attack on the Final Award.

a. Eni's Breach of Contract Claim Is an Impermissible Collateral Attack Because It Seeks to Rectify the Harm Eni Suffered by the Final Award.

In assessing whether a second proceeding constitutes a collateral attack, a court need not address the merits of the new claim or assess if any preclusion doctrines apply. Rather, as the Court of Chancery correctly acknowledged,[25] a second proceeding is an impermissible collateral attack on a prior arbitral award when the party's "ultimate objective" in the second proceeding is either "to rectify the alleged harm [it] suffered" in the first arbitration or to remedy alleged misconduct that tainted the prior award.[26] These two branches of the collateral

[25] Op. at 13–17, 30–32.

[26] *Decker*, 205 F.3d at 910; *Phillips Petroleum*, 1988 WL 60380, at *6 (damages claim premised upon one party "act[ing] illegally in the arbitration, thereby tainting the arbitration award" an impermissible collateral attack); *Pryor*, 2012 WL 2046827, at *6 (breach of contract action where party's objective was to remedy harm suffered in an earlier arbitration an impermissible collateral attack); *Corey*, 691 F.2d at 1211–13 (party seeking to remedy harm caused by improper selection of arbitrators an impermissible collateral attack); *Arrowood*, 2015 WL 4597543, at

attack doctrine are disjunctive: either circumstance constitutes an attack on award finality and jeopardizes the FAA's exclusive process for judicial review of awards.

Evaluated under this standard, Eni's Second Arbitration is the quintessential impermissible collateral attack on a prior arbitration proceeding. In the Second Arbitration, Eni seeks to undo the result of the Final Award by having an entirely new panel "rectify" a "harm" it suffered in the first proceeding by allowing it to claw back the restitution it paid to Gulf for avoidance of its future obligations under the TUA. Eni's objective to undo the Final Award is apparent from the face of its second Notice of Arbitration. There, Eni readily admits that the damages it seeks in the Second Arbitration include *the very amounts* it paid Gulf per the Final Award: "Gulf's breaches have caused substantial injury and damages to Eni, including . . . *the amounts that Eni has had to pay to Gulf for Gulf's purported decommissioning of the Pascagoula Facility*." A353 (emphasis added). The sole reason Eni had to pay Gulf those amounts, of course, is the Final Award.

Just as then-Chancellor Strine concluded in finding the breach of contract claim in *Pryor* to be an impermissible collateral attack and therefore precluded by

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*6 (claim alleging "intentional misconduct" in a prior arbitration impermissible collateral attack); *Prudential Sec.*, 865 F. Supp. at 451 (fraud claim alleging misconduct in the arbitration which decreased the claimant's award impermissible collateral attack); *Gulf Petro*, 512 F.3d at 749–50 (common law and statutory claims an impermissible collateral attack where alleged harm derived from the impact the conduct had on the final award issued by the arbitrators).

the FAA, Eni's "objective in this breach of contract claim is to remedy 'the alleged harm [it] suffered by'" paying a larger "arbitration award than [it] would have [paid] . . . . In order to obtain such relief, a [party] is limited to proceeding under the FAA."[27] "Such arbitral mulligans are forbidden by the FAA . . . . [T]he FAA does not permit a second arbitration demand to be used to nullify an arbitral award, in whole or in part."[28]

The Court of Chancery's correct treatment of Eni's negligent misrepresentation claim reveals its error in allowing Eni's contract claim to proceed. In enjoining Eni from prosecuting that negligent misrepresentation claim, the Court of Chancery reasoned that:

> Eni's ultimate objective in the Second Arbitration is to receive payment for decommissioning costs it was required to pay to satisfy the Final Award. In other words, Eni is seeking to claw back some or all of the damages that were awarded to Gulf in an arbitration proceeding that is supposed to be concluded. If Eni had its way, for all practical purposes, the finality of the Final Award would be undone and the monetary recovery Gulf obtained in the First Arbitration would be nullified . . . .

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[27] *Pryor*, 2012 WL 2046827, at *6; *see also Ergobilt, Inc. v. Neutral Posture Ergonomics, Inc.*, 2002 WL 1489521, at *8–9 (N.D. Tex. July 9, 2002) (denying motion to file supplemental complaint where proposed breach of contract action sought "exactly the relief Plaintiffs seek by vacating the award, namely, a reduction or offset in the amount of attorney's fees awarded by the arbitrator. Under these circumstances, the court believes Plaintiffs' proposed breach of contract action amounts to 'no more, in substance, than an impermissible collateral attack on the award itself'") (quoting *Decker*, 205 F.3d at 910).

[28] *Arrowood*, 2015 WL 4597543, at *5–6.

Op. at 30.[29] The Court of Chancery accordingly held that it would be "*the epitome of a collateral attack*" to allow Eni to "claw back" the decommissioning costs it paid Gulf through its negligent misrepresentation claim. *Id* (emphasis added).

But Eni's breach of contract claim targets the exact same objective and damages as the barred negligent misrepresentation claim: reimbursement of amounts it paid under the First Award "measured in terms of the impact" that the prior tribunal's alleged error "had on the arbitration award."[30] In the Court's own words, Eni's contract claim's "ultimate objective" is no different: it also seeks to "claw back some or all of the damages" awarded Gulf, and if Eni prevails, "for all practical purposes, the finality of the Final Award would be undone" and "the monetary recovery Gulf obtained in the First Arbitration would be nullified." Op. at 30. Thus, the Court should have similarly considered Eni's breach of contract claim to be the "epitome of a collateral attack." *Id*.

But instead of following the reasoning it correctly adopted in the context of the misrepresentation claim, the Court of Chancery concluded that because the first tribunal "never reached the merits" of the contract claim and "never granted any

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[29] The Court of Chancery's decision also relied on a second ground to find the negligent misrepresentation claim barred, that "the essence of" that claim "is that Gulf procured damages in the First Arbitration by engaging in misconduct that tainted the Final Award." *Id.* at 31.

[30] *See Prudential Sec.*, 865 F. Supp. at 450 (subsequent proceeding is a collateral attack where "the harm claimed . . . was measured in terms of the impact that the misconduct had on the arbitration award").

relief based on that claim, it cannot be said that Eni's contract claim in the Second Arbitration seeks to rectify 'harm' allegedly suffered in the First Arbitration." *Id*. at 33. On that basis, the Court of Chancery found that the contract claim "does not constitute a collateral attack on the Final Award under Gulf's own formulation of the operative test." *Id*. This rationale, however, is both inaccurate and irrelevant to the collateral attack doctrine.

First, the Court of Chancery improperly second-guessed the first tribunal's decision regarding Eni's breach claim in the context of its overall award. The panel concluded that the breach of contract allegations that Eni had itself characterized as an "alternative" ground for the relief sought had become "academic" and worthy of "no further consideration" in light of its other determinations. A133. In other words, the tribunal concluded that Eni's contract allegations would not change the outcome of the TUA termination and the resulting financial adjustment between the parties. The panel's decision not to further expound on the contract claim because its other holdings rendered that claim "academic" and "deserv[ing] [of] no further consideration" was itself a decision on the matter. Allowing Eni to attack that portion of the award in a second arbitration would therefore unwind the careful balance the first panel struck (as shown on the face of the Final Award) in resolving the claim that Eni actually presented to the tribunal, namely whether the TUA should be terminated—a result

that Gulf strenuously opposed—and the economic consequences of early termination.

Second, the Court misidentified the alleged "harm" that the Second Arbitration seeks to redress. That alleged harm is not some unrelated and independent injury that has nothing to do with the Final Award. Instead, as set forth above, it aims to reduce the very damages that the first tribunal ordered Eni to pay. In that respect, Eni's breach of contract claim is indistinguishable from its negligent misrepresentation claim: both improperly seek to recover purported "damages" that claw back some or all of the actual damages that the Final Award required Eni to pay Gulf.

Third and finally, under the Court of Chancery's own reasoning concerning the negligent misrepresentation claim, whether or not the first panel "granted any relief based on that [contract] claim" (Op. at 33) is irrelevant to whether the second arbitration presents a collateral attack on the prior award. Putting aside that the panel's decision not to further consider the contract claim was itself a decision, the collateral attack doctrine focuses on the *effect* the second proceeding has on the award in the first arbitration—not on how the prior arbitral tribunal dealt with any given claim in the first arbitration, the way the "new" claim is formulated, or the extent to which the claim may or may not have figured into the prior arbitration. Indeed, even a claim that the claimant in a second proceeding had

never presented in the first arbitration—and hence a claim on which the first tribunal necessarily rendered no decision—can be an impermissible collateral attack if it seeks to redress the alleged harm or impugns the conduct of the first arbitration. Attempts to arbitrate purported "independent" claims are accordingly barred when they are "in reality, an attempt to augment and modify the first arbitration award."[31] In short, the "metaphysical artistry" of artful pleadings is eschewed in favor of its "legal substance" and its intended or likely effect on the prior award.[32]

Whatever the litigation tactics used in the second proceeding, the operative test for what constitutes a collateral attack under the FAA—and the one that promotes arbitration by protecting the finality of arbitral awards—is the second proceeding's intended or likely effect on the prior award and its finality. Here, the Court of Chancery improperly ignored both that the "harm" Eni is seeking to remedy by its breach of contract claim is the first panel's award of equitable damages to Gulf and its decision that there was no need to resolve Eni's breach of

[31] *Prudential Sec.*, 865 F. Supp. at 451 (rejecting attempt to arbitrate purportedly "independent" claim as "in reality, an attempt to augment and modify the first arbitration award").

[32] *See, e.g.*, *Gulf Petro*, 512 F.3d at 749–50; *Phillips Petroleum*, 1988 WL 60380, at *4–5 (rejecting argument that challenge to prior award was not a collateral attack because it was not seeking to prevent its enforcement or defeat rights acquired thereunder as "more notable for its metaphysical artistry than for its legal substance").

contract claim in light of the overall resolution of the arbitration: termination of the TUA and the payment of equitable damages to Gulf.

b. Eni's Breach of Contract Claim Should Not be Permitted to End-Run the Exclusive Means of Modifying Final Arbitration Awards under the FAA, the Arbitration Rules, and the Parties' Agreement.

Eni's Second Arbitration is particularly egregious because it is undisputed that Eni never took advantage of its opportunities to challenge the Final Award under either the ICDR Rules or the FAA. If Eni believed that the first panel improperly failed to decide its breach of contract arguments in awarding Gulf restitution because they were "academic and deserv[ing] [of] no further consideration" in light of that Panel's overall resolution of the dispute, then it had two avenues of recourse: (1) under ICDR Rule 33(1), Eni could have requested, within thirty days of the award, that the tribunal "make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award"; or (2) within ninety days of the award, Eni could have moved to vacate the Final Award under the FAA, on grounds that the arbitrators "so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made."[33]

Eni did neither. Instead, before the arbitral tribunal it invoked Rule 33(1) for another purpose, but did not seek further elaboration on Gulf's alleged breach of

[33] 9 U.S.C. § 10(a)(4).

contract. And before the Court of Chancery it counterclaimed to confirm the Final Award in its entirety, represented to the Court that it had no intention to challenge or collaterally attack the Final Award, and affirmatively conceded that no grounds for challenging the award existed. A269; A276. Accordingly, Eni is now barred from seeking to undo the Final Award and collaterally attacking it in a subsequent arbitration.

Allowing Eni to bypass these lawful channels for modification, amplification, or challenge of the Final Award in these circumstances engenders the very consequences that award finality is designed to prevent. As the Court of Chancery previously observed in dismissing a similar effort to circumvent the FAA, allowing such attempts to proceed "would validate the very type of collateral attack that the law prohibits, and would undermine the integrity of agreements to arbitrate, as well as the federal and state statutory schemes designed to enforce and make effective the arbitration remedy."[34] Consequently, Eni should be barred from "challeng[ing] the very wrongs affecting the award" in a subsequent arbitration when "review [was] provided" under the ICDR Rules and the FAA.[35]

Finally, Eni will likely argue here, as it did below, that the issue presented is of little consequence because Gulf will be free to advance all of the same collateral

[34] *Phillips Petroleum*, 1988 WL 60380, at *6.

[35] *Corey*, 691 F.2d at 1213.

attack arguments in front of the new panel in the Second Arbitration. But such an argument not only disregards the responsibilities the FAA assigns to the courts rather than to arbitrators, but also underscores what went wrong here. The parties litigated their dispute for years and at great cost before the first panel, which then rendered an overall decision accounting for all of the claims—including finding Eni's breach of contract claim "academic and deserv[ing] [of] no further consideration" in light of the overall resolution. A133. Now, Eni wants a second bite at the apple to reduce the damages it had to pay, and it wants that bite without regard to the FAA's exclusive procedures for challenging an arbitral award and without regard to its prior representations to the Court of Chancery that it would not collaterally attack the Final Award and had no grounds to do so. In short, allowing Eni to reargue its case to an entirely new panel is at odds with the FAA, undermines the pro-arbitration public policy, and is an affront to equity.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below with respect to the breach of contract claim and bar Eni from proceeding with that claim in the Second Arbitration.

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CERTIFICATE OF SERVICE

I, Bradley R. Aronstam, hereby certify that on March 18, 2020, I caused a true and correct copy of the foregoing *PUBLIC VERSION Appellants' Opening Brief* to be served through File & Serve*Xpress* on the following counsel of record:

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