EFiled: Apr 17 2020 03:14PM EDT
Filing ID 65585227
Case Number 22,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GULF LNG ENERGY, LLC and GULF LNG PIPELINE, LLC,	)	No. 22,2020
Plaintiffs Below, Appellants/Cross-Appellees,	)	CASE BELOW:
v.	)	COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 2019-0460-AGB
ENI USA GAS MARKETING LLC,	)	**PUBLIC VERSION**
Defendant Below, Appellee/Cross-Appellant.	)	**filed April 17, 2020**

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

OF COUNSEL:

Joseph J. LoBue
Helene Gogadze
SHEPPARD MULLIN RICHTER & HAMPTON LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 747-1900

Dated: April 2, 2020

CHIPMAN BROWN CICERO & COLE, LLP
Joseph B. Cicero (#4388)
Gregory E. Stuhlman (#4765)
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, Delaware 19801
(302) 295-0191

Attorneys for Defendant-Below, Appellee-Cross Appellant Eni USA Gas Marketing LLC

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

NATURE OF THE PROCEEDINGS

This case involves the straightforward application of the parties' agreed-upon arbitration clause under the principles announced in the United States Supreme Court's recent decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019), which requires courts to enforce arbitration clauses as written.

Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC (collectively, "Gulf") sought to enjoin an arbitration filed by Eni USA Gas Marketing LLC ("Eni") on the grounds that it is precluded by a prior arbitration award. Gulf bases its preclusion argument on the so-called "collateral attack" doctrine, which precludes a party from challenging a prior arbitration award in subsequent arbitral or judicial proceedings. Eni, on the other hand, argues that the issue of preclusion — based on whatever legal grounds Gulf asserts — is unmistakably subject to arbitration under the express terms of the parties' broad arbitration clause.

The case thus presents three issues for the Court to consider:

(1) *who decides* whether Gulf's preclusion claims are covered by the arbitration clause (the "who decides" arbitrability question);

(2) *whether* Gulf's preclusion claims are covered by the arbitration clause (the "arbitrability" question); and

(3) whether Eni's claims in the new arbitration are, in fact, precluded by the prior arbitration award (the merits question).

The first two of these issues are jurisdictional. If the parties' arbitration clause assigns either of the first two issues to the arbitrators, the Court of Chancery had no power to proceed to the third question on the merits to determine whether the prior arbitration award precludes Eni's new arbitration. In this case, Eni prevails on all three of the issues.

In the decision below, the Court of Chancery determined that Eni's breach of contract claims in the new arbitration were not precluded as they did not constitute a "collateral attack" on the prior arbitration award even "under Gulf's own formulation of the operative test." Court of Chancery Opinion and Order dated December 30, 2019 ("Op."), Exhibit A to Appellants' Opening Brief. Accordingly, the Court of Chancery refused to enjoin arbitration of Eni's contract claims on the grounds stated. The Court of Chancery was correct in its determination that Eni's contract claims do not constitute a "collateral attack" on the prior award and its judgment may be affirmed on that basis. However, the Court of Chancery's judgment in this respect also may be affirmed on the jurisdictional grounds noted above. The Court of Chancery had no jurisdiction to decide any of the issues presented because the parties' broad arbitration clause

clearly and unmistakably refers all such issues to arbitration. Under *Henry Schein*, that is the end of the matter.

For the same reasons, the Court of Chancery erred by enjoining Eni from pursuing arbitration of its negligent misrepresentation claim. As to that claim as well, the parties' broad arbitration clause clearly and unmistakably refers the issues of arbitrability and "who decides" arbitrability to the arbitrators themselves. Again, *Henry Schein* forecloses any other result. In all events, the Court of Chancery also erred by determining, on the merits, that Eni's negligent misrepresentation claim constituted a collateral attack on the prior arbitration award.

SUMMARY OF ARGUMENTS

Eni's Answer to Gulf's Summary of Argument on Appeal

1. Denied. The Court of Chancery properly refused to enjoin arbitration of Eni's breach of contract claims, which were not addressed on the merits in the prior arbitration. As the Court of Chancery explained, Eni's breach of contract claims in the second arbitration do not constitute a "collateral attack" on the prior arbitration award (the "Final Award") even under the legal test proffered by Gulf. For this reason alone, the Court should affirm the Court of Chancery's judgment with respect to Eni's breach of contract claims. The Court of Chancery's decision in this respect also may be affirmed on numerous alternative grounds.

Eni's Summary of Argument on Cross-Appeal

1. The Court of Chancery erred in two ways by enjoining Eni from pursuing its negligent misrepresentation claim as an impermissible collateral attack on the Final Award rendered in the prior arbitration. First, the Court of Chancery had no jurisdiction to decide whether the Final Award precluded Eni from asserting any of the claims in the second arbitration — whether under the so-called "collateral attack" doctrine or otherwise — because the parties' broad arbitration clause reserved all such issues for the arbitral tribunal. Furthermore, the Court of Chancery lacked jurisdiction to decide the threshold question of

"arbitrability" itself because the parties' broad arbitration clause clearly and unmistakably refers such issues to the arbitral tribunal as well.

2. Second, the Court of Chancery erred in its determination on the merits that Eni's negligent misrepresentation claim constituted a "collateral attack" on the Final Award.

STATEMENT OF FACTS

I. The Parties

Appellee and Cross-Appellant (Defendant in the proceeding below) Eni USA Marketing LLC ("Eni") is a Delaware limited liability company with a place of business at 1200 Smith Street, Suite 1700, Houston, Texas, U.S.A. A336.

Eni is an indirect subsidiary of Eni S.p.A., a multi-national integrated energy company headquartered in Milan, Italy. Eni S.p.A. engages in oil and gas exploration, field development and production, the supply, trading and shipping of liquified natural gas (LNG), electricity, fuels and petrochemicals. *Id.*; A023.

Appellant (Plaintiff in the proceeding below) Gulf LNG Energy LLC ("GLE") is a Delaware limited liability company, with a place of business at 569 Brookwood Village, Suite 501, Birmingham, Alabama, U.S.A. GLE owns and operates an LNG importation and regasification facility located in Jackson County, Mississippi. A023; A336. The Pascagoula Facility provides LNG unloading, storage and regassification capability for the import of LNG by ship into the Gulf Coast of the United States. A336.

Appellant (Plaintiff in the proceeding below) Gulf LNG Pipeline, LLC ("GLP") is a Delaware limited liability company with a place of business at 569

Brookwood Village, Suite 501, Birmingham, Alabama, U.S.A. GLP is a wholly-owned subsidiary of GLE. A337. GLP owns and operates a five-mile long, 36-inch diameter "sendout" pipeline for the transport of regasified LNG from the Pascagoula Facility to multiple interconnect points with downstream interstate pipelines for the purpose of distributing regasified LNG from the Pascagoula Facility into the United States. *Id.*

II. Eni Prevails in Arbitration Against Gulf

On December 8, 2007, Eni and Gulf entered into the Terminal Use Agreement (the "TUA") in connection with services to be provided by Gulf at a terminal and pipeline facility to be constructed near Pascagoula, Mississippi for importation and regasification of LNG for distribution in the United States. Op. at 4; A063.

The purpose of the TUA was to provide for the importation and regasification of LNG at Gulf's Pascagoula Facility in order to take advantage of what was universally understood to be rapidly growing need for imported LNG and natural gas into the United States market. A085-089; A340.

After the TUA became effective, the natural gas market in the United States experienced radical change. In particular, the unforeseen vast new production and supply of shale gas in the United States — now universally

known as the "shale gas revolution" — made importation of LNG into the United States commercially irrational and economically and environmentally wasteful. At the same time, these vast new supplies of domestic gas combined with the construction and start-up of new liquefaction plants in the United States has made the U.S. a major LNG exporter for the foreseeable future. A055; A091-097. Gulf, itself, began developing its own project to convert the Pascagoula Facility from an LNG importation and regasification facility to an LNG liquefaction and export facility, and filed an application with the Federal Energy Regulatory Commission ("FERC") for that purpose. A345-346.

In March 2016, Eni initiated arbitration proceedings against Gulf pursuant to the dispute resolution provision in the TUA. Op. at 5. In the arbitration, Eni sought a declaration that, as a result of the shale gas revolution, the TUA had terminated in accordance with its terms by operation of the frustration-of-purpose doctrine under New York law. Op. at 5-6. In the alternative, Eni sought a declaration that it had the right, in any event, to terminate the TUA for Gulf's breaches as a result of Gulf's activities to convert the Pascagoula Facility to a liquefaction/export site. Op. at 6; A061. Gulf opposed Eni's frustration-of-purpose and breach of contract claims. A058.

Eni ultimately prevailed on its frustration-of-purpose claim in the arbitration. Op. at 6. On June 29, 2018 (with subsequent clarification issued on July 31, 2018), the arbitration tribunal issued the Final Award in *Eni USA Gas Marketing LLC v. Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC*, ICDR Case No. 01-16-0000-7065. The tribunal concluded that the principal purpose of the TUA had been frustrated and declared that the TUA terminated as of March 1, 2016. *Id.* The tribunal also ordered Gulf to reimburse Eni for all the payments it had made under the TUA since December 31, 2016. A151.

As a result of the termination of the contract, the tribunal awarded Gulf equitable compensation for decommissioning, *i.e.* shutting down, the Pascagoula Facility ("Decommissioning Costs"). Gulf represented to the tribunal that, without an award of substantial Decommissioning Costs, Gulf would have no source of recovery and would default on its loan agreements. A349.

Because the tribunal determined that the TUA had already terminated on March 1, 2016 in accordance with its terms by operation of the frustration-of-purpose doctrine, the tribunal did not reach and did not decide Eni's alternative claim for a declaration that Eni had the right to terminate the TUA as a result of Gulf's breaches of contract. A133.

Both parties sought confirmation of the Final Award in the Court of Chancery. In the confirmation proceeding, Eni asserted that the entire arbitration award, and thus the entirety of the relief granted by the arbitration tribunal in the Final Award – the declaratory relief declaring the TUA terminated as well as monetary relief set forth in the award – should be confirmed and recorded as the judgement of the Court of Chancery. While Gulf initially opposed this, and sought confirmation only of that portion of the Final Award relating to the termination compensation, Gulf ultimately agreed to entry of judgment confirming the Final Award in all respects. A270-273.

The Court of Chancery confirmed the Final Award in its entirety on February 1, 2019. A050. There is no dispute that Eni has paid the full amount due for termination compensation as set forth in the Final Award. Appellants' Opening Brief ("Opening Br.") at 3.

III. The TUA Is Terminated but Gulf Initiates New York Litigation Seeking Continued Payment of Fees Under the TUA

Unable to accept that it lost the arbitration, and contrary to its representations to the prior tribunal as well as the tribunal's findings in the Final Award, Gulf subsequently initiated litigation against Eni's indirect parent company, Eni S.p.A., in New York state court under a Parent Company Guarantee agreement (the "Guarantee") that Gulf and Eni S.p.A. entered into in

connection with the TUA transaction (the "New York Litigation"). A349-350. In the New York Litigation, Gulf contends that, pursuant to the Guarantee, Eni S.p.A. must continue to pay the Reservation and Operating Fees set forth in the TUA. *Id.* Gulf makes this contention notwithstanding that, among other things: (1) the TUA was terminated effective three years ago; (2) no Reservation or Operating Fees are due and payable by Eni to Gulf under the TUA; and (3) the tribunal in the prior arbitration awarded Gulf, at Gulf's specific request, costs for decommissioning (*i.e.* shutting down) the very facility for which Gulf now seeks continued payment of Reservation and Operating Fees. *Id.*

Gulf's demand for continued payment of the TUA Reservation and Operating Fees (pursuant to the Guarantee or otherwise) plainly is devoid of merit for numerous reasons, including that it is barred by Gulf's own breaches of the TUA, which were asserted in the prior arbitration but not decided in the Final Award. A349-350. Indeed, Gulf has since admitted in discovery in the New York Litigation that its breaches of the TUA provide an absolute bar to recovery on its (meritless) claims under the Guarantee. This is, in fact, Gulf's true motivation for attempting to enjoin the new arbitration and avoid a determination on the merits of Eni's breach of contract and other claims.

IV. Eni Initiates the Second Arbitration

On June 3, 2019, Eni initiated a new arbitration (the "Second Arbitration") against Gulf, which included the breach of contract claims that were not decided on the merits in the prior arbitration. Specifically, in the Notice of Arbitration Eni alleges that Gulf breached numerous provisions of the TUA by engaging in activities in pursuit of its project to convert the LNG import and regasification facility at Pascagoula to a liquefaction and export facility, and seeks "[a]n award declaring that GLE and GLP have breached the warranties and covenants set forth in at least Article 22.4(a) and 22.4(e) of the TUA." A355.

In addition to its request for declaratory relief, Eni alleges that Gulf's breaches of contract in pursuit of the liquefaction project caused injury and harm to Eni including, for example, depriving Eni of the economic value of the consent Gulf was required to obtain from Eni to pursue liquefaction, the value of repurposing and reusing the existing site facilities, and the other cost savings and benefits derived from repurposing the existing brownfield site. A353. These damages flow from Gulf's pursuit of the liquefaction project without Eni's consent.

Eni also asserts in the Notice of Arbitration that Gulf made certain representations in the prior arbitration — in order to obtain hundreds of millions

of dollars in compensation for Decommissioning Costs — that Gulf has since disavowed and contradicted in pursuit of its Guarantee claim in the New York Litigation. A350-351 ("contrary to its representations to the prior tribunal, Gulf subsequently initiated litigation against Eni S.p.A. in New York state court under a Parent Company Guarantee … contending that Eni S.p.A. must continue to pay the Reservation and Operating Fees set forth in the TUA pursuant to the Guarantee."). Eni further points out that Gulf gained for itself certain advantages by making its misrepresentations. A354 ("As a direct result of Gulf's apparent misrepresentations, the tribunal awarded Decommissioning Costs and excluded the amount of future Reservation and Operating Fee payments that Gulf would receive from ALSS in calculating compensation for Decommissioning Costs awarded to Gulf. Had Gulf not made these apparent misrepresentations, the compensation amount paid by Eni for decommissioning costs would have been greatly reduced, or reduced to zero."). However, Gulf's conduct in relation to its performance of the agreements and its manner of dealing with Eni in connection with the agreements have consequences and significance for the parties' broader transaction as a whole, including in relation to the Guarantee agreement. A349. Accordingly, in the Second Arbitration Eni seeks "[a]n award declaring that GLE

and GLP made material negligent misrepresentations to the tribunal in the prior arbitration." A355.

V. Gulf Seeks to Enjoin Eni's Arbitration in the Court of Chancery

In an effort to evade all scrutiny of its breaches of contract and other questionable conduct, on June 17, 2019, Gulf filed a complaint in the Court of Chancery seeking to enjoin the arbitration tribunal's consideration of Eni's breach of contract and the negligent misrepresentation claims (the "Complaint"). Coextensively with that effort, Gulf asserted in the New York Litigation that these issues were not properly interposed in the New York action for various reasons. A564-65 (Hearing Tr. 60:22-24; 61:1-4).

The parties submitted the matter to the Court of Chancery on cross-motions for judgment on the pleadings. On December 30, 2019, the Court of Chancery issued its Opinion and Order refusing to enjoin arbitration of Eni's breach of contract claims but enjoining Eni from pursuing its negligent misrepresentation claim in the Second Arbitration. Op. at 35.

Presently before the Court is Gulf's Appeal of the Court of Chancery's decision refusing to enjoin arbitration of Eni's breach of contract claims, and Eni's Cross-Appeal of the Court of Chancery's decision enjoining arbitration of Eni's negligent misrepresenting claim.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY REFUSED TO ENJOIN ENI'S BREACH OF CONTRACT CLAIMS

A. Question Presented

Whether the Court of Chancery erred in refusing to enjoin Eni from pursuing its breach of contract claims in the Second Arbitration. B34-42; A555-571.

B. Scope of Review

This Court reviews the denial of a permanent injunction for an abuse of discretion. *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 380 (Del. 2014). While embedded legal conclusions are subject to *de novo* review, "the factual findings that provide the basis" and inferences for conclusions of law will not be overturned unless they are "clearly erroneous." *DV Realty Advisors LLC v. Policeme's Annuity & Benefit Fund of Chi., Ill.*, 75 A.3d 101, 108-09 (Del. 2013). The questions that present a legal issue concerning applicability and scope of an arbitration agreement are subject to *de novo* review. *DMS Props.-First, Inc. v. P.W. Scott Assocs.*, 748 A.2d 389, 392 (Del. 2000).

C. Merits of Argument

The Court of Chancery properly refused to enjoin Eni's breach of contract claims. The Court of Chancery's judgment in this regard may be affirmed on

multiple grounds, including the grounds set forth in the Court of Chancery's Order. Specifically, the Court of Chancery found that Gulf did not prevail on the merits of its claim for injunction because Eni's breach of contract claims did not constitute a "collateral attack" on the prior arbitration award. The Court of Chancery's determination is correct and, assuming the court's exercise of jurisdiction was proper, its judgment may be affirmed on such grounds.

1. Eni's Breach of Contract Claim Is Not a Collateral Attack Under Gulf's Own Formulation of the Operative Test

The Court of Chancery correctly concluded that the "contract claim in the Second Arbitration does not constitute a collateral attack on the Final Award under Gulf's own formulation of the operative test." Op. at 33. According to Gulf, a subsequent action constitutes a collateral attack if it "(a) seek[s] to rectify alleged harm suffered in the earlier arbitration, or (b) challenge[s] alleged misconduct occurring in that earlier proceeding which purportedly tainted the prior Award." Op. at 25 (quoting Gulf's Supplemental Brief, at 2); *see also* A533 (Hearing Tr. 9:18-10:4) (collateral attack doctrine implicated "if your ultimate objective is to upset, undo or challenge [the prior] award"); *id.* 18:10-14 ("Our job is to show Your Honor that the two claims that have been brought in the second arbitration are clearly an effort to undo and change the result of the first. That's the core issue.").

Eni's breach of contract claims do not satisfy Gulf's own "collateral attack" test. As the Court of Chancery correctly observed, the tribunal in the prior arbitration *did not decide the merits of Eni's breach of contract claims*. Op. at 2 ("[T]he court finds that Eni's contract claim, which was pled but never decided in the first arbitration, does not amount to a collateral attack of *[sic]* the first arbitration award."); *id.* at 7 ("The First Tribunal did not decide whether Gulf breached the TUA."); *id.* at 32 ("Importantly, the First Tribunal never ruled on these issues, which it found to be academic in view of its ruling that the TUA had been terminated for frustration purpose"). This fact is indisputable and has not been challenged in any way by Gulf. *See* A133; *see also* A535 (Hearing Tr. 31:22-24) ("The panel was crystal clear. We're not reaching your breach of contract claim …"); A525 (Hearing Tr. 21:23-24 (same)).

Simply put, Eni cannot be seeking to collaterally attack, undo or alter an award on an issue that was never addressed on the merits and on which no award was ever made. That ends the matter.

Notably, Gulf fails to identify a single case that has held that asserting claims that were actually litigated but ***not*** decided on the merits in a prior arbitration somehow constitutes an impermissible attack on the award in that arbitration. Rather, all of the cases relied upon by Gulf involve attempts to undo

or alter awards rendered on claims that were actually addressed and decided in a prior arbitration.

For example, in *Arrowood*, the defendant specifically sought in the subsequent proceeding to set aside the judgment confirming the prior award and *admitted* that it was asking the new tribunal to revisit the prior tribunal's interpretation of the contract set forth in the earlier award. *Arrowood Indemnity Co. v. Equitas Ins. Ltd.*, 2015 WL 4597543 at *7 (S.D.N.Y. July 30, 2015).

In *Prudential Securities*, the defendant asserted in the subsequent proceedings procedural irregularities and fraud in the prior arbitration that purportedly tainted the prior proceedings. *Prudential Securities Inc. v. Hornsby*, 865 F. Supp. 447, 448-49 (N.D. Ill. 1994). The court found that, as alleged, the claims of "purported fraud . . . injured [the claimant] because it decreased his award" and that the claimant therefore sought "to right that alleged injustice to obtain the amount he would have received but for the fraudulent conduct." *Id*. at 452.

Likewise, in *Decker*, in the subsequent proceedings the plaintiff sought damages from procedural irregularities that allegedly compromised the prior arbitration award amount, and sought to rectify the previously-awarded amount

with its new claims. *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 906 (6th Cir. 2000).

Finally, in *Gulf Petro Trading*, the plaintiff claimed that the prior award was procured by fraud, bribery and corruption and sought to vacate the award. While the plaintiff conceded that its claim seeking vacatur of the award was properly dismissed, it argued that the remaining claims could proceed. However, because the remaining claims were based on the theory that bribery rendered the award invalid and sought relief that the plaintiff could only obtain if the award was vacated, the complaint constituted a collateral attack on the prior award. *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742, 746-51 (5th Cir. 2008). As in *Prudential Securities* and *Decker*, the plaintiff sought to alter the relief awarded in the prior arbitration to an amount that it believed it should have received absent the misconduct. *Id.* at 751.

The Court of Chancery correctly determined that Eni's breach of contract claim that was never decided on the merits in the prior award does not seek to rectify harm allegedly suffered in the prior arbitration or challenge misconduct in the prior arbitration as tainting the final award:

> [G]iven that the First Tribunal never reached the merits of the claim for breaches [ ] 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. Nor can it be said – and Gulf does not contend otherwise – that Eni is challenging alleged misconduct in the First Arbitration relating to the contract claim as having somehow tainted the Final Award.

Op. at 33.

Notably, Gulf has not cited a single judicial decision from any jurisdiction applying the "collateral attack" doctrine in these circumstances presented here — where the prior arbitration award expressly did not rule on the merits of the claims sought to be asserted in a second arbitration. *See* B33 (Tr. 7:17-22). The Court of Chancery's reasoning on this issue is correct and, assuming the court's exercise of jurisdiction was proper, its judgment should be affirmed on such grounds.

2. Gulf's Newly-Minted Arguments Lack Merit

Recognizing the fatal flaw in its position, Gulf now asks this Court to do one of two things. First, Gulf asks the Court to adopt a tortured re-interpretation of the Final Award that would convert the award from one which contains no decision on the merits to one with a merits decision in Gulf's favor. Specifically, Gulf contends the tribunal's non-decision really means that the "[T]ribunal 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 'deserving of no further consideration' was itself a decision on the matter." Opening Br. at 27. However, we know with certainty that the Tribunal "concluded" nothing about Eni's breach of contract claims because it did not consider those claims on the merits. And the only "decision on the matter" that the tribunal made in relation to Eni's breach of contract claims was its decision *not to consider and decide* those claims on the merits. This fact is admitted by Gulf. *See* Opening Br. at 28 ("Putting aside that the panel's decision not to further consider the contract claim was itself a decision . . .").

In short, the tribunal rendered no decision — on the merits or otherwise — on Eni's breach of contract claims. Gulf's convoluted attempt to re-write history is unavailing. Ironically, Gulf's argument in this regard is itself a "collateral attack" on the Final Award under Gulf's own legal test because it purports to alter the prior award from one of non-decision on the merits to one of decision on the merits.[1]

[1] Gulf notes that, once the Final Award was rendered, Eni did not seek clarification, interpretation or correction of the award with respect to the breach of contract claims. Opening Br. at 11. That is because the Final Award was absolutely clear that it did not address Eni's breach of contract claims on the merits and rendered no award on such claims. Thus, there was no need for clarification, interpretation or correction. Indeed, if Gulf wanted a decision on the merits of the breach of contract claims (or if it wanted the Final Award to be interpreted as such),

Alternatively, Gulf asks this Court to reject the legal test that it proffered to the Court of Chancery and simply change the "operative" legal test. According to Gulf, "[w]hatever 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." Opening Br. at 29. It is far too late in the game for Gulf to be switching "operative" legal tests, and its effort to do so should be rejected, particularly considering that Gulf failed to raise this argument in the proceedings below.

However, even if Gulf's new argument were considered, it could not change the result. Gulf does not cite a single authority — from any jurisdiction — to support its new legal test (*see* Opening Br. at 29-30), which Gulf crafts solely for the purpose of attempting to salvage its case. Gulf's new "operative"

Gulf itself should have sought clarification, interpretation or correction. Gulf did not do so. So Gulf must now live with the fact that the Final Award did not address the breach of contract claims on the merits. Likewise, Gulf contends that, if Eni believed that the first tribunal "improperly failed to decide" its breach of contract claims, Eni should have sought a modification of the Final Award. Appellate Br. at 30. This argument is a non sequitur. Eni does ***not*** contend that the first tribunal "improperly failed to decide" the breach claims and nowhere in the Notice of Arbitration does Eni assert or suggest any such thing. *That is precisely why Eni's second arbitration cannot constitute a collateral attack on the prior award*.

test is facially absurd. It would bar claims "intended" to affect a prior award even if those claims could not conceivably do so. And it would bar claims "likely" to affect a prior award even if they did not in fact do so. But in all events, Gulf's test could not apply in this case for all of the same reasons set forth above. The tribunal made no decision on the merits of Eni's breach of contract claims and rendered no award in connection with such claims. There is simply no award on such claims that could be subject to any "intended" or "likely" effect.

3. Eni's Breach of Contract Claim has Independent Legal Significance

Finally, Eni's breach of contract claims may not be construed as a collateral attack on the Final Award because they have independent legal significance from the relief set forth in the prior arbitration. This principle is firmly established by Gulf's own legal authorities.

As the court in *Gulf Petro Trading Co., Inc.*, explained, "[a] plaintiff need only be able to allege wrongdoing that has caused harm independent of its effect on the arbitration award to avoid the collateral attack label." *Gulf Petro Trading Co., Inc.*, 512 F.3d at 751; s*ee also Prudential Securities Inc.*, 865 F. Supp. at 450 ("If the [new] claim is independent, then it may proceed").

Gulf repeatedly asserts that Eni's breach claims in the Second Arbitration merely seek to "claw back" the amounts awarded in the prior arbitration. *See, e.g.*, Opening Br. at 3, 12, 24, 26, 28. Gulf's allegations ignore virtually all of the Notice of Arbitration and otherwise lack merit. The Notice of Arbitration makes clear that Eni's breach of contract claims have legal significance independent of the relief set forth in the prior award. Specifically, and notwithstanding termination of the TUA by the Final Award, Gulf has brought the New York Litigation seeking continued payment of the TUA fees under the Parent Company Guarantee that was entered into as part of the same underlying transaction. Eni sets forth the circumstances surrounding Gulf's guarantee action in substantial detail in its Notice of Arbitration. A348-350 (section titled "The TUA Is Terminated but Gulf Initiates Litigation Under a Parent Company Guarantee").

While Gulf's claims under the Guarantee lack merit for numerous reasons, Gulf's breaches of the TUA themselves provide an absolute defense to Gulf's claims for continued payment of fees pursuant to the Guarantee. In fact, Gulf recently admitted in discovery in the New York Litigation that any breaches of the TUA by Gulf would be a complete defense to its (meritless) claims for recovery under the Guarantee.

For these reasons, Eni's breach of contract claims in the Second Arbitration have independent legal significance from the relief set forth in the Final Award. *See* A348-349 ("Gulf's demand for continued payment of the TUA Reservation and Operating Fees (pursuant to the Guarantee or otherwise) plainly is devoid of merit for numerous reasons, including that it is barred by Gulf's own breaches of the TUA that Eni alleges here."); A355 (requesting "[a]n award declaring that GLE and GLP have breached the warranties and covenants set forth in at least Article 22.4(a) and 22.4(e) of the TUA.").

Whether Eni would prevail on its claims in the Second Arbitration is not a question that need be or should be decided by this Court. As Gulf's own cases make clear, "a plaintiff need only be able to ***allege*** wrongdoing that has caused harm independent of its effect on the arbitration award to avoid the collateral attack label." *Gulf Petro Trading Co., Inc.*, 512 F.3d at 751 (emphasis added). Eni has plainly done so here.

In the Notice of Arbitration, Eni further claims that Gulf's breaches of contract in pursuit of the liquefaction project caused monetary harm to Eni by depriving Eni of the economic value of the consent Gulf was required to obtain from Eni to pursue liquefaction, including the value of repurposing and reusing the existing site facilities and the other cost savings and benefits derived from

repurposing the existing brownfield site for use as a liquefaction and export facility. A352-353. These damages flow directly from Gulf's pursuit of the liquefaction project without Eni's consent and are wholly separate and distinct from the compensation awarded by the prior tribunal in connection with termination of the TUA on frustration-of-purpose grounds. *Id.* Accordingly, Eni's breach of contract claims in the Second Arbitration have legal significance independent of the prior award and the Court of Chancery's judgment denying the injunction may be affirmed on this basis as well.

II. THE COURT OF CHANCERY LACKED JURISDICTION TO DECIDE GULF'S PRECLUSION ARGUMENT ON THE MERITS

A. Question Presented

Whether the Court of Chancery lacked jurisdiction to decide Gulf's preclusion argument on the merits. B2-15; B21-34; A542-555.

B. Scope of Review

This Court reviews *de novo* the applicability and scope of an arbitration agreement. *DMS Props.-First, Inc.*, 748 A.2d at 392.

C. Merits of Argument

In addition to Eni's contention that the claims of its Second Arbitration are not precluded by the Final Award entered in the parties' prior arbitration under so-called "collateral attack" doctrine, Eni contends that the question of preclusion — based on whatever legal grounds Gulf asserts — is subject to arbitration under the express terms of the parties' broad arbitration clause. This is a dispute about arbitrability. And this dispute raises two unavoidable threshold jurisdictional issues: (1) is the dispute subject to arbitration and (2) "who decides" whether the dispute is subject to arbitration, the Court of Chancery or the arbitrators themselves.

Here, the Court of Chancery lacked jurisdiction to entertain Gulf's preclusion claim on the merits because the TUA expressly delegates to the

arbitration tribunal both the threshold question of arbitrability of those claims as well as the threshold question of "who decides" arbitrability. This case is controlled by United States Supreme Court's recent decision in *Henry Schein*. *Henry Schein* unequivocally requires courts to enforce arbitration clauses as written and allows no policy exceptions to that rule. Because the Court of Chancery lacked jurisdiction, the decision to refuse to enjoin Eni's breach of contract claim was not an error and may be affirmed on these jurisdictional grounds. In addition, because the Court of Chancery lacked jurisdiction, it was an error to enjoin Eni's negligent misrepresentation claim.

1. The Court of Chancery Lacked Jurisdiction Over the Threshold Question of "Who Decides" Arbitrability

It is well settled that "the question of who decides arbitrability is itself a question of contract." *Henry Schein*, 139 S. Ct. at 527. In *Henry Schein*, the United States Supreme Court made clear that, when the "contract delegates the arbitrability question to an arbitrator, a court may not override the contract. *In those circumstances, a court possesses no power to decide the arbitrability issue.*" *Id.* at 529 (emphasis added); *id.* ("Applying the [Federal Arbitration] Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability'"). This Court's case law, decided prior to *Henry Schein*, is to the same effect. *See DMS*

Props.-First, Inc., 748 A.2d at 392 ("the question 'who has the primary power to decide arbitrability' turns [on] what the parties agreed about that matter") (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

Here, the Parties have agreed to a broad arbitration agreement that covers all disputes of any nature or type, whether based on contract, statute or tort, including, in particular, any dispute relating to "arbitrability" or "jurisdiction." Specifically, Article 20.1 of the TUA provides:

> Arbitration. Any Dispute (other than a Dispute regarding measurement under Annex I or Annex II) 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 (TUA, Art. 20.1) (emphasis added).

The TUA in turn defines the term "Dispute" in the broadest possible manner to include, specifically, disputes relating to "arbitrability" or "jurisdiction:"

> "Dispute" means any dispute, controversy or claim (of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise) arising out of, relating to, or connected with this Agreement, including any dispute as to the construction, validity, interpretation, termination, enforceability or breach of this Agreement, *as well as any dispute over arbitrability or jurisdiction*.

A176 (TUA, Art. 1(57) (Definitions)) (emphasis added).

Indeed, Gulf admitted at the hearing in the proceedings below that the TUA's arbitration clause "clearly and unmistakably" delegated the question of "arbitrability" to the arbitrators.[2]

That ends the matter. The Court of Chancery "possesse[d] no power to decide the arbitrability issue," *Henry Schein*, 139 S. Ct. at 529, and must allow the arbitrators to decide whether Gulf's claims must be arbitrated rather than litigated.

Eni filed an arbitration against Gulf for breach of contract and tort. Gulf contends that Eni's claims are precluded by the Final Award in the prior arbitration. Eni contends that all of the questions raised by Gulf's arguments are subject to arbitration. The TUA mandates that this threshold question — *i.e.* whether the issues raised by Gulf are subject to arbitration — must itself be decided by the arbitrators. Accordingly, the Court of Chancery lacked jurisdiction to entertain Gulf's Complaint to enjoin the Second Arbitration. *Henry Schein*, 139 U.S. at 529 ("When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In

[2] *See* A510 (Hearing Tr. 6:18-24) ("And even the issue of arbitrability, if it's clear and unmistakable that the parties said — as, by the way, we don't dispute our contract does — even if there is an issue of, is the issue subject to arbitrability, that's for the panel.").

those circumstances, a court possesses no power to decide the arbitrability issue."); *see also Vertiv Corp. v. SVO Bldg. One, LLC*, 2019 U.S. Dist. LEXIS 56096 at *6 (D. Del. Apr. 2, 2019) (same, citing *Henry Schein*).

Even if the TUA did not expressly delegate "arbitrability" to the arbitrators (and it did), the Court of Chancery nonetheless lacked jurisdiction over the specific "arbitrability" question presented in this case.

In *Howsam*, the Supreme Court distinguished between "substantive arbitrability" — *i.e.*, whether an arbitration agreement exists and whether the dispute falls within the scope of that agreement — and "procedural arbitrability" — *i.e.*, whether there are other obstacles that preclude a particular arbitration (otherwise covered by the clause) from proceeding to the merits. *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 592 (2002). The Court made clear that while issues of "substantive arbitrability" are for arbitrators to decide only when the parties have expressly delegated arbitrability to arbitrators (as is the case here), issues of "procedural arbitrability" are for the arbitrators to decide (even without such delegation in the parties' contract). *Id.* For example, questions as to whether an arbitration may proceed based on facts extrinsic to the scope of the arbitration clause itself, such as timeliness, waiver, estoppel and the like, are considered "procedural arbitrability" issues that the tribunal must

decide regardless of whether the arbitration clause specifically and clearly delegates the "arbitrability" issue to arbitrators. *Id.* ("In the absence of an agreement to the contrary, issues of substantive arbitrability ... are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate have been met are for the arbitrators to decide.") (internal quotations omitted).

Here, the arbitration clause covers breach of contract and tort claims. Eni's claims in the Second Arbitration are for breach of contract and tort. "Substantive arbitrability" is satisfied. Gulf's argument that those claims may not proceed because some event happened (extrinsic to scope of the arbitration itself) is a classic "procedural arbitrability" issue. The Court of Chancery would have lacked jurisdiction over this issue even if the arbitration clause did not expressly delegate "arbitrability" issues to the tribunal.

Accordingly, the Court of Chancery's judgment denying Gulf's injunction on the breach of contract claims may be affirmed on these jurisdictional grounds. In addition, because the Court of Chancery lacked jurisdiction to decide this threshold arbitrability question, the Court of Chancery erred by enjoining Eni's

negligent misrepresentation claim. Rather, the Court of Chancery should have referred all of these questions of arbitrability to the tribunal for decision.

2. The Court of Chancery Lacked Jurisdiction Because the Preclusion Defense that Gulf Raises to the Second Arbitration Is Subject to Arbitration

Even if the Court of Chancery had jurisdiction to assess the question of "who decides" arbitrability — and it does not — the Court of Chancery nonetheless would lack jurisdiction to entertain the merits of Gulf's "collateral attack" allegations. This is because the TUA expressly requires arbitration of precisely this type of claim. In other words, only the arbitrators have jurisdiction to decide whether Eni's claims in the Second Arbitration are precluded by the Final Award in the prior arbitration. This is true whether Gulf's preclusion allegations are based on the contract's language, common law doctrines, or the FAA or other statutory terms.

The TUA's arbitration clause "is a broad form arbitration agreement designed to encompass all possible disputes." A250 (TUA, Art. 20.1(a)). Whether particular issues are for a court or arbitrator to decide boils down to one question: whether such issues fall within the scope of the arbitration clause. *Henry Schein*, 139 S. Ct. at 530 ("When the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even if the court

thinks that a party's claim on the merits is frivolous."). The arbitration clause in the parties' contract covers disputes "of any and every kind or type" including disputes based on "contract, tort, statute, regulation or otherwise." A176 (TUA, Art. 1(57)). The TUA arbitration clause could not have been drafted more broadly. The clause expressly covers the parties' dispute here, in which Gulf contends that Eni's claims in the Second Arbitration are precluded by the Final Award in the prior arbitration, and Eni contends otherwise. That dispute falls *within the scope* of disputes "of any and every kind or type" including disputes based on "contract, tort, statute, regulation or otherwise." Gulf does not even attempt to explain how the issues presented in this case fall outside the scope of the parties' broadly-worded arbitration clause.

Accordingly, the Court of Chancery's judgment denying Gulf's injunction on the breach of contract claims may be affirmed on these alternative jurisdictional grounds. In addition, because the Court of Chancery lacked jurisdiction to decide whether Eni's claims in the Second Arbitration are precluded by the Final Award (whether such preclusion is based on contract, common law or statute), the Court of Chancery erred by enjoining Eni's negligent misrepresentation claim. Rather, the Court of Chancery should have referred these issues to the tribunal for decision.

3. Gulf's Arguments Regarding Jurisdiction Lack Merit

Gulf does not dispute that the TUA's arbitration clause expressly delegates "arbitrability" to the arbitrators. A510 (Hearing Tr. 6:18-24). Gulf likewise does not dispute that the TUA contains a broad arbitration clause that covers "any and every kind or type" of dispute including disputes based on "contract, tort, statute, regulation or otherwise." A176 (TUA, Art. 1(57)). Finally, Gulf does not dispute that *Henry Schein* dictates that, when the contract delegates a question to the arbitrators (including a question of arbitrability), the courts must "respect the parties' decision as embodied in the contract" and in such circumstances a court possesses "no power" to decide the issue.

In this case, Gulf has offered no justification to depart from the long-standing precedent, recently re-affirmed by *Henry Schein*, that courts must give full effect to arbitration clauses as they are written. Indeed, Gulf's arguments in this regard only serve to confirm that the Court of Chancery lacked jurisdiction to consider Gulf's request to enjoin arbitration.[3]

[3] For this reason, Gulf's arguments in the proceedings below became a moving target. For example, Gulf initially relied principally on the *res judicata* doctrine and the United States Court of Appeals for the Third Circuit's decision in *John Hancock Mutual Life Insurance Co. v. Olick*, 151 F.3d 132 (3d Cir. 1998). Specifically, Gulf contended that "Eni may argue that the *Award's res judicata* effect is a question for the new arbitration panel. But the issue here is different: the preclusive effect of a court judgment must be considered separately from that of an arbitration award, and

4. Gulf's Policy Argument Provides No Exception to Arbitral Jurisdiction

Faced with this insurmountable controlling case law, Gulf argues that the courts should incorporate some form of nebulous, unwritten "finality" policy exception into the FAA to override the parties' express agreement to arbitrate. *See e.g.,* Opening Br. 18, 24; *see also* A511 (Hearing Tr. 7:3-18). Gulf's finality policy argument is flawed for several independent reasons.

First, Gulf's effort to create an unwritten policy exception to override the parties' express agreement to arbitrate must be rejected in light of the U.S. Supreme Court's decision in *Henry Schein*. As the Court explained: "We must

---

an arbitration attacking a prior judgment may be enjoined by the court that entered the judgment." A495 (emphasis added) (citing *Olick* and cases following *Olick*). But *Olick* did not help Gulf because that case makes clear that "a district court may only order, or enjoin, arbitration based on the agreement to arbitrate itself." Accordingly, "the threshold questions a district court must answer before compelling or enjoining arbitration are these: (1) Did the parties seeking or resisting arbitration enter into a valid arbitration agreement? (2) Does the dispute between those parties fall within the language of the arbitration agreement?" *Id.* at 137 (emphases added) (internal citations omitted); *see also DMS Props.-First*, 748 A.2d at 392 ("the question 'who has the primary power to decide arbitrability' turns [on] what the parties agreed about that matter."). In this case, the answers to the questions posed by the Third Circuit's framework in *Olick* are as follows: (1) The TUA contains a valid arbitration agreement; and (2) the issue in dispute — *i.e.*, the arbitrability of the preclusive effect of the prior Award on Eni's new arbitration claims — falls expressly within the scope of the agreement to arbitrate. After Eni demonstrated that *Olick* required a finding in Eni's favor, Gulf switched gears, abandoned *Olick* and argued that Eni's claims are precluded because they purportedly are an impermissible "collateral attack" on the prior award.

interpret that Act [FAA] as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." *Henry Schein*, 139 S. Ct. at 529; *see also id*. at 530 ("When the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous.").

In reaching its decision in *Henry Schein*, the Supreme Court made clear that, when it comes down to questions of arbitrability, the FAA makes no provision for unwritten policy exceptions. *Id.* at 530 ("The short answer is that the Act contains no 'wholly groundless' exception, and we may not engraft our own exceptions onto the statutory text."); *id.* at 531 ("[W]e may not rewrite the statute simply to accommodate that policy concern.").

Notably, like Gulf, the party seeking to avoid arbitration in *Henry Schein* also tried to rely on other policy aspects of the FAA to justify an exception to arbitrability in that case. The Supreme Court rejected the notion that other FAA provisions and policies could override the requirement to enforce contract arbitration clauses as written. *Henry Schein*, 139 S. Ct. at 531. Just like the FAA provides no "wholly groundless" exception to arbitrability, the FAA likewise provides no exception to arbitrability on the grounds that "finality" concerns

might be implicated. While the FAA may indeed reflect a policy in favor of finality, the parties' agreement to delegate the adjudication of such "finality" concerns to arbitrators must still be respected. The Court should therefore enforce the arbitration clause as written.

Second, Gulf's plea for an FAA "finality" exception otherwise is incompatible with the case law. Gulf has cited no case applying a "finality" policy exception to the requirement to enforce "clear and unmistakable" (*see* A510 (Hearing Tr. 6:20-24)) arbitration clauses according to their terms.[4] And the case law demonstrates that no such exception exists. The "collateral attack" doctrine is not the only judicial policy favoring "finality." The *res judicata* and collateral estoppel doctrines raise precisely the same finality concerns, as do

[4] None of cases cited by Gulf mentions (let alone addresses) the threshold question of "who decides" arbitrability where the arbitration clause at issue expressly delegates "arbitrability" to the tribunal. *Arrowood Indemnity Co.,* 2015 WL 4597543 (threshold question of who decides arbitrability neither raised in the case nor addressed by the court); *Decker*, 205 F.3d 906 (same); *Gulf Petro Trading Co.*, 512 F.3d 742 (same); *Prudential Securities Inc.*, 865 F. Supp. 447 (same). Furthermore, none of the cases cited by Gulf address the arbitrability of the "collateral attack" doctrine in the context of a broad arbitration clause like the one contained in the TUA, which expressly delegates "statutory" disputes to the arbitrators. As a result, these cases are simply irrelevant to the threshold jurisdictional issues before the Court. Yet, even if these cases addressed the jurisdictional issues in a manner that supported Gulf's position (and they do not), it would not affect the result. Each of these cases cited by Gulf pre-dates *Henry Schein* and otherwise is incompatible with this Court's precedent. *DMS Props.-First, Inc.*, 748 A.2d at 392.

questions of the timeliness of claims and statutes of limitations. However, the courts have rejected exceptions to arbitrability in connection with all such finality concerns. For example, in *Olick*, the court held that the question whether a prior arbitration award precluded a parties' new claims fell within the scope of the parties' arbitration clause, and therefore must be referred to arbitration. While the preclusive doctrine in that case was stated as *res judicata*, this distinction makes no difference. As noted above, *res judicata* is a finality doctrine. Yet, the Third Circuit recognized no FAA "finality" exception and instead referred the issue of the preclusive effect of a prior arbitration award to the arbitrators.

The Second Circuit reached the same result in *Citigroup, Inc. v. Abu Dhabi Investment Auth.*, 776 F.3d 126, 128-33 (2d Cir. 2015). Indeed, *Citigroup* is indistinguishable from the instant case in numerous important respects. In *Citigroup*, a party sought to enjoin a second arbitration based on an award in a prior arbitration that had been confirmed by the court — just like Gulf seeks here. *Id.* at 128. The party seeking the injunction claimed that "the second arbitration constituted an 'assault' on the district court's [prior] judgment confirming the first award" — just like Gulf claims here. *Id*. The party seeking the injunction sought to preclude the second arbitration because it purportedly

would "give [the opposing party] an opportunity to relitigate the same underlying substantive claims that were . . . raised in the parties' first arbitration" — just like Gulf argues here. *Id.* at 132. The party seeking the injunction based its claim on, among other things, *the FAA* as well as the court's "inherent authority to protect its proceedings and judgments" — just like Gulf does here. *Id.* at 127-28. And the court noted that the FAA provided only limited grounds for review of the prior award — just like Gulf emphasizes here. However, the court found that those factors weighed in favor of referring the issues to arbitration. *Id.* at 132-33. Accordingly, the court observed no FAA "finality" exception but instead held that the issue of the preclusive effect of the prior award must be referred to arbitration because the parties' broad arbitration agreement required that result.

Likewise, in *Howsam*, the United States Supreme Court held that issues of timeliness of claims and estoppel are presumptively questions for arbitrators to decide. *Howsam*, 123 S. Ct. at 592. Accordingly, the Court observed no FAA exception for such issues and found them subject to arbitration even where no "clear and unmistakable" delegation could be found in the parties' arbitration clause.

Third, Gulf's "finality" argument is a red herring. Eni has asserted arbitration claims against Gulf. Gulf argues that Eni's claims are precluded by the Final Award in the prior arbitration. Whether Eni's new arbitration claims are barred by the prior award (based on statutory, common law or other grounds) is a question that must be answered in some forum. Whether a court or arbitration tribunal answers this question does not make the previous arbitration award any more, or less, final. In short, no "finality" purpose is served by having a court, rather than an arbitration tribunal, decide Gulf's "collateral attack" allegation. It still has to be done. By contrast, having a court decide the issue would disserve the FAA policy in favor of enforcing arbitration agreements according to their terms. This is particularly true where, as here, the agreement expressly delegates to the arbitrators all disputes "of any and every kind," including disputes based on "contract, tort, statute, regulation or otherwise" or involving "arbitrability" or "jurisdiction."

Finally, even if the FAA contained a theoretical interpretive exception to agreements to arbitrate for so-called "finality" issues, such an exception would not apply in this case. Whether the FAA contains a so-called "finality" policy, and the extent of such a policy, are substantive questions that, by definition, are based on a statute. The parties' arbitration clause expressly covers disputes "of

any and every kind or type" including substantive disputes based on a "statute." A176 (TUA, Art. 1(57)). Thus, the Court of Chancery lacked jurisdiction to consider any so-called FAA "finality" questions because the parties expressly and specifically agreed to submit substantive *statutory* issues "of any and every kind or type" to arbitration. Gulf's reliance on a statutory policy does not bring its claim outside the scope of the TUA arbitration clause. Rather, Gulf's reliance on a statutory policy places its claim squarely within the scope of that clause.

Whether such a statutory interpretive exception theoretically could be applied to other arbitration clauses, contained in other agreements, is of no moment in this case. Indeed, to prevail on its "finality" argument in this case, Gulf would have to show that the FAA ***prohibits*** parties from agreeing to arbitrate any issues touching on finality even if they choose to do so. Nothing in FAA or the case law remotely supports such a draconian rule.

5. Gulf's Reliance on Contract Provisions Confirms That the Issues in This Case Are Arbitrable

Gulf also relies on various provisions of the TUA itself — which provide that any arbitration award shall be "final and binding" and "not subject to appeal" — to argue that Eni may not pursue its claims in the Second Arbitration. Opening Br. at 8, 21. Yet, Gulf's reliance on such contract provisions only underscores that the disputed issues are subject to arbitration.

This is because interpretation of a contract's terms is a principal activity of arbitrators and a quintessential task of arbitral tribunals. Indeed, Gulf's own cases confirm that reliance on contractual "finality" provisions such as these strengthens the case for arbitral jurisdiction. For example, in *Olick*, the Third Circuit made clear that this type of "finality" language in the contract weighs in favor of referring the dispute to arbitration. *Olick*, 151 F.3d at 139-40. "The reasoning underlying this approach is that a provision regarding the finality of arbitration awards is a creature of contract and, like any other contractual provision that is the subject of dispute, it is within the province of arbitration." *Id.*

In fact, the court in *Olick* held that, even where there is a "[c]ontractual provision barring the re-arbitration of similar disputes between parties, the arbitrator is to decide the preclusive effect, if any, of a previous arbitration." *Id.* at 139. The court explained that, by agreeing to arbitration, the parties intended that the arbitrator, not the court, would "determine the nature and extent, if any, of that finality." *Id.* at 140. None of the cases cited by Gulf suggests otherwise. Thus, Gulf's reliance on contractual finality-related language only works in favor of arbitral jurisdiction.

III. THE COURT OF CHANCERY ERRED IN ENJOINING ENI'S NEGLIGENT MISREPRESENTATION CLAIM

A. Question Presented

Whether the Court of Chancery erred in enjoining Eni from pursuing its negligent misrepresentation claim in the Second Arbitration. B2-15; B21-38; B40-41; A542-555.

B. Scope of Review

While this Court generally reviews the entry of a permanent injunction for an abuse of discretion, *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d at 380, embedded legal conclusions are subject to *de novo* review. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). The questions that present a legal issue concerning applicability and scope of an arbitration agreement are subject to *de novo* review. *DMS Props.-First, Inc.*, 748 A.2d at 392.

C. Merits of Argument

The Court of Chancery erred by enjoining the arbitration of Eni's negligent misrepresentation claim. Notably, the Court of Chancery correctly concluded that "the broad language of the arbitration provision" in the TUA "evinces the parties' agreement to arbitrate the issue of arbitrability." Op. at 33, *see also id.* at 19 ("In my opinion, the parties to the TUA evinced a 'clear and unmistakable' agreement to arbitrate the issue of arbitrability."). Once the Court

of Chancery made this finding, its inquiry should have been at an end and the court should have referred all questions of arbitrability to the arbitration tribunal.

Nevertheless, the Court of Chancery held that, with respect to Eni's negligent misrepresentation claim, the "collateral attack" doctrine allows a court to "intervene [ ] to enjoin a second round of arbitration based on a prior arbitration in order to vindicate the policies of finality and limited review of arbitration awards embedded in the FAA *notwithstanding the existence of a broad arbitration clause*." Op. at 27 (emphasis in original). As a result, the Court of Chancery created a *de facto* policy exception to the FAA's stringent requirement that courts enforce arbitration clause as written.

In this respect, the Court of Chancery erred, and its Order enjoining arbitration of Eni's negligent misrepresentation claim should be reversed and set aside. As demonstrated above, no such policy exception to enforcement of the plain and clear terms of arbitration clauses is supported by the FAA, and no such policy exception is permitted under the United States Supreme Court's decision in *Henry Schein* or by this Court's case law. *Henry Schein*, 139 S. Ct. at 529 ("We must interpret that Act [FAA] as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract.");

see also id. at 530 ("When the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even *if* the court thinks that a party's claim on the merits is frivolous."); *DMS Properties-First, Inc.*, 748 A.2d at 392 ("the question 'who has the primary power to decide arbitrability' turns [on] what the parties agreed about that matter.").

However, even if the Court of Chancery had jurisdiction to entertain the merits of Gulf's "collateral attack" allegation, it nonetheless erred by enjoining Eni's negligent misrepresentation claim. In the Second Arbitration, Eni does not assert that the Final Award was tainted or erroneous in any way, nor does Eni seek to challenge, alter or undo any aspect of the Final Award. Indeed, Eni prevailed in the prior arbitration, the TUA was terminated as Eni had sought, and Eni has fully paid the compensation set forth in the Final Award accompanying such termination.

Rather, as with its breach of contract claims, Eni's negligent misrepresentation claim has independent significance in the circumstances of this case unrelated to the Final Award. On the one hand, Gulf sought (and obtained) in the prior arbitration hundreds of millions of dollars in compensation for the costs to decommission the facility in question. A349; *see also* Opening Br. at 9 ("[T]he tribunal ordered Eni to pay equitable restitution to Gulf together

with pre- and post-award interest . . . Specifically, it found that Gulf was 'entitled to be compensated . . . for the expenses incurred and to be incurred by [Gulf] in the context of partial performance of the TUA (based on the total costs to dispose of the Pascagoula Facility and wind down the TUA based on a 'decommissioning scenario')"). Yet, subsequently, in its New York Litigation, Gulf claimed that it was entitled to continued payment of fees for services at that very same facility for which it received *shut-down costs*. *See* A345-350 ("Contrary to its representations to the prior tribunal, Gulf subsequently initiated litigation against Eni S.p.A. in New York state court under a Parent Company Guarantee … contending that Eni S.p.A. must continue to pay the Reservation and Operating Fees set forth in the TUA pursuant to the Guarantee.").

While Eni contends that Gulf's questionable conduct has consequences, it does not contend that those consequences extend to the prior award. Rather, Eni maintains that Gulf's conduct has consequences in relation to the parties' broader transaction and dealings as a whole. Whether Eni is correct in its theory that Gulf's conduct in the arbitration (which is deemed to be conduct in performance of the underlying contract) limits Gulf's ability to pursue claims under the related Guarantee is not a question for the Court of Chancery or this Court. It suffices that Eni is "able to allege wrongdoing that has caused harm

independent of its effect on the arbitration award to avoid the collateral attack label." *Gulf Petro Trading Co., Inc.*, 512 F.3d at 751. Eni has done so.

Moreover, the significance of Eni's claims in the Second Arbitration is heightened by Gulf's posturing in the New York Litigation. Coextensively with Gulf's efforts here to enjoin arbitration of Eni's breach of contract and negligent misrepresentation claims, Gulf asserted in the New York Litigation that these issues were not properly interposed in the New York action for various reasons. A564-65 (Hearing Tr. 60:22-24; 61:1-4).

To be sure, Eni has alleged that Gulf gained for itself an improper advantage by making its misrepresentations. A354 ("As a direct result of Gulf's apparent misrepresentations, the tribunal awarded Decommissioning Costs and excluded the amount of future Reservation and Operating Fee payment that Gulf would receive from ALSS in calculating compensation for Decommissioning Costs awarded to Gulf. Had Gulf not made these apparent misrepresentations, the compensation amount paid by Eni for decommissioning costs would have been greatly reduced, or reduced to zero."). However, contrary to Gulf's allegations, nowhere in the Notice of Arbitration does Eni seek to "claw back" the decommissioning costs or any other amounts awarded in the prior arbitration.

Instead, Eni seeks "declaratory" relief and monetary relief "in an amount to be proven at the hearing on the merits, as a result of Gulf's wrongful conduct." A355. Eni's request for declaratory relief has nothing to with any amounts or other relief awarded in the prior arbitration. And the monetary relief afforded to Eni after the hearing on the merits could take a number of forms unrelated to the prior award in the unique circumstances of this case, such as the costs incurred in defending against the baseless Guarantee litigation.

Accordingly, that part of the Court of Chancery's Order enjoining arbitration of Eni's negligent misrepresentation claim should be reversed for this reason as well.

CONCLUSION

For the foregoing reasons, the Court: (1) should affirm that portion of the Court of Chancery's Order denying Gulf's request to enjoin arbitration of Eni's breach of contract claims; (2) reverse that portion of the Court of Chancery's Order enjoining arbitration of Eni's negligent misrepresentation claim; and (3) remand the case to the Court of Chancery with instructions to enter judgment in favor of Eni.

Dated: April 2, 2020

CHIPMAN BROWN CICERO & COLE, LLP

/s/ Gregory E. Stuhlman
Joseph B. Cicero (#4388)
Gregory E. Stuhlman (#4765)
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, DE 19801
(302) 295-0191

Attorneys for Defendant Below, Appellee/Cross-Appellant Eni USA Gas Marketing LLC

OF COUNSEL:

Joseph J. LoBue
Helene Gogadze
SHEPPARD MULLIN RICHTER & HAMPTON LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 747-1900