No. 20-

IN THE

Supreme Court of the United States

ENI USA GAS MARKETING LLC,

Petitioner,

v.

GULF LNG ENERGY, LLC
AND GULF LNG PIPELINE, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

PETITION FOR A WRIT OF CERTIORARI

JOSEPH J. LOBUE
Counsel of Record
HELENE GOGADZE
SHEPPARD MULLIN RICHTER
& HAMPTON LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 747-1936
jlobue@sheppardmullin.com

Counsel for Petitioner

303401

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Federal Arbitration Act permits a court to refuse to enforce an arbitration agreement delegating all questions, including questions of arbitrability, to an arbitrator where a party contends that the claim sought to be arbitrated represents a "collateral attack" on a prior arbitration award.

PARTIES TO THE PROCEEDING

Petitioner is Eni USA Gas Marketing LLC. The Respondents are Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC.

CORPORATE DISCLOSURE STATEMENT

Petitioner Eni USA Gas Marketing LLC is indirectly owned by Eni S.p.A. No other publicly held company holds 10% or more of its stocks.

RELATED PROCEEDINGS

Gulf LNG Energy, LLC v. Eni USA Gas Mktg., C.A. No. 2019-0460-AGB, Chancery Court of Delaware. Judgment entered Dec. 30, 2019.

Gulf LNG Energy, LLC v. Eni U.S. Gas Mktg., No. 22, 2020, Supreme Court of the State of Delaware. Judgment entered Nov. 17, 2020.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

STATUTES AND OTHER AUTHORITIES

Eni USA Gas Marketing LLC respectfully petitions for a writ of certiorari to review the judgement of the Supreme Court of the State of Delaware in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Delaware (App., *infra*, 1a–41a) is reported at 242 A.3d 575.

The opinion of the Chancery Court of Delaware (App., *infra*, 42a–79a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Delaware was entered on November 17, 2020. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

This petition is timely filed pursuant to the Supreme Court's order dated March 19, 2020.

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy

> arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This case presents a vitally important question on which the decision from the state court of last resort below (i) split from the decisions of two federal appellate courts, (ii) failed to apply this Court's clear precedent, and (iii) misapplied the Federal Arbitration Act ("FAA") to override the parties' clear and unmistakable delegation of issues to the jurisdiction of arbitrators.

The Court has consistently held that the FAA requires courts to enforce arbitration agreements as written and to refer to arbitration any issues falling within the scope of the arbitration clause. In 2019, in *Henry Schein, Inc. v. Archer & White*, the Court unanimously re-affirmed this principle even as to the threshold question of arbitrability—that is, whether an arbitration agreement covers a particular dispute—if the parties clearly and unmistakably delegated that question to an arbitrator. 139 S.Ct. 524, 530 (2019).

Here, the parties' contract contains "a broad form arbitration agreement designed to encompass all possible disputes" and delegates all disputes, including specifically disputes "over arbitrability or jurisdiction," to arbitration. The case before the lower courts involved three issues: (1) the preclusive effect of a prior arbitration award on a subsequent arbitration

proceeding; (2) whether the issue of preclusive effect is subject to arbitration; and (3) "who decides" whether that issue is subject to arbitration. The parties' arbitration agreement plainly delegates each of these issues to the arbitrators.

The Supreme Court of Delaware recognized that the contract contains a broad arbitration clause covering "all possible disputes," including a clear and unmistakable delegation of arbitrability questions to the arbitrators. App., *infra*, 5a, 23a, 26a. The Supreme Court of Delaware recognized that the United States Courts of Appeals for the Second Circuit and the United States Court of Appeals for the Third Circuit have held that disputes over the preclusive effect of a prior arbitration award must be sent to arbitration where the parties have agreed to a broad arbitration clause. *Id.* at 22a, n.72. Finally, the Supreme Court of Delaware acknowledged the Court's decision in *Schein* that courts may not employ policy exceptions to the enforcement of arbitration clauses according to their terms. *Id.* at 21a–22a.

Nevertheless, the Supreme Court of Delaware refused to honor the parties' broad arbitration clause, refused to send the issues of arbitrability and preclusion to the arbitrators, and directed the Court of Chancery of Delaware to issue an order enjoining the arbitration. *Id.* at 35a. The court below found that the courts, rather than the arbitrators, had jurisdiction over all of the issues in the case because the party opposing arbitration argued that the new arbitration constituted a so-called "collateral attack" on a prior arbitration award. *Id.* at 23a–26a. In essence, the Supreme Court

of Delaware created its own policy exception to the FAA precluding arbitration of any issues—regardless of the scope of the arbitration clause—once the specter of the "collateral attack" doctrine is raised.

The Supreme Court of Delaware's application of a "collateral attack" exception to arbitral jurisdiction is inconsistent with the FAA's text and with its "central or primary purpose" to ensure that "private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 682 (2010) (internal quotation marks and citations omitted). As it has in other recent cases, this Court should grant this petition for certiorari to address the lower courts' erroneous, arbitration-hostile application of the FAA and to reaffirm the "emphatic federal policy in favor of arbitra[tion]." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 631 (1985).

A. Background

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements […]." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24 (1991). Section 2 of the Federal Arbitration Act—which contains the FAA's "primary substantive provision," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983)—ensures that "[a] written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.

2. Section 2 embodies both "a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted).

Accordingly, Section 2 "places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms." *Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 67 (2010) (internal citations omitted). This requirement applies to disputes over "gateway" issues, such as whether a particular claim falls within the scope of an arbitration agreement. *See id.* at 68-70. And it likewise applies to disputes over the antecedent question: who decides such gateway issues, the court or the arbitrator?—the "who decides" question. *See Schein,* 139 S. Ct. at 529.

Although courts presumptively decide gateway issues, parties may override that general principle by "clear[ly] and unmistakab[ly]" agreeing to arbitrate arbitrability. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). This type of delegation provision is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," and the FAA "operates on this additional arbitration agreement just as it does on any other." *Schein*, 139 S. Ct. at 529. (citation omitted). When parties include a delegation provision in their agreement, this grants authority to the arbitrators to decide all gateway issues, including questions over "whether their [arbitration] agreement covers a particular controversy." *Id.* (citation omitted).

B. Facts and Procedural History

Petitioner Eni USA Gas Marketing LLC ("Eni") is a Delaware limited liability company with a place of business in Houston, Texas. Eni is an indirect subsidiary of Eni S.p.A., a multi-national integrated energy company headquartered in Italy. App., *infra*, 45a. Eni S.p.A. engages in, among other things, oil and gas exploration, field development and production, the supply, trading and shipping of liquified natural gas ("LNG"), electricity, fuels and petrochemicals. *Id.*

On December 8, 2007, Eni entered into a Terminal Use Agreement (the "TUA") with Respondents ("Gulf") in connection with services to be provided by Gulf at a terminal and pipeline facility near Pascagoula, Mississippi ("Pascagoula Facility") for importation and regasification of LNG for distribution in the United States. *Id.* at 45a.

In March 2016, Eni initiated arbitration proceedings against Gulf pursuant to the dispute resolution provision in the TUA. *Id.* at 47a. The arbitration was conducted under the arbitration rules and auspices of the International Centre for Dispute Resolution. *Id.* The seat of arbitration was Houston, Texas. In the arbitration, Eni sought a declaration that the TUA had terminated pursuant to the frustration-of-purpose doctrine as a result of the "shale gas revolution," which had occurred in the United States after the parties entered into the TUA. *Id.* at 47a–48a. In the alternative, Eni sought a declaration that it had the contractual right to terminate the TUA for certain alleged breaches of contract by Gulf. *Id.* Gulf opposed Eni's frustration-of-purpose and breach of contract claims.

Eni ultimately prevailed on its frustration-of-purpose claim in the arbitration. On June 29, 2018 (with subsequent clarification issued on July 31, 2018), the arbitration tribunal issued a 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 "Final Award"). *Id.* at 48a–49a. The tribunal concluded that the principal purpose of the TUA (importing LNG into the United States) had been frustrated by the shale gas revolution, declared that the TUA terminated as of March 1, 2016, and awarded Gulf certain compensation primarily for costs associated with decommissioning the Pascagoula Facility ("Decommissioning Costs"). *Id.* Because the tribunal determined that the TUA had terminated on March 1, 2016 based on the frustration doctrine, the tribunal did not reach and did not decide Eni's alternative claim for a declaration that Eni had the contractual right to terminate the TUA as a result of Gulf's breaches. *Id.* at 49a. Both parties sought confirmation of the Final Award in the Court of Chancery of Delaware. *Id.* at 51a. The Court of Chancery of Delaware confirmed the Final Award in its entirety on February 1, 2019. *Id.* at 51a–52a.

On June 3, 2019, Eni initiated a new arbitration (the "Second Arbitration") against Gulf under the TUA that included the breach of contract claims left undecided in the first arbitration. *Id.* at 52a. Eni also alleged in the Second Arbitration that, in order to obtain Decommissioning Costs, Gulf had made certain representations in the prior arbitration that Gulf had later disavowed in subsequent proceedings. *Id.* Accordingly, Eni also sought "[a]n award declaring that

[Gulf] made material negligent misrepresentations to the tribunal in the prior arbitration." *Id*.

On June 17, 2019, Gulf filed a complaint in the Court of Chancery of Delaware seeking to enjoin the Second Arbitration both as to Eni's breach of contract claims and its negligent misrepresentation claim on the grounds that the Second Arbitration was precluded by the prior arbitration award. *Id.* at 53a, 54a–55a. Eni argued that all such issues—including the question of arbitrability—were subject to arbitration under the express terms of the parties' broad arbitration clause. *Id*. at 61a.

The TUA contains "a broad form" arbitration clause expressly covering "all possible disputes" including, in particular, issues of "arbitrability." 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*.

Id. at 62a (TUA, Art. 20.1) (emphasis added).

The agreement in turn defines the term "Dispute" in the broadest possible manner to include "any dispute, controversy or claim" of "any and every kind or type" including 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*.

Id. at 63a (TUA, Art. 1(57)) (emphasis added).

The parties submitted the matter to the Court of Chancery of Delaware on cross-motions for judgment on the pleadings. On December 30, 2019, the Court of Chancery of Delaware 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. *Id.* at 79a. On January 16, 2020, Gulf appealed to the Supreme Court of Delaware the Court of Chancery of Delaware's decision refusing to enjoin arbitration of Eni's breach of contract claims, and Eni cross-appealed the Court of Chancery of Delaware's decision enjoining arbitration of Eni's negligent misrepresenting claim on February 7, 2020. *Id.* at 12a–13a.

On November 17, 2020, the Supreme Court of Delaware issued its opinion affirming the Court of Chancery of Delaware's judgment enjoining Eni's negligent misrepresentation claim and reversing the Court of Chancery of Delaware's judgment refusing to enjoin Eni's breach of contract claims. *Id.* at 35a. In so doing, the Supreme Court of Delaware failed to honor

and enforce the parties' agreement to arbitrate, took jurisdiction and decided all of the issues in the case, and directed the Court of Chancery of Delaware to modify its injunction to enjoin Eni from pursuing all claims in the Second Arbitration.

Justice Vaughn issued a dissenting opinion noting that the majority's determination was not supported by the case law relied upon. *Id.* at 36a–41a. Justice Vaughn also noted that—in line with the Court's decision in *Schein* and the principles announced in prior decisions by the Second and Third Circuits—he would enforce the parties' arbitration agreement (including the delegation of arbitrability issues) as written and refer Eni's claims to the arbitrators. *Id.* at 40a–41a.

REASONS FOR GRANTING THE PETITION

This case presents a conflict among the courts below on an important question of law involving the FAA: whether the FAA permits a court to decline to enforce an arbitration agreement (including as to questions of arbitrability) because the party opposing arbitration has argued that the claim sought to be arbitrated is precluded by a prior arbitration award. In essence, the Supreme Court of Delaware's flawed decision creates a *de facto* policy exception to the FAA making otherwise clear and unambiguous arbitration agreements *unenforceable* whenever the preclusive "collateral attack" doctrine is raised. The decision below presents an important issue on the enforceability of arbitration clauses as written, creates a split with the Second and Third Circuit Courts of Appeals, and cannot be reconciled with the Court's consistent case law favoring arbitration, including *Schein*. The petition for a writ of certiorari should be granted.

A. The Decision Below Creates a Conflict Among the Lower Courts

The Supreme Court of Delaware's decision creates a conflict among federal courts and a state court of last resort on important questions relating to the enforcement of arbitration clauses. Two federal courts of appeals have directly addressed the question of arbitrability regarding the preclusive effect of a prior arbitration award on claims in a subsequent arbitration. Both courts ruled that the FAA requires that such issues be decided by the arbitrators, rather than the courts, in the presence of a broad arbitration clause.

John Hancock Mutual Life Insurance Co. v. Olick involved a question whether a prior arbitration precluded the claims raised in a second arbitration. 151 F.3d 132 (3d Cir. 1998). Specifically, the Third Circuit considered "the question of whether, under the [FAA], a district court has the authority, notwithstanding a valid arbitration clause, to enjoin a party from pursuing arbitration on res judicata grounds arising from both a prior arbitration and a prior judgment." *Id.* at 133. In deciding that question, the Third Circuit set forth the following test:

> [T]he judicial inquiry before compelling or enjoining arbitration is narrow, and the FAA authorizes the district court to explore only two threshold questions in considering a demand for arbitration: (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 139 (*citing In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 133 F.3d 225, 228, 233 (3d Cir. 1998)).

Elaborating on this test, the court reasoned that "the proper analytical inquiry mandated under the FAA is to focus on both the existence of a valid arbitration agreement and the nature of that agreement as it relates to the parties' current dispute." *Id.* The court concluded that "Hancock's res judicata objection based on the prior arbitration is an issue to be arbitrated and is not to be decided by the courts." *Id.* at 140. The court explained its rationale as follows:

> 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 unless it may be said "with positive assurance" that the parties sought to have the matter decided by a court.

Id. at 139 (citing *Local 103 of International Union of Electrical, Radio and Machine Workers v. RCA Corp.*, 516 F.2d 1336, 1340 (3d Cir. 1975)).

Citigroup, Inc. v. Abu Dhabi Investment Authority involved a similar question of whether a prior arbitration precluded claims raised in a second arbitration. 776 F.3d 126 (2d Cir. 2015). In that case, an arbitration award was confirmed by the District Court for the Southern District of New York. While the confirmation proceedings were still pending, Abu Dhabi Investment Authority ("ADIA") served Citigroup with a notice for a second arbitration.

Citigroup sought to enjoin the second arbitration "on the ground that ADIA's new claims were barred by the doctrine of claim preclusion, or *res judicata*, because they were or could have been raised in the first arbitration." *Id.* at 128. The Second Circuit concluded that arbitrators should decide the preclusive effect of the judgment confirming the first arbitration award. The court explained as follows:

> The FAA's policy favoring arbitration and our precedents interpreting that policy indicate that it is the arbitrators, not the federal courts, who ordinarily should determine the claim-preclusive effect of a federal judgment that confirms an arbitration award. . . . We reason from our prior decisions interpreting the FAA, that the determination of the claim-preclusive effect of a prior federal judgment confirming an arbitration award is to be left to the arbitrators.

Id. at 131.

The Supreme Court of Delaware took the opposite approach and determined that the preclusive effect of the prior arbitration in the instant case—as well as the threshold question of who decides "arbitrability" of that issue—were issues to be decided by the court. The court distinguished the Second and Third Circuit decisions as involving "res judicata" rather than the "collateral attack" doctrine.

However, neither the FAA nor the parties' broad arbitration clause makes any such distinction on issues that may be subject to arbitration. As a result, the

decision of the Supreme Court of Delaware cannot be reconciled with the Second and Third Circuit's reasoning. As Justice Vaughn pointed out in his dissent below: "The Majority seems to dismiss these cases as 'res judicata cases' that do not discuss collateral attacks, as though the attorneys who sought to enjoin a second arbitration in those cases just made the wrong arguments. I do not think the cases are so easily disposed of. It is hard for me to imagine that the distinction between res judicata and collateral attack would have led to different outcomes in those cases." App., *infra*, 40a.

Justice Vaughn further explained that none of the "collateral attack" cases relied on by the Majority "appear to be ones where the parties evinced a 'clear and unmistakable' agreement to arbitrate the issue of arbitrability, and they do not discuss arbitration language as broad as the arbitration provisions of the agreement in this case." *Id.* at 36a.

The conflict created by the decision below and those of the Second and Third Circuits is substantial and the question is ripe for the Court's review.

B. The Decision Below Improperly Creates A Policy Exception to Enforcement of Arbitration Clauses Prohibited by *Schein* and the FAA

This Court has repeatedly directed lower courts to enforce arbitration agreements as written. *Schein*, 139 S. Ct. at 529-530; *American Express Co. v. Italian Colors Restaurant,* 570 U.S. 228, 233 (2013); *CompuCredit Corp. v. Greenwood,* 565 U.S. 95, 98 (2012); *AT&T*

Mobility, 563 U.S. at 339; *Rent-A-Center,* 561 U.S. at 67. As this Court recently made clear, courts may not decide even gateway questions of arbitrability when an arbitration agreement provides clear and unmistakable evidence that the parties intended to delegate arbitrability questions to an arbitrator. *Schein*, 139 S. Ct. at 529-530. The Supreme Court of Delaware ignored these directives.

"[A]rbitration is simply a matter of contract between the parties." *First Options*, 514 U.S. at 943. As a result, under the FAA, parties may agree "to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Schein*, 139 S.Ct. at 529 (internal quotation marks and citations omitted); *id.* at 527 ("[T]he question of who decides arbitrability is itself a question of contract."); *First Options*, 514 U.S. at 943 ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreement about *that* matter.") (emphasis in original) (internal citations omitted).

In *Schein,* the 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." Schein*, 139 S.Ct. at 529 (emphasis added). Once the court determines that a valid delegation agreement exits, the court's only task is to enforce that agreement a written. *Id.* at 530 ("Just

as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.").

This Court has required that arbitration agreements must be enforced under the FAA regardless of the court's views regarding the merits of the issues. As this Court explained in *AT&T Technologies, Inc. v. Communications Workers of America,* the requirement to enforce valid arbitration agreements applies whether the claims of the party pursuing arbitration are "'arguable' or not, indeed even if it appears to the court to be frivolous." 475 U.S. 643, 649-650 (1986). And, in *Schein*, this Court made clear that a court may not override clear and unmistakable delegation of arbitrability even where the court believes that an argument in favor of arbitrability is "wholly groundless." *Schein*, 139 S.Ct. at 529.

In this case, the arbitration clause could not be drafted more broadly. It expressly covers "all possible disputes" of "any and every kind or type" including, specifically, disputes relating to "arbitrability" and "jurisdiction." Nevertheless, the Supreme Court of Delaware took jurisdiction over all of the issues presented in this case, including the issue of "arbitrability," decided those issues, and enjoined arbitration. App., *infra*, 35a. In fact, the court below created a categorical judicial policy exception for the so-called "collateral attack" doctrine.

Yet, courts cannot rely on judicial policy concerns to refuse to enforce arbitration agreements. *See Schein*,

139 S.Ct. at 531; *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 270 (2009). A party that proves the existence of a valid arbitration agreement is entitled to "an order directing that such arbitration proceed *in the manner provided for in such agreement.*" 9 U.S.C. 4 (emphasis added). Here, Eni proved the existence of a valid arbitration agreement covering all of the questions at issue but instead received an order enjoining arbitration. That holding cannot be reconciled with the FAA or with this Court's numerous decisions applying the statute.

C. The Question Presented Is An Important One That Warrants The Court's Review In This Case

The question presented here is an important one regarding the enforcement of arbitration clauses that warrants the Court's review. The Court's action is necessary to protect the FAA's promise to enforce the commercial arbitration agreements as written—including clear and unmistakable delegations of questions of arbitrability—and to ensure clarity and uniformity in the application of the FAA.

As demonstrated by this Court's frequent review of FAA-related cases, commercial arbitration is an important aspect of the US legal system. As this Court has recognized, arbitration agreements enable parties to address a broad range of disputes through a process that avoids the costs associated with traditional litigation, and unburdens the courts with disputes that arise, like arbitration, primarily from contractual relationships. Parties maximize these benefits by delegating all questions (including questions of arbitrability and jurisdiction) to the arbitrators just as Eni and Gulf did in this case.

The FAA is founded on the principle that arbitrators will be "competent, conscientious, and impartial," and capable of resolving complex issues. *Mitsubishi Motors,* 473 U.S. at 633-634; *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 232 (1987). Accordingly, courts must presume that arbitrators will competently and faithfully analyze and decide all issues within the scope of their delegated authority including issues related to the preclusive effect of prior proceedings, whether based on statutes, common law doctrines or the terms of the contract itself.

By contrast, leaving the Supreme Court of Delaware's decision intact will create confusion among lower state and federal courts and invite those courts to create their own judicial policy exceptions against enforcing otherwise broadly-written and comprehensive arbitration clauses. The Supreme Court of Delaware's decision is a step backward to the Congressionally-rejected era of "judicial hostility to arbitration." *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 89 (2000); *Gilmer,* 500 U.S. at 24. The decision has the potential of generating a new class of protracted litigation over potential policy exceptions to enforcement of arbitration clauses, "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 275 (1995).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph J. LoBue
Counsel of Record
Helene Gogadze
Sheppard Mullin Richter
& Hampton LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 747-1936
jlobue@sheppardmullin.com

Counsel for Petitioner

Dated April 15, 2021

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF DELAWARE, FILED NOVEMBER 17, 2020

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

No. 22, 2020

GULF LNG ENERGY, LLC AND
GULF LNG PIPELINE, LLC,

Plaintiffs Below,
Appellants,

v.

ENI USA GAS MARKETING LLC,

Defendant Below,
Appellee.

Court Below: Court of Chancery
of the State of Delaware.
C.A. No. 2019-0460.

September 9, 2020, Submitted
November 17, 2020, Decided

Before **SEITZ**, Chief Justice; **VALIHURA**, **VAUGHN**, **TRAYNOR** and **MONTGOMERY-REEVES**, Justices, constituting the Court *en Banc*.

Upon appeal from the Court of Chancery. **AFFIRMED IN PART, REVERSED IN PART**.

Appendix A

OPINION

SEITZ, Chief Justice, for the Majority:

In this appeal and cross-appeal, we address two primary issues arising out of a commercial agreement between the parties—first, whether the Court of Chancery had jurisdiction to enjoin a second arbitration that collaterally attacks a prior arbitration award; and second, whether the second arbitration in fact collaterally attacked the prior arbitration award.

We agree with the Court of Chancery that it had jurisdiction to enjoin a collateral attack on a prior arbitration award. The parties agreed that the Federal Arbitration Act ("FAA") governed their dispute. Under the FAA, the courts have the exclusive power to review and enforce arbitration awards. A party cannot escape the FAA's time-limited and exclusive review procedure by filing a follow-on arbitration attacking the outcome of the prior arbitration.

On the second issue, we affirm in part and reverse in part the court's ruling that some claims but not others in the second arbitration collaterally attacked the award in the prior arbitration. A collateral attack on the first award does not depend on the *res judicata* or collateral estoppel effect of claims raised or decided in the prior arbitration. Rather, the question is whether the claimant alleges irregularities in the prior arbitration or seeks to rectify the harm it suffered—issues that could have been reviewed through the FAA post-award procedure.

Appendix A

The Court of Chancery should have enjoined all claims in the second arbitration between the parties because the admitted goal of the follow-on arbitration was to raise irregularities and revisit the financial award in the first arbitration. Thus, we affirm in part and reverse in part the Court of Chancery's judgment.

I.

A.

Gulf LNG Energy, LLC, a Delaware limited liability company, owns and operates a liquefied natural gas ("LNG") terminal in Mississippi (the "Pascagoula Facility" or "Facility").[1] The Facility unloads vessel-imported LNG into the United States. Gulf LNG Pipeline, LLC (collectively with Gulf LNG Energy, LLC, "Gulf"), also a Delaware entity, owns and operates a five-mile long pipeline that distributes LNG from the Pascagoula Facility to downstream inland pipelines. Eni USA Gas Marketing LLC ("Eni"), a Delaware entity, markets natural gas products and offers related services in the United States.[2]

1. Unless otherwise stated, the facts are drawn from the Court of Chancery's opinion, *Gulf LNG Energy, LLC v. Eni USA Gas Marketing LLC*, C.A. No. 2019-0460-AGB, 2019 Del. Ch. LEXIS 1403, 2019 WL 7288767 (Del. Ch. Dec. 30, 2019).

2. Eni is an indirect subsidiary of Eni S.p.A, an Italian corporation.

Appendix A

On December 8, 2007, Gulf and Eni entered into a Terminal Use Agreement (the "TUA"), whereby Gulf would construct the Pascagoula Facility, and Eni would use the Facility to receive, store, regasify, and deliver imported LNG to downstream businesses.[3] Under the TUA, Eni agreed to pay Gulf fees for using the Facility, including monthly Reservation Fees and Operating Fees. The following TUA Articles are relevant to the dispute:

> Article 22.4(a) — Gulf covenanted to "observe and comply with [Article 22.2(f)] in all respects;"[4]
>
> Article 22.2(f) — Gulf's "Constitutive Documents" will contain provisions that "limit[] [Gulf's] purpose and object to the ownership, design, financing, construction, equipping, testing, commissioning, operation, maintenance, repair, decommissioning and removal of the [Pascagoula] Facility . . ."[5]
>
> Article 22.4(e) — Gulf is entitled to "reasonable consideration" for "all transactions" with an Affiliate;[6]

3. The TUA began on December 8, 2007, and ran for twenty years.

4. App. to Opening Br. at A257 (TUA Art. 22.4(a)).

5. *Id.* at A256 (TUA Art. 22.2(f)(i)).

6. *Id.* at A258 (TUA Art. 22.4(e)).

Article 18.1(a)(vi) — Eni can terminate the TUA early if Gulf fails to perform obligations under Article 22.4(a) or 22.4(e) for a period of more than fifteen consecutive days;[7]

Article 20.1(a) — the parties agreed 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."[8] "Dispute" is defined as "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 over arbitrability or jurisdiction"[9] and

Articles § 20.1(h), (o) — arbitral awards "shall be final and binding"[10] and the parties "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

7. *Id.* at A247 (TUA Art. 18.1(a)(ix)).

8. *Id.* at A250 (TUA Art. 20.1(a)).

9. *Id.* at A176 (TUA Art. 1(57)).

10. *Id.* at 251 (TUA Art. 20.1(h)).

arbitration statute or treaty"—in this case the Federal Arbitration Act.[11]

On March 2, 2016, Eni filed for arbitration (the "First Arbitration") with the American Arbitration Association, International Centre for Dispute Resolution ("ICDR"). In its arbitration demand, Eni alleged that the United States' natural gas market had undergone a "radical change" due to "unforeseen, vast new production and supply of shale gas in the United States [that] made import of LNG into the United States economically irrational and unsustainable."[12] As Eni alleged in support of declaratory relief, (i) the essential purpose of the TUA had been frustrated and thus terminated because of "fundamental and unforeseeable change in the United States natural gas/LNG market," and (ii) a declaration that Eni could terminate the TUA at any time under Article 18.1 because Gulf breached warranties and covenants "in at least

11. *Id.* at A252 (TUA Art. 20.1(o)). Because the parties did not designate the Delaware Uniform Arbitration Act, the FAA governs their arbitration. 10 *Del. C.* § 5702(a) (requiring an arbitration agreement to "specifically referenc[e] the Delaware Uniform Arbitration Act [§ 5701 et seq. of this title] and the parties' desire to have it apply to their agreement . . . ."); *Id.* § 5702(c) ("Unless an arbitration agreement complies with the standard set forth in subsection (a) of this section for applicability of the Delaware Uniform Arbitration Act, any application to the Court of Chancery to enjoin or stay an arbitration, obtain order requiring arbitration, or to vacate or enforce an arbitrator's award shall be decided . . . in conformity with the Federal Arbitration Act . . . .").

12. *Gulf*, 2019 Del. Ch. LEXIS 1403, 2019 WL 7288767, at *2 (alteration in original).

Articles 22.4(a) and 22.4(e)."[13] Specifically, Eni contended that Gulf violated Article 22.4(a) of the TUA by filing an application to modify the pipeline to "accommodate the planned liquefaction and export activities," contrary to Article 22.4(a)'s representation that Gulf's "purpose and object" was limited "strictly to importation and regasification of LNG."[14]

On June 29, 2018, the arbitration tribunal (the "First Tribunal") issued its Final Award, finding that "the principal purpose of the TUA has been substantially frustrated" and declaring the TUA terminated as of March 1, 2016.[15] The First Tribunal ordered Eni to pay Gulf $462,199,000 as "just compensation . . . for the value that their partial performance of the TUA conferred upon Eni."[16] In language we will consider in more detail later in this opinion, the arbitrators also stated that Eni's breach of contract claim against Gulf was rendered "academic and deserves no further consideration" in light of their frustration of purpose finding.[17]

B.

On September 28, 2018, Gulf sued Eni S.p.A.—Eni's indirect parent company—in New York state court under

13. *Id.*

14. *Id.*

15. 2019 Del. Ch. LEXIS 1403, [WL] at *3.

16. *Id.*

17. *Id.*

the guarantee agreement between Gulf and Eni S.p.A. (the "Guarantee Agreement"). Gulf argued that Eni S.p.A. owed "as much as approximately $900,000,000 in guaranteed obligations" for Reservation and Operating Fees for the Pascagoula Facility running from the date of the First Arbitration's Final Award until the end of the TUA's twenty-year term.[18] In the New York litigation, Gulf claimed that, in the Guarantee Agreement, Eni S.p.A. "specifically waived, 'to the extent permitted by law, any release, discharge, reduction or limitation of or with respect to any sums owing by [Eni] or other liability of [Eni] to [Gulf].'"[19]

On December 12, 2018, Eni S.p.A. filed its answer and three counterclaims, alleging that the Guarantee Agreement was terminated by Gulf's "numerous and widespread breaches of the TUA and related agreements."[20] Eni S.p.A. argued that Gulf's breaches of Article 22 of the TUA "caused [Eni] substantial injury for which Eni S.p.A. seeks damages and other relief."[21]

Around the time that Gulf initiated the New York litigation, Gulf brought suit in the Delaware Court of Chancery seeking to confirm the Final Award. Eni filed an answer and asserted a counterclaim asking the Court of Chancery to enter judgment in Eni's favor by "confirming

18. *Id.*

19. *Id.* (alteration in original).

20. *Id.* (alteration in original).

21. *Id.*

the Final Award in its entirety."[22] Gulf and Eni each moved for judgment on the pleadings. On February 1, 2019, the court entered a final judgment confirming the arbitration award in favor of Gulf against Eni for $371,577,849.[23]

C.

On June 3, 2019, following confirmation of the First Award, Eni filed a second notice of arbitration (the "Second Arbitration"). Eni asserted two counts for declaratory relief and damages for Gulf's alleged breach of the TUA "by 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" and a third claim for negligent misrepresentation seeking "declaratory and other relief, in the form of damages and/or restitution . . . as a result of Gulf's wrongful conduct" before the First Tribunal.[24] On June 17, 2019, Gulf responded with this action in the Court of Chancery under the FAA and 10 *Del. C.* §§ 5702, 5703(b), seeking (i) a permanent injunction staying the Second Arbitration

22. *Id.*

23. Eni paid the judgment in full. The Court of Chancery's award in the confirmation proceeding was $371,577,849. It was less than the original arbitration award of $418,649,000 because amounts that Eni paid to Gulf were credited after the First Tribunal corrected its opinion. App. to Opening Br. at A286-89 (Cross-Motions for Judgment on the Pleadings Hr'g, *Gulf LNG Energy, LLC v. ENI USA Marketing LLC*, 2018-0700-AGB, 2019 Del. Ch. LEXIS 398 (Del. Ch. Feb. 1, 2019) (TRANSCRIPT)).

24. *Gulf*, 2019 Del. Ch. LEXIS 1403, 2019 WL 7288767, at *4.

and (ii) a «declaratory judgment that Eni . . . is barred from maintaining or pursuing the Second Arbitration."[25]

Gulf moved for judgment on the pleadings to enjoin Eni "from taking any further steps or actions in the Second Arbitration other than to request that the Second Arbitration be discontinued and dismissed at Eni's cost."[26] On December 30, 2019, the Court of Chancery ruled that (1) Eni was permanently enjoined from pursuing its negligent misrepresentation claim in the Second Arbitration; and (2) judgment was entered in favor of Eni on Gulf's declaratory and injunctive relief claims relating to Eni's breach of contract claim.[27]

In its decision, the Court of Chancery rejected Eni's jurisdictional arguments. First, the court reviewed a long line of cases enjoining collateral attacks on arbitration awards. As noted by the Chancellor, these decisions hold that the FAA is the exclusive review process once an arbitration award issues. Collateral attacks in follow-on proceedings are improper end runs around the FAA that undermine the FAA's goal of speedy and final resolution of disputes.

Second, the Court of Chancery found that Eni's negligent misrepresentation claim was an improper

---

25. *Id.*

26. *Id.*

27. *Gulf LNG Energy, LLC v. Eni USA Gas Marketing LLC*, 2020 WL 136834, at *1 (Del. Ch. Jan. 10, 2020) (ORDER).

collateral attack on the Final Award. As the court held, Eni's "ultimate objective in the Second Arbitration" was to recapture "decommissioning costs it was required to pay to satisfy the Final Award."[28] The court likewise found that Eni was also 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."[29] According to the court, "[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."[30] This result would be "the epitome of a collateral attack."[31] The court also 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."[32] Because "Eni made no effort to seek to vacate the Final Award on this ground," 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.'"[33]

---

28. *Gulf*, 2019 Del. Ch. LEXIS 1403, 2019 WL 7288767, at *11.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (quoting *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1213 (6th Cir. 1982)); *see also* 2019 Del. Ch. LEXIS 1403, [WL] at *12 ("As a substantive matter, however, Eni's misrepresentation claim is a transparent tactic to claw back the damages it paid Gulf under the Judgment for the purpose of reducing and potentially nullifying

Finally, the Court of Chancery found that Eni's breach of contract claims did not collaterally attack the Final Award. As the court held, "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 . . . ."[34] According to the court, "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."[35] Thus, 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."[36]

D.

On appeal, Gulf argues that the Court of Chancery erred when it refused to enjoin all claims in the Second Arbitration. According to Gulf, the court's focus should have been on the harm alleged and the relief sought in the Second Arbitration rather than the nature of the claims or whether they were actually resolved. Because Eni

---

the substance of the damages award that Gulf obtained as a result of the First Arbitration.").

34. 2019 Del. Ch. LEXIS 1403, [WL] at *12.

35. *Id.*

36. *Id.*

sought in the Second Arbitration to recoup its losses in the First Arbitration, Gulf claims that the court should have enjoined the Second Arbitration as an improper collateral attack on the Final Award.

Eni cross-appealed, arguing that the Court of Chancery lacked jurisdiction to enjoin the Second Arbitration in light of the parties' broad arbitration clause sending all disputes to an arbitrator rather than the court. And, even if the court had jurisdiction, Eni contends that the court erred by enjoining Eni's negligent misrepresentation claim as a collateral attack on the Final Award. According to Eni, the negligent misrepresentation claim is independent from the Final Award. Rather than seeking to claw back portions of the Final Award, Eni maintains, its negligent misrepresentation claim implicates the parties' broader transaction under the Guarantee Agreement as raised in the litigation in New York.

We review the Court of Chancery's permanent injunction order for an abuse of discretion. Embedded legal conclusions are reviewed *de novo*.[37]

II.

A.

We address jurisdiction first. In 1925 Congress enacted the FAA, reflecting "a liberal policy favoring arbitration" as well as the "fundamental principle that

37. *Heartland Payment Sys., LLC v. Inteam Assocs., LLC*, 171 A.3d 544, 570 (Del. 2017); *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 380-81 (Del. 2014).

arbitration is a matter of contract."[38] "The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'"[39] Depending on the language of the agreement, some threshold questions are presumptively for the courts to decide,[40] and others are presumptively for the arbitrator to decide.[41] According to the United States Supreme Court, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[42]

---

38. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (first quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); and then quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)).

39. *Concepcion*, 563 U.S. at 344 (alteration in original) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)).

40. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) ("Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide.").

41. *Id.* ("At the same time the Court has found the phrase 'question of arbitrability' *not* applicable in other kinds of general circumstance where parties would likely expect that an arbitrator would decide the gateway matter.") (emphasis in original); *see also James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006) (explaining the difference between substantive and procedural arbitrability).

42. *Moses H. Cone*, 460 U.S. at 24-25.

Once an arbitration is completed, however, and the parties have agreed that the FAA controls their arbitration, Sections 10 and 11 of the FAA provide the exclusive means to vacate, modify, or correct the award.[43] Under the FAA, the court reviews the arbitration award. Its review "is one of the narrowest standards of judicial review in all of American jurisprudence" and is limited to the narrow grounds warranting vacatur of the award under the FAA.[44] Section 10 of the FAA permits a court to vacate an arbitration award procured by fraud; evident partiality or corruption in the arbitrators; arbitrator misconduct; or when the arbitrators "exceeded their

---

43. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008) ("[T]he text [of the FAA] compels a reading of the §§ 10 and 11 categories as exclusive."); *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 909 (6th Cir. 2000) ("Once an arbitration is conducted under a valid arbitration contract, the FAA 'provides the exclusive remedy for challenging acts that taint an arbitration award.'") (quoting *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982)); *Auto Equity Loans of Del., LLC v. Baird*, 232 A.3d 1293, 2020 WL 2764752, at *3 n.24 (Del. 2020) (TABLE) (explaining that Sections 10 and 11 of the FAA "provide the exclusive grounds for judicial review of arbitration awards").

44. *Auto Equity Loans*, 232 A.3d 1293, 2020 WL 2764752, at *3 (quoting *SPX Corp. v. Garda USA, Inc.*, 94 A.3d 745, 750 (Del. 2014)); *see also Hall St. Assocs.*, 552 U.S. at 588 ("[I]t makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."); *Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986) ("Because a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings, it is well settled that judicial review of an arbitration award is very narrowly limited.").

powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[45] The court can modify or correct an award under Section 11 for "material miscalculation," when the award addresses a matter not submitted to arbitration, or if the award is imperfect in form but not on the merits.[46] In all cases, "a motion to vacate, modify, or correct an award must be served . . . within three months after the award is filed or delivered."[47] If the court does not vacate, modify, or correct an award, the award can be confirmed with the same force and effect as a court judgment.[48]

---

45. 9 U.S.C. § 10.

46. *Id.* § 11.

47. *Id.* § 12; *Corey*, 691 F.2d at 1212 ("Failure to comply with this statutory precondition of timely service of notice forfeits the right to judicial review of the award.").

48. 9 U.S.C. § 9 ("If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must grant* such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.") (emphasis added); *id.* § 12 ("Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."); *id.* § 13 ("The judgment [confirming an arbitration award] so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.").

Once court review under the FAA is finished, the courthouse doors are closed to the dispute. Some parties, however, have tried to open a new door by filing a follow-on arbitration or legal proceeding. In the follow-on proceeding, the claims are changed but the goal is the same—trying to undo a loss in the prior arbitration award. Settled federal and state precedent recognizes these follow-on proceedings as improper end runs around the FAA's exclusive review process. In the words of those cases, they are improper collateral attacks on the earlier final award.[49]

For instance, in *Corey v. New York Stock Exchange*, the Sixth Circuit held that an arbitration claimant could not circumvent the FAA review procedures by filing a second proceeding challenging a prior arbitration award.[50] The plaintiff's claims of arbitrator bias in a follow-on proceeding were "no more, in substance, than an impermissible collateral attack on the award itself" because the FAA "provides the exclusive remedy for challenging acts that taint an arbitration award . . . ."[51] According to the Sixth Circuit, the "complaint has no purpose other than to challenge the very wrongs affecting the award for which review is provided under section

49. *See Tex. Brine Co., L.L.C. v. Am. Arbitration Assoc., Inc.*, 955 F.3d 482, 487 (5th Cir. 2020) ("Judicial review in the arbitration context is limited . . . . Further, purportedly independent claims are not a basis for a challenge if they are disguised collateral attacks on the arbitration award.").

50. 691 F.2d 1205, 1212 (6th Cir. 1982).

51. *Id.* at 1211-12.

10 of the [FAA]."[52] The court also noted that allowing a collateral attack on the arbitration award would render Section 12's three-month time bar "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."[53]

Many other cases have followed this path. In *Prudential Securities Inc. v. Hornsby*, the district court enjoined a second arbitration because the plaintiff's fraud claim was "in reality, an attempt to augment and modify the first arbitration award."[54] Looking at the statement of claim, the court observed that it was "premised entirely on the . . . fraudulent concealment of documents from the original arbitration panel, misconduct in the proceeding itself" and that the plaintiff "define[d] his injury by the impact of [the] fraud on the original award."[55] As that court explained, "[b]ecause the policies behind section 10 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."[56]

In *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the plaintiff who prevailed in an arbitration filed suit

52. *Id.* at 1213.

53. *Id.*

54. 865 F. Supp. 447, 451 (N.D. Ill. 1994).

55. *Id.*

56. *Id.*

alleging Merrill Lynch interfered with the arbitration.[57] The district court dismissed the lawsuit and confirmed the arbitration award.[58] The plaintiff responded by filing a second arbitration that mirrored the allegations in her earlier complaint.[59] The *Decker* court emphasized that the prejudice complained-of "resulted from the impact of this action on the arbitration award" and that the claimant's "ultimate objective in this damages suit is to rectify the alleged harm she suffered by receiving a smaller arbitration award than she would have received."[60] Because the FAA "provide[d] the exclusive remedy for challenging acts that taint an arbitration award," the court enjoined the second arbitration and found that the plaintiff's only recourse was to move to vacate the award under FAA procedure.[61] The Sixth Circuit affirmed the district court's injunction, explaining that "[t]he FAA provides the exclusive remedy for challenging acts that taint an arbitration award whether a party attempts to attack the award through judicial proceedings or through a separate second arbitration."[62] The court refused to permit the plaintiff to "bypass the exclusive and comprehensive

57. 205 F.3d 906, 908 (6th Cir. 2000).

58. *Id.*

59. *Id.* at 908-909.

60. *Id.* at 910.

61. *Id.* ("Because Decker chose to attack collaterally the arbitration award in violation of the FAA, she fails to state a claim upon which relief may be granted.").

62. *Id.* at 911.

nature of the FAA by attempting to arbitrate her claims in a separate second arbitration proceeding."[63]

Also, in *Arrowood Indemnity Co. v. Equitas Insurance Limited*, the Southern District of New York enjoined a second arbitration when certain Underwriters claimed that Arrowood improperly withheld documents in the first arbitration that would have shifted the first arbitration panel's interpretation of a "First Advised Clause."[64] Relying on the FAA's exclusivity as a means to challenge an arbitration award, the district court noted that the Underwriters' "demand for reimbursement is explicitly premised on their assertion that Arrowood 'engaged in intentional misconduct in the recent arbitration'" and the "Underwriters want to recoup the post-Award billings that ¶ 15 of the Award requires them to pay . . . ."[65] Thus, it was a collateral attack "in direct contravention of the FAA" that "must be enjoined."[66]

B.

The Court of Chancery followed the collateral attack precedent and found that it had jurisdiction to enjoin collateral attacks on prior arbitration awards. Eni counters by pointing to the TUA's arbitration provision,

---

63. *Id.*

64. 2015 U.S. Dist. LEXIS 99787, 2015 WL 4597543, at *3 (S.D.N.Y. July 30, 2015).

65. 2015 U.S. Dist. LEXIS 99787, [WL] at *6.

66. *Id.*

where the parties agreed to submit "any and every kind or type"[67] of dispute to arbitration. According to Eni, under the parties' broad arbitration clause, an arbitrator and not the court should decide what it characterizes as the preclusive effect of the First Arbitration award on the Second Arbitration. Eni points to the United States Supreme Court's recent decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*,[68] inferring from the Schein decision that collateral attacks on arbitration awards now fall under the parties' arbitration provision. It also relies on cases where arbitrators decided the *res judicata* effect of prior awards.

In *Schein*, the Court struck down the "wholly groundless" exception to the arbitrability analysis.[69] The Court relied on the text of the FAA as well as precedent requiring that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract . . . . [and] a court possesses no

---

67. Eni Answering Br. on Appeal & Opening Br. on Cross-Appeal at 41-42.

68. 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019).

69. 139 S. Ct. at 529 ("Even when the parties' contract delegates the threshold arbitrability question to an arbitrator, the Fifth Circuit and some other Courts of Appeals have determined that the court rather than an arbitrator should decide the threshold arbitrability question if, under the contract, the argument for arbitration is wholly groundless."). Delaware has previously employed a "wholly groundless" exception to questions of arbitrability. *See McLaughlin v. McCann*, 942 A.2d 616, 626-27 (Del. Ch. 2008).

power to decide the arbitrability issue."[70] The Supreme Court held that when the parties delegate gateway issues of arbitrability to arbitrators by "clear and unmistakable" evidence, courts may not employ a "wholly groundless" exception to override the contractual will of the parties.[71] In the *res judicata* cases, the courts found that the preclusive effect of an arbitration award is for arbitrators to decide.[72]

Neither *Schein* nor the *res judicata* cases control this dispute. As the Court of Chancery noted, the Supreme Court in *Schein* did not address, much less do away with, a court's jurisdiction to enjoin collateral attacks on arbitration awards. And Gulf does not rely on res

---

70. *Id.*; *see also Vertiv Corp. v. SVO Building One*, LLC, 2019 U.S. Dist. LEXIS 56096, 2019 WL 1454953, at *3 (D. Del. Apr. 2, 2019) (referring arbitrability question of whether the court could entertain an injunction under the agreement to arbitrate to arbitrators because "*Henry Schein* clarifies that there is no judicial exception available when a contract makes a clear delegation").

71. *Id.* at 529-30.

72. *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 131 (2d Cir. 2015) (without discussing collateral attacks, the court "reason[ed] from our prior decisions interpreting the FAA that the determination of the claim-preclusive effect of a prior federal judgment confirming an arbitration award is to be left to the arbitrators" where the arbitration clause "is sufficiently broad to cover any dispute over whether ADIA's current claims were or could have been raised during the first arbitration"); *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 139-40 (3d Cir. 1998) (without discussing collateral attacks, the court decided the parties intended an arbitrator to decide whether a prior arbitration had preclusive effect on a follow-on arbitration).

judicata or collateral estoppel to stop Eni from relitigating claims that were, or could have been, raised in the First Arbitration. Rather, Gulf asked the Court of Chancery to enjoin Eni from circumventing the FAA's exclusive and limited review procedures by filing a second arbitration attacking the Final Award.[73]

The Court of Chancery had jurisdiction to enjoin Eni from pursuing the Second Arbitration. First, although the parties agreed to a broad arbitration clause, under the TUA they also agreed that "[t]he award of the arbitral tribunal shall be final and binding" and they "waive[d] any right to appeal from or challenge an 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 an applicable arbitration statute or treaty"—here the FAA.[74] After the parties completed an arbitration, they channeled all challenges to an arbitration award to the courts through the FAA review process. When a party files a follow-on proceeding attacking a prior arbitration award, they circumvent the contractually-agreed FAA review procedure. Stated

---

73. *See 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 . . . . 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.").

74. App. to Opening Br. at A251-252 (TUA Arts. 20.1 (h), (o)).

another way, the follow-on proceeding is a "thinly disguised effort . . . to re-arbitrate, in effect appeal," the prior award.[75] When "carried to its logical conclusion" a follow-on arbitration renders the "final and binding" language of an arbitration clause "meaningless."[76]

Second, when the parties agreed that the FAA controls review of an arbitration award, they signed up for a court to apply an exclusive procedure and the restrictions that accompany it.[77] In the interest of finality, the FAA allows only narrow grounds to modify, vacate, or correct an arbitration award. A follow-on proceeding starts from scratch. And a follow-on proceeding collaterally attacking the prior arbitration award evades the jurisdictional time limit for challenging the award—three months from the award. A party who "bypass[es] the exclusive and comprehensive nature of the FAA by

---

75. *Federated Rural Elec. Ins. Exch. v. Nationwide Mut. Ins. Co.*, 134 F. Supp. 2d 923, 927 (S.D. Ohio 2001).

76. *Id.* at 928.

77. Parties cannot contractually alter the FAA's review procedure, which the United States Supreme Court has confirmed is exclusive. *See Hall St. Assocs.*, 552 U.S. at 584 ("We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification."); *accord Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 219 (3d Cir. 2012) ("These grounds are exclusive and may not be supplemented by contract. In sum, when parties agree to resolve their disputes before an arbitrator without involving the courts, the courts will enforce the bargains implicit in such agreements by enforcing arbitration awards absent a reason to doubt the authority or integrity of the arbitral forum."), *aff'd*, 569 U.S. 564, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013).

attempting to arbitrate her claims in a separate second arbitration proceeding"[78] undermines the FAA's goal of a prompt, limited, exclusive, and final means to review an arbitration award.[79] "[T]he policies behind section 10 would be eviscerated if it were only an optional way to modify an arbitration award."[80]

We agree with the observation that "parties are generally free to seek arbitration under a broad arbitration

78. *Decker*, 205 F.3d at 911.

79. *See Pryor v. IAC/InterActiveCorp.*, 2012 Del. Ch. LEXIS 132, 2012 WL 2046827, at *6-7 (Del. Ch. June 7, 2012) (dismissing breach of contract claim "with prejudice because the flaw that this Count is an impermissible collateral attack on the Awards is not curable by proceeding before the arbitrator at this belated stage" despite concluding that "the question of the substantive arbitrability of the fiduciary duty and contract claims [should] be determined by the arbitrator, not this court").

80. *Prudential*, 865 F. Supp. at 451. Eni raises for the first time in its Reply Brief a recent decision, *Certain Underwriters at Lloyd's, London v. Century Indem. Co.*, 2020 U.S. Dist. LEXIS 39242, 2020 WL 1083360 (D. Mass. Mar. 6, 2020). In that case, the defendant filed a second arbitration after the plaintiff moved to confirm an arbitration award, and subsequently the defendant moved to compel arbitration causing the plaintiff to move to enforce the confirmed arbitration award. 2020 U.S. Dist. LEXIS 39242, [WL] at *2-3. The plaintiffs argued that the defendant was collaterally attacking the arbitration award, but the defendant countered that the arbitration award did not address the part of the parties' agreement that it was seeking to arbitrate. 2020 U.S. Dist. LEXIS 39242, [WL] at *3. The district court rejected the plaintiff's collateral attack theory, finding that line of cases distinguishable because, as viewed by the district court, the issue before it was a *res judicata* issue, not a collateral attack. *Id.*

clause" but "courts may intervene if the 'ultimate objective . . . is to rectify the alleged harm' a party suffered from an unfavorable arbitration award 'by attempting to arbitrate [its] claims in a separate arbitration proceeding.'"[81] As the Court of Chancery correctly observed,

> it is not surprising that a decision applying the collateral attack doctrine would not separately consider the question of arbitrability. The point of the doctrine is that a court may intervene to dismiss litigation claims or 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.*[82]

III.

Having found that the Court of Chancery had jurisdiction to enjoin collateral attacks on arbitration awards, we turn next to whether Eni's Second Arbitration demand collaterally attacked the First Award. In its Second Arbitration demand, Eni asserted three counts—(1) declaratory relief that Gulf breached the TUA; (2) damages and restitution for Gulf's breaches of contract, and (3) declaratory relief, damages, and restitution for

---

81. *Arrowood,* 2015 U.S. Dist. LEXIS 99787, 2015 WL 4597543, at *5 (alteration in original) (quoting *Decker,* 205 F.3d at 910-11).

82. *Gulf*, 2019 Del. Ch. LEXIS 1403, 2019 WL 7288767, at *10 (emphasis in original).

Gulf's alleged negligent misrepresentations in the First Arbitration. Eni sought by way of relief:

> the value of the consent that Gulf was required to obtain from Eni in order to pursue its highly-profitable liquefaction/export project; the amounts that Eni has had to pay to Gulf for Gulf's purported decommissioning of the *Pascagoula Facility*; and the value resulting from Gulf's repurposing and reuse of the existing site facilities (such as the storage tanks, pipeline and LNG vessel berthing facilities) and the other cost savings and benefits derived from repurposing the existing brownfield site.[83]

The Court of Chancery enjoined arbitration of Eni's negligent misrepresentation claims, but declined to enjoin Eni's breach of contract claims. As the court held, Eni's negligent misrepresentation claim collaterally attacked the Final Award because the alleged misrepresentations were made in the First Arbitration and could have been reviewed through the FAA process. When it came to Eni's breach of contract claims, however, the court held that "the First Tribunal never reached the merits of the claim for breach[] of [contract] and never granted any relief based on that claim . . . ."[84]

---

83. App. to Opening Br. at A353 (Second Notice of Arbitration ¶ 64) (emphasis added).

84. *Gulf*, 2019 Del. Ch. LEXIS 1403, 2019 WL 7288767, at *12.

Gulf and Eni challenge the Court of Chancery's ruling. Eni argues that the Court of Chancery erred in enjoining its negligent misrepresentation claim in the Second Arbitration because Eni succeeded in terminating the TUA in the First Arbitration, has paid the judgment, and supposedly does not seek to undo the award. It also contends that its misrepresentation claim has "independent significance in the circumstances of the case unrelated to the Final Award."[85] Eni points to what it alleges are perceived inconsistencies between what Gulf was awarded in the First Arbitration and the positions taken by Gulf in the New York litigation, and argues that Gulf's supposed tortious behavior implicates "the parties' broader transaction and dealings as a whole."[86]

Gulf argues that the court should have enjoined the arbitration contract claims because, like Eni's negligent misrepresentation claim, they collaterally attack the Final Award.[87] According to Gulf, when assessing a collateral

---

85. Eni Answering Br. on Appeal & Opening Br. on Cross-Appeal at 46.

86. *Id.* at 47.

87. *Compare* App. to Opening Br. at A350-1 (Second Notice of Arbitration ¶ 57) ("Gulf has engaged in widespread, regular and continuous activities and undertakings that have a purpose and object other than importation and regasification of LNG."); *with id.* at A057 (Final Award ¶ 16) ("Claimant asserted that, in any event, it was entitled to terminate the TUA as a result of a series of alleged contractual breaches by the Respondents. In particular, Eni argued 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 . . . ."); *and id.* at A615 (First Notice of

attack on a prior arbitration award, the question is not the *res judicata* or collateral estoppel effect of the prior arbitration award. Instead, the court must examine the harm alleged and the relief sought in the Second Arbitration to see whether it is a disguised attempt to get a second review of a prior arbitration award outside the FAA. Gulf argues that Eni's Second Arbitration collaterally attack the Final Award by two means—raising alleged irregularities in the First Arbitration and trying to recoup the restitution awarded Gulf in the First Award.

We agree with Gulf that the Court of Chancery should have enjoined Eni from pursuing all claims in the Second Arbitration. Rather than focus on the nature of the claims in the Second Arbitration, the focus should have been on whether Eni sought through the Second Arbitration to, in effect, "appeal" the Final Award outside the FAA's review process. We find that it did.

First, as the Court of Chancery found, the crux of Eni's misrepresentation claim in the Second Arbitration is that "Gulf procured damages in the First Arbitration by engaging in misconduct that tainted the Final Award."[88]

Arbitration ¶ 64) ("Eni USA hereby seeks a declaration that, through the conduct of [Gulf] described above, [Gulf] ha[s] breached the warranties and covenants set forth in at least Articles 22.4(a) and 22.4(e) . . . ."); *see also id.* at A353 (Second Notice of Arbitration ¶ 64) (seeking damages in "the amounts that Eni has had to pay to Gulf for Gulf's purported decommissioning of the Pascagoula Facility").

88. *Gulf*, 2019 Del. Ch. LEXIS 1403, 2019 WL 7288767, at *11 ("If Eni had its way, for all practical purposes, the finality of the Final Award would be undone and the monetary recovery Gulf obtained

Attacking the veracity of statements made in a First Arbitration that led to the Final Award falls "'squarely within the scope of section 10' of the FAA,"[89] which permits vacatur of an award "where the award was procured by corruption, fraud, or undue means."[90] Eni could have challenged Gulf's representations as part of the FAA's review process and did not. The claim is time-barred under the FAA.[91]

---

in the First Arbitration would be nullified. This is the epitome of a collateral attack."). In Eni's Second Notice of Arbitration, it alleged that "Gulf had an obligation to make accurate representations in the arbitration and was aware that its statements would be used and relied upon by Eni and the [First Arbitration] tribunal, and Eni and the tribunal in fact relied on Gulf's representations" and "[h]ad Gulf not made these apparent misrepresentations, the compensation amount paid by Eni for decommissioning costs would have been greatly reduced, or reduced to zero." App. to Opening Br. at 354 (Second Notice of Arbitration ¶¶ 73, 75).

89. *Texas Brine*, 955 F.3d at 489 (quoting *Corey*, 691 F.2d at 1212). *See also, e.g., Decker*, 205 F.3d at 911 ("The FAA provides the exclusive remedy for challenging acts that taint an arbitration award whether a party attempts to attack the award through judicial proceedings or through a separate second arbitration."); *Prudential*, 865 F. Supp. at 451 (enjoining second arbitration where the "claim is premised entirely on the [sic] Prudential's fraudulent concealment of documents from the original arbitration panel, misconduct in the proceeding itself").

90. 9 U.S.C. § 10; *see Texas Brine*, 955 F.3d at 489 ("Alleging wrongdoing that would justify vacatur is a sign of a collateral attack.").

91. 9 U.S.C. § 12.

Second, when addressing Eni's breach of contract claims, the court appears to have applied elements of *res judicata* in its analysis. It considered whether Eni's breach of contract claims had been decided in the First Arbitration. Had *res judicata* or collateral estoppel been the issue, referring the arbitrability question to the arbitrators would have been a different issue.[92] But a collateral attack does not hinge upon the nature of the claims or whether they were actually resolved in the prior arbitration. If that was the case, Eni would be free to raise in the Second Arbitration irregularities in the First Arbitration—claims exclusively within Section 10 of the FAA.[93] Instead, as noted earlier, the inquiry is whether the complainant's "ultimate objective" is to "rectify the alleged harm [the claimant] suffered" in the first arbitration.[94]

---

92. *See Citigroup*, 776 F.3d at 131 (holding that claim preclusive effect of federal judgment confirming an award is a question for arbitrators to decide in second arbitration).

93. *See Texas Brine.*, 955 F.3d at 488 ("The test for a collateral attack is not merely whether the claims attempt to relitigate the facts and defenses that were raised in the prior arbitration.") (internal quotation marks omitted).

94. *Decker*, 205 F.3d at 910; *Arrowood*, 2015 U.S. Dist. LEXIS 99787, 2015 WL 4597543, at *5 ("Although parties are generally free to seek arbitration under a broad arbitration clause, courts may intervene if the 'ultimate objective . . . is to rectify the alleged harm' a party suffered from an unfavorable arbitration award 'by attempting to arbitrate [its] claims in a separate second arbitration proceeding.'") (alteration in original) (quoting *Decker*, 205 F.3d at 910-11); *Prudential*, 865 F. Supp. at 451 (refusing an "attempt to arbitrate an 'independent' fraud claim" that was "premised entirely

Although Eni tacks on other requested relief, in the Second Arbitration Eni essentially seeks to recover "the amounts that Eni has had to pay to Gulf [under the Final Award] for Gulf's purported decommissioning of the Pascagoula Facility . . . ."[95] Eni tries to back away from this admission with several arguments, none of which are persuasive.

Eni argues that the collateral attack cases are limited to irregularities in arbitrations and do not extend to substantive claims. That is incorrect,[96] and ignores the fundamental reason why courts redress collateral attacks on arbitration awards—to prevent end runs around the exclusive FAA review process.

---

on [alleged] fraudulent concealment of documents from the original arbitration panel, misconduct in the proceedings itself"); *Phillips Petroleum Co. v. Arco Alaska, Inc.*, 1988 Del. Ch. LEXIS 77, 1988 WL 60380, at *5 (Del. Ch. June 14, 1988) ("Authorities interpreting the relevant arbitration statutes hold that a claim that a party's prior conduct tainted an arbitration award must be raised in a proceeding to vacate the award. That same body of law proscribes an independent action to challenge the arbitration award.").

95. App. to Opening Br. at A353 (Second Notice of Arbitration ¶ 64).

96. *Decker*, 205 F.3d at 910-11 (contract and tort claims brought in follow-on proceeding that did not "directly challenge the [prior] arbitration award" collaterally attacked the prior award); *Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742. 749-50 (5th Cir. 2008) (claims separate from the claims in a prior arbitration collaterally attacked the prior arbitration); *Corey*, 691 F.2d at 1212-13 (holding that a claimant "may not transform what would ordinarily constitute an impermissible collateral attack into a proper independent action by changing defendants and altering the relief sought").

Eni also notes that it sought to recover damages and not just the restitution it was required to pay under the Final Award. While Eni characterized its request for relief in the Second Arbitration as damages, it elevates pleading over substance. Eni sought to recoup as damages the amount it paid in restitution. And the First Tribunal already considered whether "deductions should be applied" to reduce the restitution award.[97] Allowing Eni to re-arbitrate deductions to the restitution award would give Eni a mulligan for the First Arbitration. If it was dissatisfied with the result, or was entitled to other relief, it could have sought review under the FAA.[98]

Finally, Eni argues that its contract claims have "independent legal significance," and Eni "need only be able to allege wrongdoing that has caused harm

---

97. App. to Opening Br. at A136 (Final Award ¶ 359).

98. 9 U.S.C. § 10(a)(4) (vacatur permitted where the arbitrators "so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made"); *see also Gulf Petro*, 512 F.3d at 750 ("The relief Gulf Petro seeks—the award it believes it should have received, as well as costs, expenses, and consequential damages stemming from the unfavorable award it did receive—shows that its true objective in this suit is to rectify the harm it suffered in receiving the unfavorable Final Award."); *ErgoBilt, Inc. v. Neutral Posture Ergonomics Inc.*, 2002 U.S. Dist. LEXIS 12459, 2002 WL 1489521, at *9 (N.D. Tex. July 9, 2002) (denying leave to file supplemental complaint where the court found "that Plaintiffs' proposed breach of contract action raises the same issues presented by their Motion to Vacate. In fact, the relief requested . . . is 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").

independent of its effect on the arbitration award to avoid the collateral attack label."[99] Eni appears to make this argument because it wants to assert its breach of contract claims in defense of the Guarantee Agreement litigation. It is unclear how Eni's defenses in another proceeding bear on the issues before us. In any event, Gulf states that Eni has been able to raise its breach of contract claims as a defense in the Guarantee Agreement litigation.[100]

Under these circumstances, Eni's breach of contract claims aim to modify the Final Award by revisiting the core issue in the First Arbitration—was the contract terminated and, if so, what is the appropriate remedy?[101] Had Eni wished to clarify, amend, or challenge the First Arbitration's financial award, it should have done so under the FAA within the three-month limitations period.[102]

---

99. Eni Answering Br. on Appeal & Opening Br. on Cross-Appeal at 23 (quoting *Gulf Petro*, 512 F.3d at 751).

100. Gulf Reply Br. on Appeal & Answering Br. on Cross-Appeal at 17-18.

101. *See Prudential*, 865 F. Supp. at 451 (finding allegedly independent fraud claim was "in reality, an attempt to augment and modify the first arbitration award"); *Arrowood*, 2015 U.S. Dist. LEXIS 99787, 2015 WL 4597543, at *6 ("Under these circumstances, the Second Arbitration demand to recover sums already paid amounts to a collateral attack on the merits of the Award.").

102. 9 U.S.C. § 12. The FAA permits vacatur "where the arbitrators . . . so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). "An award is mutual, definite and final if it 'resolve[s] all issues submitted to arbitration, and determine[s] each issue fully so that no further litigation is necessary to finalize the

Now, "[s]uch arbitral mulligans are forbidden by the FAA."[103] Eni's contract claims collaterally attack the Final Award and should have been enjoined.

IV.

We affirm in part and reverse in part the Court of Chancery's judgment, and remand with instructions for the court to modify its permanent injunction order to enjoin Eni from pursuing all claims in the Second Arbitration. Jurisdiction is not retained.

---

obligations of the parties." *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 686 (2d Cir. 1996) (alteration in original) (quoting *Dighello v. Busconi*, 673 F. Supp. 85, 90 (D. Conn. 1987), *aff'd*, 849 F.2d 1467 (2d Cir. 1988)); *see also Three Bros. Trading, LLC v. Generex Biotechnology Corp.*, 2020 U.S. Dist. LEXIS 72600, 2020 WL 1974243, at *6 (S.D.N.Y. Apr. 24, 2020) (vacating and remanding a portion of an arbitration award under Section 10(a)(4) where arbitrator did not reach "any conclusion" on economic value of warrants and "would undoubtedly result in further litigation to determine the economic value of the warrants").

103. *Arrowood*, 2015 U.S. Dist. LEXIS 99787, 2015 WL 4597543, at *5.

VAUGHN, Justice, dissenting:

The Majority discusses four cases in part II. A. of its opinion. None of them appear to have involved an arbitration clause as broad as the one involved here. The arbitration clause in *Corey v. New York Stock Exchange* was contained in the constitution of the stock exchange.[1] It provided, in relevant part, that "[a]ny controversy . . . shall . . . be submitted for arbitration."[2] The arbitration clause at issue in *Arrowood Indemnity Co. v. Equitas Insurance Ltd.* provided, in relevant part, that "if any dispute shall arise . . . with reference to the interpretation of this Contract . . . the dispute shall be referred to three arbitrators."[3] In *Decker v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, no contractual arbitration language appears, but plaintiff Decker contended that her claims fell "within the scope of a valid arbitration agreement and thus must be arbitrated."[4] In *Prudential Securities Inc. v. Hornsby,*[5] no mention is made of the language of the arbitration agreement. None of these cases appear to be ones where the parties evinced a "clear and unmistakable" agreement to arbitrate the issue of arbitrability, and they do not discuss arbitration language as broad as the arbitration provisions of the agreement in this case.

---

1. 691 F.2d 1205, 1207 n.2 (6th Cir. 1982).

2. *Id.*

3. 2015 U.S. Dist. LEXIS 99787, 2015 WL 4597543, at *1 (S.D.N.Y. July 30, 2015).

4. 205 F.3d 906, 911 (6th Cir. 2000).

5. 865 F. Supp. 447 (N.D. Ill. 1994).

The Chancellor recognized there are "two different lines of authority concerning the arbitration of disputes under the FAA[:]" one that enforces the "policy against collateral attacks on arbitration awards" and one that interprets "broad arbitration clauses as written on the question of arbitrability."[6] In addition to discussing three of the above-mentioned cases from the first line of authority, he discussed two cases from the second line of authority. One is *John Hancock Mutual Life Insurance Co. v. Olick*.[7] A question involved there was whether a prior arbitration precluded claims raised in a second arbitration. As stated by the Third Circuit, the court considered "the question of whether, under the [FAA], a district court has the authority, notwithstanding a valid arbitration clause, to enjoin a party from pursuing arbitration on res judicata grounds arising from both a prior arbitration and a prior judgment."[8] In the part of its analysis discussing "Res judicata Based on the Prior Arbitration[,]" the court set forth the following test:

> [T]he judicial inquiry before compelling or enjoining arbitration is narrow, and the FAA authorizes the district court to explore only two threshold questions in considering a demand for arbitration: (1) Did the parties seeking or resisting arbitration enter into a valid

6. *Gulf LNG Energy, LLC v. Eni USA Gas Marketing LLC*, 2019 Del. Ch. LEXIS 1403, 2019 WL 7288767, at *1, *4 (Del. Ch. Dec. 30, 2019).

7. 151 F.3d 132 (3d Cir. 1998).

8. *Id.* at 133.

> arbitration agreement? (2) Does the dispute between those parties fall within the language of the arbitration agreement?[9]

Elaborating on this test, the court reasoned that "the proper analytical inquiry mandated under the FAA is to focus on both the existence of a valid arbitration agreement and the nature of that agreement as it relates to the parties' current dispute."[10] The court concluded that "Hancock's res judicata objection based on the prior arbitration is an issue to be arbitrated and is not to be decided by the courts."[11] The court explained its rationale as follows:

> 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 unless it may be said "with positive assurance" that the parties sought to have the matter decided by a court.[12]

---

9. *Id.* at 139 (citing *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 133 F.3d 225, 228, 233 (3d Cir. 1998)).

10. *Id.*

11. *Id.* at 140.

12. *Id.* at 139 (citing *Local 103 of International Union of Electrical, Radio and Machine Workers v. RCA Corp.*, 516 F.2d 1336, 1340 (3d Cir. 1975)).

The other case in this second "line of authority" discussed by the Chancellor is *Citigroup, Inc. v. Abu Dhabi Investment Authority*.[13] In that case, there was an arbitration award that was confirmed by the District Court for the Southern District of New York. While the confirmation in the district court was still pending, Abu Dhabi (ADIA) served Citigroup with a new notice for a second arbitration. Citigroup sought to enjoin the second arbitration "on the ground that ADIA's new claims were barred by the doctrine of claim preclusion, or *res judicata*, because they were or could have been raised in the first arbitration."[14]

The Second Circuit concluded that arbitrators should decide the claim-preclusive effect of the judgment confirming the first arbitration award. Its explanation of that conclusion included the following reasoning:

> The FAA's policy favoring arbitration and our precedents interpreting that policy indicate that it is the arbitrators, not the federal courts, who ordinarily should determine the claim-preclusive effect of a federal judgment that confirms an arbitration award. . . . We reason from our prior decisions interpreting the FAA, that the determination of the claim-preclusive effect of a prior federal judgment confirming an arbitration award is to be left to the arbitrators.[15]

13. 776 F.3d 126 (2d Cir. 2015).

14. *Id.* at 128.

15. *Id.* at 131.

The Majority seems to dismiss these cases as "*res judicata* cases" that do not discuss collateral attacks, as though the attorneys who sought to enjoin a second arbitration in those cases just made the wrong arguments. I do not think the cases are so easily disposed of. In *John Hancock*, the court stated that the question presented was a question "under the [FAA]."[16] In *Citigroup*, the court discusses the "FAA's policy favoring arbitration."[17] It is hard for me to imagine that the distinction between *res judicata* and collateral attack would have led to different outcomes in those cases.

The United States Supreme Court has held that the "question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'"[18] The Chancellor found that the contract in this case evinces a "clear and unmistakable" agreement to arbitrate the issue of arbitrability,[19] a finding which I think is undeniable given the breadth of the arbitration language.

The parties agreed to arbitrate "any dispute," and "dispute" is defined to include "any dispute over

---

16. 151 F.3d at 133.

17. 776 F.3d at 131.

18. *Gulf*, 2019 Del. Ch. LEXIS 1403, 2019 WL 7288767, at *6 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)).

19. 2019 Del. Ch. LEXIS 1403, [WL] at *7.

arbitrability or jurisdiction."[20] I would enforce the agreement as written and find that the arbitrability of Eni's negligent misrepresentation and breach of contract claims are issues to be decided by arbitrators, not the courts. I would reverse the Court of Chancery order permanently enjoining Eni from pursuing its negligent misrepresentation claim in the second arbitration.

20. *Id.*

APPENDIX B — MEMORANDUM OPINION OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE, DATED DECEMBER 30, 2019

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

C.A. No. 2019-0460-AGB

GULF LNG ENERGY, LLC AND GULF LNG PIPELINE, LLC,

Plaintiffs,

v.

ENI USA GAS MARKETING LLC,

Defendant.

MEMORANDUM OPINION

September 11, 2019, Submitted
December 30, 2019, Decided

BOUCHARD, C.

In February 2019, this court entered an order and final judgment confirming an arbitration award in favor of Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC and against Eni USA Gas Marketing LLC for approximately $371.5 million. The judgment was the culmination of an arbitration proceeding that also resulted in the termination

of a contract among the parties concerning Eni's use of a liquefied natural gas terminal in Mississippi that the Gulf entities constructed and own. Entry of the judgment, however, did not end the parties' legal entanglements.

In September 2018, the Gulf entities sued Eni's parent company in New York state court to enforce a payment guarantee. In June 2019, Eni began a second arbitration against the Gulf entities asserting two discrete claims for negligent misrepresentation and breach of contract. The filing of the second arbitration prompted this lawsuit, in which the Gulf entities seek entry of a permanent injunction to enjoin Eni from pursuing the second arbitration.

Pending before the court is the Gulf entities' motion for judgment on the pleadings. The motion brings to center stage two different lines of authority concerning the arbitration of disputes under the Federal Arbitration Act—one that allows courts to intervene to prevent collateral attacks on arbitration awards; the other that enforces the contractual intent of parties on questions of arbitrability. For the reasons explained below, the court reaches different conclusions as to Eni's two new claims in resolving the pending motion based on these two lines of authority.

First, the court finds that Eni's negligent misrepresentation claim in the second arbitration constitutes an impermissible collateral attack that seeks to undo the damages award from the first arbitration. Accordingly, as to that claim, the court grants the Gulf

entities' motion and will enter a permanent injunction to enjoin Eni from pursuing the negligent misrepresentation claim in the second arbitration.

Second, the 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 the first arbitration award. Accordingly, as to that claim, the court denies the Gulf entities' motion and, in view of the broad arbitration clause in the parties' contract, leaves it to the tribunal in the second arbitration to determine whether that claim is arbitrable and, if so, whether the claim would be precluded based on the first arbitration.

I. BACKGROUND

The facts recited in this opinion come from the parties' pleadings, documents incorporated therein, and the parties' submissions.[1] Unless otherwise noted, these facts are not in dispute.

A. The Parties

Plaintiff Gulf LNG Energy, LLC, a Delaware limited liability company, owns and operates the liquefied natural gas ("LNG") terminal at the Pascagoula Facility in Mississippi.[2] The purpose of the LNG terminal is to facilitate the import of LNG by ship into the United

1. Verified Complaint for Injunctive Relief (Dkt. 1); Defendant's Answer to Verified Complaint for Injunctive Relief (Dkt. 12).

2. Answer ¶ 9.

States.[3] Plaintiff Gulf LNG Pipeline, LLC, a Delaware limited liability company, owns and operates a five-mile long pipeline that delivers and distributes natural gas from the Pascagoula Facility to downstream inland pipelines.[4] This decision refers to Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC together as "Gulf" or the "Gulf entities."

Defendant Eni USA Gas Marketing LLC ("Eni"), a Delaware limited liability company, is in the business of marketing natural gas products and performing related services in the United States.[5] Eni is an indirect subsidiary of Eni S.p.A., an Italian corporation in the oil and gas industry.[6]

B. The Terminal Use Agreement

On December 8, 2007, Gulf and Eni entered into the Terminal Use Agreement ("TUA"), which provided that Gulf would construct the Pascagoula Facility.[7] Eni planned to use the Pascagoula Facility to receive, store, regasify, and deliver LNG to downstream pipelines in the United States.[8] Under the TUA, Eni agreed to pay

---

3. *Id.*

4. *Id.* ¶ 10.

5. *Id.* ¶ 11.

6. *Id.*

7. *Id.* ¶ 15; Compl. Ex. C ("TUA").

8. Compl. ¶ 15.

Gulf various fees for the use of the Pascagoula Facility, including monthly fees known as "Reservation Fees" and "Operating Fees."[9] The initial term of the TUA commenced on December 8, 2007 and runs for twenty years from the "Commercial Start Date."[10]

Gulf alleges it incurred substantial debt and spent over $1 billion to construct the Pascagoula Facility,[11] which became operational on October 1, 2011.[12] Apart from an initial import of LNG when the Facility first became operational, Eni did not use the Pascagoula Facility.[13]

Five provisions in the TUA are relevant to the present dispute. In Article 22.4(a), Gulf covenanted to "observe and comply with [Article 22.2(f)] in all respects."[14] In Article 22.2(f), the Gulf entities represented and warranted that their "Constitutive Documents" will limit their purpose to, among other things, constructing, operating, and maintaining the Pascagoula Facility.[15]

Article 22.4(e) requires Gulf to receive "reasonable consideration" for any transaction it engages in with

9. TUA Art. 11.1(b).

10. *See id.* at 1, Arts. 1.32, 1.178.

11. Compl. ¶ 16.

12. Answer ¶ 16.

13. *Id.*

14. TUA Art. 22.4(a).

15. *Id.* Art. 22.2(f).

an "Affiliate."[16] Article 18.1 provides Eni with the right to terminate the TUA early if Gulf violates, among other provisions, Articles 22.4(a) or 22.4(e).[17] Finally, as discussed further below, Article 20.1(a) of the TUA contains a broad arbitration clause.[18]

C. Eni Initiates the First Arbitration Against Gulf

On March 2, 2016, Eni filed a notice of arbitration with the American Arbitration Association, International Centre for Dispute Resolution, asserting claims against Gulf (the "First Arbitration").[19] Eni's arbitration notice contended that, since the parties entered into the TUA, the natural gas market in the United States "has experienced radical change" due, in particular, to "the unforeseen, vast new production and supply of shale gas in the United States [that] made import of LNG into the United States economically irrational and unsustainable."[20]

In the First Arbitration, Eni sought, among other relief, (i) a declaration that "the essential purpose of the TUA has been frustrated and that the TUA has

16. *Id.* Art. 22.4(e). "Affiliate" is defined to mean "a Person . . . that directly or indirectly controls, is controlled by, or is under common control with, another Person." *Id.* Art. 1.7.

17. *Id.* Art. 18.1.

18. *See* Part II.B.

19. Dkt. 38.

20. *Id.* ¶ 3.

terminated" because of a "fundamental and unforeseeable change in the United States natural gas/LNG market,"[21] and (ii) a declaration that Eni could terminate the TUA at any time under Article 18.1 because the Gulf entities "have breached the warranties and covenants set forth in at least Articles 22.4(a) and 22.4(e)" of the TUA.[22] With respect to its second requested declaration, Eni asserted that Gulf violated Article 22.4(a) because Gulf had filed an application to modify the pipeline to "accommodate the planned liquefaction and export activities" contrary to the representation in Article 22.4(a) that the "purpose and object" of the Gulf entities was limited "strictly to importation and regasification of LNG."[23]

On June 29, 2018, the arbitration tribunal ("the First Tribunal") issued its Final Award.[24] The First Tribunal held that "the principal purpose of the TUA has been substantially frustrated" and declared that the TUA was terminated as of March 1, 2016.[25] The First Tribunal ordered Eni to pay the Gulf entities $462,199,000 as "just compensation . . . for the value that their partial performance of the TUA conferred upon Eni."[26] This amount represents the sum of (i) restitution for "Eni's

21. *Id.* ¶¶ 57, 59.

22. *Id.* ¶ 64.

23. *Id.* ¶¶ 48, 61.

24. Compl. Ex. B ("Final Award").

25. *Id.* ¶ 346.

26. *Id.* ¶ 403.

proportionate share of the decommissioning costs" ($418,649,000) and (ii) 5% of the remaining TUA contract value ($43,550,000) as "compensation for all additional benefits conferred on Eni pursuant to the acquisition of the TUA capacity as part of the Angola Project."[27] Gulf also was awarded interest since the hearing date on the restitution amount.[28]

The First Tribunal did not decide whether Gulf breached the TUA. It explained that the breach of contract claim was "academic and deserves no further consideration" because First Tribunal already had declared that the TUA's purpose had been frustrated.[29]

D. Gulf Sues Eni S.p.A. in New York State Court

On September 28, 2018, Gulf sued Eni S.p.A.—Eni's parent company—in New York state court (the "New York Action").[30] The New York Action concerns a dispute over a payment guarantee (the "Guarantee Agreement")

---

27. *Id.* ¶¶ 401, 403. The "Angola Project" refers to Eni's purchase of a 13.6% stake in Angola LNG Limited to "increase its gas business in Angola." *Id.* ¶¶ 42, 45, 159. The terms of the deal included "i) a payment of $260 million, and ii) the acquisition by Eni of the residual regasification capacity at [the] Pascagoula Facility." *Id.* ¶ 42. "Decommissioning costs" are the costs associated with returning the LNG terminal at the Facility "to the condition it was prior to entering the contract." *Id.* ¶ 351.

28. *Id.* ¶ 403.

29. *Id.* ¶ 347.

30. Compl. Ex. G.

between Gulf and Eni S.p.A.[31] Specifically, Gulf contends that Eni S.p.A. owes it "as much as approximately $900,000,000 in guaranteed obligations" under the Guarantee Agreement for Reservation and Operating Fees concerning the Pascagoula Facility running from the date of the Final Award until the end of the TUA's initial twenty year term.[32] Gulf advances this claim even though the First Tribunal ruled that the TUA was terminated on the theory that Eni S.p.A "specifically waived, 'to the extent permitted by law, any release, discharge, reduction or limitation of or with respect to any sums owing by [Eni] or any other liability of [Eni] to [Gulf].'"[33]

On December 12, 2018, Eni S.p.A. filed its answer and three counterclaims in the New York Action.[34] Eni S.p.A. asserts, among other things, that "the Guarantee Agreement has terminated due to [Gulf's] numerous and widespread breaches of the TUA and related agreements"—in particular Article 22 of the TUA—and that Gulf's "breaches have also caused [Eni] substantial injury for which Eni S.p.A. seeks damages and other relief."[35]

---

31. *Id.* ¶ 1.

32. *Id.* ¶¶ 1, 37, 72.

33. *Id.* ¶ 69 (quoting Guarantee Agreement § 3.2).

34. Pls.' Suppl. Br. Ex. 1 (Dkt. 33).

35. *Id.* at 2, 13, 22.

E. The Court Enters Judgment on the Final Award

On September 25, 2018, Gulf filed an action in this court to confirm the Final Award in the First Arbitration and enter judgment against Eni requiring it to pay Gulf the amount of the Final Award that remained outstanding.[36] On October 23, 2018, Eni filed its answer and counterclaim.[37] In its counterclaim, Eni asked the court to enter judgment in Eni's "favor confirming the Final Award in its entirety."[38]

In November and December 2018, Gulf and Eni each filed motions for judgment on the pleadings to confirm the Final Award, although they disagreed on certain aspects of the language to be included in a final order and judgment.[39] After filing their respective motions, the parties engaged in negotiations and narrowed their disputes. During a hearing held on February 1, 2019, the court resolved the parties' remaining disagreements over the language of the final order and judgment,[40] which it entered later that day (the "Judgment").[41] The Judgment

---

36. C.A. No. 2018-0700-AGB ("Confirmation Action"), Dkt. 1 ¶¶ 1, 48.

37. Confirmation Action, Dkt. 8.

38. Confirmation Action, Dkt. 8 at 39.

39. *See* Confirmation Action, Dkts. 14, 20.

40. Confirmation Action, Dkt. 47 at 44-49.

41. Confirmation Action, Dkt. 45.

recites that "both Gulf LNG and ENI USA agree that the Final Award should be confirmed in its entirety" and entered judgment "in favor of Gulf LNG and against ENI USA in the amount of $371,577,849,[42] which Eni subsequently paid in full.[43]

F. Eni Initiates the Second Arbitration Against Gulf

On June 3, 2019, Eni filed a second notice of arbitration with the American Arbitration Association, International Centre for Dispute Resolution, asserting three claims against Gulf (the "Second Arbitration")[44] . The first two claims seek declaratory relief and damages based on Gulf's alleged breach of "the TUA by 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."[45] The third claim, for negligent misrepresentation, seeks "declaratory and other relief, in the form of damages and/or restitution . . . as a result of Gulf's wrongful conduct" before the First Tribunal.[46] These claims are discussed in greater detail below.

---

42. Confirmation Action, Dkt. 45 ¶ 3.

43. Answer ¶¶ 4-5.

44. Compl. Ex. F ("Second Arbitration Notice").

45. *Id.* ¶¶ 66-67, 69-70.

46. *Id.* ¶ 76.

G. Procedural History

On June 17, 2019, Gulf filed this action under the Federal Arbitration Act ("FAA") and 10 *Del. C.* §§ 5702 and 5703(b), seeking two forms or relief: (i) "a permanent injunction staying the Second Arbitration" (Count I) and (ii) "a declaratory judgment that Eni . . . is barred from maintaining or pursuing the Second Arbitration" (Count II).[47] On July 9, 2019, Gulf filed a motion for judgment on the pleadings on Count I to enjoin Eni "from taking any further steps or actions in the Second Arbitration other than to request that the Second Arbitration be discontinued and dismissed at Eni's cost."[48] Briefing and argument on this motion, including supplemental submissions, was completed on September 11, 2019.

II. ANALYSIS

Under Court of Chancery Rule 12(c), the court may grant a motion for judgment on the pleadings "when no material issue of fact exists and the movant is entitled to

---

47. Compl. ¶¶ 12, 58, 61. Section 5702 of the Delaware Uniform Arbitration Act provides, in relevant part, that "any application to the Court of Chancery to enjoin or stay an arbitration, obtain an order requiring arbitration, or to vacate or enforce an arbitrator's award shall be decided by the Court of Chancery in conformity with the Federal Arbitration Act" unless the parties' arbitration agreement specifically refers to, and expresses their intention to apply, the Delaware Uniform Arbitration Act. 10 *Del. C.* § 5702(c). The arbitration provision in the TUA contains no such reference and reflects no such intention. *See* TUA Art. 20.

48. Pls.' Mot. ¶ 34 (Dkt. 14).

judgment as a matter of law."[49] To obtain a permanent injunction, the Gulf entities must (i) "succeed on the merits of their case," (ii) "demonstrate that irreparable harm will result in the absence of an injunction," and (iii) "prove that, on balance, the equities weigh in favor of issuing the injunction."[50]

The parties' positions on the merits of Gulf's request for a permanent injunction have shifted since Gulf filed this case. Ultimately, the parties each came to rely primarily on one of two different lines of authority concerning the arbitration of disputes under the FAA: (i) cases enforcing the policy against collateral attacks on arbitration awards and (ii) cases interpreting broad arbitration clauses as written on the question of "arbitrability," *i.e.*, "who decides" whether a particular issue is arbitrable. The court begins by reviewing the parties' contentions concerning these lines of authority.

A. The Collateral Attack Doctrine

Gulf argues that the court should enjoin the Second Arbitration because it is an impermissible collateral attack on the Judgment this court entered confirming the Final Award in the First Arbitration. In support of this argument, Gulf relies on a series of decisions where

---

49. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

50. *Harden v. Christina Sch. Dist.*, 924 A.2d 247, 269 (Del. Ch. 2007).

courts have (i) dismissed litigation claims[51] or (ii) entered injunctions against the procession of a second arbitration,[52] which amounted to a collateral attack on an award entered in a prior arbitration. The rationale of these decisions is that the FAA affords limited review of and a tight deadline to challenge an arbitration award to ensure that finality is achieved promptly and efficiently.

Under Section 10 of the FAA, a party may petition to vacate an arbitration award only in limited circumstances, *i.e.*, 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

---

51. *See e.g., Phillips Petroleum Co. v. Arco Alaska, Inc.*, 1988 Del. Ch. LEXIS 77, 1988 WL 60380, at *6 (Del. Ch. June 14, 1988) (damages claim that adversary "acted illegally in the arbitration, thereby tainting the arbitration award" an impermissible collateral attack); *Pryor v. IAC/InterActive Corp.*, 2012 Del. Ch. LEXIS 132, 2012 WL 2046827, at *6 (Del. Ch. June 7, 2012) (breach of contract claim premised on adversary providing disallowed evidence in a prior arbitration an impermissible collateral attack); *Gulf Petro Trading Co., Inc. v. Nigerian Nat'l. Petroleum Corp.*, 512 F.3d 742, 749-50 (5th Cir. 2008) (common law and statutory claims premised on an arbitration panel's misconduct in a previous arbitration an impermissible collateral attack).

52. *Prudential Sec. Inc. v. Hornsby*, 865 F.Supp. 447, 450-51 (N.D. Ill. 1994); *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 910 (6th Cir. 2000); *Arrowood Indem. Co. v. Equitas Ins. Ltd.*, 2015 WL 4597543, at *4-5 (S.D.N.Y. July 30, 2015).

submitted was not made."[53] Under Section 11, a party similarly may petition to modify an arbitration award only in limited circumstances, *i.e.*, 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 the controversy."[54] Section 12 of the FAA requires that "a motion to vacate, modify, or correct an award must be served . . . within three months after the award is filed or delivered."[55]

The court reviews next three decisions where courts have granted the relief Gulf seeks here—entry of an injunction against the procession of a second arbitration under the collateral attack doctrine—in deference to the policies underlying the foregoing provisions of the FAA.

In *Prudential Securities Incorporated v. Hornsby*, the district court enjoined Arthur Hornsby from pursuing a second arbitration against Prudential.[56] In the first arbitration, the tribunal awarded Hornsby $290,000 in resolving his claims that a Prudential employee (Storaska) mismanaged his account and that Prudential failed to supervise Storaska adequately and fraudulently concealed

53. 9 U.S.C. § 10(a).

54. 9 U.S.C. § 11(a)-(c).

55. 9 U.S.C. § 12.

56. 865 F.Supp. at 452-53.

his wrongdoing.[57] Ten months later, Hornsby filed a second arbitration, alleging a conspiracy between Prudential and Storaska to "feign[] compliance with [Hornsby's] document requests during the AAA arbitration while fraudulently concealing internal memoranda that confirmed Storaska's improper sales practices and Prudential's toleration of those practices."[58] Hornsby sought "compensatory and punitive damages in excess of $1 million against Prudential" in the second arbitration.[59]

The district court found that the second arbitration amounted to a collateral attack on the prior AAA arbitration because the claim in the second arbitration "is premised entirely on Prudential's fraudulent concealment of documents from the original arbitration panel, misconduct in the proceeding itself."[60] The district court's reasoning drew on the policies underlying the provisions of the FAA governing review of arbitration awards:

> The strictures of section 10 and section 12 [of the FAA] 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.

* * * * *

57. *Id.* at 448.

58. *Id.* at 448-49.

59. *Id.* at 449.

60. *Id.* at 451, 453.

> Because the policies behind section 10 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. Like the collateral actions noted above, Hornsby's attempt to arbitrate an "independent" fraud claim against Prudential is, in reality, an attempt to augment and modify the first arbitration award.[61]

In *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Sixth Circuit Court of Appeals affirmed a district court's entry of an injunction to enjoin a second arbitration.[62] In the first arbitration, an NASD arbitration panel awarded Emily Decker $40,000 in damages in resolving her claim that Merrill Lynch had mismanaged Decker's securities investment.[63] A few months later, Decker filed a complaint against Merrill Lynch in Michigan state court, which it removed to federal court, alleging that Merrill Lynch interfered with the arbitration when one of its subsidiaries hired the chairperson of the arbitration panel.[64] Decker then filed a second arbitration with the NASD, asserting the same claims.[65]

---

61. *Id.* at 450, 451.

62. 205 F.3d at 911-12.

63. *Id.* at 908.

64. *Id.*

65. *Id.*

Appendix B

The Sixth Circuit agreed with the district court that Decker's complaint and second arbitration amounted to a collateral attack, because Decker's "ultimate objective in this damages suit is to rectify the alleged harm she suffered by receiving a smaller arbitration award than she would have received in the absence of the chairperson's relationship with Merrill Lynch."[66] Invoking the policy considerations underlying the FAA, the Sixth Circuit affirmed the district court's dismissal of the complaint and enjoining of the second arbitration:

> The FAA provides the exclusive remedy for challenging acts that taint an arbitration award whether a party attempts to attack the award through judicial proceedings or through a separate second arbitration. It would be a violation of the FAA to allow Decker to arbitrate the very same claims that we have determined constitute an impermissible collateral attack when previously presented for adjudication by a court. Decker may not bypass the exclusive and comprehensive nature of the FAA by attempting to arbitrate her claims in a separate second arbitration proceeding.[67]

In *Arrowood Indemnity Company v. Equitas Insurance Limited*, the district court enjoined certain "Underwriters" from pursuing a second arbitration

66. *Id.* at 910.

67. *Id.* at 911.

against Arrowood.[68] In the first arbitration, an arbitration panel accepted Arrowood's interpretation of certain language in a contractual reinsurance program—*i.e.*, a "Common Cause Coverage" provision that included a "First Advised Clause"—and issued an award requiring the Underwriters to pay Arrowood approximately $44.8 million.[69] Over a year later, the Underwriters filed a second arbitration demand (i) seeking access to certain Arrowood records concerning the interpretation of the Common Cause Coverage provision and (ii) asserting that Arrowood "engaged in intentional misconduct in the recent arbitration between the parties."[70]

The district court found that the second arbitration was "in direct contravention of the FAA" and "must be enjoined" because it sought "to recover all sums paid to Arrowood" in the first arbitration.[71] The district court further explained that the Underwriters' theory was that the first arbitration panel "erred in its interpretation of the Common Cause Provision due to Arrowood wrongfully, and 'improperly,' withholding relevant documents" during the first arbitration.[72]

---

68. 2015 U.S. Dist. LEXIS 99787, 2015 WL 4597543, at *8.

69. 2015 U.S. Dist. LEXIS 99787, *[WL]* at *1-2.

70. 2015 U.S. Dist. LEXIS 99787, *[WL]* at *3-4.

71. 2015 U.S. Dist. LEXIS 99787, *[WL]* at *6.

72. *Id.*

B. Enforcement of Broad Arbitration Clauses

In response to Gulf's reliance on the collateral attack doctrine, Eni contends that the court "lacks jurisdiction to entertain the matters set forth in the complaint because the TUA delegates the threshold question of 'arbitrability' to the arbitration tribunal."[73] In other words, the policy underlying Eni's opposition is that the court must enforce a broad arbitration clause that delegates to an arbitrator the authority to decide a disagreement about the scope of an arbitration provision.[74]

The United States Supreme Court held long ago that the "question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'"[75] The test under Delaware law for determining when there is clear and unmistakable evidence that the parties intended to have an arbitrator rather than the court decide questions of substantive arbitrability turns

---

73. Def.'s Opp'n Br. 3 (Dkt. 17).

74. *UPM-Kymmene Corp. v. Renmatix, Inc.*, 2017 Del. Ch. LEXIS 766, 2017 WL 4461130, at *4 (Del. Ch. Oct. 6, 2017) ("A disagreement about the scope of an arbitration provision—such as whether an arbitration provision governs a particular dispute—is known as an issue of 'substantive arbitrability.'") (citations omitted).

75. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (quoting *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)).

on whether the arbitration clause: (1) "generally provides for arbitration of all disputes;" and (2) "incorporates a set of arbitration rules that empower[s] arbitrators to decide arbitrability."[76] New York law, which governs the TUA,[77] is to the same effect.[78]

In my opinion, the parties to the TUA evinced a "clear and unmistakable" agreement to arbitrate the issue of arbitrability. To start, the TUA expressly provides, with a limited exception not relevant here, that "all possible disputes" shall be resolved through arbitration:

> Any 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.[79]

---

76. *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006).

77. TUA Art. 19.

78. *See Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 689 N.E.2d 884, 885, 888, 666 N.Y.S.2d 990 (N.Y. 1997) (finding "clear and unmistakable" evidence of an agreement to arbitrate arbitrability where the arbitration clause provided that "[a]ny controversy . . . shall be settled by arbitration in accordance with the rules of the NASD Code" and the NASD Code provided that "[t]he arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code") (internal quotations omitted).

79. TUA Art. 20.1(a).

The TUA goes on to define the term "Dispute" broadly to include "any dispute, controversy or claim . . . arising out of, relating to, or connected with this Agreement . . . as well as any dispute over *arbitrability* or jurisdiction,"[80] and expressly provides that "arbitration shall be conducted in accordance with the International Arbitration Rules of the American Arbitration Association."[81]

Focusing on the broad language in the TUA's arbitration clause, Eni argues that Gulf's request for an injunction must be denied because the arbitrators in the Second Arbitration—and not this court—must decide the whether the Final Award entered in the First Arbitration has any preclusive effect on the claims asserted in the Second Arbitration. In making this argument, Eni emphasizes that the United States Supreme Court unanimously held earlier this year in *Henry Schein, Inc. v. Archer and While Sales, Inc.*, that courts must respect the parties' decision to delegate the arbitrability question to an arbitrator even if the argument for arbitration appears to be frivolous:

> We must interpret the [FAA] as written, and the [FAA] 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. In those circumstances, a court possesses no power to decide the arbitrability

80. *Id.* Art. 1.57 (emphasis added).

81. *Id.* Art. 20.1(b).

> issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.[82]

Schein is a consequential decision that emphatically reinforces that arbitration rights are a creature of contract, and thus that courts must enforce such contracts as written.[83] But *Schein* does not address the collateral attack doctrine. Nor does *Schein* address the scenario present here where a second, related arbitration proceeding has been filed. The court discusses next two circuit court decisions on which Eni relies where the courts have enforced broad arbitration clauses and allowed an arbitrator to determine the arbitrability of the claims asserted in a second arbitration.

In *John Hancock Mutual Life Insurance Company v. Olick*, the Third Circuit considered "the question of whether, under the [FAA], a district court has the authority, notwithstanding a valid arbitration clause, to enjoin a party from pursuing arbitration on res judicata grounds arising from both a prior arbitration and a prior judgment."[84] The prior judgment arose from a district court

---

82. 139 S.Ct. 524, 529, 202 L. Ed. 2d 480 (2019).

83. One consequence of *Schein* is that it should end the additional "no non-frivolous argument about substantive arbitrability" inquiry this court has conducted under *McLaughlin v. McCann*, 942 A.2d 616, 626-27 (Del. Ch. 2008) "to guard against the frivolous invocation of an arbitration clause even when the *Willie Gary* test has been satisfied." *UPM-Kymmene*, 2017 Del. Ch. LEXIS 766, 2017 WL 4461130, at *4.

84. 151 F.3d 132, 133 (3d Cir. 1998).

action captioned *Carroll v. Hancock* that involved alleged "violations of several federal and state statutes, along with various common law fraud theories, in connection with a series of limited partnership transactions."[85] The prior arbitration related to the same limited partnership transactions "that were the subject of the *Carroll* action."[86]

Over one year after entry of the prior judgment and of an award in the prior arbitration, Olick filed a second arbitration asserting claims "sounding in fraud, misrepresentation, tortious interference with business relations, slander, libel, and RICO violations."[87] Hancock argued that Olick's second arbitration claim "arose from the same factual circumstances as the previous arbitration . . . as well as the prior federal judgment, and therefore principles of res judicata barred Olick from raising a claim that could have been raised at either the prior arbitration proceeding or the *Carroll* litigation."[88]

Recognizing that the case presented "somewhat of a 'hybrid' situation in that Hancock's objection to arbitrating Olick's claims stems from both a prior arbitration and a prior judgment," the Third Circuit differentiated between the two scenarios in its analysis.[89] With respect to the prior

85. *Id.* at 134.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 137.

federal judgment, the Third Circuit concluded, based on its precedents, "that the district court . . . should have first decided the preclusive effect of the prior federal judgment as it relates to Olick's [second] demand for arbitration."[90] With respect to the prior arbitration, however, the Third Circuit concluded that "Hancock's res judicata objection based on the prior arbitration is an issue to be arbitrated and is not to be decided by the courts."[91] In reaching the latter conclusion, Circuit Judge Seitz, writing for the panel, explained the Court's rationale as follows:

> 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 unless it may be said "with positive assurance" that the parties sought to have the matter decided by a court.[92]

In *Citigroup, Inc. v. Abu Dhabi Investment Authority*, the Second Circuit held that the arbitrators in a second arbitration "should also decide the claim-preclusive effect of a federal judgment confirming an arbitral award."[93] In the first arbitration, the Abu Dhabi Investment Authority (ADIA) asserted a variety of claims (fraud,

---

90. *Id.* at 138-39.

91. *Id.* at 140.

92. *Id.* at 139.

93. 776 F.3d 126, 131 (2d Cir. 2015).

securities fraud, negligent misrepresentation, breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing) against Citigroup, alleging that it "had diluted the value of [ADIA's] investment [in Citigroup] by issuing preferred shares to other investors."[94] The first arbitration panel returned an award in favor of Citigroup, which the United States District Court for the Southern District of New York later confirmed. While that confirmation proceeding was pending, ADIA filed a second arbitration "again asserting claims of breach of contract and breach of the implied covenant of good faith and fair dealing."[95] Citigroup sought to enjoin the second arbitration "on the ground that ADIA's new claims were barred by the doctrine of claim preclusion, or *res judicata*, because they were or could have been raised in the first arbitration."[96]

The Second Circuit's explained that its conclusion that the arbitrators should decide the claim-preclusive effect of the judgment confirming the first arbitral award was as a "simple intuitive step" that followed from two of the Second Circuit's prior precedents.[97] In those prior cases, the Second Circuit held "that arbitrators are to resolve the claim-preclusive effect of an arbitration award confirmed by a state court and the issue-preclusive effect of a federal

94. *Id.* at 127.

95. *Id.*

96. *Id.* at 128.

97. *Id.* at 131.

judgment."[98] Additionally, the Second Circuit expressed the view that the arbitrators would be better positioned than the confirming court to consider the preclusive effect of an arbitration award based on their familiarity with the underlying merits:

> Indeed, in confirming the award, the district court did not review the merits of any of ADIA's substantive claims or the context in which those claims arose. Instead, it considered only whether the arbitration panel's evidentiary rulings and application of New York choice-of-law principles violated the FAA. Under these circumstances, a district court unfamiliar with the underlying circumstances, transactions, and claims, is not the best interpreter of what was decided in the arbitration proceedings, the result of which it merely confirmed.[99]

* * * * *

With the foregoing discussion of the legal principles upon which the parties primarily rely in mind, the court turns next to consider the elements of Gulf's request for entry of a permanent injunction to enjoin Eni from

---

98. *Id.* S*ee also Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Belco Petroleum Corp.*, 88 F.3d 129 (2d Cir. 1996) (addressing preclusive effect of arbitration award confirmed by a state court); *United States Fire Ins. Co. v. Nat'l Gypsum*, 101 F.3d 813 (2d Cir. 1996) (addressing preclusive effect of federal judgment).

99. 776 F.3d at 132-33 (citations omitted).

pursuing the claims it has asserted in the Second Arbitration.

C. The Merits of Gulf's Request for a Permanent Injunction

Gulf contends that the two substantive claims Eni has asserted in the Second Arbitration—for negligent misrepresentation and breach of contract—constitute impermissible collateral attacks on the First Arbitration.[100] Synthesizing the six cases applying the collateral attack doctrine cited above, Gulf contends the relevant inquiry for determining if the claims in the Second Arbitration amount to an impermissible collateral attack is whether "the nature of the claims and relief sought in the Second Arbitration . . . (a) seek[] to rectify alleged harm suffered in the earlier arbitration, or (b) challeng[e] alleged misconduct occurring in that earlier proceeding which purportedly tainted the prior Award."[101]

In response, Eni advances essentially three lines of argument. First, it contends that *Schein* overruled all of the cases on which Gulf relies that have applied the collateral attack doctrine, each of which pre-dates *Schein*.[102] Second, Eni discounts most of Gulf's precedents because, according to Eni, they "do not address the

100. Gulf also asserted a claim for declaratory relief in the Second Arbitration, but that claim goes hand in hand with its contract claim. *See* Second Arbitration Notice ¶¶ 66-67, 69-70.

101. Pls.' Suppl. Br. 2.

102. Def.'s Suppl. Br. 4 (Dkt. 34).

arbitrability question."[103] Third, Eni argues as a factual matter that its claims in the Second Arbitration do not constitute a collateral attack on the Final Award.[104] The court addresses these issues, in turn, below.

As to Eni's first line of argument, *Schein* nowhere mentions the collateral attack doctrine. *Schein* does not even refer to any of the cases Gulf cites that have applied that doctrine. In the absence of any actual discussion or analysis of the collateral attack doctrine in *Schein*, this court declines to assume that the Supreme Court's rejection of a "wholly groundless" exception to arbitrability means that it intended to overrule this well-established doctrine. Apart from the fact that *Schein* does not even discuss the issue, the question of arbitrability that *Schein* does address focuses on the need to honor contractual intent whereas the collateral attack doctrine is premised on different considerations, namely the policies of finality and limited review underlying the provisions of the FAA governing judicial review and confirmation of arbitration awards.[105]

As to Eni's second line of argument, it is not surprising that a decision applying the collateral attack doctrine would not separately consider the question of arbitrability. The point of the doctrine is that a court may intervene to dismiss litigation claims or to enjoin a second round

---

103. *Id.* 6.

104. *Id.* 14.

105. *See* Part II.A.

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*. As the *Arrowood* court put it:

> Although parties are generally free to seek arbitration under a broad arbitration clause, courts may intervene if the "ultimate objective . . . is to rectify the alleged harm" a party suffered from an unfavorable arbitration award "by attempting to arbitrate [its] claims in a separate second arbitration proceeding." Such arbitral mulligans are forbidden by the FAA, which is the "exclusive remedy for challenging acts that taint an arbitration award[,] whether a party attempts to attack the award through judicial proceedings or through a second arbitration."[106]

This approach is consistent with then-Chancellor Strine's decision in *Pryor v. IAC/InterActiveCorp.*,[107] a case on which both parties rely. In that case, William Pryor sued IAC in the Court of Chancery for alleged misconduct in an arbitration that valued Pryor's shares in Shoebuy.com, Inc., a company that IAC acquired.[108] The arbitrator selected Houlihan Lokey as the valuation

106. 2015 U.S. Dist. LEXIS 99787, 2015 WL 4597543, at *5 (quoting *Decker*, 205 F.3d at 910-11).

107. 2012 Del. Ch. LEXIS 132, 2012 WL 2046827.

108. 2012 Del. Ch. LEXIS 132, *[WL]* at *1.

expert for the arbitration, and Houlihan Lokey issued an award adopting IAC's proposed appraisal value.[109] After issuance of the arbitration award, Pryor filed suit in the Court of Chancery seeking to vacate the award and asserting claims for breach of contract and breach of fiduciary duty against IAC for introducing in the arbitration "certain market evidence in violation of the terms of the Stockholder's Agreement" that governed the valuation of his shares.[110]

In adjudicating IAC's motion to dismiss, the court found (i) that "the substantive arbitrability of the fiduciary duty and contract claims [must] be determined by the arbitrator" and (ii) relying on *Decker*, that the "breach of contract claim fails for a separate reason because . . . it constitutes an impermissible collateral attack" on the arbitration award.[111] Significantly, the court dismissed the fiduciary duty claim "without prejudice to allow Pryor to re-file in the event that the arbitrator concludes that the breach of fiduciary duty claim is not arbitrable," but dismissed the contract claim "with prejudice because the

---

109. *Id.*

110. *Id.*

111. 2012 Del. Ch. LEXIS 132, *[WL]* at *6. In finding that the contract claim constituted an impermissible collateral attack, the court reasoned as follows: "Pryor's objective in this breach of contact claim is to remedy 'the alleged harm [he] suffered by receiving a smaller arbitration award than [he] would have received in the absence of the [submission of allegedly improper evidence].' In order to obtain such relief, a plaintiff is limited to proceeding under the FAA." *Id.*

flaw that this Count is an impermissible collateral attack on the [arbitration award] is not curable by proceeding before the arbitrator at this belated stage."[112] The court's "with prejudice" dismissal of the contract claim accords with the ability of courts to intervene to dispose of collateral attack claims definitively notwithstanding the existence of a broad arbitration clause.

Eni's third line of argument gets to the core issue before the court, *i.e.*, whether the negligent misrepresentation and contract claims it has asserted in the Second Arbitration amount to a collateral attack on the Final Award. In my opinion, for the reasons discussed next, the negligent misrepresentation claim does but the contract claim does not.

1. Negligent Misrepresentation Claim

Eni's claim for negligent misrepresentation, seeks "declaratory and other relief, in the form of damages and/or restitution . . . as a result of Gulf's wrongful conduct" before the First Tribunal.[113] The gravamen of this claim is that Gulf falsely represented to the First Tribunal "that it would no longer be able to recover Reservation and Operating fees from its other customer, ALSS or from any other source, if Eni prevailed in the arbitration" in order "[t]o secure the award of equitable compensation for Decommissioning Costs of the Pascagoula Facility in

112. 2012 Del. Ch. LEXIS 132, *[WL]* at *7.

113. Second Arbitration Notice ¶ 76.

the amount of approximately $418 million."[114] According to Eni, had Gulf not made this misrepresentation, "the compensation amount paid by Eni for decommissioning costs would have been greatly reduced, or reduced to zero" because the First Tribunal "excluded the amount of future Reservation and Operating Fee payments that Gulf would receive from ALSS in calculating the compensation for Decommissioning Costs [it] awarded to Gulf."[115]

The negligent misrepresentation claim is a collateral attack on the Final Award for two reasons. First, 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. This is the epitome of a collateral attack.[116]

---

114. *Id.* ¶ 72.

115. *Id.* ¶ 75.

116. *See Arrowood*, 2015 WL 4597543, at *6 (second arbitration that sought "to recover all sums paid to Arrowood" in the first arbitration was a collateral attack). *See also Prudential*, 865 F.Supp. at 451 (second arbitration that attempted "to augment and modify the first arbitration award" was a collateral attack); *Decker*, 205 F.3d at 910 (second arbitration brought to "rectify . . . receiving a smaller arbitration award" than desired in first arbitration was a collateral attack).

Second, and related to the first point, 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. Yet Eni made no effort to seek to vacate the Final Award on this ground and has 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."[117]

Eni devotes substantial attention in its opposition papers explaining why its contract claim does not constitute a collateral attack, a conclusion with which the court agrees, but it makes virtually no effort to do so with respect to its negligent misrepresentation claim.[118] Indeed, Eni's defense on this point boils down to the conclusory assertion that "Eni does not assert [the negligent misrepresentation] claim in order to undo or alter the prior Award."[119] This contention exalts form over substance. Eni did pay Gulf the sum it was ordered to pay in the Judgment and, as technical matter, it does not seek to alter the words of the Judgment. As a substantive matter, however, Eni's misrepresentation claim is a transparent tactic to claw

---

117. *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1213 (6th Cir. 1982) ("Very simply, Corey did not avail himself of the review provisions of section 10 of the Arbitration Act and may not transform what would ordinarily constitute an impermissible collateral attack into a proper independent direct action by changing defendants and altering the relief sought."); *see also Phillips Petroleum*, 1988 Del. Ch. LEXIS 77, 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).

118. *See* Def.'s Suppl. Br. 14-22.

119. *Id.* 20.

back the damages it paid Gulf under the Judgment for the purpose of reducing and potentially nullifying the substance of the damages award that Gulf obtained as a result of the First Arbitration.

2. Contract Claim

In the Second Arbitration, Eni seeks declaratory relief and damages and/or restitution on the theory that "Gulf breached the TUA by engaging in 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."[120] In the First Arbitration, Eni sought a declaration that Gulf "breached the warranties and covenants set forth in at least Articles 22.4(a) and 22.4(e) and that Eni [] thereby may properly terminate the TUA pursuant to Article 18.1."[121] 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 of purpose:

> Considering the Tribunal's finding on the frustration of TUA's purpose, the question as to whether [the Gulf entities] have breached the warranties and covenants, including those set forth at Articles 22.4(a) and 22(e) of the TUA, has become academic and deserves no further consideration.[122]

120. Second Arbitration Notice ¶ 66-67, 69-70.

121. Dkt. 38 ¶ 64.

122. Final Award ¶ 347.

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. Specifically, 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. 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.

Given the court's conclusion that the contract claim in the Second Arbitration is not a collateral attack, and the broad language of the arbitration provision in the TUA that evinces the parties' agreement to arbitrate the issue of arbitrability, 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. This conclusion accords with the decisions in *Schein, Olick*, and *Citigroup* discussed above.[123]

* * * *

For the reasons explained above, the court concludes that Gulf has established that Eni's misrepresentation claim in the Second Arbitration constitutes an impermissible

123. *See* Part. II.B.

collateral attack on the Final Award but that Gulf has failed to make this showing with respect to its contract claim in the Second Arbitration.

D. The Remaining Elements for a Permanent Injunction

It is well-established under Delaware law that requiring a party to "devote unnecessary time and resources to contest" an issue that the court has determined to be "not arbitrable" amounts to irreparable harm.[124] Accordingly, absent an injunction, Gulf would suffer irreparable harm if it were required to arbitrate the misrepresentation claim in the Second Arbitration.

Finally, the balance of the equities weighs in Gulf's favor to obtain a permanent injunction with respect to the negligent misrepresentation claim. Without an injunction, Gulf will be deprived of the finality to which it is entitled concerning the damages award it obtained as a result of the First Arbitration. On the other side of the ledger, Eni has made no argument that the equities weigh in its favor, and the court is hard-pressed to conceive of a basis for such an argument insofar as the negligent misrepresentation claim is concerned.

---

124. *Bd. of Educ. of Sussex Cty. Vocational-Tech. Sch. Dist. v. Sussex Tech. Educ. Ass'n*, 1998 Del. Ch. LEXIS 47, 1998 WL 157373, at *5 (Del. Ch. Mar. 18, 1998); *see also Delaware Pub. Emps. v. New Castle Cty.*, 1994 Del. Ch. LEXIS 168, 1994 WL 515291, at *4 (Del. Ch. Aug. 25, 1994).

III. CONCLUSION

For the foregoing reasons, Gulf's motion for judgment on the pleadings is granted with respect to the negligent misrepresentation claim that Eni has asserted in the Second Arbitration but otherwise is denied. The parties are directed to confer and to submit an implementing order consistent with this decision within five business days.