IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PERSONNEL DECISIONS, INC., a Minnesota corporation, Plaintiff, v. BUSINESS PLANNING SYSTEMS, INC., a Delaware corporation, Defendant.	))))))))))	C.A. No. 3213-VCS

MEMORANDUM OPINION

Date Submitted: February 14, 2008
Date Decided: May 5, 2008

Daniel V. Folt, Esquire, DUANE MORRIS LLP, Wilmington, Delaware; Patrick J. Loftus, Esquire, DUANE MORRIS LLP, Philadelphia, Pennsylvania, *Attorneys for Plaintiff.*

James D. Griffin, Esquire, GRIFFIN & HACKETT, P.A., Georgetown, Delaware; John M. Shoreman, Esquire, McFADDEN & SHOREMAN, LLC, Washington, District of Columbia, *Attorneys for Defendant.*

STRINE, Vice Chancellor.

I. Introduction

In this case, I apply the terms of the Delaware Uniform Arbitration Act ("DUAA") to an arbitration agreement in interstate commerce, when the arbitration agreement does not provide for arbitration in Delaware as that Act requires. I reach this result because the parties unambiguously demonstrated through the course of performing their arbitration agreement that they believed they had entered an agreement subject to the DUAA, and because the party that first invoked that statute is estopped to deny its application. The litigants' shared belief that the DUAA applied was so strong that the parties failed to realize it did not apply by its own terms until the court sent an inquiring letter after the close of briefing on this motion. Because neither Delaware public policy nor the Federal Arbitration Act ("FAA") preclude parties from voluntarily choosing to use the DUAA, I resolve the underlying dispute in accordance with the statutory provisions of the DUAA. That dispute involves a question of statutory interpretation.

In 2003, defendant, Business Planning Systems, Inc., sent two notices of intention to arbitrate to the plaintiff in this case, Personnel Decisions, Inc. At that time, Personnel Decisions did not believe the breach of contract claims underlying those notices were time-barred, as they dealt with a contract dispute involving events that took place in 2000. But Business Planning waited until 2007 — some four years later — to file the arbitration equivalent of a complaint, a demand, and take the necessary steps to begin the arbitration process in earnest. That was more than seven years after the alleged breaches of contract. Personnel Decisions responded to the demand by filing this action under §§ 5702(c) and 5703(b) of the DUAA, seeking to enjoin the arbitration because it argues

Business Planning's contract claims were time-barred when the demand was sent. Under those sections of the DUAA, a party to an arbitration agreement may sue to enjoin an arbitration on the ground that the claims sought to be arbitrated were time-barred at the time a demand was made or a notice of intention to arbitrate was sent. But Business Planning contends that another section of the DUAA, § 5703(c), precludes this suit because Personnel Decisions did not sue within 20 days after receiving the notices of intention to arbitrate in 2003.

In this opinion, I reject Business Planning's argument that Personnel Decisions was required to raise its limitation defenses in 2003 when the notices of intention to arbitrate were filed or lose any ability to seek an injunction. Business Planning's argument exploits a statutory ambiguity to create a "gotcha" opportunity for indolent plaintiffs. By its reading, a torpid claimant can file a premature notice when it is not prepared to go to arbitration, sit on its demand until the statute of limitations is well expired, and then claim that the premature notice cut off the respondent's §§ 5702(c) and 5703(b) right to seek an injunction if the claimant's case was time-barred when the demand is finally made. I refuse to interpret the relevant statutory provisions in that way because doing so would undercut the General Assembly's predominant purpose in enacting the unique provisions of §§ 5702 and 5703 — giving arbitration respondents a fair opportunity to seek an injunction against the arbitration of time-barred claims.

II. Factual Background

Personnel Decisions and Business Planning executed a Development and Marketing Agreement (the "Development Agreement") on June 15, 1998 that contained an arbitration clause.[1] The arbitration clause stated that:

> [Personnel Decisions] and [Business Planning] agree that any dispute that cannot be amicably resolved within 30 days will be submitted to and resolved by arbitration. In this event, the parties will agree upon a neutral arbiter who has significant experience with software issues, or will request that an appropriate neutral arbiter be selected from a list of qualified individuals by the American Arbitration Association.[2]

Because Personnel Decisions was a Minnesota corporation with its offices in Minneapolis and Business Planning was a Delaware corporation with its offices in Delaware, the Development Agreement fell in the stream of interstate commerce. This meant the FAA would govern the agreement[3] unless the parties instead contracted to apply the DUAA.[4] But the parties failed to scrutinize those intricacies, which in any event would only be important if a situation arose implicating one of the few instances in which those statutes materially differ. The Development Agreement required the application of Delaware substantive law, but it did not address which arbitration act

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[1] Compl. Ex. A ("Agreement") ¶ 1.

[2] Agreement ¶ 23. Although the Development Agreement contemplated the AAA choosing an arbitrator in some circumstances, it did not reference the AAA Rules.

[3] 9 U.S.C. §§ 1, 2 (stating FAA applies to agreement to arbitrate implicating interstate commerce); *see also SBC Interactive, Inc. v. Corporate Media Partners,* 1998 WL 749446, at *4 (Del. Ch. Oct. 7, 1998) (holding the Court of Chancery has equitable jurisdiction to apply the FAA to an agreement to arbitrate in interstate commerce).

[4] *See Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468 (1989) (allowing parties to contract for application of state arbitration act rules inconsistent with the FAA in an agreement to arbitrate in interstate commerce); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61-62 (1995) (same).

governed the Development Agreement.[5] Nor did it require arbitration in Delaware, the statutory trigger for applying the DUAA.[6]

A. Business Planning Initiates Arbitration Under The DUAA And Four Years Later The Parties Brief Arguments On How The DUAA Should Be Interpreted

Nearly five years after the Development Agreement was executed, Business Planning sent Personnel Decisions a March 19, 2003 notice of intention to arbitrate (the "First Notice"), which claimed that Personnel Decisions had breached the Development Agreement.[7] According to Business Planning, Personnel Decisions had breached its obligation to use "reasonable efforts" to market software developed by Business Planning "[b]y May 2000," and had breached a no-assignment clause in the autumn of 2000 when it assigned some or all of its contract obligations to a third party.[8] There was little green left on these bananas; depending on the precise date of the first alleged breach, the limitations period would soon expire.[9]

Although the Development Agreement did not expressly select the DUAA or meet its triggering term by calling for arbitration of disputes within Delaware, Business Planning unambiguously invoked the DUAA in the First Notice. It warned Personnel Decisions that it would lose certain rights to judicial review under § 5703(c) of the DUAA if it did not respond within 20 days. But Personnel Decisions would not have had

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[5] Agreement ¶ 20.

[6] 10 *Del. C.* § 5702(a) ("The making of [a written agreement to arbitrate a dispute] *providing for arbitration in this State* confers jurisdiction on the Court to enforce the agreement under this chapter . . . .") (emphasis added).

[7] Compl. Ex. B.

[8] *Id.*

[9] *See* 10 *Del. C.* § 8106. Business Planning did not provide the exact date of the alleged breach in that letter. *See* Compl. Ex. B.

any such rights to lose in the first place unless the DUAA applied to the Development Agreement. Unlike the FAA, the DUAA permits a party to seek an injunction against arbitration if "at the time the demand for arbitration was made *or* a notice of intention to arbitrate was served": 1) a valid arbitration agreement was not made; 2) the agreement had not been complied with; or 3) "the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in [court]."[10] For its part, as we shall see, § 5703(c) allows a claimant to file a notice of intent to arbitrate meeting certain standards and thereby force a respondent to seek an injunction based on these defenses within 20 days or lose the right to seek pre-arbitration judicial review.

By expressly referencing this unique provision of Delaware law, Business Planning obviously invoked the DUAA and signaled its belief that it governed disputes under the Development Agreement. Invoking the § 5703(c) language also makes no practical sense under the FAA, because that statute does not enable parties to go to court, rather than the arbitrator, with a defense that a claim is time-barred or that the underlying

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[10] 10 *Del. C.* § 5702(c) (emphasis added); *see*, *e.g.*, 9 U.S.C. § 1, *et seq.* (2008) (containing no comparable provision); *see also* UNIF. ARBITRATION ACT, 7 U.L.A. § 1, *et seq.* (1956) (same); UNIF. ARBITRATION ACT, 7 U.L.A. § 1, *et seq.* (2000) (same); *Dresser Indus., Inc. v. Global Indus. Tech., Inc.*, 1999 WL 413401, at *5 n.5 (Del. Ch. June 9, 1999) (noting the unusual nature of § 5702(c)).

contract is invalid.[11] Under the FAA, those defenses go to the arbitrator in the first instance.[12]

In the correspondence that followed, neither party disputed Business Planning's contention in the First Notice that the DUAA required prompt action for Personnel Decisions to preserve judicial review of limitations defenses. Business Planning continued to invoke the DUAA. For example, when Business Planning sent a second notice of intention to arbitrate (the "Second Notice") on July 1, 2003, it contained an identical paragraph regarding § 5703(c) of the DUAA that warned Personnel Decisions of the consequences under the DUAA if it did not act to protect its rights.[13]

In contrast to Personnel Decisions' prompt July 15, 2003 response,[14] Business Planning took a torpid approach to initiating arbitration. It was silent for over four years. In other words, Business Planning took no action to prosecute the arbitration or otherwise resolve the dispute until August of 2007 when it filed a Demand for Arbitration (the "AAA Demand") with the American Arbitration Association ("AAA") on August 10, 2007.[15] This was four years after it first notified Personnel Decisions of the alleged

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[11] Additionally, the language used in the First and Second Notices was quite similar to language suggested by a leading treatise for use with a nearly identical statutory scheme contained in New York's arbitration act. *Compare* Compl. Ex. B *with* LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 18:7, at 18-12 (3d ed. 2007); *compare* 10 *Del. C.* §§ 5702(c) & 5703(c) *with* 75 N.Y. CPLR §§ 7502(b) & 7503(c).

[12] *See*, *e.g.*, *Howsam v. Dean Witter Reynolds*, *Inc.*, 537 U.S. 79, 84 (2002) (finding that a similar arbitration clause meant "the applicability of . . . [a] time limit rule [wa]s a matter presumptively for the arbitrator, not for the judge"); *see also Brown v. T-Ink, LLC*, 2007 WL 4302594, at *1, *12 (Del. Ch. Dec. 7, 2007).

[13] Compl. Ex. C.

[14] Compl. Ex. D.

[15] The parties disagree over when the Demand for Arbitration was filed. Personnel Decisions places it on August 8, 2007. Business Planning places it on August 14, 2007. Even the forms

breaches and seven years after the alleged breaches themselves. In that AAA Demand, Business Planning for the first time requested Delaware as the location for the arbitration.[16]

Personnel Decisions filed its own action in this court on September 7, 2007 seeking, under authority of §§ 5702(c) and 5703(b) of the DUAA, an injunction against the arbitration on the grounds that Business Planning's claims were barred by the statute of limitations and laches (for ease of reference, the "Limitations Defenses"). Personnel Decisions moved for a preliminary injunction. In response, Business Planning moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Business Planning contends that § 5703(c) precludes Personnel Decisions from asserting the Limitations Defenses in court because Personnel Decisions did not file a complaint within 20 days of the First or Second Notice, even though these defenses were not ripe at that time.

The parties fully briefed the motion to dismiss, both assuming that the DUAA applied.

B. <u>After The Court Sends A Letter, The Parties React To The Unforeseen Possibility The DUAA Does Not Apply</u>

In reviewing the Development Agreement in response to their papers, I recognized that the Development Agreement did not meet the literal requirements of the DUAA. Being chary about deciding the case in a dispute where I had a question about which

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disagree on that date, ranging from August 10, 2007 ("Demand for Arbitration: Statement of Claim") to August 14, 2007 ("Commercial Arbitration Rules: Demand for Arbitration").

[16] *See* Compl. Ex. D. It had previously mentioned only Washington, D.C.

statute applied, I asked the parties in advance of oral argument to submit letters explaining which arbitration act applied — the DUAA or the FAA.

After receiving the court's letter, the parties for the first time appreciated the importance that the location of arbitration might play in resolving this dispute. Both realized that their respective arguments over the proper location for the arbitration — which until then were motivated solely by cost and convenience — undercut their respective objectives in this litigation.

This reality put Personnel Decisions in an especially tough spot. It had argued that any arbitration should take place in Minnesota, near its headquarters.[17] The convenience of a nearby arbitration now conflicted with its desire for judicial review, but Personnel Decisions chose to abandon seeking the former in favor of the latter. It argued in a February 6, 2008 letter to the court that "the[] facts, viewed cumulatively, support the parties' mutual assent to arbitrate in Delaware" and "[i]n addition, [Business Planning's] serial references to the Delaware statutory scheme (including an express declaration of Delaware as forum locale) . . . constitute fair evidence of mutual assent sufficient to invoke the DUAA."[18] Its letter also withdrew Personnel Decisions' objection in arbitration to a Delaware locale, and it claimed this meant the parties "presently agree[d] that the arbitration should take place in Delaware."[19] Taking its letter as a whole,

[17] *See*, *e.g.*, Letter from James D. Griffin to Vice Chancellor Leo E. Strine, Jr. (Feb. 8, 2008) at Ex. A (Letter from Bradley D. Hauswirth to Hannah R. Cook, (Aug. 30, 2007)).
[18] Letter from Daniel V. Folt to Vice Chancellor Leo E. Strine, Jr. (Feb. 6, 2008).
[19] *Id.*

Personnel Decisions argued that 1) the parties had agreed to arbitrate in Delaware and 2) Business Planning had assented to applying the DUAA to the agreement.

When Business Planning submitted its responsive letter to the court two days later, on February 8, 2008, it withdrew its request contained in the AAA Demand it filed in August of 2007 for a Delaware arbitration and its assertion that the DUAA applied.[20] Business Planning now sought to deny that § 5703 of the DUAA, which it had first invoked, applied to the Development Agreement. It instead contended that the parties had never agreed on an arbitration site in Delaware, and that therefore the DUAA did not apply. Because the DUAA did not apply, its argument continued, this court lacked subject matter jurisdiction to adjudicate the dispute because it had been committed to arbitration by the parties.

III. Legal Analysis

A. The DUAA Applies

The record of communications and tussle after my letter establishes that the parties never agreed to arbitrate in Delaware. But in these unusual circumstances, this flaw is not fatal to Personnel Decisions' case. Rather, there are two independent reasons why the parties' conduct in performing the Development Agreement clearly leads to application of the DUAA. The first is contractual, based on the parties' course of performing the Development Agreement. The second is equitable, and is based on Business Planning's desire to avoid a statute it was the first to invoke.

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[20] Letter from James D. Griffin to Vice Chancellor Leo E. Strine, Jr. (Feb. 8, 2008).

1. The Course Of Performing The Development Agreement Demonstrates The Parties Agreed That The Terms Of The DUAA Should Control

The Restatement of Contracts (Second) tells us that, after plain meaning, the most persuasive evidence of the parties' agreement is the course of its performance.[21] No provision in the Development Agreement specifies which arbitration act applies to the agreement, or conflicts with application of the DUAA.[22] The most helpful term within the Development Agreement itself is its statement that: "The validity, construction, *and performance* of this agreement will be governed by the laws of the state of Delaware."[23] Our law is clear that such a term is insufficient in itself to trigger the DUAA or, as I will discuss in a later section, demonstrate the requisite intent to apply the DUAA notwithstanding application of the FAA.[24] But, here, the parties' own performance under the Development Agreement makes it obvious that they viewed the Development Agreement as an arbitration agreement governed by the DUAA, not the FAA, a perception that likely arose out of their subjective view of the choice of law provision's effect.

[21] *See* RESTATEMENT OF CONTRACTS (SECOND) § 202 cmt. g (2008) ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. . . . Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or waiver by one party."); *id.* § 202(4) (stating "any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement").
[22] *See City of Wilmington v. Wilmington FOP Lodge #*1, 2004 WL 1488682, *7 (Del. Ch. June 22, 2004) ("[C]ourse of performance . . . may be used to aid a court in interpretation of an ambiguous contract, [or it] it may also be used to supply an omitted term when a contract is silent on an issue.") (citing RESTATEMENT (SECOND) OF CONTRACTS § 223 & cmt. b. (1979) and 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.13 (2d ed. 2001)).
[23] Agreement ¶ 20 (emphasis added).
[24] *See*, *e.g.*, *Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *6 (Del. Ch. May 13, 2005).

For its part, Business Planning filed the First and Second Notices expressly invoking the DUAA and trying to use it to its advantage. And, as counsel for Business Planning readily admitted at oral argument, Business Planning thought the parties were proceeding under the DUAA,[25] which is the most common-sense explanation for why it first invoked the DUAA in March of 2003. Because nothing in the Development Agreement would preclude me from finding the parties agreed to apply the DUAA, the unique circumstances here lead to some practical questions. When Business Planning and Personnel Decisions agreed that the Development Agreement called for the application of the DUAA, who am I to question that determination? What do I know about their Agreement that they themselves do not?

The evidence that Personnel Decisions and Business Planning agreed that the DUAA would control is overwhelming. Nearly five years have elapsed since the First Notice was sent invoking the DUAA. Over that time period the parties exchanged multiple correspondence to each other referencing the DUAA, including Business Planning's First and Second Notices, and the formal Demand filed with the AAA. Personnel Decisions and Business Planning researched and prepared briefs to this court on an issue that necessarily implicated the DUAA. Business Planning — who in 2007 had every incentive to argue the DUAA did not apply — never once hinted in any submission filed with the court that the DUAA was inapplicable.[26] After all these events

[25] Transcript of Oral Argument, at 22-23.

[26] *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. April 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."), *aff'd*, 840 A.2d 641 (Del. 2003). Business Planning's briefs particularly demonstrated this belief. *See*

occurred, nine years after the agreement was signed, seven years after the alleged breaches of contract and four years after Business Planning first invoked the DUAA in its First Notice, it took a letter from this court to reconsider a fundamental assumption underlying years of dispute. That assumption was so basic to the parties that both changed where they wanted to arbitrate when that letter injected uncertainty about its viability. I am convinced that, but for my letter, Business Planning and Personnel Decisions never would have realized there was a question about the DUAA's applicability. The course of performing the arbitration agreement therefore unambiguously demonstrates that all concerned parties believed the DUAA governed the Development Agreement.

2. Applying The DUAA Does Not Offend Delaware's Public Policy

Business Planning has argued no basis and I perceive none to find that Delaware public policy is offended by the decisions of two commercial parties, one of whom is a Delaware corporation, to choose to have the DUAA govern their arbitration agreement, even though they did not agree to hold the arbitration in Delaware. Delaware is a freedom of contract state, with a policy of enforcing the voluntary agreements of

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Business Planning Reply Br. at 5-6 ("Section 5703(c) establishes the procedure a party must employ to initiate arbitration under the Delaware Uniform Arbitration Act . . . . [Business Planning] strictly complied with the requirements of Section 5703(c) in instituting the arbitration."); *see also* Business Planning Op. Br. at 4.

sophisticated parties in commerce.[27] Parties frequently tailor their approach to dispute resolution[28] and voluntary use of the DUAA, rather than the FAA, is one way to do that.[29]

The DUAA was enacted to reverse the common law hostility toward agreements to arbitrate and place them on the same ground as other contracts by ensuring they are specifically enforced and irrevocable by one party, "save upon such grounds as exist at law or in equity for the revocation of any contract."[30] Allowing sophisticated parties to choose the DUAA even for arbitrations outside Delaware only advances their freedom to contract in the field of arbitration in the security that courts will not second-guess their contractual preferences.

I therefore conclude it does not violate Delaware public policy to allow Business Planning and Personnel Decisions to elect to apply the DUAA to their agreement, as they have here.

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[27] *E.g.*, *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1061 (Del. Ch. 2006).
[28] *See*, *e.g.*, *McLaughlin v. McCann*, 946 A.2d 616 (Del. Ch. 2008) (holding reference to AAA rules in arbitration agreement allows arbitrator to determine his own authority (substantive arbitrability) pursuant to the AAA rules); *see also* Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326, 337 (2007) ("Arbitration operates in a contract model in which arbitration legislation constitutes a set of default rules that apply only when parties fail to legislate the terms of arbitration. Numerous arbitration landmarks stress the decisional powers of the parties to custom forge the terms of the conflict.").
[29] This result does not result in parties "creating" subject matter jurisdiction by stipulation, as Business Planning fears. A valid arbitration clause divests this court of subject matter jurisdiction to hear disputes within its ambit. *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 295 (Del. 1999); *see also NAMA Holdings, LLC v. Related World Market Center*, 922 A.2d 417, 429 (Del. Ch. 2007). If the parties were to later contract to allow a claim previously covered by an arbitration clause to proceed in court, subject matter jurisdiction would not be "created" if the claim otherwise fell in this court's jurisdiction; an impediment — the contractual obligation to arbitrate a dispute — would merely be removed. Likewise, a motion to enjoin an arbitration is a claim within this court's conditional equity jurisdiction. *SBC Interactive, Inc.*, 1998 WL 749446, at *4 (finding the Court of Chancery derives subject matter jurisdiction to enforce the FAA from its inherent equity jurisdiction).
[30] 10 *Del. C.* § 5701; *see Pettinaro Constr. Co., Inc. v. Partridge*, 408 A.2d 957, 961 (Del. Ch. 1979) (noting this change in public policy).

3. The FAA Does Not Control Because The Parties Elected To Apply The DUAA

Like the DUAA, the FAA evidences a strong policy favoring arbitration of disputes that parties contract to arbitrate.[31] It is by now "well established" that the FAA displaces otherwise inconsistent provisions of state arbitration acts,[32] such as the DUAA, restraining those acts to the secondary role of governing agreements to arbitrate in intrastate commerce.[33] When determining the arbitrability of disputes, courts must display a "healthy regard for the federal policy favoring arbitration."[34] Nevertheless, "[t]he 'liberal federal policy favoring arbitration agreements,' manifested by [the FAA], is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'"[35]

Consistent with its core purpose of protecting parties' voluntary right to enter arbitration contracts, the FAA does not preempt the application of state arbitration acts when parties choose to use them. Rather, parties may contract to apply state procedural law instead of the FAA, but, to protect the interests served by the FAA, courts will honor

[31] *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *James & Jackson LLC v. Willie Gary LLC*, 906 A.2d 76, 80 (Del. 2006).
[32] *Preston v. Ferrer*, ___ U.S. ___, 128 S.Ct. 978, 988 (2008) (quoting *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272, 115 S.Ct. 834 (1995) and citing cases); *see also Southland*, 465 U.S. at 1.
[33] Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326, 327 (2007) ("[S]tate arbitration law occupies a secondary role" to the FAA because of "its narrow interpretation to only intrastate commerce.").
[34] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The [FAA] establishes that, as a matter of federal law, 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.").
[35] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1 at 24, 25 n.32).

that preference only if the parties "clearly evidence their intent to be bound by such rules."[36] For the reasons previously articulated, there is "clear[] evidence" that the parties here intended the DUAA to govern their agreement.[37]

4. Business Planning Is Estopped To Deny The DUAA Controls

Alternatively, to allow Business Planning, the first party to specifically invoke the DUAA, to now change its position to advance its litigation aims would offend equitable principles. In particular, the doctrine of quasi-estoppel precludes Business Planning from changing its position now in litigation to gain an advantage. That doctrine "'precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken.' Quasi-estoppel applies when it would be unconscionable to allow a person 'to maintain a position inconsistent with one to which he acquiesced, or from

[36] *Sovak v. Chugai Pharm Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002) (quoted parenthetically in *Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *6 n.42 (Del. Ch. 2005)); *see also Mastrobuono*, 514 U.S. at 61-62; *Volt*, 489 U.S. 468; *cf. Preston v. Ferrer*, 128 S.Ct. at 988 (discussing the differences between *Mastrobuono* and *Volt*).

[37] *Sovak v. Chugai Pharm Co.*, 280 F.3d at 1269. One other point that is notable, is that the parties did not contract for application of the AAA rules to their agreement, a factor the U.S. Supreme Court recently found to cut in favor of the parties' desire to have the FAA control over inconsistent state arbitration laws. *See Preston v. Ferrer*, 128 S.Ct. at 988 (2008) (suggesting strongly that if an arbitration agreement incorporates the AAA rules by reference, that fact would overcome any showing by a choice-of-law clause that parties' agreed to arbitrate under a state arbitration act, and would have changed the result in *Volt*).

In the absence of clear evidence the parties intended the DUAA to control, application of §§ 5702(c) and 5703(c) would be preempted by the FAA. *Application of Prudential Secs. Inc.*, 205 A.D.2d 424, 425 (N.Y. App. Div. 1994) (holding that nearly identical New York statutory provisions, 74 N.Y. CPLR §§ 7502(b) & 7503(c) (2008), were preempted by the FAA); *see Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. at 84 (arbitrators decide the statute of limitations); *contra Matter of Propulsora Ixtapa Sur, S.A. De C.V. v. Omni Hotels Franchising Corp.*, 211 A.D.2d 546, 546 (N.Y. App. Div. 1995) (holding the FAA did not preempt because the FAA was "silent" as to arbitrability of a limitations period).

which he accepted a benefit.'"[38] "To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another . . . ."[39]

When it invoked the DUAA in the First Notice, Business Planning sought to ascertain whether Personnel Decisions would seek to challenge the validity or performance of the Development Agreement and whether Personnel Decisions would argue that any then-existing claims were barred by the statute of limitations. Otherwise, Business Planning threatened that Personnel Decisions would not have the right to challenge them in court. Aside from the benefits Business Planning received from its offensive use of § 5703(c) of the DUAA, its invocation of that statute caused a material detriment to Personnel Decisions. In reliance on Business Planning's consistent invocation of the DUAA, Personnel Decisions filed suit on a theory unique to the DUAA and researched and prepared several briefs to the court on terms of the DUAA, all for a proceeding with a limited scope.

Similarly, the equities do not favor Business Planning. It had full knowledge of all relevant facts necessary to make a determination of the DUAA's application during the period 2003 to 2007.[40] Its self-interested 180 degree turn is graceless. Business Planning is properly stuck with life as it understood it until I sent my letter, a life under the DUAA.

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[38] *Albertson v. Winner Automotive*, 2004 WL 2435290, at *4 (D. Del. 2004) (quoting *Bott v. J.F. Shea Co., Inc.*, 299 F.3d 508, 512 (5th Cir. 2002)).

[39] *KTVB, Inc. v. Boise City*, 486 P.2d 992, 994 (Idaho 1971) (quoting *Yuen Shee v. London Guarantee & Acc. Co.*, 40 Haw. 213, 1953 WL 7558, at *10 (Haw. 1953)).

[40] *Cf.* 13 WILLISTON ON CONTRACTS § 39:34 (4 ed. 2000) (constructive knowledge is sufficient to effect a waiver); *see also Pabst Brewing Co. v. City of Milwaukee*, 105 N.W. 563 (Wis. 1905).

B. Resolving The Dispute Under The DUAA

Because I have determined that the DUAA applies, I now address the parties' primary dispute — whether the DUAA permits Personnel Decisions to seek to enjoin the arbitration proceedings because Business Planning's AAA Demand was made at a time when the underlying claims were time-barred. As I will detail momentarily, the interplay of competing subsections of §§ 5702 and 5703 of the DUAA creates an ambiguity in the statute that must be resolved. This result should not be surprising — this court has on many different occasions commented on the twisted and ambiguous nature of these sections of the DUAA.[41]

Personnel Decisions asserts that it is entitled to ask this court to enjoin the arbitration under the plain language of 10 *Del. C.* § 5702(c) because Business Planning's arbitration claims were time-barred at the time Personnel Decisions made a demand for arbitration in August 2007.[42] Section 5702(c) provides in relevant part:

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[41] *E.g.*, *Pettinaro Constr. Co.*, 408 A.2d at 959 ("The Delaware General Assembly, in adopting the Uniform Arbitration Act, made several inexplicable changes, some of which have led to ambiguities. The entire section 5703 is peculiar to Delaware and the language of § 5703(a) and (c) are hopelessly inconsistent."); *see also W.B. Venables & Sons, Inc. v. Bd. of Educ. of Seaford Sch. Dist.*, 1981 WL 88263, at *6 (Del. Ch. June 15, 1981) ("[I]t is difficult to comprehend what the General Assembly had in mind when it enacted those provisions [relating to post-arbitration judicial review of the statute of limitations period] as part of our law."); *Dresser Indus., Inc.*, 1999 WL 413401, at *5 n.5 (suggesting the General Assembly might consider conforming the DUAA to the Uniform Arbitration Act in this regard).

[42] Business Planning makes another argument worthy of brief discussion. It claims that Personnel Decisions has participated in arbitration by appearing at a scheduling teleconference and by filing a response to the AAA Demand, which would bar its access to court under § 5703(b). I do not find these actions, meant solely to preserve Personnel Decisions' rights and to avoid prejudice, to constitute "participat[ion]" under § 5703(b). *Cf. City of Wilmington v. Wilmington FOP Lodge #1*, 2004 WL 1488682, at *7-8 (Del. Ch. June 22, 2004) (finding that a party did not participate in the arbitration when it helped select an arbitrator and set the place and time of the arbitration, but had not participated in discovery).

> If, *at the time that a demand for arbitration was made* or a notice of intention to arbitrate was served, *the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the State*, a party may assert the limitation as a bar to the arbitration on complaint to the Court as provided in § 5703(b) or by way of defense in an existing case.[43]

Section 5703(b), in turn provides:

> Subject to [§ 5703(c)], a party who has not participated in the arbitration and who has not been made or served with an application to compel arbitration *may file its complaint with the Court seeking to enjoin arbitration on the ground that* a valid agreement was not made or has not been complied with or that *the claim sought to be arbitrated is barred by limitation of § 5702(c).*[44]

Business Planning recognizes this language, but counters by arguing that a different provision dealing with the contents of the statutorily required notice of intention to arbitrate, § 5703(c), should take precedence over § 5702(c). It notes that § 5703(c) is read into § 5702(c), through § 5703(b). Section 5703(c), in relevant part, states the following:

> A party must serve upon another party a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to enjoin the arbitration within 20 days after such service such party shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in Court the bar of a limitation of time. . . . A complaint seeking to enjoin arbitration *must be made by the party served within 20 days after service of the notice* or the party shall be so precluded.[45]

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[43] 10 *Del. C.* § 5702(c) (emphasis added).
[44] 10 *Del. C.* § 5703(b) (emphasis added).
[45] 10 *Del. C.* § 5703(c) (emphasis added).

In other words, Business Planning contends that § 5703(c) is an absolute bar on seeking an injunction, even though Personnel Decisions is not seeking an injunction within 20 days of receiving a *notice of intention to arbitrate* (a "Notice"), but rather, based on the claims being time-barred at the time it received a *demand for arbitration* (a "Demand") in accordance with § 5702(c)'s option to seek an injunction if the underlying claims are time-barred at the time of a Notice *or* at the time of a Demand.

One of the peculiarities underlying this case stems from Business Planning's attempt to exploit the ambiguity in the language of the DUAA that bifurcates the Notice from the Demand. Business Planning argues that because § 5703(c) refers only to Notice, a Notice can exist separately from a Demand and in essence serve as a placeholder complaint.[46] That reading of the DUAA separates Notice from Demand in a manner unsupported by most, if not all other sources of arbitration law. The American Arbitration Association and the leading commercial arbitration treatise view Notice and Demand as one and the same because they are typically part of the same package — the document that commences arbitration must also necessarily be communicated to one's arbitration adversary.[47] In other words, as in litigation, service of an arbitration Notice usually is contemporaneous with or follows the filing of the document stating the claims and formally commencing the adversarial process, which in this case was Business

[46] 10 *Del. C.* § 5703.
[47] *See* AAA Commercial Arbitration Rule R-4(a)(i), (ii), *available at* http://www.adr.org/sp.asp?id=22440#R4 (stating that "[t]he initiating party (the 'claimant') shall, within the time period, if any, specified in the contract(s), give to the other party (the 'respondent') written notice of its intention to arbitrate (the 'demand')" and that "[t]he claimant shall file at any office of the AAA two copies of the demand"); LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 18:2, at 18-2 (3d ed. 2007) (stating that the "demand for arbitration" is "often called 'notice of intention to arbitrate' in statutory language").

Planning's Demand.[48] In light of arbitration practice, the better approach to reading the DUAA's ambiguous language and lack of explicit definitions of Notice and Demand is that the Notice and the Demand are generally part of the same package. Stated differently, the General Assembly's separation of Notice from the Demand in § 5703(c) does not indicate that a Notice can exist in the absence of the Demand, but that the simultaneous or subsequent formal service of a Notice compliant with § 5703(c) can have the effect of invoking the 20-day period for seeking pre-arbitration judicial review of the covered defenses.

In fact, in a prior case where a party attempted to exploit the DUAA's opaque language on Notice and Demand, this court held that a Demand can serve as a Notice when it meets the statutory requirements for a Notice and is served on the other party.[49]

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[48] This is not to suggest that these terms are not ambiguous and that the plain language of "notice of *intention* to arbitrate" does not suggest that the Notice might come before the Demand. Nevertheless, that plain language reading does not comport with the use of "notice of intention to arbitrate" as an arbitration term of art that contemplates Notice and Demand being the same or the general understanding that in litigation, which is the closest analog to arbitration proceedings, notice is given at or after the filing of the complaint. An unscientific search of the relevant case law suggests Delaware lawyers generally take the view that Notice is served at or *after* the Demand. *See*, *e.g.*, *Nutzz.com, LLC v. Vertrue Inc.*, 2006 WL 2220971, at *3 (Del. Ch. July 25, 2006) (Notice and Demand made on the same day); *Fidelity & Deposit Co. of Maryland v. State Dept. of Admin. Servs.*, 830 A.2d 1224, 1228 (Del. Ch. 2003) (Notice made following Demand); *Weymouth v. State of Delaware*, 1983 WL 17987, at *3 (Del. Ch. July 18, 1983) (same). Moreover, a party in a recent case who had every incentive to demonstrate that the Notice should precede the Demand, could not find any relevant case supporting that proposition. *See Fidelity & Deposit Co. of Maryland*, 830 A.2d at 1228 ("F & D argues that a requirement that the Notice be served before the Demand is somehow 'implied' by the statute. To buttress this 'implication' argument, F & D relies on cases from outside jurisdictions, in irrelevant legal contexts (*i.e.,* landlord/tenant law), to create a general proposition that a 'notice' must always precede some other action.").

[49] *Bd. of Educ. of the Seaford Sch. Dist. v. W.B. Venables & Sons, Inc.*, 1978 WL 171757, at *2 (Del. Ch. Dec. 18, 1978) ("The mere fact that the notice served on Seaford was captioned 'Demand for Arbitration' rather than a 'Notice of Intention to Arbitrate' should not leave Seaford in any doubt as to Venables' intentions. The distinction Seaford attempts to draw here is merely

Likewise, a recent case held that a statutorily compliant Notice can follow a Demand where that Demand was the complaint-like document that "procedurally [began] the arbitration process."[50] In that case, bifurcating the Notice from the Demand did not adversely affect the arbitration respondent because that party still had the full 20 days to seek a court injunction. The question here is whether a Notice can precede a Demand and have the effect of invoking § 5703(c)'s 20-day preclusion period where the facts indicate that that Notice did not also serve as or follow a Demand, that is, when the Notice was not complaint-like and did not procedurally begin the arbitration process.[51]

That question arises from dueling sections of the DUAA. Particularly, when §§ 5702(c) and 5703(c) are read together, § 5703(c) is ambiguous with respect to whether it prohibits judicial review where the respondent does not seek an injunction within 20 days of receiving a *Notice* because the claims were not time-barred as of that time but rather brings a prompt action at the time it receives the *Demand* because that is when the claimant first formally spelled out its claims and formally began the arbitration process.

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semantical, for it is clear that the 'Demand for Arbitration' served upon them was sufficient notice to them of Venables' intention to arbitrate."). Similarly, no harm would be done to the DUAA by construing a document entitled as a Notice as also being a Demand if it serves the function of commencing arbitration. This is less likely to happen in practice though because the document that commences arbitration with the AAA is entitled a "Demand for Arbitration." *See* AAA, Commercial Arbitration Rules Demand for Arbitration Form, *available at*, http://www.adr.org/si.asp?id=3771; *see also W.B. Venables*, 1978 WL 171757, at *2 ("I might add, that the form utilized by Venables is the official form of the American Arbitration Association and serves as their initial pleading for the institution of arbitration proceedings.").

[50] *Fidelity & Deposit Co. of Maryland*, 830 A.2d at 1228 ("By accepting F & D's position that Notice must precede the Demand (which procedurally begins the arbitration process), the court would be imposing an additional term upon the statute that was not put in place by the legislature.").

[51] These arcane issues about Notice and Demand that have been generating litigation over the last 30 years could be resolved by the General Assembly either conforming the DUAA to the Uniform Arbitration Act or rewriting the statute to resolve these issues. *See* note 41, *supra*.

Because of this ambiguity, I will attempt to find the construction of the DUAA that does the least violence to the statute, and that "resolve[s] the ambiguity by reconciling its language with the legislative intent."[52] In doing so, I look to the statute as a whole and seek to avoid "literal or perceived interpretations which yield mischievous or absurd results."[53]

Under Business Planning's view of the DUAA, §§ 5702(c) and 5703(c) operate to create the ultimate "gotcha" provision to advantage indolent claimants. All a claimant needs to do to deny its arbitration adversary an injunction preventing arbitration of time-barred claims is to send a Notice at a time when the underlying claims are not time-barred and then wait to file a Demand until after the statute of limitation expires. A respondent would be thereby precluded from raising an argument in a petition to enjoin at the time of the Notice — any argument would be frivolous at that time — and the respondent would also be precluded from asserting ripe defenses at the time of the Demand.[54] Such an

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[52] *Daniels v. State*, 538 A.2d 1104 (Del. 1988); *see also* NORMAN J. SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:5, at 212, 216 (7 ed. 2007) ("If doubt or uncertainty exists as to the meaning or application of a statute's provisions the court should analyze the act in its entirety and harmonize its provisions in accordance with legislative intent and purpose.").

[53] *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989) (citing *Daniels v. State*, 538 A.2d 1104, 1110 (Del. 1988); *Burpulis v. Director of Revenue*, 498 A.2d 1082, 1087 (Del. 1985)).

[54] Although the text of § 5714(a)(5) of the DUAA suggests a meaningful post-arbitration judicial review of arbitration awards for time-barred claims, the confusion caused by the various DUAA provisions inspired a decision of this court suggesting that post-arbitration review of such defenses is not available. *W.B. Venables*, 1981 WL 88263, at *7 ("Boiled down, the Delaware Act seems to hold that unless a timely application is made to the Court under § 5703 to enjoin arbitration, the decision on a Statute of Limitations defense is left to the discretion of the arbitrators and is not subject to a later review on the merits by the Court."). Under the reasoning in *W.B. Venables*, the reference in § 5714(a)(5) to the § 5702(c) time-limitations section was added merely to give effect to other provisions in the statute, and not to provide for another review of an arbitrators' determination of a time-bar doctrine. *See id.* That reasoning, to be

interpretation of the statute seems contrary to the General Assembly's discernable intent in enacting § 5702(c) and to other relevant principles of our public policy.

Taken to its extreme, a claimant could rekindle a dispute before an arbitrator dozens or even hundreds of years later without allowing a respondent access to court so long as the claimant served a Notice before the claim was time-barred. Under Business Planning's interpretation, any party to an arbitration agreement seeking to prohibit judicial review could (and should) send a Notice immediately after its execution that merely identifies the "agreement pursuant to which arbitration is sought," thereby forever precluding the other party from enjoining the arbitration of time-barred claims.[55] Business Planning's choice to wait for four years after filing the First and Second Notice in 2003 — a full year longer than another full application of the relevant limitations period — suggests that these absurd hypotheticals are not inconceivable.

Allowing the Notice to be in effect forever in such a circumstance would be at odds with policy determinations made in analogous areas of Delaware law. Delaware has a strong policy against giving substantive weight to placeholder actions. In one manifestation of that policy, the filing of a complaint and praecipe does not toll the

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candid, seems inconsistent with the plain language of § 5714(a)(5). That language says that a party precluded from seeking pre-arbitration review of a limitations defense by a court may seek to vacate an arbitration award on the grounds that the claims were time-barred so long as the party presented that defense to the arbitrator and gave him a chance to consider it in the first instance. In fact, a comparison of § 5714(a)(5) to its corresponding provision in New York's arbitration act — an act that predates the DUAA and contains nearly identical language to §§ 5702(c) and 5703(c) — indicates that the General Assembly consciously departed from the New York act's model to confer a substantive post-arbitration review by a court. *Compare* 10 *Del. C.* § 5714(a)(5) *with* N.Y. CPLR § 7511(b)(2)(iv); *compare* 10 *Del. C.* §§ 5702(c) & 5703(c) *with* N.Y. CPLR §§ 7502(b) & 7503(c).

[55] This result would occur, in part, because of the minimal notification requirements for a Notice, which on the face of § 5703(c) do not even include a statement of the asserted claim.

statute of limitations unless the summons is delivered in a timely manner.[56] In another, a Delaware court applying the *McWane* doctrine, "typically will defer to a first-filed action in another forum and will stay Delaware litigation pending adjudication of the same or similar issues in the competing forum."[57] But Delaware courts do not give any effect for the purposes of first-filed status where the other litigation is merely a placeholder action that has not been perfected by proper service of a complaint.[58] Delaware's public policy against the pre-textual tolling of limitations periods and the securing of a preferred forum cuts against Business Planning's interpretation of the DUAA.

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[56] *See*, *e.g.*, *Russell v. Olmedo*, 275 A.2d 249, 259 (Del. 1971) ("[O]rdinarily the filing of an action will commence the tolling of the statute of limitations, but . . . this is subject to the requirement that the plaintiff diligently seek to bring the defendant into court and subject him to its jurisdiction."); *cf.* Court of Chancery Rule 41(b), (e) (providing for the dismissal of cases where the plaintiff has failed to prosecute or the case has been inactive for one year). And, more analogous to the facts of this case, just saying that you are planning to sue someone without formally acting on that statement does not toll the statute of limitations. *See* 10 *Del. C.* § 8106 (stating that "no action" based on a breach of contract "shall be brought after the expiration of 3 years from the accruing of the cause of such action"); Court of Chancery Rule 3(a)(1) ("An action is commenced by filing with the Register in Chancery a complaint . . . ."); *cf.* 18 *Del. C.* § 6856 ("A plaintiff may toll the [two-year statutes of limitations for a claim against a health care provider for personal injury] for a period of time up to 90 days from the applicable limitations contained in this section by sending a Notice of Intent to investigate to each potential defendant.").

[57] *Fort James Corp. v. Beck*, 2005 WL 2000761, at *4 (Del. Ch. Aug. 16, 2005) (quoting DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 5-1 (2005)).

[58] *See*, *e.g.*, *Caithness Resources, Inc. v. Ozdemir*, 2000 WL 1741941 (Del. Ch. Nov. 22, 2000) ("The [*McWane*] doctrine, however, is not meant to provide comfort to indolent plaintiffs who do no more than file a placeholder in another state without a complaint that informs the defendant of the claims it faces."); *Joyce v. Cuccia*, 1996 WL 422339, at *5 (Del. Ch. July 24, 1996) ("A plaintiff cannot file a complaint, keep that pleading in his 'back pocket' by withholding service and not informing the adverse party of its pendency, and later . . . be heard to argue that the first complaint is a 'first filed' action . . . ."); *Stepak v. Tracinda Corp.*, 1989 WL 100884, at *6 (Del. Ch. Aug. 18, 1989) ("The formality of filing a complaint, while taking no step to actually commence litigation, cannot alone have significance.").

Rather, the more sensible resolution of this statutory ambiguity is to read the DUAA in accord with the General Assembly's objectives in adopting the scheme of review for limitations of time found in §§ 5702(c), 5703(c), and 5714(a)(5). This is accomplished by reading § 5703(c) to bar a pre-arbitration judicial review of those defenses only when a claimant has filed all the documents necessary to truly begin the arbitration process — that is, when the Notice accompanies the Demand or is sent after it.[59] When a claimant has done that, § 5703(c)'s 20-day time-bar kicks in. But when it has not, § 5702(c) gives the respondent an independent right to pre-arbitration judicial review if the claims are time-barred as of the time a later Demand is filed.

This reading gives effect to both § 5702(c) and § 5703(c) in a way that does not encourage arbitration claimants to file a premature Notice not accompanied by all the documents required to genuinely initiate the arbitration process, bifurcate that Notice from a Demand, and delay for an absurd length of time before sending the second of two documents that are ordinarily sent on the same day. Moreover, it does not enable a party to use the Notice as a placeholder to preclude an appropriate injunction.[60] This reading

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[59] This is not to say that parties are required to involve the AAA or its rules to arbitrate their disputes, although the admitted reality is that they commonly do. When they do not, this reading of the DUAA requires that, to be effective, the Notice must accompany or follow the document or documents that in reality begin the arbitration process.

[60] I recognize that another way to interpret the statute is that a party in Personnel Decisions' position cannot obtain judicial review of its limitations defenses until after the arbitration is concluded, using § 5714(a)(5). That is, under this approach a party in Personnel Decision's predicament is cut off — or "precluded" in § 5703(c)'s terms — from enjoining the arbitration on limitations grounds, but can seek review of that limitations defense from a court in post-arbitration vacatur proceedings under § 5714(a)(5) so long as it has presented that defense to the arbitrator. That reading is plausible, although *W.B. Venables* casts doubt on it. *See* note 54, *supra*. But, in my view, the General Assembly's desire to protect respondents facing stale claims by permitting pre-arbitration review and Delaware's general policy against tactical games-

also gives meaning to the word "or" in § 5702(c), by reading it as envisioning that a respondent would not lose its right to present an injunction application if the claimant filed a timely Notice, but then sat on its hands before genuinely initiating the arbitration process by making its Demand.[61] By allowing a party to attack a torpid Demand, this reading of § 5703(c) discourages claimants from dilatory tactics of this kind.

This interpretation likewise comports with the objective that the General Assembly had in adopting those sections of the DUAA, which becomes apparent upon a comparison to other adoptions of the Uniform Arbitration Act. Although the general intent behind the DUAA is a desire to encourage arbitration, §§ 5702(c), 5703, and 5714(a)(5) indicate another objective. The General Assembly evinces a desire for parties facing arbitration to have the ability to seek an injunction against the arbitration of time-barred claims. That desire is obvious because the Uniform Arbitration Act does not have counterpart provisions to the DUAA that contemplate pre-arbitration judicial review of time bar defenses. Delaware is one of a select few states to add a provision like § 5702(c) to its version of the Uniform Arbitration Act.[62]

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playing through the use of placeholder filings suggests permitting Personnel Decisions to proceed now in reliance on the language of § 5702(c) permitting judicial review.

[61] This is not the first time this court has observed that the General Assembly expressly included the ability to seek judicial review based on the Demand rather than just the Notice because it contemplated claimants playing games with the Notice. *See Fidelity & Deposit Co. of Maryland*, 830 A.2d at 1229 n.12 (observing that the ability to seek judicial review if the underlying claim is time-barred at the time of Demand allows the respondent to seek judicial review immediately upon learning of a Demand without having to wait for Notice in a situation where the claimant delays in sending Notice).

[62] *See* N.Y. CPLR §§ 7502 & 7503; GA. CODE ANN. §§ 9-9-5 & 9-9-6. These provisions of the DUAA are almost identical to New York's arbitration act, which predates the DUAA's 1972 enactment date.

Taken together, the relevant policy considerations counsel in favor of allowing Personnel Decisions to present its Limitations Defenses in this action. By allowing it to do so, the policy interest in ensuring that arbitration claimants do not file placeholder Notices and then unreasonably delay in actually stating their claims is advanced. So too is the General Assembly's policy judgment, which is contrary to the FAA or Uniform Arbitration Act, that our courts should be open to hear injunction actions. Finally, so long as this court requires Personnel Decisions to move with dispatch there will be no unreasonable potential for abuse, especially given the pressures for timely action that already influence respondents.[63]

IV. Conclusion

For the foregoing reasons, Personnel Decisions motion for a preliminary injunction is GRANTED, and Business Planning's motion to dismiss is DENIED.

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[63] Although my reading of § 5702(c) does not subject a respondent to a specific deadline for seeking an injunction absent an effective § 5703(c) Notice, the respondent must seek an injunction quickly after receiving a Demand because the respondent either participates in the arbitration, after which it cannot seek an injunction, or it delays participation in the arbitration after receiving a Demand and risks the entry of a default arbitration award. *See* 10 *Del. C.* § 5703(b). Moreover, a party seeking injunctive relief must move promptly or face the bar of laches. *See*, *e.g.*, *Wright v. Scotton*, 121 A. 69, 72 (Del. 1923) ("The rule is well established, independent of any statute of limitations, that if a party is guilty of laches or unreasonable delay in applying for an injunction, he thereby forfeits his claim to that special form of remedy.").