IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

ROSEMARY ORNER, Petitioner, v. COUNTRY GROVE INVESTMENT GROUP, LLC, et al., Respondents.	)))))))))	C.A. No. 2245-VCS

MEMORANDUM OPINION

Date Submitted: August 10, 2007
Date Decided: October 12, 2007

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STRINE, Vice Chancellor.

I. Introduction

This case originally involved a complaint by plaintiff Rosemary Orner to enjoin three affiliated defendants, each of which is a limited liability company, from arbitrating certain claims they had filed against Orner. The case is now about whether an arbitration award entered for the affiliated defendants, and against Orner, (the "Award") should be vacated. The case underwent this transformation because the arbitrator, Paul Cottrell (the "Arbitrator"), decided to proceed with the Arbitration in the absence of a court order staying or enjoining the proceeding. After receiving several clear communications from the Arbitrator of that intention — including an order to that effect — Orner neither sought expedited treatment of her request for an injunction against arbitration nor prepared for arbitration. Indeed, when the date for the Arbitration hearing came, Orner failed to show up. The Arbitrator's staff called Orner's counsel to ask where he was, and was told that Orner would not participate.

The Arbitrator went on to hold the hearing and issued a detailed decision, rendering the Award in favor of the affiliated defendants. Orner and the affiliated defendants have since tangled in submissions about the consequences of this odd course of events.

In this decision, I conclude that the entry of the Award does not render this case moot because Orner may, as she has done, seek to have the Award vacated. Orner makes two arguments as to why the Award should be vacated. The first is that the dispute that was arbitrated was not arbitrable under an agreement with one of the defendants and therefore the Arbitrator had no authority to enter an Award against Orner on claims she

had not agreed to arbitrate. In this decision, I conclude that an extremely capacious arbitration clause included in a contract between Orner and one of the affiliated defendants does, when interpreted under Maryland law principles as it must be, cover the claims that were arbitrated.

The second argument that Orner makes is that the Award must be vacated because the Arbitrator abused his discretion by refusing to stay the Arbitration until this court ruled on Orner's request to enjoin the Arbitration. I also reject that argument. Orner proceeded in this court with no urgency. She did not seek expedited treatment, even after receiving notice from the Arbitrator on several occasions that the Arbitration would not be stayed in the absence of a court order. Rather than moving with alacrity in this court, Orner took the least responsible course of action possible. She sat on her hands here and simultaneously ignored her obligations under the scheduling order set by the Arbitrator, failing to attend to deadlines or even to appear at the Arbitration. In view of that course of conduct and the clear notice the Arbitrator had given of his intent to proceed — notice which gave Orner the chance to seek expedition here — I cannot find that the Arbitrator abused his discretion in refusing to postpone the Arbitration. Therefore, I find no basis to vacate the Award and will enter a judgment in the affiliated defendants' favor enforcing that Award.

II. Facts

Here are the key undisputed facts as they emerge from the record before me, such as it is.[1]

Plaintiff and Delaware resident Rosemary Orner is a real estate agent with Re/Max Premier Properties Ltd. in Ocean City, Maryland, who also sells homes across the border in Sussex County, Delaware. Defendant Country Grove Investment Group, LLC ("Investment Group") is a Maryland LLC formed by a Maryland family named the Colemans for the purpose of facilitating their participation in various real estate development activities. In particular, Investment Group was used by the Colemans as the entity facilitating their involvement in developing two residential housing developments in Sussex County, Country Grove and Oakridge Village. To that end, eponymously named, affiliated Delaware LLCs, defendants Maryland Shore Homes at Country Grove, LLC ("Country Grove") and Maryland Shore Homes at Oakridge Village, LLC ("Oakridge Village"), were formed. Because the defendants are affiliates and take a common position on the issues before the court, I generally refer to them collectively as the "Investment Group."

In November of 2004, the Investment Group's Oakridge Village affiliate orally reached an agreement of some sort with Orner and her employer, Re/Max Premier Properties, Ltd., for Orner to sell homes located in the Oakridge Village development. In January of 2005, the Investment Group expanded its relationship with Orner, through its

[1] The record is not ideal. The parties' submissions cull together the key documents in a less than organized and comprehensive manner.

Country Grove affiliate, and authorized her to sell homes in the Country Grove development. As with the prior agreement, Orner's understanding as to her role in selling homes at Country Grove was not committed to writing.

Shortly after having been engaged to find buyers for the Investment Group's Oakridge Village and Country Grove developments in Sussex County, Orner and her husband bought two non-voting shares in the Investment Group for $100,000. In purchasing her units, Orner executed a Subscription Agreement that contained a broad arbitration clause (the "Arbitration Clause") purporting to require arbitration before the American Arbitration Association ("AAA") to resolve "*any and all claims* (other than claims for injunctive or other equitable relief) *now or at anytime hereafter* as to which the *Company* [defined as the Country Grove Investment Group, LLC], its officers or Manager, *their affiliates*, attorneys, accountants, agents or employees and the undersigned [i.e., Orner], his successors or assigns may be adverse parties, whether arising out of this agreement *or from any other cause*."[2] The Subscription Agreement contained a provision specifying that its terms were to be interpreted under the laws of Maryland.

On January 6, 2006, the Investment Group terminated Orner's right to sell homes at Country Grove and Oakridge Village. Three days later, Orner locked the doors to a model home in Oakridge Village that she was renting to the Investment Group for use as

[2] Letter from Joseph C. Raskauskas to Vice Chancellor Leo E. Strine, Jr., August 27, 2007, at Ex. 1 (Class A Non-Voting Shares Subscription Agreement) (hereinafter "Subscription Agreement"), at 6-6 (emphasis added).

a sales office. The Investment Group and Orner soon disputed who owed who what in the wake of the break-up. For its part, the Investment Group alleged that Orner failed to perform in her role as its real estate agent and pointed to instances where she kept a model home in Oakridge Village open only intermittently, failed to return telephone calls to prospective home purchasers, failed to post lots on the Multiple Listing Services, made MLS posts that were both misleading and unethical, made promises of delivery dates to home buyers that she knew were unrealistic, and overstated claims to commissions. On June 9, 2006, the Investment Group filed a demand for arbitration before the AAA making these allegations.

For her part, Orner claimed that between November 2004, and her termination on January 6, 2006, she sold 24 homes on behalf of Country Grove and Oakridge Village and was owed commissions for several of those sales. The various claims and contentions of Orner and the Investment Group regarding their duties to each other arising out of Orner's efforts to sell homes in the Country Grove and Oakridge Village developments will be referred to simply as the "Commissions Dispute."

For the sake of clarity, it is also useful to note that the Commissions Dispute does not require for its resolution the enforcement or interpretation of the Subscription Agreement. The only relevance of the Subscription Agreement to the Commissions Dispute involves the question of whether the Arbitration Clause requires that Dispute to be arbitrated, rather than litigated in a court.

When the Investment Group filed for arbitration with the AAA, it sought to have the Arbitration conducted in Towson, Maryland. On June 27, 2006, Joseph Raskauskas,

as attorney for Orner, sent a letter to the AAA arguing that the Commissions Dispute was not arbitrable and that if the dispute was arbitrable, Towson, Maryland was not acceptable as the site for arbitration. The latter objection was consistent with the Arbitration Clause itself, which gave Orner, as the party defending the Arbitration, the right to "select" the "site[] of arbitration . . . provided that such site[] is within the United States and is the site of such person's principal residence or place of business."[3] She chose Delaware.

The very next day, Orner filed this suit purporting to have this court enjoin the Arbitration under § 5703(b) of the Delaware Uniform Arbitration Act ("DUAA").[4] Orner did not seek expedited treatment of her claim.

On June 30, 2006, the AAA advised the parties that "in the absence of an agreement by the parties or a court order staying this matter, the [AAA] will proceed with administration pursuant to the Rules."[5] In the wake of that notice, Orner did not seek expedition of this case. Instead, on August 30, 2006, Orner requested postponement of the Arbitration from the AAA pending the outcome of this suit.

That request was denied at a preliminary hearing held on November 8, 2006, before the Arbitrator. The Arbitrator then ruled that he would defer the issue of arbitrability to the Court of Chancery and set a schedule for the case "[u]ntil a court

[3] Subscription Agreement at 6-6.
[4] 10 *Del. C.* § 5703(b).
[5] Hjortsberg Aff. Ex. B (Letter from Paris N. Earp, AAA Case Manager, June 30, 2006), at 18.

ruling is issued."[6] In his later Award of April 4, 2007, the Arbitrator recalled his rulings at the November 8, 2006 preliminary hearing teleconference:

> I advised that, given the Petition pending in the Chancery Court, I would not decide issues of arbitrability, but that the arbitration would proceed unless [Orner] obtained a court order enjoining it. As stated during this call, I also scheduled the arbitration hearings to take place in March 2007 in order to give the Respondent sufficient time to secure a decision from the Chancery Court.[7]

On behalf of Orner, Raskauskas has continued to insist that he believed that if it came down to it, the Arbitrator would stay the Arbitration proceedings if this court had not yet ruled on Orner's contention that the Commissions Dispute was not arbitrable.

The problem with that argument is that the undisputed record of communications from the AAA and the Arbitrator belie it. As noted, the AAA sent a confirmatory letter to Raskauskas and Maryland counsel for the Investment Group, dated November 21, 2006, confirming the various deadlines the Arbitrator had established at the November 8 conference. These included the requirements to exchange document requests by December 1, 2006, produce those documents on or before January 8, 2007, attempt to agree to exhibits on or before February 23, 2007, and complete discovery on or before February 28, 2007. Most important, the letter confirmed that the Arbitrator had set March 6, 7 and 8, 2007 down as the dates on which the final hearing would be held. To make things even clearer, the AAA also sent a notice of hearing on November 27, 2006,

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[6] Letter from Joseph C. Raskauskas to Vice Chancellor Leo E. Strine, Jr., August 9, 2007, at Ex. 6 (Letter from Karen Fontaine, AAA Case Manager, to Parties, November 21, 2006).
[7] Hjortsberg Aff. Ex. D (Order and Award of the American Arbitration Association, April 4, 2007) (hereinafter "Arb. Award"), at 3-4.

further advising Orner that those dates should be marked prominently on her calendar. Still, Orner did not seek to have her case in this court expedited.

On December 28, 2007, Orner again asked the AAA for a postponement of the Arbitration. By that time, Orner had already missed a December 1, 2006 deadline to exchange document requests with the Investment Group.[8] Orner's lack of action was consistent with her overall approach to the Arbitration process. Despite the lack of any order by the AAA or the Arbitrator staying proceedings, Orner's counsel simply ignored the schedule set by the Arbitrator and clearly communicated to Orner and him by the AAA.[9] Orner's counsel Raskauskas appeared to be content to rely on the notion that the Arbitration hearing could not take place until the resolution of this case.[10]

At the same time, however, Raskauskas continued to fail to seek expedition of this case. At most, Raskauskas haggled with his opposing counsel in this action over a briefing schedule, purporting to make his agreement to a briefing schedule contingent on his opponent's agreement to have the Arbitration postponed. No agreement to that effect was ever reached. Yet, Raskauskas never approached the court on behalf of Orner to ask

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[8] In a letter dated January 17, 2007 sent to the AAA and copied to Orner's counsel Raskauskas, the Investment Group's lawyer, Matt Hjortsberg, described Raskauskas as confirming via voicemail messages that Orner "ha[d] no intention of producing any documents given her pending, yet dormant, action . . . to stay the Arbitration." Hjortsberg Aff. Ex. C (Letter from Matthew G. Hjortsberg to Robert E. Leif, AAA Case Manager, January 17, 2007), at 1.

[9] *E.g.*, Glikin Aff. Ex. A (Letter from Joshua A. Glikin to Paul Cottrell, February 21, 2007), at 2 ("Finally, although the Scheduling Order in this Arbitration requires the parties to agree on exhibits for the arbitration no later than Friday, February 23, 2007, Mr. Raskauskas has stated unequivocally that he will not agree to anything related to this Arbitration.").

[10] According to the Arbitrator, "[Orner]'s counsel also asserted on various occasions that the arbitration hearing could not legally take place because a Chancery Court action contesting arbitrability had been filed. In response, [the Arbitrator] stated that, in the absence of an order from the Court, the arbitration hearing would proceed." Arb. Award at 4.

for expedition. Instead, he proceeded with a briefing schedule that culminated on March 22, 2007, *after* the Arbitration hearing was to be completed.

The AAA continued to make its position regarding the procession of the Arbitration plain. In January, the Investment Group had opposed the continuance of the Arbitration requested by Orner. On February 8, 2007, the Arbitrator rejected Orner's request for a continuance and ordered that the Arbitration scheduled for March 6, 7, and 8 would proceed.

Despite receiving an order clearly indicating that the Arbitration would proceed as scheduled, Orner did not move to expedite this case or for any order of this court staying the Arbitration hearing until the arbitrability question could be resolved.

March 6, 2007 arrived. The Arbitrator was ready to hear the Commissions Dispute. The Investment Group was present. But Orner and her counsel were absent. After Orner and Raskauskas failed to show up at the scheduled time, the Arbitrator's staff called Raskauskas and asked him if he was planning on attending the Arbitration. Raskauskas indicated that he and his client Orner were not going to participate. This was consistent with an earlier decision made by Raskauskas, communicating that he would not attend and that he would be on vacation.

The Arbitrator determined to proceed with the hearing, and heard the Investment Group's evidence and arguments regarding the Commissions Dispute, which touched on matters including bonuses and commissions allegedly due Orner, rent for the lease of a model home that Orner owned which was used by the Investment Group as a sales office in the Oakridge Village development, personal property, including furnishings the

Investment Group could not recover after Orner locked the doors to the model home, the value of deposit checks and reservation lists for lots in the two developments, and the Investment Group's contention that Orner was required to return certain commissions and bonuses that had been paid to her.

On March 9, 2007, the Arbitrator directed the parties to send him their requests for proposed awards by the end of that day. Raskauskas sent a response to the Arbitrator three days later on March 12, 2007, alleging (inconsistently with the undisputed record) that the Arbitrator had agreed in the November 8, 2006 teleconference hearing and had represented that the Arbitration would be postponed until after this court had ruled, and that Raskauskas had been unaware that any joint exhibits had been filed before the hearing date. The Investment Group responded to Raskauskas, noting that the Arbitrator's Order of February 8, 2007 had made clear that the Arbitration was proceeding, and pointing out that Orner had not sought expedition in this court.

On April 4, 2007, the Arbitrator entered the Award in favor of the Investment Group in the amount of $42,136.58. The Award was accompanied by a written opinion articulating the basis for the Award.

Raskauskas claims that he did not receive a copy of the April 4 Award from the AAA, and that the first time he obtained a copy of the Award was on May 14, 2007, when his opposing counsel in this case, Craig Karsnitz, faxed one to him. The AAA Rules do not provide for any redetermination of the merits of a claim after an award is

issued, and therefore Orner contends that her only remedy for setting aside the Award is an order of this court.[11]

III. Analysis

This odd chain of events had the effect of multiplying the issues before this court. Because the Arbitration was held and an Award entered before the parties presented this court with arguments regarding whether the Commissions Dispute was arbitrable, additional questions arose. For its part, the Investment Group argued that the entry of the Award mooted this case, because Orner could no longer obtain an injunction against the procession of an arbitration that had already been held. Orner responded that the question of arbitrability remained, because if the Commissions Dispute was not arbitrable, then the Arbitrator's Award should be vacated because entering it was beyond his authority. Alternatively, Orner argues that the Award should be vacated because the Arbitrator abused his discretion by refusing to postpone the Arbitration until Orner's claim that the Commissions Dispute was not arbitrable was decided.

Distilled into questions, the following issues require resolution. First, does the Arbitrator's entry of an Award against Orner moot her argument that the Commissions Dispute was not arbitrable? Second, if not, was the Commissions Dispute arbitrable? Finally, if the Commissions Dispute was arbitrable, should Orner be granted relief from the Arbitrator's Award because she and her counsel did not, due to their own tactical

[11] *See* American Arbitration Association, Commercial Arbitration Rule R-36 (allowing the arbitrator to reopen a hearing only "before the award is made"); *id.* at R-46 ("The arbitrator is not empowered to redetermine the merits of any claim already decided.").

choice, participate in the Arbitration hearing? I address these questions in turn, after addressing a choice of law issue that the parties themselves somewhat elided.

A. Which Statute Applies: The FAA Or The DUAA?

Orner initially sought to enjoin pending and future arbitration of the Commissions Dispute under § 5703 of the Delaware Uniform Arbitration Act, and now moves that the Award be vacated under the same statute. Although the Investment Group has not quibbled much over Orner's invocation of the DUAA, I cannot apply that statute because it is inapplicable to the current dispute.

By its plain terms, the DUAA only applies when the parties make "an agreement . . . providing for arbitration in this state."[12] The DUAA does not govern the Subscription Agreement here because the parties did not make such an agreement.

The Subscription Agreement states that "[t]he sites of arbitration and any counterclaims shall be selected by the person against whom arbitration is sought provided that such site[] is within the United States and is the site of such person's principal residence or place of business."[13] That the Arbitration proceeded in Delaware results from the happenstance that the Investment Group was the party that filed for arbitration and that Orner was the respondent. Had the roles been reversed — a real possibility in this situation — the Investment Group could have "called venue" and chosen Maryland, its home state and the state whose law governs the Subscription Agreement, as the site for

[12] 10 *Del. C.* § 5702(a); *SBC Interactive, Inc. v. Corporate Media Partners*, 1998 WL 749446, at *3 (Del. Ch. 1998); *see also Gen. Elec. Co. v. Star Tech., Inc.*, 1996 WL 377028, at *11 (Del. Ch. 1996).
[13] Subscription Agreement at 6-6.

the Arbitration. In that circumstance, Orner's own argument would seem to indicate that Maryland's version of the Uniform Arbitration Act would be applicable, especially because Maryland was the choice of law the parties made in the Subscription Agreement itself.[14] In other words, in Orner's view, the question of which statute to apply to disputes like this would depend on post-signing events like which party filed for arbitration and whether a party had moved its domicile in the meantime. That sort of uncertainty is inefficient. No doubt that is a reason the DUAA clearly limits its own applicability to agreements between parties to arbitrate in Delaware.

Rather than either the DUAA or its Maryland counterpart, the Federal Arbitration Act is the statute more clearly pertinent to the Subscription Agreement.[15] The FAA governs any arbitration agreement affecting interstate commerce,[16] which the Subscription Agreement clearly does. As it turns out, the FAA's applicability has no material bearing on the outcome of this dispute. Under the FAA, parties need not arbitrate disputes that they did not agree to arbitrate.[17] To determine whether a dispute is governed by a contractual arbitration provision, courts acting under the FAA have been

[14] Maryland's trigger for the application of its arbitration act, the Maryland Uniform Arbitration Act, is arguably implicated by the choice of law provision. Md. Code Ann., Cts. & Jud. Proc. § 3-202 ("An agreement providing for arbitration under the law of the State confers jurisdiction on a court to enforce the agreement and enter judgment on an arbitration award."); *Rourke v. Amchem Prods., Inc.*, 835 A.2d 193, 209 (Md. Ct. Spec. App. 2003), *aff'd*, 863 A.2d 926 (Md. 2004) ("When an agreement's choice of law clause provides that disputes will be resolved in accordance with state law, however, the selected state's arbitration act governs issues concerning arbitration under the agreement's arbitration clause.").

[15] *SBC Interactive*, 1998 WL 749446, at *3 (refusing to apply the DUAA to an agreement and instead applying the FAA because the agreement provided for arbitration in New York City, rather than Delaware).

[16] 9 U.S.C. §§ 1 & 2.

[17] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

directed by the United States Supreme Court to apply the contract law of the state whose law governs the contract.[18] The same method would be required under the DUAA because this state's law requires that deference be paid to choice of law provisions in commercial contracts.[19] Under either of the statutes, resolution of this case therefore would require me to determine the effect of the Arbitration Clause in the Subscription Agreement under Maryland law. If that inquiry yields the result that the Commissions Dispute was not covered by that Arbitration Clause, the Award must be vacated.[20]

Likewise, the applicability of the FAA has little bearing on the question of whether the Award should be vacated because the Arbitrator refused to postpone the hearing at Orner's request.[21] Under the FAA, an arbitration award can be vacated when

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[18] *Id.* at 945; *see, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

[19] *E.g., Annan v. Wilmington Trust Co.*, 559 A.2d 1289, 1293 (Del. 1989) (applying Delaware's policy of enforcing choice of law clauses in commercial contracts where the law to be applied "bears some material relationship to the transaction").

[20] Even if neither the DUAA nor the FAA applied, traditional principles of equity make relief available to a party facing arbitration or an arbitration award as to a matter it did not agree to arbitrate. *SBC Interactive, Inc.*, 1998 WL 749446, at *4 (Del. Ch. 1998) (holding the Court of Chancery has subject matter jurisdiction to enforce, vacate, or modify an arbitration award rendered under the FAA); *Dresser Indus., Inc. v. Global Indus. Tech., Inc.*, 1999 WL 413401, at *4 (Del. Ch. 1999) ("This court's traditional equity jurisdiction also includes the authority to enjoin an arbitration because the claims sought to be arbitrated were not committed to arbitration by the parties."); *see Moss v. Prudential-Bache Sec., Inc.*, 581 A.2d 1138, 1140 (Del. 1990) ("The Court of Chancery clearly had subject matter jurisdiction to enforce awards rendered under the Federal Arbitration Act.").

[21] Orner has advanced an odd argument. Conceding the problems with her contention that the Subscription Agreement is covered by the DUAA and that the FAA therefore likely governs, she says I should apply the DUAA as a procedural set of rules, akin to rules of civil procedure. I perceive no reasonable basis to call the DUAA merely procedural, much less to substitute its substantive provisions (*e.g.* § 5714(a)(4)) for the pertinent FAA provisions (*e.g.*, § 10(a)(3)) or principles of Maryland law. *Cf. Prefatory Note to the Uniform Arbitration Act* at ii (2000) ("In contrast to the 'front end' issues of enforceability and substantive arbitrability, there is no definitive Supreme Court case law speaking to the preemptive effect, if any, of the FAA with

"the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown,"[22] a circumstance similar to that covered by § 5714(a)(4) of the DUAA.[23] Therefore, there is no perceptible conflict between the statutes.

B. Is This Case Mooted Because The Award Was Entered?

As the prior section presaged, the entry of the Award did not moot this case. Although it is, of course, true that the precise form of relief Orner originally sought — an injunction against the Arbitration — is now untimely, her underlying claim that the Commissions Dispute was not subject to an agreement to arbitrate and that the Dispute should therefore be adjudicated in a court remains viable.[24] Consent to arbitration is a question of contract, and one party to a dispute may not compel the other to arbitrate in the absence of a prior agreement to the contrary.[25]

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regard to [the standards and procedure for vacatur, confirmation and modification of arbitration awards].").

[22] 9 U.S.C. § 10(a)(3).

[23] Section 5714(a)(4) requires a court to vacate an award when "[t]he arbitrators refused to postpone the hearing upon sufficient cause being shown therefore . . . ." 10 *Del. C.* § 5714(a)(4). Notably, the Maryland Uniform Arbitration Act also uses nearly identical language, requiring a court to vacate an award when "[t]he arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement . . . ." Md. Code Ann., Cts. & Jud. Proc. § 3-224(b)(4).

[24] In *SBC Interactive, Inc. v. Corporate Media Partners*, this court found that there was "no meaningful distinction between enforcing and vacating an arbitration award and modifying an arbitration award in the context of a subject matter jurisdiction inquiry." 1998 WL 749446, at *4 n.23 (Del. Ch. 1998). Likewise, in *Dresser Industries, Inc. v. Global Industrial Technologies, Inc.*, this court found that "[t]he FAA 'does not require parties to arbitrate when they have not agreed to do so' and 'simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.'" 1999 WL 413401, at *4 (Del. Ch. 1999) (*quoting Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

[25] *E.g.*, *First Options of Chicago*, 514 U.S. at 945; *Mastrobuono*, 514 U.S. at 62-63, & n.9; *Volt Info. Sciences*, 489 U.S. at 475-76.

The Subscription Agreement contains a choice of laws provision requiring it to be interpreted in accordance with Maryland law.[26] Under Maryland law, "[t]he extent of an arbitrator's authority . . . depends on the language of the submission to arbitration. A decision by an arbitrator on any matter not referred or submitted to him is beyond his authority, and is therefore void."[27] Therefore, if the Commissions Dispute was not arbitrable, the Award must be vacated.

C. Did Orner Consent to Arbitration?

Both Orner and the Investment Group believe that this court, rather than the Arbitrator, should decide the question of whether the Commissions Dispute is arbitrable.[28] I decide that question now.

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[26] Subscription Agreement at 6-6.

[27] *Brzowski v. Md. Home Improvement Comm'n*, 691 A.2d 699, 711 (Md. Ct. Spec. App. 1997); *see also Cont'l Mill & Feed Co. v. Doughnut Corp. of Am.*, 48 A.2d 447, 450 (Md. 1946) (same); *Pumphrey v. Pumphrey*, 191 A. 235, 236 (Md. 1937) (same).

[28] The parties' agreement that I should decide arbitrability obviates the need to consider a complicated question. Because the parties chose arbitration under the AAA, a line of cases exists that considers an election to arbitrate under the AAA Rules (which permit arbitrators to decide questions of arbitrability) to be "clear and unmistakable evidence" that the parties have consented to have an arbitrator determine arbitrability sufficient to satisfy the rule of *First Options of Chicago, Inc. v. Kaplan.* 514 U.S. at 944. Our Supreme Court recently joined that line. *See James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 78 (Del. 2006) (adopting as a matter of policy the majority view that even after *First Options*, simply agreeing to arbitrate with reference to the AAA rules constitutes clear and unmistakable evidence of consent to arbitrate arbitrability). But a notable dissenter from that line has been the federal District Court for the District of Maryland, which has predicted that the Maryland Court of Appeals — Maryland's highest court — would conclude that the mere decision to use AAA arbitration was not a clear indication of the parties' agreement to have the question of arbitrability decided by an arbitrator rather than a court. *Diesselhorst v. Munsey Bldg. L.L.L.P.*, 2005 WL 327532, at *13 (D. Md. 2005) (citing *Martek Biosciences Corp. v. Zuccaro*, 2004 WL 2980741, at *3 (D. Md. 2004)). Because the Subscription Agreement is to be interpreted under Maryland law, those decisions would suggest that a court, rather than the Arbitrator, would decide whether the Commissions Dispute is covered by the Arbitration Clause in the Subscription Agreement. But there is another final pivot. Unlike Delaware jurisprudence on the point, such as *DMS*

Orner's essential argument that the Commissions Dispute is not arbitrable is a simple one. She says that the Subscription Agreement was entered into after the oral understandings by which she came to perform real estate sales work for the Investment Group's affiliates, Oakridge Village and Country Grove. Orner thus claims that there is an inference to be drawn that the later — by a few months — Subscription Agreement could not have been intended to set forth the method for resolving disputes under the parties' prior oral agreements. Rather, Orner argues that the Arbitration Clause's breadth was designed solely to make sure that any claim, of any type, she made in her capacity as an investor in the Investment Group was covered by that Clause. She says it cannot be read as addressing claims related to her separate and pre-existing status as a realtor working for the Investment Group's affiliates, Country Grove and Oakridge Village. Orner therefore asks that I interpret language in the contract which refers any dispute "arising out of th[e] agreement *or from any other cause*" to only mean any dispute "arising out of or related to" the Subscription Agreement. Under this reading, Orner claims the Commissions Dispute is not arbitrable because resolution of the Commissions

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Properties-First, Inc. v. P.W. Scott Associates, Inc., 748 A.2d 389, 392 (Del. 2000), Maryland courts have held that when an arbitration clause is broad, a doubtful question about arbitrability should be determined by the arbitrator herself, rather than a court. *Contract Cons., Inc. v. Power Tech. Ctr. LP*, 640 A.2d 251, 253 (Md. 1994); *Crown Oil & Wax Co. v. Glen Constr. Co.*, 578 A.2d 1184, 1190 (Md. 1990) (interpreting *Gold Coast Mall, Inc. v. Larmar Corp.*, 468 A.2d 91, 97 (Md. 1983)). The continuing force of that reasoning after *First Options* is, candidly, murky. *Compare Allstate Ins. Co. v. Stinebaugh*, 824 A.2d 87, 94 (Md. 2003) (suggesting in dicta that arbitrator decides) *with First Options*, 514 U.S. at 944-45 (1995) (requiring that ambiguities in who decides arbitrability be resolved by a court). Fortunately, I need not opine where that curvy road ultimately ends. Having both agreed that I should decide the question of arbitrability, Orner and the Investment Group have relieved me of the need to consider whether the Subscription Agreement contemplated that the Arbitrator would decide disputes over arbitrability.

Dispute does not require interpretation or enforcement, or even the existence, of the Subscription Agreement. To read "any other cause" as covering well, "any other cause," would in Orner's view be unreasonable because it would cover a universe of possible claims (like a car accident on the grounds of Country Grove between Orner's vehicle and one owned by the Investment Group) that the parties cannot have reasonably contemplated when entering into the Subscription Agreement.

In response, the Investment Group contends that the Arbitration Clause in the Subscription Agreement is a capacious one that clearly sweeps in any dispute between Orner, on the one hand, and the Investment Group and its affiliates, on the other. Given that Orner was invited by the Investment Group to become one of its investors shortly after having become engaged by it to act as a sales representative, the Investment Group argues that there is nothing unreasonable or unfair about giving effect to the plain words of the Arbitration Clause. Those words, when given their ordinary meaning, simply reflect an agreement between sophisticated parties with a multi-faceted commercial relationship to resolve all their disputes by arbitration. Given that the public policies of our nation and the two states in which the parties reside all favor arbitration, the Investment Group contends that there is no proper basis for a court to conclude that holding Orner to her promise threatens her with any unfairness, much less the loss of a fundamental right.

The basic Maryland contract law principles that must be applied to resolve this disagreement are familiar. As a matter of general contract interpretation it is true, as Orner notes, that Maryland courts seek "to avoid interpreting contract language between

two parties in a manner that is void of a commonsensical perspective."[29] A court may prefer a construction that makes a contract fair and reasonable over one that leads to either a harsh or unreasonable result.[30] But this preference for "reasonable" constructions over "harsh" ones is contingent upon there being an initial ambiguity in the contract.[31] Maryland law requires that all contracts be interpreted in accordance with their plain meaning. "When the words are clear and unambiguous, according to their commonly understood meaning, [a court's] inquiry ordinarily ends."[32] Particularly, in an arbitration agreement,

> [T]he courts seek to give effect to the intent of the parties, as evidenced by the agreement itself, which will be liberally construed to that end. Where the meaning of words used is in controversy, the language will be taken in its natural sense, without straining it in either direction, and it is the rule that the agreement will be construed as a whole.[33]

In other words, a court may not create a contractual ambiguity or uncertainty where none otherwise exists to avoid an undesirable result.[34] "A term of a contract is ambiguous if, to a reasonably prudent person, the term is susceptible to more than one meaning."[35] In the event of ambiguity, however, Maryland's public policy in favor of arbitration —

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[29] *Fister ex rel. Estate of Fister v. Allstate Life Ins. Co.*, 783 A.2d 194, 205 (Md. 2001).
[30] *Azat v. Farruggio*, 875 A.2d 778, 785 (Md. Ct. Spec. App. 2005).
[31] *Estate of Fister*, 783 A.2d at 203; *Azat*, 875 A.2d at 785.
[32] *Estate of Fister*, 783 A.2d at 212.
[33] *Pumphrey v. Pumphrey*, 191 A. 235, 236 (Md. 1937).
[34] *Estate of Fister*, 783 A.2d at 204.
[35] *Estate of Fister*, 783 A.2d at 203 (citing *Cole v. State Farm Mut. Ins. Co.*, 753 A.2d 533, 537 (Md. 2000)).

which is consistent with Delaware's[36] and the federal government's[37] — requires that doubt be resolved in favor of arbitrability.[38] In other words, if it is reasonable to read the contract as requiring the dispute to be arbitrated, that is how it should be read.[39]

Here, there is no ambiguity and the Commissions Dispute is plainly arbitrable. For starters, Orner concedes that that Country Grove and Oakridge Village are affiliates of the Investment Group for purposes of the Arbitration Clause.[40] That concession is unsurprising given their clear relationship to the Investment Group, Orner's knowledge of their affiliation, and her own equity investment in the Investment Group.

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[36] *E.g.*, *Ishimaru v. Fung*, 2005 WL 2899680, at *13 (Del. Ch. 2005) ("In interpreting the Arbitration Clause, Delaware public policy comes into play and requires that doubts should be resolved in favor of arbitrability when a reasonable interpretation in that direction exists.").

[37] *First Options*, 514 U.S. at 944-45 ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983))); *cf. id.* ("[T]he law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement['] — *for in respect to this latter question the law reverses the presumption*." (emphasis added) (internal quotations omitted)).

[38] *Rourke v. Amchem Prods., Inc.*, 863 A.2d 926, 942 (Md. 2004) (preferring a construction favoring arbitration, in part, because of "the ordinary mandate that, where an arbitration agreement exists, ambiguities as to arbitrability be resolved in favor of arbitration."); *see also Crown Oil & Wax Co. v. Glen Constr. Co.*, 578 A.2d 1184, 1190 (Md. 1990) ("[T]he court should promote the public policy favoring arbitration and leave the issue of arbitrability to the arbitrators.").

[39] *See Rourke*, 863 A.2d at 942; *Alamria v. Telcor Int'l, Inc.*, 920 F. Supp. 658, 663 (D. Md. 1996) (noting that the federal policy in favor of arbitration requires resolving contractual ambiguities in favor of arbitrability when interpreting a contract governed by Maryland law (citing *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989))); *see also Crown Oil*, 578 A.2d at 1190; *Gold Coast Mall*, 468 A.2d at 97.

[40] Orner Reply Br. at 2.

Equally important is that the fact that the Arbitration Clause's broad sweep is made plain not once, but twice, in the Subscription Agreement.[41] The first time the sweep of the clause emerges is in the following paragraph:

> The undersigned [Orner] hereby agrees that *any and all claims* (other than claims for injunctive or other equitable relief) *now or at anytime hereafter* as to which the Company [the Investment Group], its officers or Managers, *their affiliates*, attorneys, accountants, agents or employees and the undersigned his successors or assigns may be adverse parties, *whether arising out of this agreement or from any other cause*, will be resolved by arbitration . . . . *The parties covenant that under no conditions will any of them file any action at law against any other or bring any claim in any forum other than before the American Arbitration Association . . . .*[42]

Orner focuses her argument on the words "or any other cause," and claims that they cannot be read to cover claims not related to the Subscription Agreement itself. As will be discussed, that argument is weak in itself due to how commonplace it is for arbitration clauses to only cover claims "arising out of or related to" the underlying contract, and the fact that the words "or any other cause" are far broader. The argument is also weakened by the contractual language addressing "any and all claims" whether then extant or arising in the future.

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[41] Though its language is not controlling, additional notice to Orner can be found in the Summary of the Offering, which synopsizes the Arbitration Clause as follows: "By execution of the subscription agreement for purchase for the securities offered hereby, Investors in this Offering agree to submit to arbitration all claims arising from their investment *or from any other cause* which they may at any time assert against the Company, its Manager, his Affiliates, or his agents." Subscription Agreement at 1-2 to 1-3 (emphasis added). By its terms, the Summary of the Offering is "non-technical" and qualifies all information by reference to the actual language of the Subscription Agreement. *Id.* at 1-1.

[42] *Id.* at 6-6 (emphasis added).

But other plain language in the Arbitration Clause renders Orner's narrow reading entirely untenable. That language states that "[i]t is the intent of the parties *and their affiliates* to deal with *all* disputes between them by arbitration *to the maximum degree allowed by law* (including claims against any party's current or former attorneys, accountants, agents, employees, successors or assigns)."[43] Any rational person agreeing to these words would understand that she was binding herself to arbitrate all disputes she had with the Investment Group and its affiliates, unless there was some positive law prohibition to the arbitration of a particular dispute.

There is simply no ambiguity here. The Subscription Agreement does not contain a proviso limiting Orner's obligations under the Arbitration Clause to claims arising out of her status as an investor. Rather, all means all, with the exception of claims for "injunctive or other equitable relief." The Agreement says that all means all twice, presumably to make it inescapably clear, and presumably includes the "maximum degree" language for that same purpose.

Furthermore, Orner has not cited to any principle of Maryland law that would preclude the Arbitration Clause from covering the Commissions Dispute. Although Orner posits extreme examples like car accidents, the job of this court is to decide whether the Commissions Dispute is arbitrable. That is a commercial dispute arising between sophisticated parties involved in joint economic activity centered on two housing developments. That Orner — who was given a role in marketing and selling

[43] *Id.* (emphasis added).

homes in those developments and soon thereafter given the chance to acquire an equity interest in the Investment Group — would agree to arbitrate all commercial disputes she had with the Investment Group is hardly unthinkable. Indeed, given the relationship she forged with the Investment Group in the Subscription Agreement — having extended herself from a mere contractor to one of its equity investors — an agreement by Orner that she and the Investment Group would settle all their differences by arbitration makes logical commercial sense. No provision of Maryland law of which the court is aware is offended by giving effect to the plain language of the Arbitration Clause in this circumstance.

To this point, it is notable that Maryland courts have displayed great discipline in refusing to substitute their own sense of subjective fairness or equity in place of the parties' negotiated words.[44] For example, in *Estate of Fister v. Allstate Life Insurance Co.*, the decedent Fister had attempted on several occasions to find someone to kill her.[45] To avoid a coverage exclusion in her life insurance contract for suicide, Fister drove to a remote site with a close friend to make her death appear to be a murder. Fister had her friend Larry hold a shotgun to her head as she attempted to discharge the weapon with a

[44] *See, e.g.*, *United Life & Acc. Ins. Co. v. Prostic*, 182 A. 421, 422 (Md. 1936) ("It must be by a true process of construction that the effect of a clause is ascertained; that is, either by accepting a meaning plainly appearing from the words, or, in cases of ambiguity, by choosing between two or more permissible meanings. It is not within the function of the court to impose a meaning on the contract."); *Blue Bird Cab Co., Inc. v. Amalgamated Cas. Ins. Co.*, 675 A.2d 122, 125 (Md. Ct. Spec. App. 1996) ("Where there is no ambiguity in an insurance contract, however, the Court has no alternative but to enforce the policy's terms.").

[45] *Fister ex rel. Estate of Fister v. Allstate Life Ins. Co.*, 783 A.2d 194, 197 (Md. 2001).

string.[46] After several attempts to pull the string failed, Fister started yelling at her friend, saying: "Let's do it! Let's do it! Let's do it! . . . Larry, for the first time in your life, do something right, help me! Help me!" In the heat of the moment, her friend Larry relented and pulled the trigger.[47] The life insurance company argued that the death was a suicide and denied Fister's estate any recovery under the policy. The trial court was swayed by the equities, given that Fister had essentially demanded that her friend take her life, and ruled for the insurance company. But the Maryland Court of Appeals reversed and held that the commonly understood meaning of the word 'suicide' required the final act be performed by the deceased.[48] Despite this graphic tale of a woman seeking to end her own life and taking all steps but the last to do so, Maryland's highest court held that the term suicide was not ambiguous and allowed recovery despite the compelling facts demonstrating that Fister had desired and played a key role in bringing about her own death.[49] In so ruling, the court stated: "[w]e are being asked to re-write the statute and contract so as not to offend notions of fair play, or so as to achieve that which is, at least from the perspective of the insurer, the fair result. We refuse."[50]

The discipline displayed by the Maryland Court of Appeals in adhering to the plain meaning rule in *Estate of Fister* counsels against deviating from plain meaning

[46] *Id.*
[47] *Id.*
[48] *Id.* at 203-04.
[49] *Id.* at 203.
[50] *Id.* at 205.

here, simply so that Orner can avoid the non-onerous consequence of arbitrating, rather than litigating, the Commissions Dispute.

Furthermore, Orner's reliance on cases involving arbitration clauses that plainly govern only claims "arising under or relating to" the contract in which those clauses were contained does not avail her.[51] The ubiquity of narrower clauses of that kind, if anything, strengthens the Investment Group's argument. Had the parties wished to limit the reach of the Arbitration Clause in the Subscription Agreement to only claims "related" to that Agreement, they had no shortage of clear boilerplate achieving that common objective from which to draw.[52] Instead of using language of that common kind, they not once, but twice made clear that they were covering all disputes between Orner and the Investment

[51] For example, the case of *Pumphrey v. Pumphrey* does not aid Orner. 191 A. 235, 237 (Md. 1937). In that case, the Maryland Court of Appeals held that an arbitration clause in an agreement between two brothers who jointly owned a real estate company did not cover claims by one of the brothers who sought to prohibit the other from acquiring properties and otherwise transacting business as a real estate agent in the same localities as the real estate company operated. *Id.* But the clause in that case was far narrower than the sweeping clause Orner signed and only covered claims involving the brother's "respective [ownership] interests in the" real estate company and any claims arising under their ownership agreement. *Id.*

[52] *E.g.*, *Contract Cons., Inc. v. Power Tech. Ctr. LP*, 640 A.2d 251, 258 (Md. 1994) ("Any controversy or claim arising out of *or related to the contract*, or the breach thereof shall be settled by arbitration . . . ."") (emphasis added); *Crown Oil & Wax Co. v. Glen Constr. Co.*, 578 A.2d 1184, 1189 (Md. 1990) ("All claims, disputes and other matters in question between the [parties] arising out of, *or relating to*, the Contract Documents or the breach thereof . . . shall be decided by arbitration . . . unless the parties mutually agree otherwise.") (emphasis added); *Hartford Accident & Indem. Co. v. Scarlett Harbor Assoc. L.P.*, 674 A.2d 106, 141 (Md. Ct. Spec. App. 1996) ("All claims, disputes and other matters in question between the [parties] arising out of *or relating to* the Contract Documents or the breach thereof . . . shall be decided by arbitration . . . ."") (emphasis added); *Bel Pre Med. Ctr., Inc. v. Frederick Contractors, Inc.*, 320 A.2d 558, 567 (Md. Ct. Spec. App. 1974) ("All claims, disputes and other matters in question *arising out of or relating to the contract* or the breach thereof.") (emphasis added). The AAA recommends this clause for commercial contracts: "Any controversy or claim arising out of *or relating to this contract*, or the breach thereof, shall be settled by arbitration . . ." American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* (Sept 1, 2007), *available at* http://www.adr.org/si.asp?id=4125 (emphasis added).

Group and its affiliates, save those that involved a request for equitable or injunctive relief. That is, unlike the arbitration clauses contained in the cases relied upon by Orner, the Arbitration Clause contained in the Subscription Agreement covers any dispute between the contracting parties, *no matter the topic,* unless equitable relief was sought.

Finally, as noted previously, Maryland law principles require that any ambiguity be resolved in favor of arbitrability if the agreement can be reasonably read as providing for the dispute to be arbitrated. Certainly, the broad language of the Subscription Agreement can be reasonably read as covering the Commissions Dispute and, as earlier noted, that reading produces no commercially illogical or unfair result.

D. Should The Award Against Orner Be Vacated Because The Arbitrator Refused To Postpone The Hearing?

Even if the Commissions Dispute was arbitrable, Orner argues that the Award should be vacated because the Arbitrator decided the merits of the Commissions Dispute before this Court ruled on whether that Dispute was arbitrable. Orner relies upon the statutory standard for vacating an award under the DUAA; nevertheless, the relevant provisions for vacating an arbitration award under the FAA are, as noted, almost identical to those in the DUAA. I will therefore evaluate the merits of Orner's argument as if it was made under the corresponding FAA section. After a thorough consideration of her position, I refuse to vacate the Award of the Arbitrator for the following reasons.

Under § 10(a)(3) of the FAA, Orner argues that the Arbitrator was "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown."[53] When an arbitrator refuses to postpone an arbitration, a court must undertake a deferential review to determine if there is "any reasonable basis" for an arbitrator to deny a request for postponement.[54] In reviewing arbitrator rulings, courts recognize "the basic policy behind arbitration, which is to permit parties to resolve their disputes in an expeditious manner without all the formalities and procedures that might attend full fledged litigation."[55]

Orner argues that because the Arbitrator ruled on the merits of the dispute before this court ruled on arbitrability, the Arbitrator's refusal to postpone necessitates vacatur of the decision. Orner insists that the Arbitrator ruled that the Arbitration would not proceed until this Court ruled on the scope of the Arbitration agreement. But the record indisputably and decisively refutes that contention.

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[53] The FAA allows a federal court to vacate an award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3). The relevant DUAA provision requires vacatur where "[t]he arbitrators refused to postpone the hearing upon sufficient cause being shown therefore, or refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 5706, or failed to follow the procedures set forth in this chapter, so as to prejudice substantially the rights of a party, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection." 10 *Del. C.* § 5714(a)(4); *see also* Md. Code Ann., Cts. & Jud. Proc. § 3224 (b)(4). Section 5706 of Title 10 explicitly allows an arbitrator to "determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear." 10 *Del. C.* § 5706(1).

[54] *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1016 (11th Cir. 1998).

[55] *Scott*, 141 F.3d at 1016; *accord Schmidt v. Finberg*, 942 F.2d 1571, 1574 (11th Cir. 1991); *see also El Dorado Sch. Dist. No.*, 247 F.3d at 848; *Storey v. Searle Blatt Ltd.*, 685 F. Supp. 80, 82 (S.D.N.Y. 1988).

As recited previously, the AAA and the Arbitrator consistently informed Orner that the Arbitration process was proceeding unless Orner obtained a judicial order staying or enjoining it. Orner was informed of that reality many times, including in a February 8 Order of the Arbitrator. In response to these multiple communications, she never sought expedited treatment of this case, nor ever began to participate in the Arbitration process. Instead, Orner took the approach of litigating this case at a leisurely pace — not even filing her first brief until January 2007 and her reply until after the Arbitration hearing — and assuming she could simply ignore the Arbitration process without risk.

Given that Orner had been given repeated notice of the Arbitrator's intention to proceed, had no rational basis to believe that the hearing would be postponed absent procurement of a judicial order enjoining or staying the proceedings, and that the Arbitrator's staff called her counsel on the day of the hearing only to be informed that Orner did not intend to participate, I cannot say that the Arbitrator abused his discretion.[56]

[56] The pertinent decisional law emphasizes that arbitrators must be afforded reasonable discretion whether to postpone a hearing. *E.g.*, *El Dorado Sch. Dist. No. 15*, 247 F.3d at 848 ("Although each party must be given the opportunity to present its arguments and evidence, an arbitrator is not guilty of misconduct merely because, in the face of a denial of a requested postponement, a party chooses to absent itself from a duly scheduled hearing."); *Scott*, 141 F.3d at 1016 (holding a party's failure to appear at the arbitration because he attended related litigation, created "self-imposed scheduling obstacles that we have held do not require an arbitrator to postpone a hearing"); *Schmidt*, 942 F.2d at 1574 (holding that delays of greater than a year were a sufficient "reasonable basis" for an arbitrator to refuse to postpone a hearing); *Ceco Concrete Cons. v. J.T. Schrimsher Cons. Co.*, 792 F. Supp. 109,110 (N.D. Ga. 1992) ("By its motion to vacate[, a party] effectively was seeking a stay of proceedings pending determination of a related proceeding. Such right to a stay does not exist under the Federal Arbitration Act."); *C.T. Shipping, Ltd. v. DMI (U.S.A.) Ltd.*, 774 F. Supp 146, 149 (S.D.N.Y. 1991) (finding arbitrator was "under no obligation to grant [one of the parties] an indefinite postponement to allow it to call a particular witness"); *Agrawal v. Agrawal*, 775 F. Supp. 588, 591 (E.D.N.Y. 1991) (After a demand for arbitration was filed in July, initial hearing dates on October 30 and November 31 were

It is, of course, arguable that it would have been more prudent for the Arbitrator to have informed the parties that a hearing date would be set once the parties had received a ruling from this court on arbitrability. But I cannot conclude that the AAA and the Arbitrator had only that option. By proceeding as they did, they put Orner on clear, repeated, and early notice that she should seek expedited relief to halt the Arbitration and that, absent obtaining that relief, she should be prepared to complete the Arbitration. Instead of heeding that warning, Orner did not seek timely relief from this court. Instead, she proceeded at a torpid pace while blithely ignoring the Arbitration schedule.

Faced with a party who was on long-standing notice that the hearing would proceed absent a stay or injunction, and whose lawyer confirmed his client's intention to absent herself from the hearing, the Arbitrator's decision to proceed cannot, in my view, be deemed an abuse of his discretion. That is especially so when the other party had complied with the schedule set by the Arbitrator, had prepared to arbitrate the matter, and was ready to proceed with the hearing. The Arbitrator's refusal to postpone did not deprive Orner of her right to a fair adjudication; Orner did that to herself. Arbitrators should have the discretion to enforce their scheduling orders. That is especially so when, as here, the Arbitrator gave the complaining party timely notice of the need to seek a judicial stay order if the party wished relief from the schedule. It was Orner and her

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rescheduled to January 15 and 16 at the request of a party. That same party filed an action in state court to stay the arbitration and his counsel withdrew from the arbitration while continuing to represent him in the state court proceeding. Arbitrator's denial of requested postponement was upheld.); *see also Ebasco Constructors, Inc. v. Ahtna, Inc.*, 932 P.2d 1312, 1316 (Alaska 1997) (reviewing FAA cases and refusing to vacate an arbitration award when counsel for one of the parties withdrew 25 days before an arbitration hearing leaving that party 16 days after the arbitrator's denial to find new counsel).

counsel who decided that she would not participate in the Arbitration for tactical reasons and would instead risk a negative outcome in this court. Orner must now accept the consequences of her and her lawyer's casual approach. The Award will be confirmed.

IV. Conclusion

Orner's claim seeking to vacate the Award will be dismissed, the Award will be confirmed. Each side to bear its own costs. The parties shall submit an agreed upon implementing order within ten days.