IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOEL LEFKOWITZ, IRA LEFKOWITZ, THOMAS DOUGHERTY, BRIAN SAKOSITS, and INVESTMENT S CORP.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 4381-VCP
HWF HOLDINGS, LLC and HOBOKEN WOOD FLOORING, LLC,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: June 16, 2009
Decided: November 13, 2009

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PARSONS, Vice Chancellor.

This action arises from the sale of equity in a family-owned flooring retail business. Several years after consummating the sale, Purchasers sent a letter informing Sellers that Purchasers planned to instigate arbitral proceedings in Chicago to pursue indemnification claims under the purchase agreement. Contending that Purchasers have no right to force arbitration under the law governing the agreement, Sellers seek a preliminary injunction in this Court to prevent the arbitration from proceeding. Purchasers have moved to dismiss Sellers' claims for lack of subject matter jurisdiction, among other things.

The resolution of the pending motions turns primarily on whether the arbitration clause of the purchase agreement invokes the application of two unique provisions of the Delaware Uniform Arbitration Act, which Sellers claim imbue the Court with jurisdiction to decide if the threatened arbitration claims are barred by the applicable statute of limitations or another defense. For the reasons stated in this Memorandum Opinion, I find that neither of these provisions governs this dispute and, thus, Sellers' motion for a preliminary injunction should be denied and their complaint dismissed.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiffs, Joel Lefkowitz, Ira Lefkowitz, Thomas Dougherty, Brian Sakosits, and Investment S Corporation (collectively, "Sellers") are the former owners of shares of stock in a flooring retail company known as Hoboken Wood Flooring Corporation (the "Company"). Three of the individual plaintiffs are residents of New Jersey while the fourth resides in Massachusetts. The final plaintiff, Investment S Corp., is an "S"

corporation organized under Delaware law. Defendants, HWF Holdings, LLC and Hoboken Wood Flooring, LLC (collectively, "Purchasers") are limited liability companies, formed, respectively, in Delaware and New Jersey.

B. Facts

On May 26, 2005, after at least five months of due diligence by Purchasers, their law firm, Kirkland & Ellis LLP, and their outside accounting firm, PricewaterhouseCoopers, LLP, the parties entered into an Equity Purchase Agreement ("EPA") whereby Sellers sold most of their equity in the Company for approximately $115 million. After the sale, Purchasers managed the Company for more than two years and then ceased operations in November 2007.

On November 21, 2007, after Company operations had ended, Purchasers sent Sellers a letter alleging breaches of certain terms in the EPA and notifying them of Purchasers' intent to seek indemnification.[1] A little more than fourteen months later, on January 29, 2009, Purchasers sent a second letter notifying Sellers of an "Arbitral Dispute" based on the same alleged breaches of the EPA and informing them that, pursuant to Section 9.12 of the EPA,[2] Purchasers intended to file an arbitration demand

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[1] Purchasers claim they sent this letter to fulfill the requirements of Article VII of the EPA, which states, in pertinent part, that Sellers may only be held liable for indemnification if the party seeking indemnity gives written notice to Sellers within thirty months of closing—*i.e.*, no later than November 26, 2007.

[2] Section 9.12 of the EPA establishes the procedures for arbitration. In relevant part, the clause provides that:

in Chicago within forty-five days to obtain indemnification from Sellers for the alleged breaches.[3]

C. Procedural History

Sellers filed their Complaint in this action on February 17, 2008, and concurrently moved to preliminarily enjoin Purchasers from commencing arbitral proceedings in Chicago. On March 6, 2009, Purchasers filed an Answer and moved to dismiss for three reasons: First, for lack of subject matter jurisdiction pursuant to Court of Chancery Rule 12(b)(1) because the dispute is subject to arbitration under the applicable clause in the EPA; second, for improper venue under Rule 12(b)(3) because the EPA requires arbitration in Chicago; and third, under Rule 12(b)(6) because Sellers failed to state a claim against Purchasers upon which relief can be granted.

> Except as expressly provided elsewhere in this Agreement . . . any dispute, controversy, or claim arising under or relating to this Agreement or any breach or threatened breach thereof . . . shall be resolved by final and binding arbitration administered by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules; provided that nothing in this Section 9.12 shall prohibit a party from instituting litigation to enforce any Final Determination. The parties hereby agree and acknowledge that, except as otherwise provided in this Section 9.12 or in the Commercial Arbitration Rules of the AAA . . . the arbitration procedures and any Final Determination hereunder shall be governed by, and shall be enforced pursuant to the Uniform Arbitration Act and applicable provisions of Delaware law.

[3] The claimed breaches arise from alleged errors in pre-closing financial statements of the Company relating to three issues: (1) reserves for doubtful accounts receivable; (2) reserves for obsolete or slow-moving inventory; and (3) vacation accruals. These errors purportedly violated Sections 4.5-4.7 of the EPA.

The parties have briefed and argued Sellers' motion for a preliminary injunction and Purchasers' motion to dismiss. This Memorandum Opinion reflects my rulings on those motions.

D. Parties' Contentions

In the Complaint, Sellers ask for a declaratory judgment and a preliminary and permanent injunction in three counts. Count I seeks declaration that Purchasers' claims for indemnification are time-barred by Delaware's three-year statute of limitations, 10 *Del. C.* § 8106. Count II seeks a further judgment declaring that Purchasers' claims for indemnification also are barred by the time limits established in Section 9.12 of the EPA. Finally, Count III seeks to enjoin Purchasers preliminarily and permanently from commencing or pursuing arbitration proceedings in Chicago.

Sellers have moved for a preliminary injunction, arguing that Purchasers attempt to force arbitration should be barred because (1) the three-year Delaware statute of limitations period has expired and (2) Purchasers have not complied with the arbitration procedures established in the EPA.[4] Sellers further argue that being forced to arbitrate claims that clearly are barred by contract and the statute of limitations would cause them

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[4] Section 9.12(b) of the EPA states that, after serving notice of an Arbitral Dispute, the parties "may, within 45 days . . . commence arbitration." Sellers argue that "may" should be read as "must" to give effect to the forty-five day time limitation, and that Purchasers failed to meet that requirement in that they waited more than fourteen months after sending their November 21, 2007 letter referencing the underlying arbitral dispute before attempting to instigate an arbitration.

irreparable harm.[5] Purchasers urge denial of the preliminary injunction motion because Sellers have not demonstrated a reasonable probability of success on the merits,[6] have not identified any irreparable harm that would result from having an arbitrator decide questions of procedural arbitrability, as she typically would, and have not shown that the harm of arbitration to Sellers would outweigh the harm suffered by Purchasers in having to litigate such questions in this Court rather than arbitrating them as provided in the EPA.

In a similar vein, in support of their co-pending motion to dismiss, Purchasers contend that the Federal Arbitration Act ("FAA"), not the Delaware Uniform Arbitration Act ("DUAA"), governs this action because the underlying transaction relates to interstate commerce and the EPA calls for arbitration in Chicago using the American Arbitration Association's ("AAA") Commercial Arbitration Rules ("AAA Rules").

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5 Sellers cite several cases upholding the proposition that being forced to participate in non-consensual arbitration constitutes irreparable harm. *See Brown v. T-Ink, LLC*, 2007 WL 4302594, at *13 (Del. Ch. Dec. 4, 2007); *HDS Inv. Hldg., Inc. v. Home Depot, Inc.*, 2008 WL 4604262, at *9 (Del. Ch. Oct. 17, 2008) ("[The Chancery] Court has clearly held that a party faced with immediate arbitration of non-arbitrable issues is threatened with irreparable harm sufficient to warrant an injunction."); *Parfi Hldg. AB v. Mirror Image Internet, Inc.,* 842 A.2d 1245, 1259 (Del. Ch. 2004) ("It is well settled that . . . the procession of an unwarranted arbitration poses the threat of irreparable injury to the party rightfully resisting arbitration.").

6 On this point, Purchasers deny that Sellers have shown a reasonable probability of success in proving that this Court has jurisdiction to decide matters of substantive arbitrability or is the proper venue for this action or that Purchasers' threatened arbitration would be barred as untimely by the Delaware statute of limitations or Section 9.12 of the EPA.

Purchasers further argue that Delaware is not the proper venue for this case in light of the parties' decision to arbitrate in Chicago. Moreover, according to Purchasers, even if this Court determines it has jurisdiction to hear Sellers' motion for a preliminary injunction, the motion should be denied because the Delaware statute of limitations does not apply to claims arising under the EPA and Purchasers have complied with all arbitral procedures established in the EPA.[7]

Sellers reply that the parties evinced a clear intention to make the DUAA applicable through choice-of-law references in two separate sections of the EPA, namely, Sections 9.9 and 9.12. Sellers also argue that, under Sections 5702(c) and 5703(b) of the DUAA,[8] this Court has the requisite jurisdiction to hear their motion and grant a preliminary injunction because Purchasers' claims are barred by the statute of limitations and the procedural requirements of the EPA.

Because the arguments pertinent to Sellers' motion for a preliminary injunction and Purchasers' motion to dismiss overlap extensively, the following analysis applies equally to both motions, unless otherwise noted.

II. ANALYSIS

A. Standards for Adjudication

Generally, a court will grant a preliminary injunction only where the moving party establishes (1) a reasonable probability of success on the merits at a final hearing, (2) an

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7 Purchasers argue, in the alternative, that they did not forfeit their right to arbitrate even if they failed to comply fully with the procedures outlined in the EPA.

8 10 *Del. C.* §§ 5702(c), 5703(b).

immediate and irreparable harm to the moving party if the injunction is not granted, and (3) a balance of hardships analysis weighing in the movant's favor.[9] While each element must be met, "there is no steadfast formula for the relative weight each deserves" and, thus, "a strong demonstration as to one element may serve to overcome a marginal demonstration of another."[10] A preliminary injunction is an extraordinary remedy that the courts will only grant sparingly.[11]

In considering a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, the court must address the nature of the wrong alleged and the remedy sought to determine whether a legal, as opposed to an equitable, remedy is available and adequate.[12] If a claim is properly committed to arbitration, this Court lacks subject matter jurisdiction because arbitration provides an adequate legal remedy.[13] While Delaware's public policy strongly favors arbitration, arbitration is consensual.[14]

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9 *E.I. du Pont de Nemours & Co., Inc. v. Bayer CropScience L.P.*, 958 A.2d 245, 251 (Del. Ch. 2008).

10 *Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2008 WL 902406, at *3 (Del. Ch. Apr. 3, 2008) (quoting *Alpha Builders, Inc. v. Sullivan,* 2004 WL 2694917, at *3 (Del. Ch. Nov. 5, 2004)).

11 *Brown*, 2007 WL 4302594, at *13.

12 *See Carder v. Carl M. Freeman Cmtys.*, 2009 WL 106510, at *3 (Del. Ch. Jan. 5, 2009) (citing *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001)).

13 *Id*.

14 *See id.*; *Julian v. Julian*, 2009 WL 2937121, at *3 (Del. Ch. Sept. 9, 2009) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

Consequently, courts will only require arbitration of disputes that the parties have agreed to arbitrate.

Even if a court has jurisdiction over the subject matter of a dispute, an action still may be dismissed under Rule 12(b)(3) if that court is not the proper venue for resolving that dispute. Courts traditionally dismiss a matter under Rule 12(b)(3) when the contract underlying the dispute contains an explicit forum selection clause[15] or when, applying the doctrine of *forum non conveniens*, Delaware is clearly not the appropriate forum for litigation.[16] Here, there is no forum selection clause beyond the provisions in Section 9.12 referring all matters to arbitration and Purchasers have not made a *forum non conveniens* argument. As far as the Court can tell, Purchasers' motion to dismiss this action for improper venue rests on the same arguments pertaining to arbitrability that form the basis for their challenge to subject matter jurisdiction. Thus, there is no need to address separately Purchasers' motion to dismiss under Rule 12(b)(3).

Finally, a court will only grant a motion to dismiss based on Rule 12(b)(6) when "it appears with reasonable certainty that the plaintiff cannot prevail on any set of facts that can be inferred from the pleadings."[17] While the court will grant plaintiffs all

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[15] *See, e.g.*, *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *5 (Del. Ch. Oct. 19, 2000) (citing to numerous federal court decisions interpreting the identical federal counterpart to Court of Chancery Rule 12(b)(3) in the context of motions to dismiss premised on a forum selection clause).

[16] *See Berger v. Intelident Solutions, Inc.*, 906 A.2d 134 (Del. 2006); *Parvin v. Kaufmann*, 236 A.2d 425, 427 (Del. 1967).

[17] *Romero v. Career Educ. Corp.*, 2005 WL 1798042, at *2 (Del. Ch. July 19, 2005).

reasonable inferences that may be drawn from their complaint, it "is not required to accept every strained interpretation of the allegations proposed by the plaintiff."[18] Consequently, mere conclusory allegations—unsupported by facts in the complaint—will not be accepted as true.[19]

B. Does the FAA, DUAA, or Model UAA Govern under the EPA?

Sellers' motion for a preliminary injunction and, by extension, Purchasers' motion to dismiss, initially hinge on the Court's determination of one gateway issue: whether the DUAA, the model Uniform Arbitration Act ("Model UAA"), or the FAA applies to the EPA.[20] The relevance of this inquiry arises from two unique provisions of the DUAA—Sections 5702(c) and 5703(b)—upon which Sellers base their motion for a preliminary injunction.[21] In pertinent part, Section 5702(c) provides:

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[18] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (citations and quotations omitted).

[19] *See Latesco, L.P. v. Wayport Inc.*, 2009 WL 2246793, at *5 (Del. Ch. July 24, 2009) (citing *Solomon v. Pathe Commc'n Corp.*, 672 A.2d 35, 38 (Del. 1996)).

[20] Purchasers' various grounds for dismissal based on Rules 12(b)(1), 12(b)(3), and 12(b)(6) rest essentially on the same general proposition, namely, that this dispute is not properly before this Court because the parties agreed to have all matters—including time bar defenses and other procedural arbitrability questions—decided in arbitration. Thus, this discussion pertains to all of the asserted grounds for dismissal to the extent they turn on whether the EPA is subject to the DUAA.

[21] 10 *Del. C.* §§ 5702(c), 5703(b). The motivating policy behind these unique provisions was to "giv[e] arbitration respondents a fair opportunity to seek an injunction against the arbitration of time-barred claims," as Sellers have done here. *See Pers. Decs., Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *1 (Del. Ch. May 5, 2008). I note, however, that, effective July 2, 2009, the DUAA was amended to reflect recent judicial interpretations of the statute and to "preserve Delaware's pre-eminence in offering cost-effective options for resolving

> 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.

Likewise, under Section 5703(b), a party may ask the Court to "enjoin arbitration on the ground [1] that a valid agreement . . . has not been complied with or [2] that the claim sought to be arbitrated is barred by limitation of § 5702(c)." Neither of these sections, or their equivalents, appears in the FAA, the Model UAA, or the AAA Rules.[22] Thus, if DUAA §§ 5702(c) and 5703(b) apply, Sellers' motion for a preliminary injunction is properly before the Court and I must consider the merits of that motion; if those statutory provisions do not apply, the Court lacks jurisdiction to adjudicate the dispute because the parties agreed to commit it to arbitration.

1. Inapplicability of the FAA

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disputes." *See* Del. H.B. 49, 145th Gen. Assem. §§ 2-6 (2009). Among other things, the Bill (1) eliminated the prior version of Section 5702(c), which allowed a party to seek an injunction in the Court of Chancery enjoining arbitration in disputes barred by the statute of limitations, and (2) made certain changes to clarify that the DUAA only applies when the parties explicitly provide that their agreement shall be subject to its terms. *See infra* note 28.

While the recent changes are significant, the parties agree that none of the amendments apply to this dispute and that the case should be resolved under the pre-July 2, 2009 version of the DUAA, if the statute applies at all. Accordingly, unless otherwise noted, all references in this Memorandum Opinion to sections of the DUAA relate to the Act before the recent amendments took effect.

[22] *Dresser Indus., Inc. v. Global Indus. Tech., Inc.*, 1999 WL 413401, at *4-5 (Del. Ch. June 9, 1999).

As a preliminary matter, I first consider Purchasers' contention that the FAA, and not the DUAA, governs the EPA. Generally, the FAA governs arbitral agreements made between parties in interstate commerce.[23] As such, the FAA serves as the default rule and displaces inconsistent provisions of state arbitration acts, thereby relegating the DUAA, and similar state statutes, to "the secondary role of governing agreements to arbitrate in intrastate commerce."[24]

Courts, however, traditionally have found the DUAA to govern a contract in spite of the default applicability of the FAA in two instances: First, where the contract calls for arbitration in Delaware;[25] and, second, where the contract concerns interstate commerce with arbitration outside Delaware, but the parties nevertheless "clearly evidence desire to be bound" by the DUAA either through the language of the contract or

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23 *See* 9 U.S.C. §§ 1-2; *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *7 (Del. Ch. Dec. 4, 2007).

24 *Pers. Decs.*, 2008 WL 1932404, at *6.

25 *See, e.g., Carder v. Carl M. Freeman Cmtys., LLC*, 2009 WL 106510, at *2 n.6 (Del. Ch. Jan. 5, 2009) ("Because the parties to the Contract provided for Delaware as the location of the arbitration, the Uniform Arbitration Act, as enacted by Delaware . . . applies. In addition, the property in issue is located in Delaware.") (citations omitted); *Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *6 (Del. Ch. May 13, 2005) ("By its own terms, the DUAA applies to arbitration that occurs in Delaware . . . ."); *Towerhill Wealth Mgmt., LLC v. Bander Family P'ship, L.P.*, 2008 WL 4615865, at *1 n.3 (Del. Ch. Oct. 9, 2008) ("The DUAA . . . is only applicable to agreements 'providing for arbitration in this State.') (quoting 10 *Del. C.* § 5719(a)(2)).

the dealings of the parties.[26] In *Personnel Decisions*, for instance, even though the contract language did not establish the parties' intent to apply the DUAA, the parties' course of dealing clearly evidenced that desire.[27] Thus, the presumption that the FAA applies may be overcome where the parties unequivocally demonstrate intent to displace the federal standard with some other rule.[28] Absent a clear indication of intent to apply a different standard, however, the FAA will apply to arbitration agreements based in

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[26] *Pers. Decs.,* 2008 WL 1932404, at *6; *Mehiel*, 2005 WL 1252348, at *6 n.42 (citing *Sovak v. Chugai Pharm. Co.,* 280 F.3d 1266, 1269 (9th Cir. 2002) ("Parties may agree to state law rules for arbitration even if such rules are inconsistent with those set forth in the Federal Arbitration Act (FAA) . . . however, parties must clearly evidence their intent to be bound by such rules. In other words, the strong default presumption is that the FAA, not state law, supplies the rules for arbitration.")).

[27] *See Pers. Decs.,* 2008 WL 1932404, at *1, 4-6.

[28] As with contract formation in general, parties are free to structure procedures for arbitration in almost any way they see fit. *See Volt Info. Sci. v. Bd. of Trs.*, 489 U.S. 468, 476 (1989) ("Where . . . the parties have agreed to abide by the state rules of arbitration, enforcing those rules . . . is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the [FAA] would otherwise permit it to go forward."); *Brown*, 2007 WL 4302894, at *7; *Pers. Decs.*, 2008 WL 1932404, at *6 n.19 ("Delaware is a freedom of contract state, with a policy of enforcing the voluntary agreements of sophisticated parties in commerce"); *see also Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) ("[S]hort of authorizing trial by battle or ordeal or . . . by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.").

The recent amendment to 10 *Del. C.* § 5702(a) clarifies the applicability of the DUAA by stating that, while parties are free to opt out of the FAA, the FAA will apply to arbitral agreements formed in interstate commerce unless, by express election, "the parties specifically choose to have their agreement governed by" the terms of the DUAA. *See supra* note 21; Del. H.B. 49, 145th Gen. Assem. §§ 2-6 (2009).

interstate commerce[29] and "application of [Sections] 5702(c) and 5703(b) [will] be preempted."[30]

There is some contradiction in Purchasers' arguments regarding applicability of the FAA, Model UAA, or DUAA. Purchasers assert that the FAA governs the EPA because the underlying transaction relates to interstate commerce and the EPA calls for arbitration in Chicago.[31] At the same time, though, Purchasers contend that the EPA expressly invokes the Model UAA, and not the DUAA, as the governing law for purposes of arbitration.[32] The latter contention undercuts the former and actually begs the conclusion that the EPA does "clearly evidence [the parties'] intent to be bound" by a set of rules *other than* the FAA.[33] In relevant part, the EPA states that "except as otherwise provided in this Section 9.12 or in the Commercial Arbitration Rules of the AAA . . . the arbitration procedures . . . shall be governed by, and shall be enforced pursuant to *the Uniform Arbitration Act* . . . ."[34] While the full import of this language will be developed

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29 *See Mehiel*, 2005 WL 1252348, at *6 n.42.

30 *Pers. Decs.*, 2008 WL 1932404, at *6 n.37 (citing *In re Prudential Sec. 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); *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84 (2002) (arbitrators decide the statute of limitations)).

31 *See* Defs.' Op. Br. ("DOB") at 12-14; Defs.' Rep. Br. ("DRB") at 12-16.

32 *See* DRB at 8-11.

33 *See supra* note 26.

34 *See supra* note 2 (emphasis added).

later, I note here that whether the phrase "Uniform Arbitration Act" refers to the DUAA or the Model UAA, it clearly overrides the default applicability of the FAA.[35] Thus, because the parties unequivocally demonstrated their intent to displace the federal standard with a different rule, I cannot accept Purchasers' contention that the FAA applies to the EPA.

2. Did the parties intend to apply the DUAA or the Model UAA?

I turn next to the question whether the EPA clearly demonstrates that the parties unambiguously intended the DUAA or the Model UAA to govern their arbitration rights. Based on the arguments presented by the parties, it appears that, except in cases involving a time-bar defense of the kind Sections 5702(c) and 5703(b) of the DUAA authorize a court to determine, whether the EPA called for application of the DUAA or Model UAA would matter very little. This, however, is one of those cases. Sellers contend that two choice-of-law references in the EPA establish the parties' clear intent to apply the DUAA. Purchasers counter that the EPA clearly references the Model UAA, and not the DUAA, as the governing law.[36] For the reasons discussed below, I find that even though the language in Section 9.12 of the EPA is arguably ambiguous, it supports a reasonable inference that the DUAA applies. I do not consider that the only reasonable inference or

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[35] The DUAA displaces the FAA only where the parties "clearly evidence their intent to be bound" by the DUAA. *Pers. Decs.*, 2008 WL 1932404, at *6 (citing *Sovak v. Chugai Pharm. Co.,* 280 F.3d 1266, 1269 (9th Cir. 2002)).

[36] *See* DRB at 8-11.

even the most compelling inference; nevertheless, I accept the inference that the DUAA applies as true for purposes of Purchasers' motion to dismiss.

The EPA contains two provisions that, read together, inform the question of DUAA applicability. The first, Section 9.9, is a generic choice-of-law clause that provides as follows:

> All questions concerning the construction, validity and interpretation of this Agreement shall be governed by and construed in accordance with the domestic laws of the State of Delaware without giving effect to any choice of law or conflict of law provision (whether of the State of Delaware or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Delaware.[37]

The second, Section 9.12, outlines the EPA's arbitration procedures. In addition to confining "any dispute, controversy, or claim arising under or relating to" the EPA to arbitration administered by the AAA under the AAA Rules, the clause states that "except as otherwise provided in this Section 9.12 or in the Commercial Arbitration Rules of the AAA . . . the arbitration procedures . . . shall be governed by, and shall be enforced pursuant to the Uniform Arbitration Act and applicable provisions of Delaware law."[38]

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[37] A general choice of law provision of this type, *i.e.*, one which calls for application of Delaware law to all contract interpretation questions, is not enough on its own to support an inference that the parties intended Delaware law to govern the arbitration procedure. *See Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *6 (Del. Ch. May 13, 2005) (citing *Sovak*, 280 F.3d at 1269 (interpreting a general choice-of-law clause as simply supplying state substantive, decisional law, and not state law rules for arbitration)).

[38] *See* EPA § 9.12.

The reference to the "Uniform Arbitration Act" in Section 9.12 lies at the heart of the question of DUAA applicability. Sellers contend that, because the Model UAA becomes legally binding only insofar as it is adopted by a state, "Uniform Arbitration Act" must refer to the DUAA.[39] Moreover, they argue that, in accordance with the interpretive requirements of Section 9.9, "Uniform Arbitration Act" must be interpreted as the DUAA because the DUAA explicitly provides that it may be cited as the "Uniform Arbitration Act." [40] Thus, according to Sellers, one would expect sophisticated parties drafting a clause governed by the DUAA to refer to it as the Uniform Arbitration Act. Purchasers counter that the Model UAA has legal force and effect in the context of the EPA insofar as it has been adopted by the parties,[41] and that the Court should interpret the "Uniform Arbitration Act" reference "literally," *i.e.*, as referring to the Model UAA.[42]

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[39] Sellers also suggest that the phrase "and applicable provisions of Delaware law" supports this reading by implicitly adding "Delaware" before "Uniform Arbitration Act." While this argument may be plausible, it is not the only reasonable reading or even the most reasonable reading of Section 9.12, especially in light of the surrounding provisions of the EPA.

[40] *See* 10 *Del. C.* § 5721 (noting that the DUAA "may be cited as the Uniform Arbitration Act."). Sellers suggest that, in light of these arguments, the natural meaning of the phrase "Uniform Arbitration Act and applicable provisions of Delaware law" is "the Uniform Arbitration Act as enacted in Delaware, which includes 10 *Del. C.* §§ 5702 and 5703, plus any other provisions of Delaware law that are applicable to arbitration." Pls.' Rep. Br. at 6-7.

[41] *See supra* note 28.

[42] Purchasers also argue that this "literal" interpretation is required by the EPA's use of the definite article "the" rather than "an" in "the Uniform Arbitration Act." Purchasers suggest that if the parties had intended that "Uniform Arbitration Act"

When interpreting this section of the EPA, the Court seeks to give full effect to the parties' intent as expressed in that document.[43] "A determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law"[44] and, accordingly, "the court looks to the most objective indicia of that intent: the words found in the written instrument."[45] As a result, the language of the EPA will be deemed ambiguous only if its language is susceptible to two or more reasonable interpretations.[46]

In this case, Section 9.12 appears to be ambiguous, because both sides have advanced reasonable, but different, interpretations of it. Sellers contend that, while the reference to "Uniform Arbitration Act" alone may be insufficient to show that the parties meant the DUAA, the combination of that provision and the choice of law provision in Section 9.9 make it reasonable to draw that inference. Yet, Purchasers' interpretation is equally—if not more—persuasive.

For instance, Sellers' contention that "Uniform Arbitration Act" must refer to the DUAA because 10 *Del. C.* § 5721 states that the DUAA may be cited that way is

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refer to the DUAA, the final clause would have read "the Uniform Arbitration Act and [other] applicable provisions of Delaware law." *See* DRB at 10.

43 *See Nw. Nat'l Ins. Co. v. Esmark, Inc.,* 672 A.2d 41, 43 (Del. 1996) ("Contracts must be construed as a whole, to give full effect to the intentions of the parties.").

44 *HIFN, Inc. v. Intel Corp.,* 2007 WL 2801393, at *9 (Del. Ch. May 2, 2007) (citing *Reardon v. Exch. Furniture Store, Inc.,* 188 A. 704, 707 (Del. 1936)).

45 *Sassano v. CIBC World Mkts. Corp.,* 948 A.2d 453, 462 (Del. Ch. 2008).

46 *See Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2009 WL 3161643, at *6 (Del. Ch. Sept. 30, 2009) (citing *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1196 (Del. 1992)).

undercut by the fact that at least twenty other states that have adopted the Uniform Arbitration Act have statutory provisions analogous to 10 *Del. C.* § 5721,[47] including Illinois, the state of arbitration in this case.[48] Additionally, Section 9.12(f) of the EPA provides that an arbitral award may be enforced "in *any* state or federal court having jurisdiction over the Arbitrable Dispute."[49] This language undermines Sellers' interpretation that "Uniform Arbitration Act" means the DUAA because the DUAA provides that an arbitral award made under it may be enforced only in the Delaware Court of Chancery.[50] In the EPA, the parties explicitly designated the arbitral location as Chicago and suggested that an award resulting from arbitration under the Agreement could be enforced in any court having jurisdiction, which in this case might include Illinois, Massachusetts, New Jersey, and Delaware, among other jurisdictions. In these circumstances, one reasonably could infer that the parties intended "Uniform Arbitration Act" to mean that version of the Model UAA enacted in Illinois or any other state in which state enforcement of the award was being sought. The Model UAA would govern, among other things, confirmation, vacation, and modification of arbitral awards.

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[47] *See supra* note 40.

[48] *See, e.g.*, *Alaska Stat*. § 09.43.180; *Ark. Code Ann.* § 16-108-223; 710 *Ill. Comp. Stat*. 5/22; *Mont. Code Ann*. § 27-5-111.

[49] Emphasis added.

[50] *See* 10 *Del. C.* § 5713.

In the context of a motion to dismiss, however, Sellers are entitled to have all logical and reasonable factual inferences drawn in their favor.[51] Thus, even though the Sellers' interpretation is not the only reasonable one and, based on the preliminary record presently before me, does not even appear to be the most reasonable inference, I must assume for the purpose of Purchasers' motion to dismiss that Sellers' interpretation of Section 9.12 is correct and, therefore, the phrase "Uniform Arbitration Act" refers to the DUAA.[52]

3. Inapplicability of Sections 5702(c) and 5703(b) of the DUAA

But even if the EPA called for application of the DUAA, the question remains whether the anomalous provisions of the DUAA relied upon by Sellers would apply in this case. Sellers contend that Sections 5702(c) and 5703(b) should apply because the EPA provides that arbitration procedures are to be "administrated" by the AAA under the AAA Rules but "governed" by the DUAA.[53] This argument—raised for the first time during argument—strains the language of Section 9.12. When interpreting a contract, "the court's ultimate goal is to determine the shared intent of the parties."[54] Here, the

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51 *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1275 (Del. 2007) (citing *White v. Panic,* 783 A.2d 543, 549 (Del. 2001)).

52 At this point, I do not hold that the DUAA applies to the EPA, but only that the Complaint supports a reasonable inference that it may apply. As discussed *infra* Part II.B.3, a more definitive decision is not necessary to resolve the motions before me.

53 *See* Tr. at 14-19, 32-33.

54 *See Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2009 WL 3161643, at *6 (Del. Ch. Sept. 30, 2009) (citing *Sassano,* 948 A.2d at 462).

most logical reading of Section 9.12 and the corresponding intent of the parties is that all disputes, controversies, and claims arising under the EPA must be resolved by final and binding arbitration administered by the AAA and governed by the AAA Rules.[55]

In contrast, Purchasers argue that even if the EPA called for application of the DUAA, the DUAA will only apply when necessary to fill gaps in procedure not sufficiently addressed by Section 9.12 of the EPA or the AAA Rules.[56] Taking the plain meaning of the language as a whole, Purchasers accurately describe the arbitration procedure established in Section 9.12. The key to this interpretation is the phrase "except as otherwise provided in." In pertinent part, that section provides that "*except as otherwise provided* in this Section 9.12 or in the Commercial Arbitration Rules of the AAA . . . the arbitration procedures . . . shall be governed by, and shall be enforced pursuant to the Uniform Arbitration Act and applicable provisions of Delaware law."[57] Also relevant to this inquiry, Section 9.12(e) states that "[t]he arbitration shall be conducted under the Commercial Arbitration Rules of the AAA as in effect from time to time, except as otherwise set forth herein or as modified by the agreement of all the Parties."

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55 *See supra* note 2.

56 Purchasers contend that, under the contract, EPA § 9.12 and the AAA Rules provide the primary sources for arbitration procedures and, thus, trump any inconsistent provisions of the DUAA. *See* DOB at 16-17; DRB at 7.

57 EPA § 9.12 (emphasis added).

These two sections, when read together, establish a clear hierarchy for the governance of arbitration procedure. By the terms of the EPA, any arbitration of disputes or claims arising under that contract is governed firstly by Section 9.12, secondly by the AAA Rules, and lastly by "the Uniform Arbitration Act and applicable provisions of Delaware law."[58] Under this hierarchy, the DUAA acts as a gap-filler, providing arbitration procedures insofar as those procedures do not conflict with Section 9.12 or the AAA Rules. Specifically, Sections 5702(c) and 5703(b) of the DUAA, which invest the Court with authority to hear certain procedural arbitrability questions otherwise left to the arbitrator, apply only if they are not inconsistent with the arbitration procedures established by Section 9.12 and the AAA Rules. Before determining whether these sections of the DUAA apply and, by extension, whether Sellers' claims based on their time-bar defenses should be decided by this Court, I first review briefly the general rules for handling questions of substantive and procedural arbitrability.

Generally speaking, substantive arbitrability—the "gateway question" concerning the applicability of an arbitration clause—is often quite nuanced.[59] Analysis of this question includes a determination of both the scope of an arbitration provision and the broader issues of whether the contract or the arbitration clause is valid and enforceable.

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[58] *See supra* note 2.

[59] *See James & Jackson, LLC v. Willie Gary, LLC,* 906 A.2d 76, 79 (Del. 2006).

The underlying question for substantive arbitrability is "whether the parties decided in the contract to submit a particular dispute to arbitration."[60]

Before examining substantive arbitrability, however, a court frequently must answer the question of "*who* should decide 'whether the parties decided in the contract to submit a particular dispute to arbitration or to a court.'"[61] As the Delaware Supreme Court held in *DMS Properties*, that question—*i.e.,* whether the parties agreed to arbitrate certain types of disputes—"is generally one for the courts to decide and not for arbitrators."[62] Consequently, courts presume parties did not agree to arbitrate questions of arbitrability, unless there is "clear and unmistakable evidence that they did so."[63]

The Delaware Supreme Court's seminal decision in *Willie Gary* articulated a two-pronged test for determining whether an arbitration clause constitutes such "clear and unmistakable evidence" of the parties' intent to arbitrate arbitrability.[64] An arbitration clause satisfies this evidentiary standard if it (1) generally refers all disputes to arbitration and (2) references a set of arbitral rules that empowers arbitrators to decide arbitrability.[65]

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[60] *Id*.

[61] *See Julian v. Julian*, 2009 WL 2937121, at *5 (Del. Ch. Sept. 9, 2009) (quoting *Carder v. Carl M. Freeman Cmtys.,* 2009 WL 106510, at *3 (Del. Ch. Jan. 5, 2009)) (emphasis added).

[62] *DMS Properties-First, Inc. v. P.W. Scott Assoc., Inc.*, 748 A.2d 389, 391-92 (Del. 2000).

[63] *Willie Gary*, 906 A.2d at 79 (quoting *First Options*, 514 U.S. at 944).

[64] *See id* at 80.

[65] *Id*.

Because both prongs of this test must be satisfied, an arbitration clause that contains broad exceptions such that "not all disputes must be referred to arbitration" will not meet the *Willie Gary* test.[66]

Neither party contends that the affirmative defenses raised by Sellers here constitute questions of substantive arbitrability. Even if those defenses *were* questions of substantive arbitrability, however, the parties have clearly and unmistakably indicated their intent to let the arbitrator decide such questions because Section 9.12 of the EPA satisfies both prongs of the *Willie Gary* test. That is, it (1) generally refers all disputes to arbitration without any broad carve-outs and (2) states unequivocally that the arbitration is to be governed in the first instance by the AAA Rules.

In contrast to substantive arbitrability, questions of procedural arbitrability deal with whether parties have complied with the terms of the arbitration clause.[67] For example, a contract might provide that to arbitrate a dispute, one party must provide notice to another party within a certain number of days of some event. Whether a party seeking arbitration provided adequate notice according to the contract presents a procedural question. Additionally, under the FAA, the Model UAA, and the recently

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[66] *See McLaughlin v. McCann*, 942 A.2d 616, 621 (Del. Ch. Feb. 21, 2008) ("[T]he carve-outs and exceptions to committing disputes to arbitration should not be so obviously broad and substantial as to overcome heavy presumption that the parties agreed, by referencing the American Arbitration Association (AAA) Rules and deciding to use AAA arbitration to resolve a wide range of disputes, that the arbitrator, and not a court, would resolve disputes about substantive arbitrability.").

[67] *Brown v. T-Ink, LLC,* 2007 WL 4302594, at *10 (Del. Ch. Dec. 4, 2007).

amended version of the DUAA, a statute of limitations defense constitutes a question of procedural arbitrability.[68] The law presumes that procedural arbitrability questions will be handled by arbitrators and not by courts.[69] The standard Sellers would have to meet to overcome this presumption is similar to the standard for overcoming the presumptive applicability of the FAA to arbitral agreements made in interstate commerce—*i.e.*, showing clear applicability under the EPA of Sections 5702(c) and 5703(b) of the DUAA.[70]

Given this distinction between substantive and procedural arbitrability, Sellers' time-bar defenses clearly constitute questions of procedural arbitrability normally left to the arbitrator, unless the pertinent sections of the DUAA apply. Even assuming that

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[68] *See supra* note 21; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (noting that, under the FAA, arbitrators decide the statute of limitations); *Dresser Indus., Inc. v. Global Indus. Tech., Inc.*, 1999 WL 413401, at *5 n.5 (Del. Ch. June 9, 1999) (citing *Fenton Area Pub. Schs. v. Lorenson-Gross Constr. Co.,* 335 N.W.2d 221, 225 (Mich. Ct. App. 1983) (noting that, under the Model UAA, the "timeliness of an arbitration proceeding is a procedural issue to be determined by the arbitrators rather than the courts.")).

Unlike the FAA, Model UAA, or current version of the DUAA, the earlier version of DUAA § 5702(c) authorizes parties to present statute of limitations defenses to a court, as opposed to the arbitrator, in the first instance. Nevertheless, that version of the DUAA acknowledges that arbitrators possess the power to consider such defenses. Thus, under the prior version of the DUAA, parties could choose to assert statute of limitations defenses initially in the Court of Chancery, through an injunction proceeding, or in arbitration. *See* 10 *Del. C.* §§ 5702(c), 5703, 5714(a)(5) (1974).

[69] *See Julian v. Julian*, 2009 WL 2937121, at *4 (Del. Ch. Sept. 9, 2009) (citing *Willie Gary,* 906 A.2d at 79).

[70] *See supra* notes 26, 28.

Section 9.12 calls for application of the DUAA, however, in light of the hierarchy of arbitral procedure governance mentioned above,[71] the applicability of Sections 5702(c) and 5703(b) of the DUAA hinges on whether the AAA Rules empower the arbitrator to decide issues of procedural arbitrability, including affirmative statute of limitations and contractual time bar defenses such as those raised by Sellers. If they do, then the pertinent DUAA sections conflict with the AAA Rules and do not apply to the EPA.

The AAA Rules contain three provisions relevant to this inquiry. The first, Rule R-1(a), states that "[t]he parties shall be deemed to have made [the AAA] rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association . . . under its Commercial Arbitration Rules."[72] This the parties have done.[73] Second, under Rule R-7(a), "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Finally, Rule R-7(c) indicates that parties "must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim" directly to the arbitrator, who is then empowered to "rule on such objection as a preliminary matter or as part of the final award."

Taken together, these sections show that the AAA Rules contemplate that questions of procedural arbitrability will be handled by the arbitrator and not the Court.

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[71] *See supra* notes 56-58 and accompanying text.

[72] *See* DOB Ex. A, AAA Rules.

[73] *See supra* note 2.

Most relevantly, Rule R-7(a) grants significant authority to the arbitrator, similar to that afforded under the FAA and Model UAA, both of which empower the arbitrator to decide procedural arbitrability questions, including statute of limitations defenses.[74] As discussed earlier, the parties intended that Section 9.12 of the EPA and the AAA Rules primarily would govern any arbitration among them. Only in situations not addressed by those sources does the EPA direct the parties to the DUAA and applicable provisions of Delaware law to fill the procedural gaps. Here, the AAA Rules plainly assign to the arbitrator in the first instance the responsibility to resolve procedural arbitrability questions, such as contractual time limit and statute of limitations defenses. Because Sections 5702(c) and 5703(b) of the DUAA are inconsistent with that, I find that they do not apply to arbitral disputes under the EPA and that the issues presented in Sellers' Complaint must be heard by the arbitrator. Therefore, Sellers have an adequate remedy at law and this Court lacks jurisdiction to hear their motion for a preliminary injunction. Accordingly, I will grant Purchasers' motion to dismiss.

4. A note on the decision to defer to arbitration

Having concluded that the disputed sections of the DUAA do not apply to arbitration under the EPA, I add one final point. In light of the well-recognized policies in Delaware supporting arbitration,[75] courts generally favor contractually-bargained-for

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[74] *See supra* note 68.

[75] *See, e.g., Meades v. Wilm. Hous. Auth.*, 2003 WL 939863, at *5 (Del. Ch. Mar. 6, 2003); *Ruggiero v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 499459, at *6 (Del. Ch. June 23, 1999) ("[A]rbitration practice is designed as an alternative dispute

arbitration and "ordinarily resolve any doubts in favor of" that dispute resolution mechanism.[76] Thus, to the extent there is any basis for doubt about the above findings, I conclude that, consistent with the holding in *McLaughlin*, this Court "should defer to arbitration, leaving the arbitrator to determine what is or is not before her."[77]

C. May the Court Hear Sellers' Motion under Traditional Equity Jurisdiction?

Even though Sections 5702(c) and 5703(b) of the DUAA are inapplicable, Sellers argue in the alternative that this Court has subject matter jurisdiction over the dispute under its traditional general equity jurisdiction, inherited from the English Court of Chancery.[78] The Court's equity jurisdiction includes the authority to enjoin an arbitration where (1) "the claims sought to be arbitrated were not committed to arbitration by the

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resolution mechanism and is intended to expedite, streamline, and efficiently resolve disputes in a manner which saves prospective litigants time and expense.").

[76] *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155-56 (Del. 2002).

[77] *McLaughlin v. McCann*, 942 A.2d 616, 625 (Del. Ch. 2008). "In general, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Id*. at 621 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

[78] *See Eastman Kodak Co. v. Cetus Corp*., 1991 WL 202184, at *2 (Del. Ch. Oct. 4, 1991) ("This Court's jurisdiction is coextensive with that of the High Court of Chancery of Great Britain at the time of the American Revolution."); *SBC Interactive, Inc. v. Corporate Media P'rs,* 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).

parties" and (2) irreparable injury would be suffered absent an injunction.[79] Courts will not accept jurisdiction over claims properly committed to arbitration, however, because in such a case, an adequate legal remedy exists.[80] As previously explained, the parties agreed in the EPA that this dispute should be handled in arbitration. Consequently, despite their argument to the contrary based on the relevant sections of the DUAA, Sellers have an adequate remedy at law. Because Sellers have not articulated any other basis upon which this Court properly could exercise jurisdiction over this dispute, Purchasers' motion to dismiss for lack of subject matter jurisdiction is well-founded.[81]

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I hold that the issue of whether Purchasers' claims are barred by either the Delaware statute of limitations or the time limits created under the EPA presents a procedural question that must be decided by the arbitrator, not this Court. Accordingly, I deny Sellers' motion for a preliminary injunction and declaratory judgment and grant Purchasers' motion to dismiss this action under Court of Chancery Rule 12(b)(1) for lack of subject matter jurisdiction. This ruling

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79 *Dresser Indus., Inc. v. Global Indus. Tech., Inc.*, 1999 WL 413401, at *3 (Del. Ch. June 9, 1999).

80 *Id.* at *4; *Pers. Decs., Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 n.29 (Del. Ch. May 5, 2008) ("A valid arbitration clause divests this court of subject matter jurisdiction to hear disputes within its ambit.").

81 Having determined that the parties' dispute should be handled in arbitration in accordance with the terms of the EPA, I need not address the merits of Plaintiffs' statute of limitations or contractual time bar defenses. Similarly, I do not reach Purchasers' arguments for dismissal based on their contention that Plaintiffs have failed to state a claim on which relief can be granted.

is without prejudice to Sellers' argument that Purchasers' underlying claims are time-barred.

IT IS SO ORDERED.