JAIN v. COURIER DE MERE: THE SEVENTH CIRCUIT COMPELS ARBITRATION FOR TWO NON-U.S. CITIZENS

Henri Courier de Mere (de Mere), a citizen and resident of France, invented and owned the patents to electronic ballasts for fluorescent and gas discharge lamps.[1] Ishwar Jain (Jain), a citizen and resident of India, had a written agreement with de Mere to market and negotiate licensing for de Mere's inventions.[2] The agreement provided that Jain was entitled to ten percent of all amounts received by de Mere in marketing and licensing the product.[3] The agreement also stated that "[a]ny disagreement arising out of this contract may only be presented to an arbitrary commission applying French laws."[4] The parties did not stipulate a forum for the arbitration or a method of appointing an arbitrator or arbitrators.[5] On August 25, 1993, with the help of Jain, de Mere executed a licensing agreement with Motorola Lighting, Inc. (Motorola) of Illinois.[6] De Mere paid Jain $25,000, representing ten percent of the first royalty payment advanced by Motorola.[7] Jain claimed that de Mere wrongfully withheld payment of ten percent of other moneys Motorola paid to de Mere.[8] De Mere claimed he did not owe Jain any further amounts beyond the $25,000.[9] On March 18, 1994, Jain served de Mere with a demand for arbitration in Illinois under the Commercial Arbitration Rules of the American Arbitration Association (AAA).[10] De Mere claimed that arbitration could only occur in France and objected to the appointment of the AAA and its selection of an arbitrator.[11] Jain then brought suit in the Federal District Court for the Northern District of Illinois to compel arbitration in Illinois.[12] The district court held that it

1. Jain v. Courier de Mere, 51 F.3d 686, 688 (7th Cir.), *cert. denied*, 116 S. Ct. 300 (1995).
2. *Id.*
3. Jain v. Courier de Mere, No. 94 C 3388, 1994 U.S. Dist. LEXIS 11804, at *1 (N.D. Ill. 1994).
4. *Jain*, 51 F.3d at 688.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Jain*, 51 F.3d at 688.
10. *Id.*
11. *Id.*
12. *Id.*

had no authority to enforce the arbitration agreement under chapter one of the Federal Arbitration Act (FAA)[13] or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention),[14] absent an agreement by the parties specifying the location of arbitration and the method of designating arbitrators.[15] The district court denied a motion for reconsideration, and Jain appealed on the grounds that the district court incorrectly determined that it could not compel arbitration.[16] The U.S. Court of Appeals for the Seventh Circuit reversed and remanded the district court's decision, *holding* that the FAA and the Convention empower a district court to: a) compel arbitration in the district where the action to compel arbitration is brought and b) designate an arbitrator in an international commercial arbitration agreement where the parties fail to designate a forum or a method of choosing arbitrators. *Jain v. Courier de Mere*, 51 F.3d 686 (7th Cir.), *cert. denied*, 116 S. Ct. 300 (1995).

Until Congress enacted the FAA, American courts refused to enforce arbitration clauses, because arbitration deprived courts of their jurisdiction.[17] When Congress enacted the FAA in 1925, its objective was to overcome judicial hostility to arbitration.[18] The FAA governs the enforcement, validity, and interpretation[19] of arbitration clauses in both state and federal courts.[20] Section two of the FAA provides that the grounds for revocation of an arbitration agreement are the same as for any contract.[21] Absent grounds for revocation, the district court must find the arbitration agreement valid and enforceable.[22] Should one of the parties to an arbitration agreement refuse to arbitrate, the other party may petition

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13. 9 U.S.C. §§ 1-9 (1994).

14. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), Sept. 30, 1970, 21 U.S.T. 2517, as codified in the Federal Arbitration Act (FAA), 9 U.S.C. §§ 201-08 (1994).

15. *Jain*, 51 F.3d at 688.

16. *Id.*

17. Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974); *see also* Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 838 (1995). In refusing to enforce arbitration clauses, the American courts followed the English view.

18. *Id.*

19. Convention, *supra* note 14, art. II(3), 21 U.S.T. at 2519.

20. *Allied-Bruce*, 115 S. Ct. at 838.

21. FAA, 9 U.S.C. § 2 (1994). Please note that the FAA includes two chapters. Chapter 1, entitled General Provisions, contains sections 1-16. Chapter 2, entitled Convention on the Recognition and Enforcement of Foreign Arbitral Awards, contains sections 201-08. This Note will refer to the FAA both in terms of chapters and sections.

22. *Id.*

any U.S. district court with proper subject matter jurisdiction to compel arbitration.[23] That court must then compel arbitration in the same district, if the arbitration clause is valid.[24] The second chapter of the FAA provides the court with methods to enforce arbitration clauses in international commercial disputes involving one or more non-U.S. citizens.[25] Chapter two of the FAA codifies the Convention under U.S. law.[26] The Convention expands the chapter one provisions of the FAA and thus provides the court flexibility in interpreting international arbitration agreements.[27] For example, section 206 permits a court to compel arbitration at any place worldwide that is provided for in the agreement.[28] Chapters one and two of the FAA are not entirely separate entities. Chapter two incorporates chapter one to the extent that there is no conflict between the two provisions.[29]

In an action to compel arbitration, courts have interpreted chapter two in various ways.[30] The U.S. Court of Appeals for the First Circuit takes the most systematic and comprehensive approach. To determine whether to compel arbitration under chapter two of the FAA, the First Circuit asks four basic questions.[31] First, the court must ask whether a

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23. FAA, 9 U.S.C. § 4 (1994). Section 4 states in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28 . . . of the subject matter of a suit arising out of the controversy between the parties, for an order directing such arbitration to proceed . . . . The hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed."

Id. (citing 28 U.S.C. §§ 1331-34 (1994)).

24. *Id.*

25. 9 U.S.C. §§ 201-08 (1994). District courts have original jurisdiction over actions or proceedings falling under the Convention. *Id.* § 203.

26. Convention, *supra* note 14, 21 U.S.T. at 2517.

27. Oil Basins Ltd. v. Broken Hill Proprietary Co., 613 F. Supp. 483, 486-87 (S.D.N.Y. 1985).

28. FAA, 9 U.S.C. § 206 (1994); *see also Oil Basins*, 613 F. Supp. at 486-87 (quoting State Department letter to Speaker of the House regarding district court authority under FAA chapter 2: "[s]ince there may be circumstances in which it would be highly desirable to direct arbitration within the district in which the action is brought and inappropriate to direct arbitration abroad, Section 206 is permissive rather than mandatory").

29. 9 U.S.C. § 208 (1994).

30. *See* Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982); Euro-Mec Import Inc. v. Pantrem & C., S.p.A., Civ. A. No. 90-2624, 1992 U.S. Dist. LEXIS 18046, at *1, *13 (E.D. Pa. Nov. 16, 1992).

31. *See Ledee*, 684 F.2d at 184, 186-87. The four questions presented in *Ledee* are derived from both the articles of the Convention itself, *supra* note 14, 21 U.S.T. at 2517, and from the

written arbitration agreement exists which covers the subject matter of the dispute.[32] The second question concerns whether the agreement designates an arbitral forum within the territory of a Convention signatory.[33] The third question seeks to determine whether the agreement arises out of a commercial legal relationship.[34] Finally, the court asks whether at least one party to the agreement is a non-U.S. citizen or, in the alternative, whether the commercial agreement has a reasonable relation with at least one foreign state.[35] If all four questions are answered in the affirmative, then the court must order arbitration unless it finds, based on other grounds, that the agreement is null and void, inoperative, or incapable of being performed.[36] In *Ledee v. Ceramiche*, all four questions yielded affirmative answers, and the First Circuit found no grounds on which to declare the agreement null and void, inoperative, or incapable of being performed.[37] As a result, the court compelled arbitration between an Italian tile producer and its Puerto Rican distributor.[38]

In contrast, when any one of the questions is answered in the negative, the court may not compel arbitration under chapter two. If the answer to questions one, three, or four is negative, the court cannot order arbitration under the Convention.[39] Absent a written arbitration agreement, a commercial legal relationship between the parties, or a reasonable relation with at least one foreign state, a court does not have authority to compel arbitration.[40] A number of cases have held, however, that question two, regarding choice of forum, need not yield an affirmative answer in order for a court to compel arbitration.[41] These

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Convention as adopted in the chapter 2 provisions of the FAA, 9 U.S.C. §§ 201-08 (1994). Other courts use a more free form analysis of these provisions. *See, e.g.*, *Oil Basins*, 613 F. Supp. at 486.

32. *Ledee*, 684 F.2d at 186 (citing the Convention, *supra* note 14, arts. II (1)-(2), 21 U.S.T. at 2519); FAA, 9 U.S.C. § 202.

33. *Id*. at 186-87 (citing FAA, 9 U.S.C. § 206 (1994); Convention, *supra* note 14, arts. I(1), I(3), 21 U.S.T. at 2519).

34. *Id*. at 187 (citing FAA, 9 U.S.C. § 202 (1994); Convention, *supra* note 14, art. I(3), 21 U.S.T. at 2519).

35. *Id*. (citing FAA, 9 U.S.C. § 202 (1994)).

36. *Ledee*, 684 F.2d at 187; *see also Euro-Mec*, 1992 U.S. Dist. LEXIS 18046, at *1.

37. *Ledee*, 684 F.2d at 187.

38. *Id*.

39. *Id*.

40. *Id.*

41. For cases in which arbitration was compelled, see *Euro-Mec*, 1992 U.S. Dist. LEXIS 18046, at *12-14 (plaintiff, a Pennsylvania corporation; defendant, an Italian corporation); Oil Basins Ltd. v. Broken Hill Proprietary Co., 613 F. Supp. 483 (S.D.N.Y. 1985) (plaintiff, a Bermuda

cases determined that an arbitration agreement is still enforceable under the Convention even if the parties fail to designate a forum in their agreement.[42]

In *Oil Basins Ltd. v. Broken Hill Proprietary Co.*, the U.S. District Court for the Southern District of New York granted a Bermudan plaintiff's motion for an order compelling arbitration with an Australian defendant.[43] The district court found that, under FAA, chapter two, section 206, it had discretion to compel arbitration only in its own district or in a forum specified in the contract.[44] The parties, however, failed to designate a forum in their arbitration agreement.[45] The court relied on FAA, chapter two, section 208, which states that chapter one applies "to the extent that [it] is not in conflict with [chapter two] or the Convention as ratified by the United States."[46] The court then applied chapter one, section four, of the FAA to the dispute.[47] Section four requires a court to order arbitration in its own district.[48] The court ruled that this requirement did not conflict with FAA section 206, chapter two,[49] and compelled arbitration in the Southern District of New York.[50]

The U.S. Court of Appeals for the Ninth Circuit followed a similar reasoning in *Bauhini Corp. v. China National Machinery and Equipment Import and Export Corp.*[51] This case involved a California plaintiff and a Chinese defendant.[52] The parties' arbitration agreement was unclear as to the forum.[53] One clause stipulated arbitration in

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corporation; defendants, Australian corporations); Bauhini Corp. v. China Nat'l Mach. & Equip. Import & Export Corp., 819 F.2d 247 (9th Cir. 1987) (plaintiff, a California corporation; defendant, a Chinese corporation); Capitol Converting Co. v. Curioni, No. 87 C 10439, 1989 U.S. Dist. LEXIS 13904, at *1 (N.D. Ill. Nov. 9, 1989) (plaintiff, an Illinois corporation; defendant, an Italian corporation); Tolaram Fibers, Inc. v. Deutsche Eng'g Der Voest-Alpine Industrieanlagenbau, No. 2:91CV00025, 1991 U.S. Dist. LEXIS 3565, at *1 (M.D.N.C. Feb. 26, 1991) (plaintiff, a North Carolina corporation; defendant, a German corporation).

42. *See id.*

43. 613 F. Supp. at 488. Neither party was domiciled in New York, but New York law was the parties' choice of law. *Id.* at 486.

44. *Id.* at 486-87 (quoting 9 U.S.C. § 206 (1994)).

45. *Id.*

46. *Id.* at 487 (citing 9 U.S.C. § 208 (1994)); 9 U.S.C. § 208 (1994).

47. *Id.* at 487 (citing 9 U.S.C. § 4 (1994)).

48. 9 U.S.C. § 4 (1994).

49. *Id.* § 206.

50. *Oil Basins*, 613 F. Supp. at 487.

51. 819 F.2d 247 (9th Cir. 1987).

52. *Id.*

53. *Id.* at 248.

Peking, but in several other places in the standard form agreement, the parties left blank the space for stipulating the forum.[54] The court in *Bauhini* ruled that the document failed to indicate what forum the parties intended to select.[55] Because the agreement did not stipulate a forum, the Ninth Circuit read section four of the FAA to apply and ordered arbitration in its own district.[56]

In *Capital Converting Co. v. Curioni*,[57] the U.S. District Court for the Northern District of Illinois agreed with the reasoning in *Bauhini*. In *Curioni*, an Illinois plaintiff and an Italian defendant failed to designate a place for arbitration.[58] The court ruled that under these circumstances, FAA, chapter one, section four, does not conflict with chapter two.[59] Accordingly, the court compelled arbitration in the Northern District of Illinois.[60]

Under a similar reading of the FAA, the Northern District of Illinois resolved the problem of choosing an arbitrator when the parties failed to designate one.[61] In *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, where two U.S. parties failed to designate a method of choosing an arbitrator, the court looked at the parties' course of dealings to discover what method they intended.[62] The court stated that even if the parties had not established a course of dealings, FAA section five authorized the court to appoint an arbitrator upon either party's application.[63]

This interpretation of the FAA comports with federal policy favoring arbitration for resolving international commercial disputes. Courts generously construe the parties' intentions as to issues of arbitrability.[64] Absent a clear course of dealings, courts interpret omissions in the agreement as evidence of the parties' intent to leave the issue open.[65] Doubts about enforceability of the arbitration clause are

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54. *Id.*
55. *Id.* at 249.
56. *Bauhini*, 819 F.2d at 250.
57. No. 87C10439, 1989 U.S. Dist. LEXIS 10439, at *1 (N.D. Ill. Nov. 9, 1989).
58. *Id.*
59. *Id.* (citing 9 U.S.C. §§ 1-16, 201-08 (1994)).
60. *Id.*
61. Schulze & Burch Biscuit Co. v. Tree Top, Inc., 642 F. Supp. 1155, 1157 (N.D. Ill. 1986), *aff'd*, 831 F.2d 709 (7th Cir. 1987).
62. *Id.* at 1155-56.
63. *Id.* at 1156.
64. Mitsubishi Motors, Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985).
65. Oil Basins, Ltd. v. Broken Hill Proprietary Co., 613 F. Supp. 483, 487 (S.D.N.Y. 1985); *Schulze*, 642 F. Supp. at 1155-56.

resolved in favor of arbitration.[66] The policy in favor of arbitration promotes certainty in international commercial transactions.[67]

Consistent with this policy, the Seventh Circuit resolved the noted case in favor of arbitration.[68] The case was one of first impression because neither party was a U.S. citizen.[69] Accordingly, the court undertook a *de novo* review of both the issue of designating a forum and the issue of appointing an arbitrator.[70]

First, the court inquired whether it had jurisdiction over the suit brought by Jain.[71] FAA section 203 provides, "the district courts of the Untied States shall have original jurisdiction over . . . an action or proceeding [falling under the Convention], regardless of the amount in controversy."[72] In order for an action to fall under the Convention, FAA section 202 requires that the parties have a commercial legal relationship and that at least one party be a non-U.S. citizen or, in the alternative, that there be some non-U.S. tie.[73] Since neither party was a U.S. citizen, and since the parties' relationship was commercial, the action fell under the Convention.[74] Thus, the court concluded that it had valid subject matter jurisdiction.[75] Because the parties were not diverse and no federal question beyond that of arbitration was raised, the court noted that its subject matter jurisdiction was based solely on FAA section 203.[76]

Next, the court reviewed the FAA to determine whether it had authority to compel arbitration in any particular place.[77] This inquiry began with FAA section 206.[78] Section 206, however, only empowers the court to compel arbitration "in accordance with the [arbitration]

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66. Scherk v. Alberto-Culver Co., 417 U.S. 506, 518-20 (1974).
67. *Id.* at 518.
68. Jain v. Courier de Mere, 51 F.3d 686, 692 (7th Cir.), *cert. denied*, 116 S. Ct. 300 (1995).
69. *Id.* at 688.
70. *Id.*
71. *Id.* at 689.
72. *Id.* (quoting 9 U.S.C. § 203 (1994)).
73. *Jain*, 51 F.3d at 689 (relying on FAA, 9 U.S.C. § 202 (1994), transaction could tie in based on performance abroad, property abroad, or some reasonable relation with one or more foreign states).
74. *Id.* at 689.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Jain*, 51 F.3d at 689.

agreement at any place therein provided for."[79] Where, as in the noted case, the parties fail to designate a place for arbitration, section 206 does not provide one.[80] Since no other section of chapter two allows a court to designate a place for arbitration in the absence of a choice of forum by the parties, the Seventh Circuit then turned to the last section of the chapter, section 208.[81] Section 208 is a suppletive provision; it allows the court to apply, in an international arbitration dispute, any part of FAA chapter one that does not conflict with chapter two.[82] Finally, the court applied chapter one, section four to find that its district was a proper forum for the arbitration.[83] Section four requires a U.S. district court to compel arbitration in the district in which the petition for an order to compel arbitration was filed.[84] Thus, the court concluded that arbitration may only be compelled in the Northern District of Illinois.[85]

De Mere argued that most of the previous international cases involving motions to compel arbitration involved diverse parties.[86] De Mere attempted to distinguish his case on the grounds that both he and Jain are citizens of foreign nations and are, therefore, not diverse.[87] In response, the court stressed that in at least one case, *Oil Basins*, a district court compelled arbitration between two foreign nationals.[88]

In addition, the court noted that its conclusion was consistent with the original intent of the Convention as expressed in Article II(3).[89] Article II(3) states that a court shall compel arbitration unless the court finds the agreement null and void, inoperative, or incapable of being performed.[90] Given the language of Article II(3), the court concluded that chapters one and two of the FAA enable the court to enforce the parties' agreement to arbitrate.[91]

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79. *Id*. at 689 (quoting FAA, 9 U.S.C. § 206 (1994)).
80. *Id.*
81. *Id*. at 689.
82. *Id*. at 689 (quoting 9 U.S.C. § 208 (1994)).
83. *Jain*, 51 F.3d at 689-90.
84. *Id*. (quoting FAA, 9 U.S.C. § 4 (1994)).
85. *Id*. at 690.
86. *Id*. at 691 (citing *Bauhini*, 819 F.2d at 248; Circus Productions, Inc. v. Rosgoscirc, 93 Civ. 1304, 1993 U.S. Dist. LEXIS 13984, at *1 (S.D.N.Y. Sept. 30, 1993); *Tolaram*, 1991 U.S. Dist. LEXIS 3565, at *1; *Capitol Converting*, 1989 U.S. Dist. LEXIS 10439, at *1).
87. *Id.*
88. *Jain*, 51 F.3d at 691.
89. *Id.* (quoting Convention, *supra* note 14, art. II(3), 21 U.S.T. at 2519).
90. Convention, *supra* note 14, art. II(3), 21 U.S.T. at 2519.
91. *Jain*, 51 F.3d at 691.

Using a similar argument, the court determined that it also had the ability to appoint an arbitrator to resolve the dispute between Jain and de Mere.[92] Again, utilizing the suppletive provision, FAA section 208, the court reasoned that it could refer to provisions from FAA chapter one that do not conflict with chapter two. The court then determined that chapter two did not conflict with chapter one on the issue of appointing arbitrators because chapter two does not contain any relevant provisions.[93] FAA, chapter one, section 5, requires a district court to appoint an arbitrator or arbitrators if the parties' agreement either does not designate an arbitrator or does not provide a method of selection.[94] Since the agreement between Jain and de Mere neither specified an arbitrator nor provided a method of selection, the court held that the district court had the power to appoint an arbitrator.[95]

In its conclusions, the court noted that its decision is severely limited in scope.[96] Usually a defendant in de Mere's position would contest personal jurisdiction or plead forum non conveniens.[97] Furthermore, the parties will usually define in the agreement the forum and the method of choosing arbitrators.[98] Therefore, the court stated that its decision was not likely to cause scores of plaintiffs to seek resolution of arbitration disputes in the United States.[99]

That the decision is of limited scope does not excuse the Seventh Circuit's error. Because there is no jurisdictional or logical basis for the court's holding, it should have refrained from compelling arbitration in this particular situation.

First, the court misinterpreted the issue of subject matter jurisdiction. The court concluded that it had subject matter jurisdiction under FAA section 203.[100] The court then explicitly stated that section 203 is the sole basis for its subject matter jurisdiction.[101] However, the legal predicate for subject matter jurisdiction may only be found in Federal Rules of Civil Procedure sections 1331 (federal question

92. *Id.* at 692.
93. *Id.*
94. *Id.* (quoting FAA, 9 U.S.C. § 5 (1994)).
95. *Id.* at 692.
96. *Jain*, 51 F.3d at 692.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 689.
101. *Id.*

jurisdiction) and 1332 (diversity jurisdiction).[102] The court did not find a basis for subject matter jurisdiction that satisfied either Federal Rules of Civil Procedure sections 1331 or 1332.[103] There was no basis for diversity jurisdiction because neither party is a U.S. citizen.[104] In addition, the court did not find any federal question beyond that of arbitration, which it deemed to be insufficient as a base for subject matter jurisdiction under Federal Rules of Civil Procedure section 1331.[105] It is inconsistent for the court to decline to characterize the noted case as a federal question and then to confer subject matter jurisdiction based solely on FAA section 203, a federal law. Moreover, it is not possible for section 203 to confer jurisdiction autonomously. If the issue in *Jain* turns on a dispute governed by the FAA, then the case may qualify as a federal question. The court would then have subject matter jurisdiction based on Federal Rules of Civil Procedure section 1331. FAA section 203 does not confer subject matter jurisdiction.[106] Instead, it sets out under what conditions the provisions of FAA chapter two apply.[107]

In expressly declining to qualify the noted case as a federal question, the Seventh Circuit distinguished its analysis from that of the New York District Court in *Oil Basins*. In that case, the court qualified the arbitration dispute as a federal question with subject matter jurisdiction under Federal Rules of Civil Procedure section 1331.[108] The Seventh Circuit neglected to note this fundamental difference between its analysis and that of *Oil Basins*. Instead, the Seventh Circuit distinguished the New York District Court decision on other grounds.[109] *Oil Basins* was the only case cited by the court which directly supports the proposition that a district court can compel arbitration between two foreign nationals. Accordingly, the court would have strengthened its argument by conferring subject matter jurisdiction on the same basis as in *Oil Basins*, using Federal Rules of Civil Procedure section 1331.

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102. 28 U.S.C. §§ 1331-34 (conferring subject matter jurisdiction in federal courts). Sections 1333 and 1334 address the special situations of maritime and bankruptcy jurisdiction.

103. *Id.*

104. *Id.*

105. 28 U.S.C. § 1331.

106. 9 U.S.C. § 203 (1994).

107. *Id.*

108. Oil Basins Ltd. v. Broken Hill Proprietary Co., 613 F. Supp. 483, 485 (S.D.N.Y. 1985).

109. Jain v. Courier de Mere, 51 F.3d 686, 691 (7th Cir.), *cert. denied*, 116 S. Ct. 300 (1995) (distinguishing *Oil Basins*, wherein both parties wanted court to compel arbitration).

The court cited a number of cases, both in its own circuit and in other circuits, which used FAA section 4 to justify an order of arbitration.[110] However, in those cases, with the exception of *Oil Basins*, Federal Rules of Civil Procedure section 1332 conferred subject matter jurisdiction because the parties were diverse.[111] De Mere offered this same argument to the court.[112] The court rejected it, stating, "de Mere's position has some plausibility but is ultimately unconvincing."[113] The court then proceeded to justify its decision on policy grounds.[114] Given the court's faulty reasoning on the jurisdictional issue, the federal policy in favor of arbitration does not justify the court's decision.

Second, the court's personal jurisdiction over de Mere is also questionable. Clearly, de Mere did not challenge the court's personal jurisdiction. Nonetheless, there was little basis for the court to exercise personal jurisdiction over de Mere. De Mere never availed himself of anything in Illinois.[115] The conflict between de Mere and Jain arose out of their marketing agreement.[116] The agreement likely did not expressly target either the United States or Illinois as the market for licensing de Mere's invention.[117] This agreement, which gave rise to the dispute, pre-dated any activity by the parties in Illinois. Thus, the conflict did not arise out of the parties' contacts with Illinois. In fact, the court had a minimal interest in this dispute between two foreign nationals over an agreement that was unrelated to their contacts with the forum.

This weak, de facto basis for personal jurisdiction, coupled with the court's confusion regarding the issue of subject matter jurisdiction, undermines the court's credibility. Given this jurisdictional picture and the lack of cases to support its position, the court should have hesitated to extend the law.

By compelling arbitration under these circumstances, the court, in effect, applied U.S. law extraterritorially to non-U.S. citizens. While the

110. *See supra* note 84.
111. *Id.*
112. *Jain*, 51 F.3d at 691.
113. *Id.*
114. *Id.*
115. *See id.* at 686.
116. *Id.*
117. *Id.*

Convention is a UN treaty signed by both France and India,[118] the Seventh Circuit applied the U.S. version as codified in the FAA.[119]

In addition, the court used these provisions from the U.S. version of the Convention to rewrite the terms of the parties' agreement. As a result, the court failed to give proper effect to the parties' intentions as expressed in their written agreement. That agreement was fraught with ambiguity due to omissions and translation problems. For example, it is unclear what the parties meant by an arbitrary commission.[120] The agreement also provided that this commission may only apply French laws.[121] From the vague terminology, it is unclear whether the parties intended to only apply the French law of obligations or also French arbitration law.

Under the Convention, as ratified by the signatory countries, a court cannot compel arbitration when an agreement cannot be performed.[122] This agreement, as drafted, cannot be performed, and therefore the Convention dictates that the court should refrain from compelling arbitration. The court's interpretation of Article II(3) of the Convention is unfounded, and, accordingly, so is the result the court reaches. Ironically, the court reached the "arbitrary" result indicated by the parties in their agreement.

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118. Convention, *supra* note 14, 21 U.S.T. at 2547, 2549.

119. *Jain*, 51 F.3d at 688.

120. "Arbitrary commission" is possibly a translation from the French "organisme arbitral." *See* C. PR. CIV. § 1444 (Dalloz 1995).

121. *Jain*, 51 F.3d at 686. The court failed to give effect to any of these vague expressions of intent because to do so would mean opening the door to interpretations of French law and that is beyond its reach.

122. Convention, *supra* note 14, art. II(3), 21 U.S.T. at 2519.