"But it's 2021!" Service of Motion to Vacate Via Email Found Insufficient by the Eleventh Circuit

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While we are all getting used to the "new normal" of working remotely and relying on emails for almost all communications, a recent decision from the United States Court of Appeals for the Eleventh Circuit provides arbitration practitioners with a stark reminder – the "notice" requirements of the Federal Arbitration Act (FAA) will be strictly enforced and providing notice of a motion to vacate via email may not qualify as proper service.

In *O'Neal Constructors, LLC v. DRT Am., LLC*, 991 F.3d 1376 (11th Cir. 2021), O'Neal Constructors, LLC (O'Neal) and DRT America (DRT) entered into a contract containing an arbitration provision. Following a dispute, the parties went to arbitration and, on January 7, 2019, the panel issued an award requiring DRT to pay O'Neal a total of $1,415,193. The amount awarded to O'Neal consisted of two parts: $765,102 for the underlying contract dispute and $650,090 for reimbursement of O'Neal's attorneys' fees. While DRT paid O'Neal the first portion of the award, DRT refused to pay the portion that related to O'Neal's attorneys' fees.

On April 4, 2019, as a result of DRT's refusal to pay O'Neal's attorneys' fees, O'Neal filed a motion to confirm the award in Georgia state court (which was subsequently removed to the Northern District of Georgia). The next day, in a separate action, DRT filed a motion to vacate the attorneys' fees portion of the award and, that same night, DRT's counsel emailed O'Neal's counsel a "courtesy copy" of DRT's memorandum in support of the motion to vacate. A few weeks later, on April 30, 2019 (*i.e.*, more than three months after the award was issued), DRT served O'Neal (via U.S. Marshall) with a copy of the motion to vacate.

Following consolidation of the parties' dueling actions, the district court denied DRT's motion to vacate and confirmed the award. In so doing, the court found that DRT had not timely served O'Neal with notice of the motion to vacate because O'Neal had not consented to be served via email.

In affirming the district court's decision, the Eleventh Circuit noted that the FAA imposes "strict procedural requirements on parties seeking to vacate arbitration awards" and that one of those requirements was providing the adverse party or their counsel "notice of a motion to vacate . . . within three months after the award is filed or delivered." As (1) O'Neal did not consent to receive notice via email; and (2) DRT's service of notice via U.S. Marshall took place more than three months after the award was issued, the Eleventh Circuit easily concluded that DRT's notice of its motion to vacate was "not serve[d] in a proper and timely way."

As parties (and their counsel) continue to work and communicate remotely, it is critical to remember that, while convenient, communications via email are not always sufficient to provide adverse parties with "proper notice." While that day may very well come, for now, parties should rely on the tried and true method of providing notice – hard copy via mail or process server. Failing that, and if service via email is going to be attempted, parties should make certain that the other party has expressly consented to receiving notice in that manner.

If you have questions or would like additional information, please contact Justin K. Fortescue (fortescuej@whiteandwilliams.com; 215.864.6823) or another member of our Reinsurance Group.