

Gemalto Tells Texas Judge Retailers Owe \$46M Arbitral Award

By Jack Newsham

Law360, New York (April 14, 2016, 8:59 PM ET) -- Payment technology giant Gemalto NV asked a Texas judge on Wednesday to turn a \$46 million arbitration award against a joint venture of dozens of major American retailers into a judgment, saying a unanimous arbitral panel found Merchant Customer Exchange LLC reneged on a major contract.

MCX — which is rolling out an alternate payment network called CurrentC — was found liable by an arbitral panel last month of having hired Amsterdam-based Gemalto's U.S. affiliate to create its payment system, only to conduct secret talks with a competitor and cut ties with Gemalto after finding fault with a largely successful test of its technology, according to a copy of the award.

Carmine R. Zarlenga, a partner at Mayer Brown LLP representing Gemalto, told Law360 Thursday that preparing for the arbitral hearings involved deposing Gemalto's overseas employees and retrieving documents from his client's foreign offices. Building the case around themes and a narrative ultimately won the tribunal of the American Arbitration Association over, he said. Gemalto was awarded \$42.8 million, and Mayer Brown won \$3 million in fees.

"These were all old-world, contract-law principles [applied] to very new-world digital technology," he said. "I worried about how [the arbitrators] were going to apply the principles to something this different, this new, and I think they were very faithful to the old-world principles."

According to the award, Gemalto and MCX inked a deal in April 2013 to come up with a payment system, which was meant to reduce the card processing fees that merchants shell out, after Gemalto beat out several other bidders. But shortly after the contract was signed, MCX and its members, which include Wal-Mart, ExxonMobil and Best Buy, began to express "rumblings of discontent" with the Gemalto deal. That summer, MCX's new CEO, Dekkers Davidson, quietly rekindled discussions with Paydiant Inc., a Massachusetts startup now owned by Paypal that had also been considered to design MCX's system, the award said.

Gemalto's first version of the system was tested in stores in October 2013, the award said. As expected, there were some bugs, but Gemalto began to address them in a manner consistent with the contract, the panel found. By December, however, angry letters were flying back and forth, and MCX reached a new deal with Paydiant that it expected would save it \$20 million compared to its seven-year contract with Gemalto, the award said. Arbitration soon followed.

MCX asked a Texas judge to vacate the award earlier this month. The company said the panel blew off

its counterclaims and “failed to completely adjudicate” its defenses. Under Texas law, MCX contended, the \$42.8 million award — which stems from a figure in the companies’ contract — should be reduced because it clearly outstrips the damages Gemalto suffered.

A representative for MCX didn’t reply to a request for comment. CurrentC, its payment app, is currently being tested in Columbus, Ohio, according to its website.

The arbitral panel consisted of chair Michael S. Wilk, George Bowles and Lionel Schooler.

Gemalto is represented by Carmine Zarlenga, Brian Rosenthal, Adam Hudes, Dara Kurlancheek and Cody Gillians of Mayer Brown LLP and Clayton E. Bailey and Benjamin L. Stewart of Bailey Brauer PLLC.

MCX is represented by C. David Kinder, Phylis J. Speedlin, Jane E. Bockus and Mark J. Barrera of Dykema Cox Smith and Bartholomew L. McLeay of Kutak Rock LLP.

The case is Merchant Customer Exchange LLC v. Gemalto Inc., cause number DC-16-03893 in the District Court of Dallas County, Texas.

--Editing by Jill Coffey.