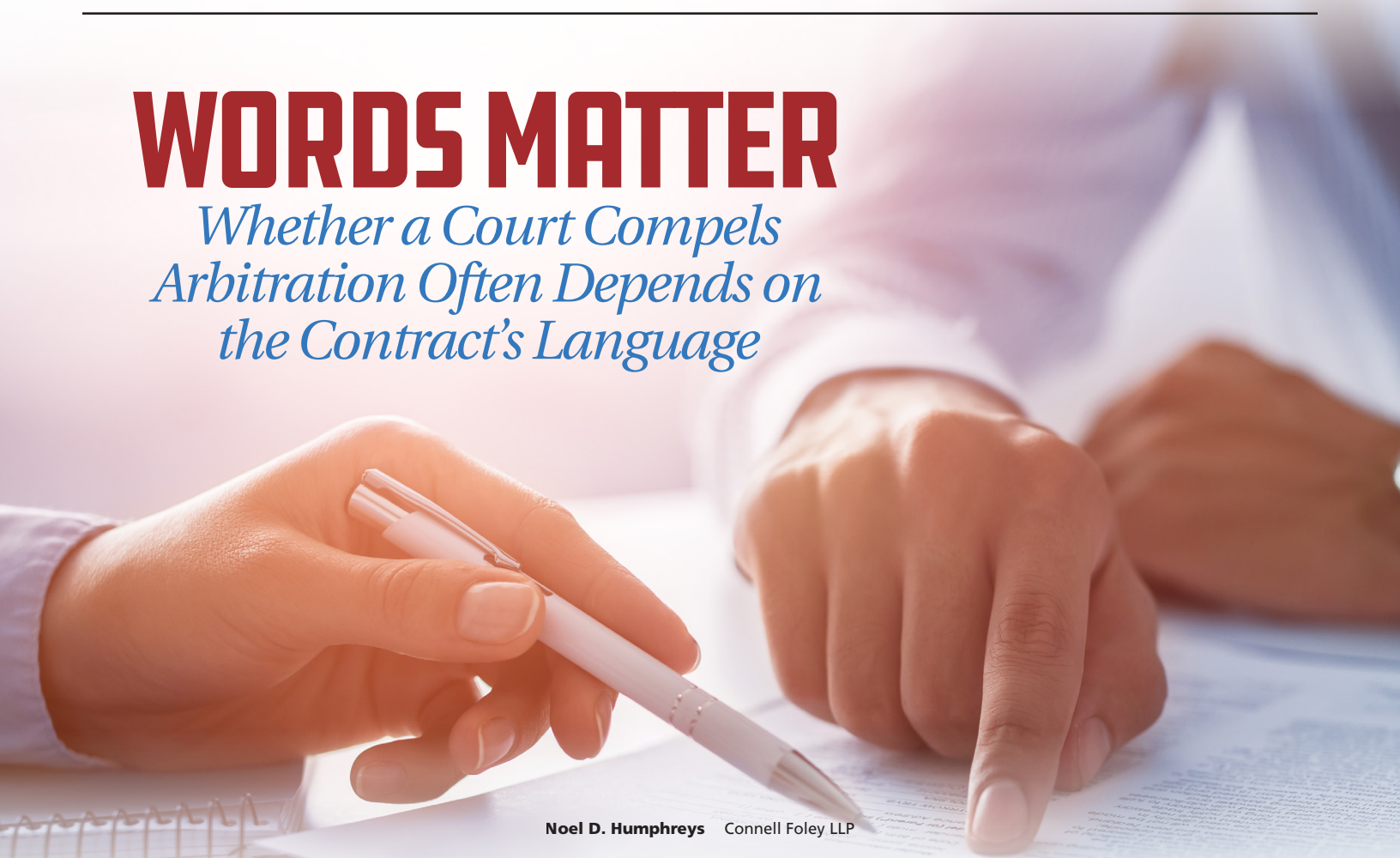
WORDS MATTER

Whether a Court Compels Arbitration Often Depends on the Contract's Language



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A contract's arbitration clause is not boilerplate. The specific words there actually matter. Some recent decisions have made clear that the words drafters chose may imply hidden or unexpected, maybe unintended, meanings. For example:

- If the parties intend to exclude injunctive relief from arbitration, how that exception is expressed may make a difference to how the matter proceeds if a dispute arises.
- Enforceability of an arbitration provision may hinge on whether the parties specify a particular arbitration source such as AAA or JAMS rather than specifying no service provider. Whether an arbitrator or a court decides what is arbitrable may hang in the balance.
- There is a difference between a provision that makes all disputes between the parties subject to arbitration and a provision that make only disputes arising out of the agreement subject to arbitration. To facilitate a court's decision regarding whether to compel arbitration in a particular case, a contract drafter seems well-advised to include explicit statements with as few exceptions and limitations as possible regarding what the parties intend if a dispute arises.
- In a recent Third Circuit decision involving rental cars, the arbitration clause appeared in the paper wrapper headed "Rental Terms & Conditions," but the rental agreement incorporated terms from the "rental jacket."[i] The court decided the "Agreement does not incorporate the rental jacket beyond doubt," because the printed form failed to call the wrapper by the name on the wrapper. That simple drafting error made a difference.

Take this fairly simple-seeming arbitration clause:

> *Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.*

The clause has generated multiple decisions from a federal district court, the Fifth Circuit Court of Appeals[ii] and even the U.S. Supreme Court.[iii]

The still-pending case arose when a dental supply firm, Archer & White Sales, accused some other firms of colluding against it in Texas. The agreement that contained this clause was with one of the accused colluders, now a predecessor in interest of the remaining defendant.

Initially in front of a magistrate judge, defendants invoked the Federal Arbitration Act and moved to compel arbitration. Archer & White opposed that motion, arguing that its complaint sought injunctive relief (as well as damages), and the arbitration clause explicitly excluded actions seeking such relief. The magistrate judge granted the motion, determining that the arbitrator should decide whether the matters in arbitration should be decided by the arbitrator or a court pursuant to this clause. The magistrate's idea was that the clause incorporated the AAA rules, which, in general, permit the arbitrator to decide what he or she is empowered to decide. The magistrate said defendants presented at least a "plausible construction" that would compel arbitration.

Three years later, the district court vacated that order and held that the court could decide the threshold arbitrability question. The district court reasoned that this action fell squarely within the arbitration clause's express exclusion of actions seeking injunctive relief.

The Fifth Circuit affirmed, asserting

that they perceived no plausible argument that the dispute was outside the scope of the exception.[iv] The Supreme Court rejected the circuit court's "wholly groundless" rationale.

Instead, the Supreme Court held that if a "contract delegates the arbitrability question to an arbitrator, a court may not override the contract."[v] The Supreme Court reaffirmed its holding in its decision in *First Options*,[vi] that "parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by "clear and unmistakable' evidence." On remand, therefore, the Fifth Circuit considered whether the arbitration clause set forth above was "clear and unmistakable" evidence that the parties had delegated to the arbitrator the question of whether the arbitrator's authority extended to determining whether plaintiff's claims were subject to arbitration.

The standard pattern for a court involves, first, a determination that there is a valid agreement including a valid arbitration provision and, second, a determination that the dispute falls within the arbitration clause. The presumption is that, without "clear and unmistakable" evidence of intent to delegate arbitrability to the arbitrator, the court should decide arbitrability. Here, the parties were not disputing that there was a valid arbitration clause, even though defendant was not a party to the contract.

Precedent in the Fifth Circuit, the Third Circuit and other Circuits[vii] holds that a clause identifying AAA rules as the manner of arbitration constitutes sufficient "clear and unmistakable" evidence of intent to delegate the arbitrability question to the arbitrator. Under AAA Rule 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 or to the arbitrability of any claim or counterclaim."[viii]

Ignoring the parenthetical in the contract language, defendants argued that the sentence stated clearly that disputes were to be arbitrated under AAA rules, meaning that the arbitrator decides his or her jurisdiction and authority. On the other hand, plaintiff argued that what was "clear and unmistakable" was that injunctive relief was outside the scope of the delegation to the arbitrator. Defendant asserted that what the court was not permitted to do was determine the scope of arbitrator's authority after the parties had invoked the AAA rules which give that power to the arbitrator. Allowing the court to determine the scope of delegation to the arbitrator, defendant said, was contrary to the parties' intent.

Plaintiff sought both money damages and injunctive relief. As a result, the court had to consider whether the contracting parties' intent, as expressed in the arbitration clause, meant bifurcation of the claims. In other words, did the parties intend that the arbitrator should consider the money damages portion of the case, while a court should consider the injunctive relief portion of the case? In part, based on the construction of the sentence where the language appeared, the Fifth Circuit decision held that the arbitration provision's exclusion of "actions seeking injunctive relief" meant that the court should hear all of plaintiff's action for damages and injunctive relief.

Consequently, the Fifth Circuit decision did not compel arbitration, because the parties had intended that the dispute as presented was not to be resolved by arbitration.

The court did not reach the question of whether the defendant could successfully invoke the arbitration clause even though the defendant was not a party to the agreement.

The Supreme Court may let us know how properly to read this provision. The Court in June agreed to hear the case this fall. [ix]

The recent Third Circuit decision in *Richardson v Coverall North America*[x] was more cursory than the Fifth Circuit's *Archer & White* decision. The Coverall North America decision involved claims that workers were misclassified under New Jersey law as independent contractors, rather than as employees. This decision followed other Circuit Court decisions that calling for a decision under AAA rules in an arbitration clause manifests "clear and unmistakable" evidence that the parties had a meeting of the minds intending that the arbitrator must determine arbitrability issues.

This decision can be compared with the 2017 Third Circuit decision in *Moon v. Breathless*,[xi] which involved a similar claim under the federal Fair Labor Standards Act (the "FLSA"). The agreement under consideration in that case included the following clause, which did not name an arbitration provider:

> In a dispute between Dancer and Club under this Agreement, either may request to resolve the dispute by binding arbitration. THIS MEANS THAT NEITHER PARTY SHALL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT OR TO HAVE A JURY TRIAL — DISCOVERY AND APPEAL RIGHTS ARE LIMITED IN ARBITRATION. ARBITRATION MUST BE ON AN INDIVIDUAL BASIS. THIS MEANS NEITHER YOU NOR WE MAY JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION, OR LITIGATE IN COURT OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS.

The panel in that matter decided that Ms. Moon's FLSA claim did not arise out of "this Agreement," but instead arose out of the statute. In that decision, the court did not compel arbitration.

Recent decisions such as these suggest that courts are more likely to compel arbitration if a dispute arises if the arbitration clause clearly and unmistakably names an arbitration service provider and explicitly indicates that the parties intend to delegate to the arbitrator threshold questions of arbitrability.

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i *Bacon v. Avis Budget Grp., Inc.*, No. 18-3780, 2020 BL 184123 (3d Cir. May 18, 2020),
ii Most recently, *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019).
iii *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 , 528 , 202 L. Ed. 2d 480 (2019) ("Schein").
iv *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 497 (2017), rev'd, 139 S. Ct. 524 , 202 L. Ed. 2d 480 (2019).
v *Henry Schein*, 139 S. Ct. at 529
vi *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 , 944 , 115 S. Ct. 1920 , 131 L. Ed. 2d 985 (1995).
vii *Richardson v. Coverall N. Am., Inc.*, No. 18-3393, 2020 BL 157077, 2020 Us App Lexis 13568, 2020 WL 2028523 (3d Cir. Apr. 28, 2020) ("*Richardson*"); *Brennan v. Opus Bank*, 796 F.3d 1125 , 1130-31 (9th Cir. 2015) ("Our holding today should not be interpreted to require that the contracting parties be sophisticated . . . before a court may conclude that incorporation of the AAA rules constitutes 'clear and unmistakable' evidence of the parties' intent [to delegate arbitrability]."); see also McGee v. Armstrong, 941 F.3d 859 , 863 , 865-66 (6th Cir. 2019); *Arnold v. Homeaway, Inc.*, 890 F.3d 546 , 548-49 , 551-52 (5th Cir. 2018); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766 , 767-69 (8th Cir. 2011).
viii Am. Arbitration Ass'n, Commercial Arbitration Rules and Medication Procedures 13 (2013), https://www.adr.org/sites/default/files/Commercial%20Rules.pdf .
ix *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963., 2020 BL 220261, 2020 Us Lexis 3181 (U.S. June 15, 2020)
x *Richardson v. Coverall N. Am., Inc.*, No. 18-3393, 2020 BL 157077, 2020 Us App Lexis 13568, 2020 WL 2028523 (3d Cir. Apr. 28, 2020).
xi *Moon v. Breathless, Inc.*, 868 F.3d 209, 27 WH Cases2d 725 (3d Cir. 2017).

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