The Arbitration Newsletter

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(John Allen Chalk, Sr., Editor)

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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BEWARE THE CARVE-OUT!

ARCHER AND WHITE SALES, INCORPORATED v. HENRY SCHEIN, INCORPORATED et al.

The Fifth Circuit Court of Appeals, on August 14, 2019, filed its opinion on remand from the United States Supreme Court in the *Henry Schein* case,[2] stating, "… the placement of the carve-out here is dispositive."[3] The "actions" and "disputes" described in the parties' arbitration clause carve-out[4] are not arbitrable.[5] The alleged anti-trust violations, filed almost seven years earlier, are plainly described in the carve-out, therefore, there is nothing to arbitrate. The "arbitration rules" of the American Arbitration Association and the resulting delegation agreement arising out of the AAA arbitration rules, although in an otherwise valid arbitration agreement,[6] has no application for the carve-out "actions" and "disputes."[7] The district court's original denial of defendants' motions to compel arbitration is affirmed.[8]

The Fifth Circuit, on remand, was convinced that the carve-out language constituted "plain," "plainly," "plain language," "plain text," "plain and unambiguous language," "clear on its face," and "natural reading," that under North Carolina governing law did not allow the Court to

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[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of The Arbitration Newsletter is to inform generally. The application of the comments in The Arbitration Newsletter to specific questions and cases should be discussed with the reader's independent legal counsel.

[2] *See* "The Arbitration Newsletter," June, 2019, for the U.S. Supreme Court opinion at 139 S. Ct. 524, 526 (2019).

[3] Archer and White Sales, Incorporated v. Henry Schein, Incorporated, *et al*., 2019 U.S. App. LEXIS 24226, *13 (5th Cir. August 14, 2019); *see* 2019 U.S. App. LEXIS 24226 at *6 fn 11 ("Sending the case back to us, the Court instructed this court to determine whether clear and unmistakable evidence of the parties delegation exists here.").

[4] 2019 U.S. App. LEXIS 24226 at *4 ("(except for **actions** seeking injunctive relief and **disputes** related to trademarks, trade secrets, or other intellectual property of Pelton & Crane)"). (Emphasis added.).

[5] 2019 U.S. App. LEXIS 24226 at *19-20.

[6] 2019 U.S. App. LEXIS 24226 at *7, 9, and 14.

[7] 2019 U.S. App. LEXIS 24226 at *9 fn 24 ("It is undisputed that the Dealer Agreement incorporates the AAA rules [AAA Commercial Arbitration Rules – 2013], delegating the threshold arbitrability inquiry to the arbitrator for at least some category of cases.").

[8] 2019 U.S. App. LEXIS 24226 at *15-16 and *19.

"rewrite the words of the contract."[9] The actions in this litigation clearly and plainly were included in the carve-out that prevents any clear and unmistakable delegation applicable to such actions.[10]

Several arbitration clauses are discussed by the Court – the clause in the present case,[11] the *Crawford* clause,[12] the *Oracle* clause,[13] and the *NASDAO OMX* clause.[14] They were quoted and discussed by the Court to demonstrate that the mere existence of a carve-out in an arbitration clause does not automatically or *per se* negate clear and unmistakable delegation in such clauses. But nothing in these quoted arbitration clauses affected the plain meaning of the arbitration clause in question.[15]

There is no party arbitration agreement for the "actions" and "disputes" in the present case.[16] Although *AT&T Technologies* (1986),[17] *First Options* (1995),[18] *Howsam* (2002),[19] *Rent-A-Center* (2010),[20] and numerous Fifth Circuit cases[21] have recognized the "clear and unmistakable" delegation right for parties in their arbitration agreements, this case is about the plain meaning of the parties' carve-out exception to arbitration that the Court cannot rewrite.

OBSERVATIONS

1. Carve-outs in an arbitration clause are difficult, if the parties intend to delegate arbitrability to the arbitrator.

2. Every carve-out requires careful thought and precise, unambiguous, limiting language.

3. Remember that the AAA Commercial Rules of Arbitration (2013) contain R-37 ("Interim Measures") and R-38 ("Emergency Measures of Protection").

4. Both these AAA Rules contain reservations at R-37(c) and R-38(h) that may be construed to mean no waiver of delegation rights if these respective rules are adopted in the parties' arbitration agreement.[22]

5. Other arbitral providers have similar rules that should be consulted before completing an arbitration agreement that calls for that arbitral provider to administer the agreed arbitration.

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[9] 2019 U.S. App. LEXIS 24226 at *13-14.
[10] 2019 U.S. App. LEXIS 24226 at *14-15.
[11] 2019 U.S. App. LEXIS 24226 at *4.
[12] 2019 U.S. App. LEXIS 24226 at *9 fn 26.
[13] 2019 U.S. App. LEXIS 24226 at *11-12 fn 29.
[14] 2019 U.S. App. LEXIS 24226 at *11-12 fn 31.
[15] 2019 U.S. App. LEXIS 24226 at *17-18.
[16] 2019 U.S. App. LEXIS 24226 at *17-18.
[17] 2019 U.S. App. LEXIS 24226 at *8 fn 22.
[18] 2019 U.S. App. LEXIS 24226 at *3 fn 3.
[19] 2019 U.S. App. LEXIS 24226 at *6 fn 16.
[20] 2019 U.S. App. LEXIS 24226 at *6 fn 17.
[21] 2019 U.S. App. LEXIS 24226 at *7 fn 21, *8 fn 23, and *9 fn 26.
[22] I have not researched and know of no cases that so construe AAA R-37(c) and R-38(h). **BEWARE!**

6. Currently, a number of federal circuits have held that the parties' adoption of AAA Arbitration Rules and other arbitral provider rules, including the UCITRAL rules, with competence-competence provisions (e.g., AAA Commercial R-7) constitute "clear and unmistakable" delegation of arbitrability to the arbitrator. The drafter, however, will want to consider some clarification that states: "Nothing in this arbitration agreement shall be deemed to limit or nullify the parties' agreement to refer all arbitrability questions to the arbitrator."

7. But nothing in an arbitration will save the carve-out that unambiguously excepts certain "actions" or "claims" from arbitration.

8. A subtle distinction exists between arbitration scope questions (i.e. **what** issues have the parties submitted to arbitration in the face of silence or ambiguity) and **who** decides **what** issues have been submitted to arbitration (in the face of silence or ambiguity), both of which are described as "arbitrability" questions.

    a. *First Options* devotes two full paragraphs to these two questions and decides that the **what** question is supported by the strong federal policy favoring arbitration thus favoring arbitration of the issues under consideration.[23]

    b. But *First Options* reverses this favorable federal policy for the **who** question and requires that the parties *clearly* and *unmistakably* agree to delegate the **who** question to the arbitrator (thereby overcoming the presumption that the **who** question is to be answered by the courts without regard for the strong federal policy favoring arbitration).

[23] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995).