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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To Compel, or Not to Compel: That is the Question
A-1 Premium Acceptance, Inc. v. Hunter[2]

Imagine the administrator named in your arbitration agreement stops providing arbitration services for all consumer claims, nationwide. Who will hear the disputes under that agreement? This is exactly the question posed to the Supreme Court of Missouri in A-1 Premium Acceptance, Inc. v. Hunter.

This case arose when Appellee, Hunter, defaulted on an $800 dollar loan provided by Appellant, A-1. The loan contract, executed in 2006, contained the following arbitration clause:

> You [the borrower] agree and understand that a claim or demand for recovery of the balance due lender resulting from your default in payment may be asserted by lender in any court of competent jurisdiction. However, you agree that any claim or dispute including class action suits, other than that resulting from your default in payment, between you and the lender or against any agent, employee, successor, or assign of the other, whether related to this agreement or otherwise, ***and any claim or dispute related to this agreement or the relationship or duties contemplated under this contract, including the validity of this arbitration clause, shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect.*** Any award of the arbitrator(s) may be entered as a judgment in any court of competent jurisdiction. Information may be obtained and ***claims may be filed at any office of the National Arbitration Forum or at P.O. Box 50191, Minneapolis, MN 55405.*** This agreement shall be interpreted under the Federal Arbitration Act.[3]

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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. My thanks to Morgan Parker, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] 557 S.W.3d 923 (MO. 2018).

[3] *Id* at *2 (emphasis in original).

However, the administrator named in the Agreement, National Arbitration Forum ("NAF"), was no longer providing consumer arbitration services. In 2009, NAF was sued by the Minnesota Attorney General on allegations of consumer fraud, deceptive trade practices, and false advertising.[4] The substance of the claims revolved around the NAF's "one-sided" arbitrations where the NAF was alleged to have worked with creditors to ensure that there would be positive arbitration outcomes for the creditor.[5]

A-1 filed suit in a Missouri county circuit court seeking to recover the remaining principal on the loan plus interest and attorney's fees. In her answer, Hunter alleged a counterclaim for violations of the Missouri Merchandising Practices Act, and requested class certification on that issue. A-1 then moved to compel arbitration on the counterclaim pursuant to the arbitration agreement.[6] A-1 appealed after the circuit court denied the motion to compel.

This raised the determining question: what forum is to take over adjudication of the dispute that NAF would have heard? Multiple state and federal courts had heard this same issue and had come to different conclusions. Some courts held that the arbitration clauses were still enforceable and that an alternative arbitrator would be determined by the court.[7] Other jurisdictions held that they could not compel arbitration because the selected arbitrator was not available.[8]

In analyzing the case at hand, the Missouri Supreme Court first noted that there are two types of arbitration agreements: "(1) agreements in which the parties agree to arbitrate regardless of the availability of a named arbitrator, and (2) agreements in which the parties agree to arbitrate before—but ***only*** before—a specified arbitrator."[9] If the first type of agreement exists, section five of the Federal Arbitration Act ("FAA") authorizes and requires the court to name a substitute arbitrator if the agreement fails to identify a substitute or fails to provide a means of determining a substitute arbitrator. "If the agreement is of the latter type, however, nothing in the FAA

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[4] *Id.* at *2-3.

[5] *Id.* Most of the agreements that named the NAF as the arbitration administrator were consumer contracts of adhesion. The consumer had no ability to negotiate the contracts, and the creditor or service provider was a repeat player at arbitration proceedings.

[6] *Id.* at *3.

[7] *Courtyard Gardens Health & Rehab, LLC v. Arnold*, 485 S.W.3d 669 (Ark. 2016) (The NAF term was merely a severable ancillary logistical concern and thus arbitration should be compelled under an appointed arbitrator); *Smith v. Computertraining.com, Inc.*, 531 Fed. Appx. 713 (6th Cir. 2013) (concluding that even though the NAF was the preferred forum, the Agreement language authorized arbitration before the AAA); *Khan v. Dell Inc.*, 669 F.3d 350 (3d Cir. 2012) (held that the arbitration agreement was valid, despite its mandate of a non-operational arbitral forum); *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787 (7th Cir. 2013) (holding that FAA Section 5 required court to appoint substitute arbitrator); *Wright v. GGNSC Holdings LLC*, 808 N.W.2d 114 (S.D. 2011) (the court found NAF's unavailability to administer the dispute was procedural, not "integral," and that the court was required to appoint a substitute arbitrator under Section 5 of the FAA.).

[8] *Moss v. First Premier Bank*, 835 F.3d 260 (2d Cir. 2016) (declining to compel arbitration to a forum which was not agreed upon.); *Ranzy v. Tijerina*, 393 Fed. Appx. 174 (5th Cir. 2010) (unpublished opinion) (concluding that the district court properly denied the motion to compel arbitration given NAF's unavailability); *Flagg v. First Premier Bank*, 644 Fed. Appx. 893 (11th Cir. 2016) (unpublished opinion) (holding that "[b]ecause the choice of the NAF as the arbitral forum was an integral part of the agreement to arbitrate, we conclude that the district court properly denied First Premier's motion to compel arbitration and appoint a substitute for NAF"); *Carr v. Gateway, Inc.*, 944 N.E.2d 327 (Ill. 2011) (held that the selection of the NAF in a consumer contract was "integral to the parties' agreement to arbitrate," such that when the NAF stopped conducting consumer arbitrations, the arbitration agreement was unenforceable.).

[9] Hunter, No. SC96672, 2018 Mo. LEXIS 445, *5 (emphasis in original).

authorizes (let alone requires) a court to compel a party to arbitrate beyond the limits of the agreement it made."[10]

After considering the plain and unambiguous language of the Agreement, the Court held that this Agreement fell into the second category finding that A-1 and Hunter agreed to arbitrate exclusively before NAF, therefore no other arbitrator could be substituted according to the Agreement.[11] The Agreement states that Hunter's claims "shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect." This language clearly showed the parties' intent to be bound only to arbitration before the NAF. Additionally, the NAF "Code of Procedure then in effect" states that only the NAF can administer that Code. So even if another arbitrator was appointed, they could not decide the dispute under the procedural rules chosen in the Agreement. Finally, the Court noted that the Agreement required claims had to be filed at NAF's offices, further precluding the inference that the parties' Agreement extended to arbitration before any administrator other than the NAF.

All of these textual considerations provided a basis to conclude that the arbitration agreement was limited to an arbitration before the NAF. The Court affirmed the circuit courts denial of A-1's motion to compel arbitration.[12]

OBSERVATIONS

1. The starting place for analysis of an arbitration agreement, is always the plain meaning of the agreement language. The distinct and specific language of the individual agreements likely requires these seemingly contradictory results.

2. Arbitration agreements should be clearly drafted to include a method of selecting an alternative arbitrator (whether due to death, resignation, disqualification, or otherwise) to prevent the multiple issues that resulted from NAF's downfall. Carefully chosen arbitration rules will usually provide for such alternative appointments.[13]

3. Always pick carefully an arbitration administrator. You do not want an issue arising regarding the arbitrator's credibility or inability to perform.

4. A pre-dispute arbitration agreement can overly restrict both the arbitral institution's selection of an alternative arbitrator or the parties' selection of an alternative arbitrator and should be carefully crafted.

5. Both the parties' arbitration agreement and the parties' choice of arbitration rules should provide clearly for the selection of arbitrators and alternative arbitrators.

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[10] *Id.* at *6.
[11] *Id.*
[12] *Id.* at *10.
[13] *See* R-20, AAA Commercial Arbitration Rules (2013).