ARBITRABILITY OF DISPUTES IN DUAL CONTRACTS: SWENSEN'S ICE CREAM CO. v. CORSAIR CORP.

INTRODUCTION

When parties enter into a commercial contract, the agreement will often contain a provision that requires certain or all disputes to be settled by arbitration.¹ When a dispute arises under a contract, the parties may disagree as to whether the dispute involved is one which the parties agreed to arbitrate.² This Note discusses the various theories and policies used to determine which disputes will go to arbitration under these contract clauses.³ The discussion begins by looking at arbitration clauses in commercial contracts with a special focus on franchising.⁴ Next, theories on interpreting these clauses are analyzed both in light of the federal policy favoring arbitration as well as federal court decisions in this area.⁵ Finally, this Note focuses particularly on cases of multiple contracts and analyzes and contrasts these opinions with the opinion of the United States Court of Appeals for the Eighth Circuit in Swensen's Ice Cream Co. v. Corsair Corp.⁶ This Note concludes that the Eighth Circuit should have submitted the disputes under the subsequent agreement to arbitration because all of the contracts between the parties were interrelated.⁷

FACTS AND HOLDING

In Swensen's Ice Cream Co. v. Corsair Corp.,⁸ suit was brought by Swensen's Ice Cream Co. ("Swensen's"), the franchisor, to prevent defendants Corsair Corp. ("Corsair") and Dianne and Donald Frank, the franchisees, from operating their shops independently under a name other than Swensen's.⁹ The defendants counterclaimed, asserting that Swensen's had breached the franchise and distribution agree-
ments between the parties.\textsuperscript{10}

The franchise agreement was contained in three contracts.\textsuperscript{11} In 1979, two of these contracts were executed and contained the following arbitration clause language: “In the event of any dispute between Franchisor and Franchisee with respect to the interpretation, performance or alleged breach of this Agreement, such dispute shall be submitted to and resolved by arbitration in accordance with the rules of the American Arbitration Association.”\textsuperscript{12} In 1985, the third franchise contract was signed, and its arbitration provision provided that “disputes arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.”\textsuperscript{13} Each of the franchise agreements gave the franchisee the right to operate an ice cream shop along with the right to make ice cream to sell at these locations.\textsuperscript{14}

After executing these contracts, the parties entered into a “wholesale/distribution” agreement that set forth terms for the franchisee to control a region for ice cream distribution and this contract did not contain an arbitration clause.\textsuperscript{15} The issue in the case centered around whether disputes relating to the distribution contract should go to arbitration under the franchise agreement provisions.\textsuperscript{16}

The United States District Court for the Western District of Missouri held that most of the defendants’ counterclaims were not subject to arbitration.\textsuperscript{17} The court held that only those claims that arose directly from a breach of a franchise agreement should be submitted to arbitration.\textsuperscript{18}

\textsuperscript{10} id.
\textsuperscript{11} id. at 1308-09. A franchise agreement is an agreement between the supplier of a product or service or an owner of a desired trademark or copyright (franchisor), and a reseller (franchisee) under which the franchisee agrees to sell the franchisor’s product or service or to do business under the franchisor’s name. BLACK’S LAW DICTIONARY 658 (6th ed. 1990).
\textsuperscript{12} Swensen’s, 942 F.2d at 1309.
\textsuperscript{13} Id. This agreement contained an arbitration clause broader than the 1979 agreements. Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id. This agreement specified that “[t]he above rights are granted to you subject to your continuing to be in good standing with your various franchise agreements and other arrangements with Swensen’s.” Id.
\textsuperscript{16} Id. The distribution agreement contained a clause specifying that “[t]he above rights are granted to you subject to your continuing to be in good standing with your various franchise agreements and other arrangements with Swensen’s.” Id. at 1309.
\textsuperscript{17} Id. at 1308. The court held that any of the defendants’ counterclaims relating only to the distribution agreement were not subject to the franchise agreement’s arbitration clause. These included claims for breach of a fiduciary duty, misrepresentation of ingredients, tortious interference with defendants’ contracts with other suppliers, and prima facie tort. Id. at 1309.
\textsuperscript{18} Id. at 1309. The district court sent to arbitration the claim for breach of the
In a two-to-one decision, a panel of the Eighth Circuit affirmed the district court and held that the arbitration clauses only governed disputes arising under the franchise agreement and did not apply to the distribution agreement. The court found that the counterclaims were not based on any relationship between the distribution and franchise agreements. The court rejected the plaintiff's argument that the distribution contract was contingent upon the franchise relationship. The court found that the arbitration clauses applied only to disputes arising under all three franchise contracts.

Judge Beam, dissenting, agreed with Swensen's and found that the contracts were "intertwined" and that "they should be arbitrated as a package."

BACKGROUND
COMMERCIAL ARBITRATION

Arbitration of disputes is common in the commercial arena. Arbitration has the needed flexibility to handle a variety of issues that arise under commercial agreements. Commercial arbitration takes place in a variety of settings. The parties to the agreement can create their own forum, thereby setting forth their own procedures and processes for settling the dispute. Trade associations and exchanges also create arbitration procedures to settle disputes among their members. The American Arbitration Association and the International Chamber of Commerce also provide systems to decide

three franchise agreements, which included fraud and misrepresentation concerning a provision for recipes promised to the defendants. Id.  
19. Id. "By their terms, the three franchise agreements govern only the relationship of the parties with respect to each franchise location." Id.  
20. Id. at 1310.  
21. Id. at 1308.  
22. Id. at 1308, 1310. The court noted that "Swensen's contends, however, that the distribution agreement was contingent upon the franchise relationship, and, therefore, that any dispute concerning the distribution agreement is also subject to the arbitration clauses contained in the franchise agreements." Id. at 1308.  
23. Id. at 1311 (Beam, J., dissenting). Judge Beam stated that "The economic relationships contemplated by these interrelated contracts cannot, through any realistic analysis, be efficiently parsed out or compartmentalized for separate arbitration and judicial consideration." Id.  
26. See infra notes 27-29 and accompanying text.  
28. Id.
commercial issues.29

In the area of franchising, arbitration is preferred over litigation as a method of dispute resolution.30 In a franchise agreement, the franchisee or reseller agrees to sell a product or service under a desired trademark or copyright name owned by the franchisor.31 These same parties may also execute a distribution agreement in which the franchisee also agrees to sell the product as a distributor.32 These agreements usually establish a long-term relationship between the parties.33 When conflicts arise, litigation may be unsatisfactory.34 Franchise contracts should provide some method for resolving disputes without damaging the ongoing relation between the franchisee and the franchisor.35

One particular area of importance is trademark rights.36 The franchisor must have some method of controlling the nature and the quality of the goods that the franchisee sells under the trademark.37 The franchisor has an affirmative duty to prevent deception to the public under the trademark and failure to see that a quality product is delivered to the public can cause trademark rights to be lost.38

The ramifications of an agreement to arbitrate in a commercial contract should be carefully considered by all the parties involved.39 Once the clause is incorporated into the contract, the parties are bound by the arbitrator's decision.40 By agreeing to arbitrate, the parties waive their rights to litigate the dispute and to present issues to a jury in a civil action.41

Arbitration may not be practical in all settings, and parties may regret waiving their rights to litigation when they become bound by an arbitrator's decision.42 The courts are limited in reviewing arbitration decisions and will most likely uphold an arbitrator's decision.43 The arbitrator's decision may be based on emotion rather

29. Id.
31. See supra note 11 and accompanying text.
33. Rudnick, 28 Bus. Law. at 615.
34. Id.
35. Madson, 11 APLA Q. J. at 300.
36. Rudnick, 28 Bus. Law. at 616.
37. Id.
38. Id.
40. L. Riskin & J. Westbrook, supra note 27 at 120.
41. Madson, 11 APLA Q. J. at 311.
42. See infra notes 43-47 and accompanying text.
43. See, e.g., Ficek v. Southern Pac. Co., 338 F.2d 655, 657 (9th Cir. 1964) cert. de-
than law, and no reason need be forwarded in making the judgment.\textsuperscript{44} The cost of bringing a suit in arbitration is inexpensive compared to litigation.\textsuperscript{45} However, because the parties are not deterred by cost, they may bring more disputes before an arbitrator than they would before a court.\textsuperscript{46} Also, a party may find that a necessary remedy, such as a preliminary injunction, is not available unless expressly provided for in the arbitration agreement.\textsuperscript{47}

Generally, commercial parties prefer arbitration for reasons of cost, privacy, speed, informality, and the ability to choose an experienced and suitable decision-maker.\textsuperscript{48} Compared to arbitration, litigation is a battle that hinders the relationship between the parties by the nature of its machinery, high costs, and delays in court procedure.\textsuperscript{49} Arbitration creates a setting for fair dealing that reduces the tension between the parties.\textsuperscript{50} The arbitration agreement allows the parties to retain their autonomy by creating their own substantive and procedural rules and by choosing their own decision-maker.\textsuperscript{51} Arbitration is also cost-effective because counsel is not required and discovery procedures are more restricted.\textsuperscript{52}

In franchising, arbitration creates an atmosphere of fair dealing and good will between the parties.\textsuperscript{53} The agreement gives the franchisee security and a mechanism to voice grievances before frustrations reach a boiling point.\textsuperscript{54} The franchisee perceives the franchisor as willing to give up bargaining power in exchange for maintaining a good working relationship.\textsuperscript{55}

**THE AGREEMENT TO ARBITRATE**

Parties agree to arbitrate by drawing up a contract either before a dispute arises or afterwards in an ad-hoc agreement.\textsuperscript{56} In the

\textsuperscript{44} Madson, 11 APLA Q. J. at 315.
\textsuperscript{45} L. RISKIN \& J. WESTBROOK, \textit{supra} note 27, at 146.
\textsuperscript{46} Madson, 11 APLA Q. J. at 314.
\textsuperscript{47} \textit{Id.} at 315.
\textsuperscript{48} L. RISKIN \& J. WESTBROOK, \textit{supra} note 27, at 146.
\textsuperscript{49} Rudnick, 28 BUS. LAW. at 615.
\textsuperscript{50} Madson, 11 APLA Q. J. at 313.
\textsuperscript{51} L. RISKIN \& J. WESTBROOK, \textit{supra} note 27, at 146.
\textsuperscript{52} Madson, 11 APLA Q. J. at 313.
\textsuperscript{53} \textit{Id.} at 312-13.
\textsuperscript{54} Rudnick, 28 BUS. LAW. at 620.
\textsuperscript{55} Madson, 11 APLA Q. J. at 313.
\textsuperscript{56} L. RISKIN \& J. WESTBROOK, \textit{supra} note 27, at 135.
franchise context, the agreement to arbitrate is usually contained in
the parties’ franchise contract.57 No particular language is required
within the clause; however, the clause should clearly state the param-
eters for arbitration.58 Contract provisions usually set forth the stan-
dards, such as the place for arbitration and the procedures to be
used.59 In addition, the clause should define what particular disputes
will be taken to arbitration.60 Clearly defining the disputes that will
be arbitrated helps avoid the unnecessary misunderstandings illus-
trated in the cases that follow.61 The courts may become involved
when a dispute arises between the two parties and one contends that
they had an agreement to arbitrate.62 This party may then move for
a stay of court proceedings initiated by the other party or may peti-
tion the court to compel arbitration after the other party refuses to
arbitrate.63

FEDERAL POLICY OF ARBITRABILITY

The federal policy regarding arbitration is embodied in the Fed-
eral Arbitration Act.64 This Act renders the written provisions for
the arbitration of future disputes in commercial contracts and mar-
time transactions “valid, irrevocable and enforceable.”65 According
to the United States Supreme Court, the primary objective of this

57. Madson, 11 APLA Q. J. at 300.
58. Id. at 309.
59. L. RISKIN & J. WESTBROOK, supra note 27, at 120.
60. Madson, 11 APLA Q. J. at 309.
61. Id. at 310.
If any suit or proceeding be brought in any of the courts of the United States
upon any issue referable to arbitration under an agreement in writing for
such arbitration, the court . . . upon being satisfied that the issue involved in
such suit or proceeding is referable to arbitration under such an agreement,
shall on application of one of the parties stay the trial of the action until such
arbitration has been had.

Id. § 3. Section four states:
A party aggrieved by the alleged failure, neglect or refusal of another to arbi-
trate under a written agreement for arbitration may petition any United
States district court which, save for such agreement, would have jurisdiction
under title 28 . . . for an order directing that such arbitration proceed in the
manner provided for in such agreement.

Id. § 4.
63. Id.
65. Id. § 2. This provision provides:
A written provision in any maritime transaction or a contract evidencing a
transaction involving commerce to settle by arbitration a controversy thereaf-
ther arising out of such contract or transaction . . . shall be valid, irrevocable,
and enforceable, save upon such grounds as exist at low or in equity for the
revocation of any contract.

Id.
Act is to insure the enforcement of arbitration agreements. The courts will enforce these agreements by granting a stay from court proceedings until arbitration takes place between the parties. The courts will also compel arbitration between the parties if a party refuses, fails, or neglects to arbitrate. After the Federal Arbitration Act became effective, the federal courts developed a federal policy in this area to resolve the arbitrability issue. The "doubt test" is the method the federal courts have used to implement the federal policy on arbitration.

If a dispute does not fall within the "scope" of the arbitration clause, then the parties cannot be compelled to arbitrate. In considering whether the dispute is within the "scope of the clause," federal courts apply a "doubt test." Federal policy favors arbitration, so if any doubt exists as to whether the dispute is arbitrable, the doubt will be resolved in favor of arbitration. All that is required to compel arbitration is that the clause can be interpreted in some way to include the dispute at hand. The intentions of the parties are controlling, but these intentions are interpreted in a way that favors arbitration.

In contrast to this federal policy, at least one state court has taken a different approach. When interpreting the scope of a par-

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66. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) (explaining that the Act's purpose is to see that the courts enforce private arbitration agreements).
69. See infra notes 71-75 and accompanying text.
70. See infra notes 72-75 and accompanying text.
71. See United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) (stating that questions under the agreement must come within the scope of the provision); Prudential Lines, Inc. v. Exxon Corp., 704 F.2d 59, 63 (2d Cir. 1983) (finding that in determining scope, there is a presumption of arbitrability in commercial contract disputes).
72. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (holding that any doubts concerning whether a dispute is arbitrable should be resolved in favor of arbitration); Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163, 1165 (8th Cir. 1984) (stating that doubts should be resolved favoring arbitration); Laundry, Dry Clean & Dye House Workers Int'l Union, Local 93 v. Mahoney, 491 F.2d 1029, 1032 (8th Cir. 1974) (stating that "only the most forceful evidence to exclude the claim from arbitration can prevail"); American Fed'n of T.V. & Radio Art v. Taft Broad Co., WDAF, 368 F. Supp. 123, 126-127 (W.D. Mo. 1973) (finding that the question of arbitrability is aided by resolving doubts in favor of coverage).
73. Mitsubishi Motors Corp., 473 U.S. at 626; Morgan, 729 F.2d at 1165; Mahoney, 491 F.2d at 1032; Taft Board Co., WDAF, 368 F. Supp. at 126-127.
74. See United Steelworkers of America, 363 U.S. at 582-83 (holding that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.").
75. See Mitsubishi Motors Corp., 473 U.S. at 626 (stating the parties' intentions are generously construed as to issues of arbitrability).
ticular arbitration clause, a state court does not always presume arbi-
trability. In commercial agreements, if the agreement to arbitrate
does not expressly and without a doubt cover the subject matter in
question, a court may allow the parties access to a judicial forum in
stead of arbitration.

DETERMINING THE "SCOPE OF THE CLAUSE"

A dispute must fall within the scope of an arbitration clause in
order to be arbitrable. Parties will often disagree on the "scope of
the clause," basing their argument on the language of the clause.
In Prudential Lines, Inc. v. Exxon Corp., the United States Court of
Appeals for the Second Circuit set forth guidelines to follow in deter-
moving the scope:

Simply stated, a court should compel arbitration, and permit
the arbitrator to decide whether the dispute falls within the
clause, if the clause is "broad." In contrast, if the clause is
"narrow," arbitration should not be compelled unless the
court determines that dispute falls within the clause. Spe-
cific words or phrases alone may not be determinative
although words of limitation would indicate a narrower
clause. The tone of the clause as a whole must be
considered.

Applying this standard, the issue of arbitrability becomes a matter of
contract interpretation. The parties at the time of drafting a contract can prevent unnec-
essary disputes by clearly defining the exact issues they intend to
send to arbitration. When an arbitration clause is narrowly drafted
to apply to particular disputes, the judge will carefully scrutinize the

N.E.2d 760, 762 (1980) (stating that: "with such provisions in the commercial context
generally, the rule is clear that unless the agreement to arbitrate expressly and un-
equivocally encompasses the subject matter of the particular dispute, a party cannot be
compelled to forego the right to seek judicial relief and instead submit to
arbitration.").

77. See id.
78. Id.
80. L. RISKIN & J. WESTBROOK, supra note 27, at 135.
81. 704 F.2d 59 (2d Cir. 1983).
82. Id. at 64.
1978) (finding that the issue of arbitrability should be decided by looking at the con-
tractual intent of the parties); Atterbury, 425 F. Supp. at 843 (stating that the question
is whether the claims are arbitrable grievances within the meaning of the applicable
contracts).
84. See supra note 41 and accompanying text.
clause to insure that the intent of the parties is given effect.\textsuperscript{85} If a broad clause is not found in the provision, the court will define the narrow range of disputes to be arbitrated.\textsuperscript{86} If a contract merely states that disputes “arising under” the agreement shall go to arbitration without using the language “arising under or relating to” in the contract, then this will be deemed to show that the parties intended to keep the clause narrow.\textsuperscript{87}

In contrast, a clause stating that disputes “arising out of or relating to” the contract shall go to arbitration will be broadly construed.\textsuperscript{88} Under a broad clause, the courts will find that the parties intended to arbitrate all future disputes.\textsuperscript{89} In these cases, the courts will avoid the arbitrability issue altogether, allowing that issue to be decided in arbitration.\textsuperscript{90}

If a broad clause is used, then courts may find that the dispute should go immediately to arbitration without the court ruling on whether the dispute is arbitrable.\textsuperscript{91} Broad clauses create a presumption that the parties intended to arbitrate all disputes.\textsuperscript{92} Under this theory, fraud and misrepresentation, which may not be contract theories, will be arbitrable under “arising out of or relating to this contract” language but will not be under the narrow language of “arising out of this contract.”\textsuperscript{93}

In addition to looking at the face of the agreement, the courts

\textsuperscript{85} See Prudential Lines, Inc., 704 F.2d at 63-64 (finding that the parties intent is scrutinized under the clause).

\textsuperscript{86} See Twin City Monorail, Inc. v. Robbins & Myers, Inc., 728 F.2d 1069, 1073 (8th Cir. 1984) (stating that when the clause is narrow, there is a lesser presumption of arbitrability).

\textsuperscript{87} See S.A. Mineracao da Trindade-Samitri v. Utah Int’l, Inc., 745 F.2d 190, 194 (2d Cir. 1984) (stating that: “arising under” or its equivalent must be used to make clause narrow); Mediterranean Enter., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983) (interpreting “arising hereunder” the same as “arising under the Agreement” and concluding that the clause is narrow).

\textsuperscript{88} See In re Kinoshita & Co., 287 F.2d 951, 953 (2d Cir. 1961) (stating that the words “arising out of or relating to this contract” are sufficiently broad to cover fraud).

\textsuperscript{89} See Twin City Monorail, Inc. v. Robbins & Myers, Inc., 728 F.2d 1069, 1072-73 (8th Cir. 1984) (holding if the clause is broad its interpretation should encourage arbitration); Georgia Power Co. v. Cimarron Coal Corp., 526 F.2d 101, 106 (6th Cir. 1975) (finding that if the parties did not intend for issues to be arbitrated under a broad clause they would have provided for it).

\textsuperscript{90} See Prudential Lines, Inc., 704 F.2d at 64 (stating that if the clause is “broad” the court should permit the arbitrator to decide the issue of arbitrability); Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614, 617 (1st Cir. 1975) (holding that the arbitrator should decide the arbitrability issue).

\textsuperscript{91} M. Domke, Domke on Commercial Arbitrations § 12:01, at 153 (1968).

\textsuperscript{92} See supra note 89 and accompanying text.

\textsuperscript{93} See In re Kinoshita & Co., 287 F.2d at 952-53 (finding the language “arise under” too narrow to cover fraud); Good(e) Bus. Sys., Inc. v. Raytheon Co., 614 F. Supp. 428, 429-30 (W.D. Wis. 1985) (rejecting the argument that the language “arising in connection with” is narrow).
will also decide arbitrability by considering the conduct of the parties.\textsuperscript{94} Even without an express provision in the contract, the actions of the parties may demonstrate intent to arbitrate a particular issue.\textsuperscript{95} When parties submit the dispute to arbitration and a decision is rendered, this conduct is determinative of their intent to arbitrate.\textsuperscript{96} Participation in the arbitration process waives a party's right to object to arbitrability, even if the judgment of the arbitrator has not been determined.\textsuperscript{97} If a contract contains an arbitration clause and the party does not object to the clause or perform any act that contradicts an intent to arbitrate, then the intent to include the arbitration clause may be implied from this conduct.\textsuperscript{98}

\textbf{THE EIGHTH CIRCUIT APPROACH}

In resolving the arbitrability question, the federal district courts within the Eighth Circuit apply the "doubt test."\textsuperscript{99} Therefore, any doubts about whether a dispute is arbitrable must be resolved in favor of arbitration.\textsuperscript{100} However, unless the language of a clause can be interpreted in a way that covers the particular dispute, the matter will not be sent to arbitration.\textsuperscript{101} In determining the scope of an arbitration clause, the Eighth Circuit has focused on the arbitration clause as a whole, independent of whether it is broad or narrow.\textsuperscript{102}

In \textit{Greater Kansas City Laborer's District Council of the HOD}

\begin{enumerate}
\item[\textsuperscript{94}] See Ficek, 338 F.2d at 656 (finding that an agreement to arbitrate may be implied from the conduct of the parties).
\item[\textsuperscript{95}] Id.
\item[\textsuperscript{96}] See Atterburg, 425 F. Supp. at 844 (holding that submitting disputes to arbitration without protest shows consent to be bound by final determination).
\item[\textsuperscript{97}] See Fortune, Alsweet & Eldridge, Inc. v. Daniel, 724 F.2d 1355, 1356-57 (9th Cir. 1984) (stating that acts of a representative for defendant in arbitration showed intent to arbitrate disputes).
\item[\textsuperscript{98}] See Great Northern Nekoosa Corp. v. Asea, AB, 657 F. Supp. 1253, 1255 (W.D. Ark. 1987) (stating that an arbitration clause is considered part of an agreement when not objected to by the opposing party).
\item[\textsuperscript{99}] See Morgan, 729 F.2d at 1165 (acknowledging that doubts must be resolved in favor of arbitration); Mahoney, 491 F.2d at 1032 (holding that without an express provision to exclude the dispute the matter will most likely be submitted to arbitration); Local Union No. 4, Int'l Bhd. of Elec. Workers v. Radio Thirteen-Eighty, Inc., 469 F.2d 610, 613-14 (8th Cir. 1972) (stating that forceful evidence is required to exclude a claim from arbitration).
\item[\textsuperscript{100}] See Taft Broad Co., WDAF, 368 F. Supp. at 126-27 (concluding that the question of arbitrability is aided by resolving doubt in favor of coverage).
\item[\textsuperscript{101}] See Mahoney, 491 F.2d at 1032 (stating "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail"); Radio Thirteen-Eighty, Inc., 469 F.2d at 613-14 (stating under a "broad clause" only the most forceful evidence of a purpose to exclude the claim will keep the court from directing the dispute to arbitration).
\item[\textsuperscript{102}] See infra notes 123-33 and accompanying text.
\end{enumerate}
Carriers v. Builder’s Association, the United States District Court for the Western District of Missouri applied the “doubt test” in determining arbitrability. The arbitration clause was contained in a collective bargaining agreement between the employer and employees as a means of settling disputes and of preventing strikes and walkouts. The agreement stated that “any differences” were to be arbitrated. The issue before the court was whether a provision that was placed in the agreement at a later date, which required the employer to pay money into a health and insurance fund, was governed by the arbitration clause. In deciding this issue, the court held that judicial inquiry is restricted to examining the intent of the parties. In doing so, the court held that any doubts as to whether a dispute is arbitrable under the contract should be resolved in favor of arbitration. The district court stated that this should be done particularly when it cannot be said with “positive assurance that the arbitration clause is not susceptible of an interpretation” that would include the issue in dispute. The court concluded that the intent to exclude the dispute must be shown before arbitration of the dispute will be denied. This district court in the Eighth Circuit recognized and followed the federal policy favoring arbitration.

A district court in the Eighth Circuit, in the case of In re Hops Antitrust Litigation, interpreted broad language in a contract as not covering certain disputes arising under previous contracts. The parties’ relationship began in 1969 through a series of contracts for the sale of hops. The contracts from 1969 to 1982 did not con-

104. Id. at 433.
105. Id. at 430.
106. Id. at 434.
107. Id. at 430-31.
108. Id. at 433.
109. Id. The court concluded: “Stated simply, our judicial inquiry is ‘strictly confined’ by Congress and the Supreme Court to an examination of the parties’ complete intent and our determination of that question is to be aided by our resolution of doubt in favor of coverage.” Id.
110. Id. at 432-33. The court stated: “An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” Id. (quoting United Steelworkers of America, 363 U.S. at 564).
111. Id. at 433. The court stated that: “In the latter situation ‘only the most forceful evidence of a purpose to exclude’ must be present before we can deny coverage.” Id.
112. See supra notes 64-78, 103-11 and accompanying text.
114. Id. at 172.
115. Id. at 170.
tain arbitration clauses. However, each contract executed after 1982 provided: "[A]ny dispute arising out of or relating to this agreement, including its interpretation, validity, scope and enforceability, shall be resolved exclusively and finally by arbitration, to be held in Munich Germany." The issue before the court was whether the agreements executed before 1982 were covered by the broad language contained in the post-1982 contracts.

The United States District Court for the Eastern District of Missouri held that the post-1982 contracts did not cover the previous agreements. The court found that a general contract did not exist between the parties that governed their ongoing relationship. The post-1982 contract only represented a discrete transaction for the purchase of hops at the time of contracting. This case represents a district court in the Eighth Circuit looking beyond the language of the clause when deciding which disputes to arbitrate.

In Morgan v. Smith Barney, Harris Upham & Co., the United States Court of Appeals for the Eighth Circuit did not use the test of whether the language of the clause was broad or narrow, but analyzed the contract as a whole. Morgan was an account executive at Smith Barney and brought an action in district court for various claims, including slander and prima facie tort, against his employer. As a member of the New York Stock Exchange ("NYSE"), Morgan agreed to abide by its rules, which provided for the arbitration of disputes between NYSE members.

The Eighth Circuit found the language "arising out of" contained in Rule 347(b) of the NYSE Rules to be a sign of the parties' intent to arbitrate claims that involve significant aspects of the em-

116. Id.
117. Id. at 170. Each agreement after 1982 also required that it be governed by the laws of the Federal Republic of Germany. Id.
118. Id. at 171.
119. Id. at 172.
120. Id. The court stated: "In other words, there is not one general contract, containing an arbitration clause, that clearly covers the parties' ongoing relationship, with separate agreements amending, supplementing, or incorporated into the 'umbrella' contract." Id.
121. Id. at 172-73.
122. See supra notes 82-83 and accompanying text.
123. 729 F.2d 1163 (8th Cir. 1984).
124. See infra notes 125-33 and accompanying text.
125. Morgan, 729 F.2d at 1164.
126. Id. Rule 347(b) of the NYSE Guide provides that "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration." Id. (quoting N.Y.S.E. Guide (CCH) § 2948 (Apr. 17, 1988)).
ployment relationship. Many of Morgan's claims were arbitrable because they involved this relationship. However, Morgan's claim for slander was held to be too far removed from the employment relationship to be arbitrable. Morgan claimed to have been slandered by co-workers when they accused him of stealing. The court restricted the meaning of the language "arising out of" and held that slander by co-workers was not a claim arising under the employment relationship. The court stated that policy considerations may be used in deciding whether to give the clause a strict or liberal interpretation. The Morgan decision shows the Eighth Circuit applying policy considerations in deciding whether the "scope of the clause" should be expanded or restricted.

MULTIPLE CONTRACTS: "UMBRELLA," "INTERRELATED" AND "SCOPE OF THE CLAUSE" THEORIES

Outside of the Eighth Circuit, other federal courts have applied a variety of methods of resolving the arbitrability issue in cases of multiple contracts. When parties enter into more than one contract, an arbitration clause in one may be intended to apply to a dispute that arises under another contract. If the agreement between the parties is an umbrella contract, then the arbitration clause within that contract applies to all existing or subsequent agreements between the parties. The original and subsequent contracts are interrelated and must be read together in defining the rights of the parties. Without an umbrella contract, if the contracts are found to be "interrelated," the courts will imply that the arbitration clause was intended to apply to all contracts. Finally, if the "scope" of an arbitration clause in one contract is broad enough to encompass another contract between the parties, then any dispute arising out of

127. Id. at 1167.
128. Id. at 1167-68.
129. Id. at 1168.
130. Id.
131. Id. Morgan alleged that Smith Barney personnel told his fellow co-workers that he stole things at night from their desk. The connection between this dispute and Morgan's employment was held to be tenuous. Id.
132. Id. (quoting Coudert v. Paine Webber Jackson & Curtis, 705 F.2d 78, 83 (2d Cir. 1983)(Weis, J., dissenting)).
133. See supra 123-32 and accompanying text.
134. See infra notes 140-66 and accompanying text.
135. See infra notes 140-50 and accompanying text.
137. See id.
138. See id.
either contract will go to arbitration. 139

In Consumer Concepts, Inc. v. Mego Corp., 140 Consumer Concepts, Inc. ("Concepts") and Mego Corp. ("Mego") entered into a general contract that established an agreement to manufacture toys. 141 Any ideas for new toy lines created by Concepts would be manufactured by Mego and once the idea was approved by both, a licensing agreement would be executed. 142 The idea would then be incorporated into the general agreement. 143 Subsequent to this general contract, two more agreements were entered into that specifically dealt with the parties' rights in the manufacturing of a new toy line. 144

The issue before the United States District Court for the Southern District of New York was whether disputes under the subsequent contracts should go to arbitration under a provision in the original agreement stating that claims "arising out of or relating to this agreement or the breach thereof, shall be settled by arbitration." 145 In resolving this issue, the court emphasized the policy of resolving all doubts in favor of arbitration. 146 The arbitration clause in the original contract covered all subsequent agreements because the clause governed the parties' continuing relationship. 147 Therefore, these contracts were a "mere extension" of the general contract. 148 The court found that the subsequent agreements were created to give Concepts additional protection, and evidence showed that both parties contemplated incorporating the new toy line into the general contract. 149 Therefore, the court concluded that all of the contracts were interrelated and must be read together. 150

If the contracts are interrelated, the arbitration clause in one will cover the other agreement. 151 In Pervel Industries, Inc. v. TM

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141. Id. at 543.

142. Id. This licensing agreement allowed Mego to manufacture toy ideas created by Concepts. Id.

143. Id.

144. Id. at 545.

145. Id. at 544. The clause was found in a contract entitled "The Umbrella Agreement." Id.

146. Id. See supra notes 70-74 and accompanying text.

147. Consumer Concepts, Inc., 458 F. Supp. at 545. The court held that: "As such, the October Agreement is a mere extension of the July Agreement, the umbrella contract governing the continuing relationship between the two firms." Id.

148. Id.

149. Id.

150. Id.

151. See infra notes 155-57 and accompanying text.
Wall Covering, Inc., Pervel Industries, Inc. ("Pervel") had a distribution contract to sell its wall coverings to TM Wall Covering, Inc. ("TM") and their agreement did not contain an arbitration clause. When wall coverings were ordered, the acknowledgment forms and sales orders contained clauses for arbitration stating: "[a]ny controversy arising out of or relating to this contract shall be settled by arbitration."

The United States District Court for the Southern District of New York held that the acknowledgment forms and the original distribution agreement were not "separate and distinct" but were interrelated. The court reasoned that without the sales contracts, the original distribution agreement would have no effect. The district court concluded that the broad language of the clause and the strong federal policy favoring arbitration compelled a finding that the dispute arose from and related to the contracts for sale.

In contrast to the "interrelated" theory, one jurisdiction has required that disputed matters be expressly included in the agreement. A general contract with an arbitration clause establishing a "working relationship" between parties is not enough to require disputes arising out of this relationship to go to arbitration. Instead, the language of the agreement is carefully scrutinized to make this determination. Therefore, disputes are more likely to be found to fall outside the "scope of the clause."

In Seaboard Coastline Railroad Co. v. Trailer Train Co., the arbitration clause in the original contract was held not to cover subsequent lease agreements. Although the arbitration clause in the original agreement was a broad one, the court held that the clause did not cover subsequent leases entered into between the parties.

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153. Id. at 868.
154. Id.
155. Id. at 869. The court held that "[t]he alleged exclusive distributorship could only take effect upon a sale of a line to TM, and TM, by its own allegations, had no right to distribute Pervel products until such sale was made." Id.
156. Id.
157. Id. See supra notes 87-92 and accompanying text.
158. See Necchi v. Necchi Sewing Mach. Sales Corp., 348 F.2d 693, 696 (2d Cir. 1965) (holding that the language "arising out of or in connection with" a specific agreement did not make all disputes arising out of the working relationship arbitrable).
159. Id. at 698.
160. See supra notes 82-83 and accompanying text.
161. See supra notes 162-66 and accompanying text.
162. 690 F.2d 1343 (11th Cir. 1982).
163. Id. at 1349. The arbitration clause was part of the Car Contract. It provided: "[a]ny difference or dispute arising hereunder which cannot be settled by agreement between Carrier and Trailer Train shall be submitted to two arbitrators." Id. at 1345.
164. Id. at 1350. The court stated: "the fact is that the Car Contract is limited in
The United States Court of Appeals for the Eleventh Circuit acknowledged that, without the general contract, the lease agreements would not exist. The court held that this was not enough to make a dispute fall under the "scope of the clause." 

ANALYSIS

In Swensen's Ice Cream Co. v. Corsair Corp., the United States Court of Appeals for the Eighth Circuit concluded that arbitration clauses in three separate franchise agreements did not apply to disputes arising out of a distribution contract. The Eighth Circuit applied the approach developed by a district court in the Second Circuit in Prudential Lines, Inc. v. Exxon Corp. and looked at the language of the clause to determine whether the clause was narrowly tailored so as to apply only to the franchise contract. The language in the first two franchise agreements differed from the language in the third. The language contained in the third agreement stated: "disputes arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration." The Eighth Circuit found that because a separate franchise contract existed for each store and the third franchise location did not manufacture ice cream, its clause could not apply to the distribution agreement.

This interpretation of the arbitration clauses avoided the consideration of the federal policy favoring arbitration found in previous Eighth Circuit opinions. Because the court considered the clause to be narrow, the "doubt test" was not applied in deciding the arbitrability issue. However, the clause in the 1985 franchise agreement contained language that included disputes "relating to" this scope and its arbitration clause does not encompass this 'distinct and separate' dispute between the parties, which has no support in the provisions of the Car Contract." Id. at 1310. The arbitration clause stated: "In the event of any dispute between Franchisor and Franchisee with respect to the interpretation, performance or alleged breach of this Agreement, such dispute shall be submitted to and resolved by arbitration in accordance with the rules of the American Arbitration Association." Id. at 1309. The court stated: "None of the defendants' counterclaims remaining in the District Court 'relates to' the operation of the Battlefield Mall location because, under the terms of that franchise agreement, defendants are not allowed to manufacture ice cream at this store." Id. See supra notes 103-12, 123-33 and accompanying text. See supra notes 84-87 and accompanying text.
contract for arbitration, and under the Second Circuit approach, this broad language may have been enough for the court to conclude that all future disputes that arise out of the parties' relationship should go to arbitration.\textsuperscript{176} Broad language of this type would require the court to abstain from deciding the arbitrability issue, allowing arbitration once the language was found to govern all future disputes.\textsuperscript{177}

When interpreting the language of the clause in the contract between Swensen's and Corsair, the Eighth Circuit did not apply the analysis of its previous decision in \textit{Morgan v. Smith Barney, Harris Upham & Co.}.\textsuperscript{178} \textit{Morgan} requires the court to look at the contract as a whole, the language of the arbitration clause, and public policy considerations in deciding questions of arbitrability.\textsuperscript{179} The court should inquire into the parties' relationship and should use policy considerations as a basis for determining which disputes are arbitrable.\textsuperscript{180}

The Eighth Circuit refused to inquire into the relationship between these agreements.\textsuperscript{181} In this case, the relationship between Swensen's and Corsair was created under the franchise agreements.\textsuperscript{182} Without these agreements, the distribution contract would not have existed.\textsuperscript{183} The franchise contracts gave Corsair the right to use Swensen's trademark when selling Swensen's product under the distribution agreement.\textsuperscript{184} Therefore, the franchise and distribution contracts were interrelated and the arbitration clause should have been interpreted to apply to both.\textsuperscript{185}

A franchisor and a franchisee share a close relationship.\textsuperscript{186} A franchisor has an affirmative duty to see that a franchisee is not de-
ceiving the public when selling the product under its trademark.\textsuperscript{187} The franchise agreement establishes this contract and the long-term relationship that will exist between the parties.\textsuperscript{188}

Swensen’s and Corsair defined this relationship through the provisions in their franchise contracts.\textsuperscript{189} These contracts contained arbitration clauses.\textsuperscript{190} Without the original franchise agreement, the distribution contract could not have existed.\textsuperscript{191} This fact, in addition to the long-term relationship of the parties, established a connection between the agreements.\textsuperscript{192} The distribution agreement supplemented the obligations created in the original franchise contracts.\textsuperscript{193} Therefore, the contracts are intertwined, and the arbitration clauses applied to the distribution agreement.\textsuperscript{194}

The Eighth Circuit policy, in Swensen’s Ice Cream Co., requires the parties to spell out their rights in the provisions of their agreement.\textsuperscript{195} Arbitration clauses in commercial contracts are not uncommon and can reasonably be anticipated.\textsuperscript{196} For this reason, federal policy is better served by applying the “doubt test” and by presuming arbitrability.\textsuperscript{197}

CONCLUSION

In cases of multiple contracts between parties, the courts should look beyond the language of the contracts and inquire into the parties’ relationship.\textsuperscript{198} If the contracts are “interrelated,” then an agreement to arbitrate should apply to all contracts unless the parties provide otherwise.\textsuperscript{199} When parties enter into an agreement that de-

\textsuperscript{187} See supra notes 36-38 and accompanying text.

\textsuperscript{188} See supra note 33-34 and accompanying text.

\textsuperscript{189} Swensen’s, 942 F.2d at 1308-09.

\textsuperscript{190} Id. at 1309.

\textsuperscript{191} See supra note 156-57 and accompanying text.

\textsuperscript{192} Compare Swensen’s, 942 F.2d at 1311 (Beam, J., dissenting) (finding the contracts are intertwined and the disputes should be arbitrated) with Consumer Concepts, Inc v. Mego Corp., 458 F. Supp. 543, 545 (S.D.N.Y. 1978) (holding that the contracts were interrelated and must be read together).

\textsuperscript{193} Compare Swensen’s, 942 F.2d at 1309 (finding that the distribution contract allowed the franchisee to control a region for ice cream distribution, once the ice cream was made under the franchise contract) with Consumer Concepts, Inc., 458 F. Supp. at 545 (holding that the subsequent contract created new rights to be incorporated into the previous agreement).

\textsuperscript{194} Swensen’s, 942 F.2d at 1311 (Beam J., dissenting).

\textsuperscript{195} Id. at 1310. The court held that the franchise agreement governs the relationship between the parties as to each store.


\textsuperscript{197} See supra notes 71-75, 195-97 and accompanying text.

\textsuperscript{198} See supra notes 155-57 and accompanying text.

\textsuperscript{199} See supra note 148 and accompanying text.
fines and establishes their rights in the relationship, it can be implied that any future disputes between them also fall under the arbitration clause of the original agreement. Therefore, a dispute between the parties that arises out of their relationship should be sent to arbitration.

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200. See supra notes 140-50 and accompanying text.
201. See supra note 157 and accompanying text.