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REIGNING IN INFINITE CONSUMER ARBITRATION AGREEMENTS: A COMMENT ON THE ELEVENTH CIRCUIT'S *CALDERON V. SIXT RENT A CAR*

By

Ava McCartin*

I. INTRODUCTION

As federal courts have taken increasingly pro-arbitration stances, drafters of commercial arbitration agreements have likewise broadened the scope of their routine contracts.[1] The term "infinite arbitration agreement" describes a clause that generally exhibits one or more of the following characteristics: (1) it is not confined to disputes arising from or related to the underlying transaction, (2) the scope extends beyond the "original contractual partners," and (3) it has "have no sunset date."[2] Though these provisions can, and have, led to absurd results, corporate drafters cite the broad protections of the Federal Arbitration Act ("FAA") to support enforceability.[3] *Calderon v. Sixt Rent a Car* provides an important limit to this argument.

In *Calderon*, the Eleventh Circuit held that third parties may not "piggyback" on arbitration agreements they are not parties to by relying on legal principles that resolve ambiguities in favor of arbitration.[4] In doing so, the court held that claims sufficiently attenuated from container contracts, such as those asserted against third parties, are not governed by the FAA or the *Moses H. Cone* canon of contractual interpretation.[5] Despite the broad language included in infinite arbitration provisions, the FAA has always required a contractual nexus between the dispute and the container contract.[6] The decision in *Calderon* articulates an important caveat on seemingly infinite consumer arbitration agreements that purport to cover "any and all claims" by holding that even exceptionally broad language in arbitration clauses has limits. Importantly, this decision provides protection for consumers seeking to assert their legal claims in court, rather than compelled arbitration.

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1. David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 639-641 (2020).

2. *See id*. at 639-40 (quoting *In re* Jiffy Lube Int'l, Inc., Text Spam Litig., 847 F. Supp. 2d 1253, 1262 (S. D. Cal. 2012).

3. *See id*. at 642.

4. Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1207 (11th Cir. 2021).

5. *Id*. at 1214 (note: "container contract" refers to the larger contract that contains the arbitration agreement. The Moses H. Cone canon comes from a 1983 Supreme Court case that directed courts to resolve any doubts about the scope of an arbitration agreement in favor of arbitration. This canon is discussed at length in the analysis portion of this comment).

6. *See* Horton, *supra* note 1, at 643.

II. CASE BACKGROUND

The underlying dispute deals with two companies: Orbitz, a vacation booking service, and Sixt Rent-a-Car ("Sixt"), a car rental company that provides services through Orbitz.[7] At the heart of this dispute is whether the services provided by Sixt to the plaintiff-appellee, Ancizar Marin, qualify as services subject to mandatory arbitration under the Orbitz Terms of Use.[8] Marin used the Orbitz website to book a rental car from Sixt in February of 2019, and in doing so, he agreed to Orbitz's terms of use.[9] Later, when picking up the rental car from Sixt, Marin signed a separate agreement including independent terms between Sixt and himself.[10] The agreement between Marin and Sixt did not contain an arbitration clause.[11]

After Marin returned the car, Sixt alleged that he damaged the vehicle and billed him over $700.[12] Marin denied causing any damage and brought suit in federal district court based on the resulting charges, suing on behalf of a putative class of customers of Sixt, including Plaintiff Appellee Calderon.[13] The suit alleged multiple breach of contract and consumer protection claims.[14]

Importantly, when a customer makes a reservation through Orbitz, they necessarily agree to Orbitz's Terms of Use.[15] The Terms of Use is described as "the entire agreement between [the customer] and Orbitz," and contains a provision that mandates arbitration of any and all claims between Orbitz and the customer, effectively an infinite arbitration agreement.[16] The language pertinent to the dispute in *Calderon* is the following passage:

> Any and all claims will be resolved by binding arbitration, rather than in court . . . this includes any Claims you assert against us, our subsidiaries, travel suppliers or any companies offering products or services through us,

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7. *See Calderon*, 5 F.4th at 1207.

8. *See id.*

9. *See* Calderon v. Sixt Rent a Car, LLC, No. 19-cv-62408-SINGHAL, 2020 U.S. Dist. LEXIS 24247, at *1, *4 (F.S.D.C. Feb. 12, 2020); *Calderon*, 5 F.4th at 1207.

10. *See Calderon*, 5 F.4th at 1207.

11. *See id*.

12. *See id.* at 1208.

13. *See id*.

14. *See id.* (Notably, Orbitz was not named in the suit; the Eleventh Circuit noted that the name "Orbitz" was mentioned only a single time in the complaint filed in the district court.)

15. *See Calderon*, 5 F.4th at 1206.

16. *See id.* at 1207.

including Suppliers, (which are the beneficiaries of this arbitration agreement).[17]

This provision then provides definitions for terms used in the above language: specifically, the word "Claims," and "Services."[18] "Claims" refer to "[a]ny disputes or claims relating in any way to [1] the Services, [2] any dealings with our customer service agents, [3] any services or products provided, [4] any representations made by us, or [5] our Privacy Policy."[19] And "Services" are "the Web sites, mobile applications, call center agents, and other products and services provided by Orbitz, including any Content."[20] The Terms of Use, which contain the arbitration clause, specifically exclude "products or services provided by third parties" from its definition of "Services."[21]

In response to the suit, Sixt moved to compel arbitration and invoked the arbitration provision included in the contract between Marin and Orbitz.[22] Sixt did not invoke the language of its own agreement with Marin as part of this motion.[23] The Florida Southern District Court heard Sixt's motion to compel and issued a written decision on February 12, 2020.[24] Sixt argued that by signing Orbitz's terms of service, Marin agreed to arbitrate disputes with Sixt as well—essentially "piggybacking" on the arbitration agreement between Marin and Orbitz.[25] In the alternative, Sixt argued that the doctrine of equitable estoppel forced Marin to arbitrate his claims.[26] The court denied the motion, finding that (1) Marin's suit fell outside of the scope of the arbitration agreement, and (2) Sixt was not a party to the arbitration agreement and had no authority to compel arbitration; Sixt appealed this decision.[27]

III. ELEVENTH CIRCUIT MAJORITY ANALYSIS

17. *See Calderon*, 5 F.4th at 1207.

18. *See id*.

19. *See id*.

20. *See id.*

21. *See id.*

22. *See Calderon*, 5 F.4th at 1207.

23. *See id*.

24. *Calderon*, 2020 U.S. Dist. LEXIS 24247, at *1.

25. *See id*. at *19.

26. *See id*. at *20.

27. *See id*. at *24-25, 1.

The Eleventh Circuit considered the Orbitz contract under Florida law and analyzed both the intent of the parties and the plain language of the arbitration provision.[28] Beginning with the plain language, the court focused on the word "Claims," noting that if Marin's suit contained a "Claim," as defined by the Orbitz contract, it would be subject to arbitration.[29] Conversely, if the suit did not contain a "Claim," arbitration could not be compelled.[30] The Eleventh Circuit honed in on the third definition of "Claim" in the contract—"any services or products provided."[31] Though Sixt argued that the rental car service was clearly covered by the third category, the Eleventh Circuit disagreed for three primary reasons.[32]

First, the court examined the third category of "Claims" within the context of all five categories mentioned in the contract.[33] Applying the contract principle that "the meaning of particular terms may be ascertained by reference to other closely associated words," the court held that "Claims" include *only* services provided by Orbitz—not services provided by any other parties.[34] Because the four other categories of "Claims" "indisputably describe spheres of Orbitz's own activities," it would be irrational to infer that "services" includes services outside the sphere of Orbitz's own activities.[35] The court further pointed out that reading "services" as referring to services provided by *anyone* would create an unlimited amount of claims subject to arbitration, even where parties had not expressed an intent to arbitrate.[36]

Next, the court reasoned that two other provisions in Orbitz's terms of use indicate that "Claims" could only encompass claims related to Orbitz services.[37] The first of the two provisions deal with the initial process to bring a claim to arbitration. In the Orbitz Terms of Use, customers agree to contact "Orbitz Legal: Arbitration and Claim Manager" for any disputes that arise and give Orbitz sixty days to resolve a dispute before proceeding to arbitration.[38] The court explained that if "Claims" referred to claims an Orbitz customer may have against third parties, the customer would be expected to route their disputes through Orbitz's arbitration claim manager, even if the customer had no issue with Orbitz

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28. *See Calderon*, 5 F.4th at 1208.

29. *See id.*

30. *See id.*

31. *See id.* at 1209.

32. *See id.*

33. *See Calderon*, 5 F.4th at 1208-09 (the five types of claims are as follows: (1) Services; (2) dealings with customer service agents; (3) services or products provided; (4) representations; and (5) the privacy policy).

34. *Id.* at 1209.

35. *See id.*

36. *See id.*

37. *See id.*

38. *See Calderon*, 5 F.4th at 1210.

or its conduct—which is an unreasonable result.[39] In addition, the Orbitz agreement specifically notes that third party services are subject to their own terms and conditions.[40] From this language, the court reasoned that Orbitz foresaw customers engaging with third parties after making a booking through Orbitz, and specifically intended to exclude claims arising between Orbitz users and those third parties from the arbitration agreement.[41] Here, the court found it significant that Marin did sign a separate Terms of Use contract with Sixt that did not contain an arbitration clause.[42]

Finally, the court applied "common sense" to exclude the dispute between Sixt and Marin from falling under the Orbitz arbitration agreement.[43] If the court were to accept Sixt's proposed definition of "Claims," then all claims between Orbitz's customers and third parties would be subject to arbitration.[44] Because Florida law favors contract interpretation that avoids absurd or extreme outcomes, and forcing Orbitz customers to arbitrate all claims with third parties is an absurd result, the court rejected that interpretation.[45]

In addition to the aforementioned analysis, the court also rebutted Sixt's argument that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[46] This principle, which comes from the landmark *Moses H. Cone* case—eponymously referred to as the *Moses H. Cone* (MHC) canon—generally applies to arbitration agreements under the FAA.[47] However, the FAA only covers agreements arising out of the container contract, and here, the court determined that the Calderon dispute did not arise out of the container contract; as such, neither the FAA nor the MHC canon would apply to the dispute in *Calderon*.[48] In coming to this conclusion, the majority found that the *Moses H. Cone* canon could not apply to a claim where a non-party attempts to enforce an arbitration agreement, because that dispute is too attenuated from the container contract.[49]

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39. *See Calderon*, 5 F.4th at 1210.

40. *See id.*

41. *See id.*

42. *See id*. at 1208

43. *See id*. at 1210

44. *See Calderon*, 5 F.4th at 1210.

45. *See id.*

46. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

47. *See id.*

48. *See Calderon*, 5 F.4th at 1210.

49. *See Calderon*, 5 F.4th at 1213.

IV. CONCURRING OPINION

Notably, while the majority only briefly discusses the *Moses H. Cone* interpretation, Judge Newsom's concurring opinion speaks directly to this issue and advocates for disposing of the *Moses H. Cone* canon altogether.[50] In his concurrence, Judge Newsom asserts that courts have wrongly interpreted the *Moses H. Cone* canon to require arbitration agreements to be read in the broadest terms possible.[51] In opposition to this policy, the Judge cites three main issues: (1) the canon "directs courts to depart from a contract's most natural interpretation in favor of—and to further—a policy preference for arbitration," (2) the canon is "especially potent," and (3) "especially made up."[52]

In discussing the first point—that the canon encourages courts to depart from the most natural reading—the concurrence distinguishes substantive canons from constructive ones.[53] While constructive canons provide guidance on how to interpret the English language, substantive canons promote specific policy goals in judicial decision making.[54] Although some substantive canons arise from fairness concerns and have a long history in common law, the pro-arbitration MHC canon is relatively new.[55] Without support in English or American legal tradition, the concurrence is skeptical about applying a canon that exists seemingly only to promote pro-arbitration policy.[56]

Next, the concurrence highlights the particular potency of the *Moses H. Cone* canon, which directs courts to resolve "any doubts" about the existence or scope of an arbitration agreement in favor of arbitration.[57] Unlike other substantive canons, the MHC canon applies to *any* doubts concerning arbitrability, which greatly extends its reach and influence over claims.[58] Instead of applying the canon as a last resort, Judges are directed to begin with the principles of the MHC canon as soon as any doubts arise, and the concurrence is very bothered by this policy.[59]

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50. *See id*. at 1215.

51. *See id*. at 1218.

52. *See id*. at 1220.

53. *See id.* at 1219.

54. *See Calderon*, 5 F.4th at 1219.

55. *See id.* (discussing the doctrine of *contra proferentem*, a canon that directs courts to interpret vague contract terms against the drafter).

56. *See id*.

57. *See id*.

58. *See Calderon*, 5 F.4th at 1219 (as an example, Judge Newsom references the "rule of lenity," which Courts only apply after they have exhausted all other interpretations of a statute).

59. *See id*. at 1220.

Additionally, the concurrence calls attention to the fact that the canon is "a judicial invention."[60] Unlike the FAA, which comes straight from the legislature, the MHC canon has no legislative support.[61] And in drafting the FAA, the legislature was clear in its intentions: the FAA serves to place arbitration agreements on equal footing with other private contracts—not on higher footing.[62] Concerningly, the MHC canon does exactly that—it elevates the status of arbitration agreements above other contracts.[63] Based on these concerns, Judge Newsome advocates for retiring the canon altogether.[64]

V. SIGNIFICANCE

Calderon demonstrates a limit to the seemingly endless bounds of infinite consumer arbitration agreements. Although older arbitration provisions only sought to cover disputes related to the container contract, consumer contract drafters have become increasingly ambiguous.[65] Specifically, drafters of consumer arbitration agreements have begun drafting "infinite arbitration agreements," that purport to cover all claims between the consumer and the company, forever, regardless of whether those claims relate to the underlying contract.[66] As Professor Horton from the University of California, Davis, puts it, "infinite provisions attempt to govern conduct that has nothing to do with the original transaction, such as sexual harassment after the purchase of household goods, or 'a punch in the nose during a dispute over medical billing.'"[67] Despite the obvious absurdity of these clauses, they have become increasingly popular.[68] This popularity has led to an increase in litigation reviewing the scope of disputes that have become increasingly attenuated from their container contracts.[69]

For instance, in *Haasbroek v. Princess Cruise Lines, Ltd*, the plaintiff—a cosmetologist working onboard a cruise line—was forced to arbitrate claims against the cruise line arising from her rape and impregnation by a coworker.[70] Because Haasbroek's

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60. *See id.* at 1221.

61. *See id.*

62. *See id*.

63. *See Calderon*, 5 F.4th at 1221.

64. *See id.* at 1221.

65. *See* Horton, *supra* note 1, at 639.

66. *See id*.

67. *See id*.

68. *See id.* at 657.

69. *See* Horton, *supra* note 1, at 660-3.

70. *See* Haasbroek v. Princess Cruise Lines, Ltd., 286 F. Supp. 3d 1352, 1354 (S. D. Fla. 2017).

contract with the cruise line contained a provision agreeing to arbitrate "[a]ny and all disputes, claims or controversy whatsoever," the fact that her claims did not arise under the container contract was irrelevant.[71]

Similarly in *Mey v. DIRECTV, LLC*, the Fourth Circuit held that a plaintiff's class action complaint against DIRECTV for violating the Telephone Consumer Protection Act (TCPA) was subject to arbitration.[72] In *Mey*, the plaintiff signed a 2012 contract with AT&T containing an arbitration provision.[73] Three years later, AT&T acquired DIRECTV, and two years after that, the plaintiff initiated her complaint against DIRECTV.[74] Because DIRECTV was not a party to her initial contract and was not affiliated with AT&T when she signed the contract, the plaintiff did not believe she had any agreement to arbitrate with DIRECTV.[75] However, the Fourth Circuit disagreed.[76] Despite the degree of attenuation between plaintiff's claims and the container contract, Fourth Circuit found that the arbitration provision was sufficiently broad to encompass Mey's TCPA claims against DIRECTV.[77]

In attempting to rationalize these holdings, Professor Horton argues that because "courts have long struggled with the 'scope of arbitrability,'" drafters have embraced increasingly broad arbitration agreements.[78] As recent Supreme Court decisions have "admonished lower courts to 'rigorously enforce' arbitration agreements according to their terms,"[79] infinite arbitration agreements have gained potency despite the increasing distance from their container contracts.[80] Particularly because of how courts have interpreted the FAA to favor arbitration, drafters are incentivized to compose broader arbitration provisions. Holdings like *Calderon* provide an important safeguard for

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71. *See id.* at 1355.

72. *See* Mey v. DIRECTV, LLC, 971 F.3d 284, 286 (4th Cir. 2020).

73. *See id.* (Mey's contract with AT&T was for cell phone service, while DIRECTV provides only satellite television services).

74. *See id.*

75. *See id.* at 289 (Mey argues that since "DIRECTV and AT&T Mobility became affiliated only after Mey agreed to arbitrate, the term cannot cover DIRECTV.").

76. *See id.* at 295.

77. *See Mey*, 971 F.3d at 295-6 (The dissent points out the absurdity of this result, explaining that "a reasonable person procuring cell-phone service from AT&T Mobility and entering into the accompanying arbitration agreement would have no reason to believe she was signing away her right to sue any and all corporate entities that might later come under the same corporate umbrella as AT&T Mobility, regardless of whether they were connected in any way to the provision of her cell-phone service.").

78. Horton, *supra* note 1, at 640.

79. *See* Horton, *supra* note 1, at 642 (quoting Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013)).

80. *See id.* (quoting Citi Cars, Inc. v. Cox Enters., Inc., No. 17-22190, 2018 WL 1521770, at *5 (S.D. Fla. Jan. 22, 2018)).

consumers. Despite strong policy and precedent favoring arbitration and arbitrability, courts can and should still refuse to compel arbitration where the dispute is wholly unrelated to the container contract and doing so would lead to an absurd or unconscionable result.

In addition to limiting the scope of infinite arbitration agreements, the holding in *Calderon* also exemplifies judicial notice of deficiencies in how federal law addresses scope ambiguity with respect to arbitration.[81] While acknowledging that Sixt was correct in asserting that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,"[82] the court still declined to apply that logic to the issue in *Calderon*. In doing so, the court contrasted the broad language of the infinite arbitration agreement with the narrower scope of the FAA.[83] While Orbitz's arbitration provision covered "any and all claims,"[84] the FAA applies only to disputes related to the container contract.[85] And because Orbitz's Terms of Use are governed by the FAA, there must be a contractual nexus between the arbitrable claim and the underlying contract.[86] This reasoning is logically sound, and is another tool courts could use to resist enforcing infinite arbitration agreements in future cases.

VI. CRITIQUE

Because case law addressing the scope of infinite arbitration agreements is extremely limited, the Eleventh Circuit's ruling adds weighty authority to infinite arbitration jurisprudence.[87] But, this decision would have been more effective for consumers opposing infinite arbitration if the court had focused its holding on FAA's contractual nexus requirement. While the majority does discuss this contractual nexus argument, it does so only after analyzing the other arguments presented by the parties, including plain language and common sense.[88] In *Calderon*, the court concludes that claims arising out of rental car services are not arbitrable issues before it begins discussing the role of the FAA.[89]

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81. *See Calderon*, 5 F.4th at 1212.

82. *See id*. (quoting *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 24-25).

83. *See id*.

84. *See id*. at 1206.

85. *See id*. at 1212 (quoting 9 U.S.C. § 2).

86. *See Calderon*, 5 F.4th at 1212 n. 5.

87. Horton, *supra* note 1, at 641 (quoting Wexler v. AT&T Corp., 211 F. Supp 3d. 500, 502 (E.D.N.Y. 2016)).

88. *See Calderon*, 5 F.4th at 1209.

89. *See id.*

However, the FAA's demand for a contractual nexus between arbitrable claims and container contracts seems to be the best defense for consumers and litigators against the looming danger of infinite arbitration agreements. To emphasize this importance, the court should have begun with this point. If the court had begun by stating that the FAA requires a sufficient contractual nexus between arbitrable controversies and the container contract—a nexus that is not present in *Calderon*—it would not have needed to determine whether Orbitz's Terms of Use intended to cover the Sixt dispute at all; the FAA simply would not allow that result. The analysis would have asked whether a nexus existed between the plaintiff's claim against Sixt, and his contract with Orbitz.

Further, while the majority lays out the case for excluding this dispute from the umbrella of the FAA, it does not directly advocate against the *Moses H. Cone* canon or its use in other situations.[90] Although the majority opinion admits that the canon does not apply, Judge Newsom's meticulous concurrence provides interesting insight into how the Eleventh Circuit may rule in future disputes about the scope of arbitrability and infinite arbitration agreements.[91] While this point is well-taken in the concurrence, it would have been strengthened if it were included in the majority.

VII. CONCLUSION

The decision in *Calderon* respects individuals' rights to contract by ensuring that arbitration provisions do not extend farther than the intent of both parties. In doing so, the decision provides a framework for courts to decline to enforce infinite arbitration agreements where there is not a sufficient contractual nexus between the dispute at bar and the underlying contract or agreement. Particularly because of the generally otherwise pro-arbitration attitude of U.S. courts, *Calderon*'s holding provides an important caveat to forced consumer arbitration by reminding drafters that the FAA only applies to claims that meet the sufficient nexus test. While this logic is only discussed at length in the concurring opinion, the acknowledgement of the FAA limitations in the majority remains significant.

90. *See id*.

91. *See id*. at 1212.