

REFERENCE TO JAMS RULES IN CONTRACT
ALLOWS ARBITRATOR TO DECIDE ARBITRABILITY

Michael R. Lied
Howard & Howard Attorneys PLLC
211 Fulton Street, Suite 600
Peoria, IL 61602
Telephone: (309) 672-1483
Facsimile: (309) 672-1568
Email: mlied@howardandhoward.com

Usually, it is up to a court to determine if parties to an agreement have decided to let an arbitrator decide disputes under that agreement. But not always.

Simply Wireless sells cellular telephone goods and services to consumers and provides advertising, marketing, and distribution services to other businesses in the telecommunications industry. Simply Wireless is the registered owner of multiple trademarks using the name SIMPLY WIRELESS. Simply Wireless is also the originator and owner of the trademark SIMPLY PREPAID in connection with the sale of cellular telephone goods and services.

T-Mobile also provides cellular services. Although T-Mobile and Simply Wireless compete, they have partnered on several projects. T-Mobile and Simply Wireless partnered on a project by executing a contract referred to as the “HSN/QVC Agreement”.

This agreement included an arbitration clause that said:

19.1.1. Submission to Arbitration. Any claims or controversies . . . arising out of or relating to this Agreement (“Dispute”) shall be resolved by submission to binding arbitration. The arbitration shall be administered and hearings shall be held in Seattle, Washington before a single neutral arbitrator from the offices of Judicial Arbitration & Mediation Services. The arbitration shall be administered pursuant to the JAMS Comprehensive Rules and Procedures then in effect. . . . Notwithstanding any choice of law provision in this Agreement, the parties agree that the Federal Arbitration Act, 9 U.S.C. §§ 1-15, not state law, shall govern the arbitrability of all disputes under this Agreement.

T-Mobile filed several trademark applications with the United States Patent and Trademark Office (“USPTO”) to trademark SIMPLY PREPAID.

Simply Wireless brought an action against T-Mobile relating to the trademarks. T-Mobile filed a Notice of Intent to Seek Arbitration and moved to dismiss Simply Wireless’s complaint on two separate grounds: First, T-Mobile argued that, based upon provisions in the HSN/QVC Agreement, Simply Wireless’s failure to provide contractually required notice of its claims and to initiate arbitration in a timely manner warranted dismissal with prejudice under Federal Rule of Civil Procedure 12(b)(6). Second, T-Mobile argued that the HSN/QVC Agreement’s express

incorporation of the JAMS Comprehensive Rules and Procedures (“JAMS Rules”) “clearly and unmistakably” endowed an arbitrator—as opposed to the court—with the authority to resolve all arbitrability disputes. The district court granted T-Mobile’s motion to dismiss Simply Wireless’s complaint. An appeal followed.

Because empowering an arbitrator to determine arbitrability in the first instance cuts against the normal rule that arbitrability disputes are for the court to resolve, a court must find by ‘clear and unmistakable’ evidence that the parties have chosen to give arbitrability questions to an arbitrator.

Here, the parties agreed to submit “[a]ny claims or controversies . . . arising out of or relating to this Agreement ... to binding arbitration.” T-Mobile argued that this contractual language showed the parties’ clear and unmistakable intent to submit all arbitrability disputes to an arbitrator, but the appeals court disagreed.

However, the HSN/QVC Agreement incorporated the JAMS Rules, which empower an arbitrator to resolve arbitrability disputes. In particular, Rule 11(b) of the JAMS Comprehensive Arbitration Rules & Procedures provides that:

Jurisdictional and *arbitrability disputes*, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought... *shall be submitted to and ruled on by the Arbitrator*. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

Two other circuits have concluded that the incorporation of JAMS Rules constitutes “clear and unmistakable evidence” of the parties’ intent to delegate questions of arbitrability to the arbitrator.

The appeals court also noted that other circuits have concluded that the incorporation of arbitral rules substantively identical to those found in JAMS Rule 11(b) constitutes clear and unmistakable evidence of the parties’ intent to arbitrate the issue of arbitrability.

The court of appeals held that, in the context of a commercial contract between sophisticated parties, the explicit incorporation of JAMS Rules serves as “clear and unmistakable” evidence of the parties’ intent to arbitrate arbitrability. Because the JAMS Rules expressly delegate arbitrability questions to the arbitrator, the district court erred when it determined the arbitrability of Simply Wireless’s claims. Nevertheless, the court affirmed dismissal of the complaint on the alternate ground of allowing the arbitrator to resolve all arbitrability disputes.

The case is *Simply Wireless Inc. v. T-Mobile US, Inc.*, 877 F.3d 522 (4th Cir. 2017).