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Clumsy Drafting In Franchise Agreements Can Haunt You: Hamden v. Total Car Franchising Corp.

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A recent decision from the **United States District Court from the Western District of Virginia** highlights the importance of careful drafting of franchise agreements and, in particular, dispute resolution provisions. In ***Hamden v. Total Car Franchising Corp.***, Case No. 7:12-cv-00003 (W.D. Va May 22, 2012), a former franchisee filed a lawsuit against his franchisor alleging that he was not bound by the post-termination covenant not to compete in his franchise agreement. The franchisor moved to dismiss the lawsuit and compel arbitration, contending that the parties were required by the franchise agreement to arbitrate (rather than litigate) all disputes.

The Court agreed with the franchisee and refused to compel the parties to arbitrate the dispute. In making that determination, the Court relied heavily on the language of the dispute resolution provision in the franchise agreement. In particular, the Court quoted language from the provision that said:

> The parties will each choose one arbitrator. The two arbitrators will select a third. The parties will determine the forum for arbitration. If, however, the parties fail to establish a forum the standard rules of arbitration as set out by the American Arbitration Association will apply…. The arbitration will be binding and the decision of the arbitrators final.
>
> The format of the arbitration process is this:
>
> > One or each disputant submits a demand for arbitration to us. We will assist in the selection of arbitrators and serve as case administrator.
> >
> > Once the arbitrators are appointed, they will control the proceedings and all decisions will be final and binding and may be filed in a court of competent jurisdiction.

The Court found that the provision appeared not to be intended to apply to disputes between the franchisor and franchisee. Specifically, the Court reasoned that the dispute resolution provision would not have designated the franchisor (referred to in the agreement as "us") as "case

administrator" if the parties intended that it apply to disputes between them. In other words, the Court stated that it would make no sense for a franchisor to submit a dispute to itself as administrator -- which would have to be the outcome if the arbitration provision was read to govern disputes between the franchisee and franchisor.

Franchisors can learn two principal lessons from the Hamden case. First, it is important to ensure that your franchise contract is drafted carefully, and that all internal references are correct. Second, if the franchise agreement uses the terms "us," "we," and "our," to refer to the franchise company and "you" or "your" to refer to the franchisee, it is particularly important to ensure that each use of the personal identifiers is within the proper context as determined by a reading of the entire provision or agreement. Double- and triple-checking by several people is always a good idea.

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