

Does “May” Mean “Shall” in Arbitration?

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In recent years, an increasing number of U.S. and foreign companies have embraced arbitration as an alternative means for resolving their business disputes. Unlike prolonged litigation, arbitration offers numerous real advantages to its users, including cost savings, faster results, a neutral forum, the ability to participate in the choice of a decision-maker, and the relative finality and enforceability of arbitration awards.

With careful drafting, the parties to a contract can tailor the arbitration process to meet their specific needs and circumstances.

Because of this trend towards arbitration, courts are now routinely asked to determine whether arbitration is compulsory under a given contract. One question that often arises is whether arbitration is mandatory where the arbitration provision merely provides that the parties “may” arbitrate their dispute. While federal courts uniformly answer this question in the affirmative, finding that the presence of the term “may” does not render an arbitration clause permissive,¹ Florida’s courts have not yet settled on the question. However, as further discussed below, Florida should adopt the federal standard recently outlined in *Conax Florida Corp. v. Astrium Ltd.*, 499 F. Supp. 2d 1287 (M.D. Fla. 2007).

In *Conax*, the parties’ arbitration clause provided that “a controversy or claim arising out of or relating to this Subcontract may be finally settled by arbitration.”² (Emphasis added.) The plaintiff argued that the use of the word “may,” rendered the arbitration clause permissive and required the parties to jointly agree to

arbitration.³ In support of this interpretation, the plaintiff relied on the Fourth District Court of Appeal’s decision in *Young v. Dharamdass*, 695 So. 2d 828 (Fla. 4th DCA 1997), along with a series of forum-selection clause cases “which construe[ed] ‘may’ as permissive”⁴

In *Young*, the Fourth District declared that “the arbitration clause . . . is permissive, not mandatory. It provides that either party may seek to arbitrate any dispute.” *Young*, 695 So. 2d at 829. The *Conax* Court criticized *Young* because it “contain[ed] no analysis and lack[ed] acknowledgment of the policy favoring arbitration.”⁵ The court also rejected the plaintiff’s reliance on the forum-selection clause cases as “not applicable because, among other things, the presumption in favor of arbitrability does not apply.”⁶

Having disposed of the plaintiff’s arguments, the *Conax* Court held that the word “may” does not give one party the right to avoid arbitration under Florida law.⁷ Citing to the Third District Court of Appeal’s decision in *Ziegler v. Knuck*, 419 So. 2d 818 (Fla. 3rd DCA 1982), the *Conax* Court explained that once a party insists upon arbitration, the other party cannot avoid its contractual agreement to arbitrate.⁸ The court reasoned that a contrary interpretation would render the arbitration provision illusory, as parties can always agree to arbitrate, even in the absence of a contractual provision.⁹ Moreover, the court found that even if the word “may” did create an ambiguity in the arbitration provision’s meaning, any uncertainty would have to be resolved in favor of arbitration.¹⁰

While the Florida Supreme Court has not yet ruled on this issue, the *Conax* analysis should become the prevailing view in Florida. Consistent with federal case law, the term “may” suggests that if a dispute arises, and one party elects to arbitrate, the arbitration will be mandatory. An alternative construction, as the *Conax* Court recognized, would strain common sense as the parties would not negotiate for a right they already had – to

jointly agree to arbitration.

In addition, unlike the Fourth District Court of Appeal’s decision in *Young*, the *Conax* court recognized the strong public policy in favor of resolving disputes through arbitration.¹¹ Indeed, under both Florida and federal law, arbitration clauses are to be given the broadest possible interpretation in order to promote the resolution of controversies outside of the courts. See *Hirshenson v. Spaccio*, 800 So. 2d 670, 674 (Fla. 5th DCA 2001); *Moses H. Cone v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Accordingly, when it comes to arbitration clauses, Florida’s courts will best serve the goal of arbitration by finding that the term “may” means “shall.”

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Endnotes:

1 See, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 204 n.1 (1985) (“The use of the permissive ‘may’ is not sufficient to overcome the presumption that parties are not free to avoid the contract’s arbitration procedures.”); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir. 1996) (same); *Am. Italian Pasta Co. v. Austin Co.*, 914 F.2d 1103, 1104 (8th Cir. 1990) (same); *Local 771, IATSE, AFL-CIO v. RKO Gen., Inc.*, 546 F.2d 1107, 1115-16 (2d Cir. 1977) (same); *Nemitz v. Norfolk & W. Ry. Co.*, 436 F.2d 841, 849 (6th Cir. 1971) (same); *Deaton Truck Line, Inc. v. Local Union 612*, 314 F.2d 418 (5th Cir. 1962) (same).

2 *Conax Florida Corp.*, 499 F. Supp. 2d at 1296.

3 *Id.* at 1297.

4 *Id.* at 1297 n.10.

5 *Id.*

6 *Id.*

7 *Id.*

8 See also *United Cmty. Ins. Co. v. Lewis*, 642 So. 2d 59, 60 (Fla. 3d DCA 1994) (same).

9 *Conax Florida Corp.*, 499 F. Supp. 2d at 1298.

10 *Id.*

11 *Id.* at 1297.