

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WILLIE GARY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 1781
)	
JAMES & JACKSON LLC,)	
)	
Defendant,)	
)	
and)	
)	
MBC GOSPEL NETWORK LLC,)	
a Delaware limited liability company,)	
)	
Nominal Defendant.)	

OPINION

Date Submitted: December 29, 2005
Date Decided: January 10, 2006

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STRINE, Vice Chancellor

This opinion decides a dispute over where the members of MBC Gospel Network LLC (“MBC”) should resolve their differences over the future of that company, which operates a cable television channel known as the Black Family Channel. Using the wide contractual freedom granted to them by the Delaware Limited Liability Company Act (the “LLC Act”),¹ the creators of MBC, as we shall see, crafted a dispute resolution scheme that simultaneously contemplates that disputes regarding the Amended and Restated Operating Agreement of MBC (the “LLC Agreement”) will be resolved in arbitration while reserving to members the opportunity to seek injunctive relief and specific performance in any court of competent jurisdiction. Even more to the point, the LLC Agreement explicitly indicates that MBC shall be dissolved upon a “judicial determination that an event has occurred that makes it unlawful, impossible or impractical to carry on [MBC’s] Business.”² The language of the LLC Agreement thus tracks § 18-802 of the LLC Act, which states in pertinent part that “[o]n application . . . the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement.”

Here, the owner of the majority of the membership interests in MBC, plaintiff Willie Gary LLC (“Willie Gary”), seeks, among other things, an injunction against defendant James & Jackson LLC (“J & J”) to remedy an alleged breach of the LLC Agreement and an order of specific performance requiring J & J to live up to its alleged

¹ 8 *Del. C.* § 18-101 *et seq.*

² LLC Agmt., § 11.1(a)(ii).

promise to guarantee a debt of MBC. In the alternative, Willie Gary, which owns 80% of MBC, seeks dissolution of MBC because it and J & J, which owns the other 20%, are in deadlock regarding critical business issues.

J & J alleges that Willie Gary's claims for injunctive relief, specific performance, and dissolution must be arbitrated. J & J has moved to dismiss this action in favor of arbitration or, in the alternative, for a stay.

In this decision, I deny the motion to dismiss. For starters, I conclude that the question of whether Willie Gary's claims are arbitrable must be answered by this court. Under the identical teaching of the United States Supreme Court and the Delaware Supreme Court,³ questions of substantive arbitrability require judicial resolution unless the parties' contract clearly and unmistakably provides otherwise. In this opinion, I conclude that the mere fact that the parties agreed to arbitrate certain claims under the rules of an arbitration organization that empowers its arbitrators to rule on arbitrability is not clear and unmistakable evidence that the parties agreed to have an arbitrator decide their arbitrability disputes.

Then, I go on to explain why I find that Willie Gary need not arbitrate its claims. Although the policy of this State is identical to that of the Federal Arbitration Act, in the sense that it vigorously enforces contracts to arbitrate, it is also identical to federal law in the equally important sense that it only requires a party to arbitrate a dispute that is otherwise litigable in court when the party has a contractual (or equitably enforceable)

³ See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-5 (1995); *DMS Properties-First, Inc. v. P.W. Scott Assoc., Inc.*, 748 A.2d 389, 391-2 (Del. 2000).

duty to do so. Here, the drafters of the LLC Agreement clearly contemplated that the LLC could be dissolved after a “judicial determination” that it was “impractical” for MBC to continue. Given the plain words of the LLC Agreement to that effect and the equally specific language of the LLC Agreement permitting a party to seek injunctive relief, prevent breaches, and specifically enforce the LLC Agreement in any “court of competent jurisdiction,” it is impossible to conclude that Willie Gary has a contractual obligation to arbitrate its claims.

With the contractual freedom granted by the LLC Act comes the duty to scriven with precision. Regrettably for J & J, the drafters of the MBC LLC Agreement crafted an unwieldy dispute resolution scheme that gives parties alleging claims for compulsory relief the right to litigate, rather than arbitrate, their claims. The claims raised by Willie Gary primarily involve a request for mandatory injunctive relief and specific performance. In the alternative, Willie Gary seeks dissolution. By the LLC Agreement’s own terms, Willie Gary is permitted to seek relief in court, rather than in arbitration, for each of these claims. As such, J & J’s motion to dismiss in favor of arbitration is denied.

Moreover, J & J only initiated arbitration after Willie Gary filed its initial claims for injunctive relief in this court. Its claims in arbitration are simply mirror image claims that seek to argue that Willie Gary has acted improperly with regard to the same matters raised by Willie Gary in this case. Therefore, there is no basis to permit J & J to divest Willie Gary of its opportunity to press its claims here. The time to have provided for exclusive recourse in arbitration was at the time of crafting the LLC Agreement and that simply was not done.

I. Factual Background

The facts pertinent to the current dispute can be stated briefly and are drawn from Willie Gary's second amended complaint or are otherwise undisputed in the parties' briefs.

MBC was created in 1998 by Willie Gary and J & J. Willie Gary LLC is an eponymous creation of Willie Gary, a very successful trial attorney. J & J is an LLC formed by, among others, Alvin James, an executive with experience in broadcasting, and Marlon Jackson, a former member of the Jackson Five. Later on, Willie Gary LLC brought on as members the financial clout of two successful, albeit different types of, sluggers: Cecil Fielder and Evander Holyfield.

The goal of MBC was to create a profitable channel delivering programming involving so-called "family values" that would be targeted to an African-American audience. As of now, the Black Family Channel is accessible in areas within each of the fifty states through the nation's largest cable system operators. But it apparently has not reached anything approaching profitability.

In the restated LLC Agreement that was ultimately forged in December 1999, Willie Gary received an 80% membership interest. J & J received the remaining 20%. The LLC Agreement provides J & J with the right but not the obligation to make a capital contribution equal to 5% of the book value of the company in order to receive an additional 5% ownership when MBC achieves \$75 million in gross annual revenue (the "Revenue Trigger"). Willie Gary may not call on J & J to answer a capital call before the Revenue Trigger is pulled but is responsible itself for all additional capital contributions

until then. According to Willie Gary, it has, as of now, provided \$31 million in capital investments to MBC and loaned MBC another \$9 million. Consistent with the LLC Agreement, J & J has made no capital contributions because MBC has not reached the Revenue Trigger.

The current dispute arises because Willie Gary, which apparently has been the moving force in managing MBC since the restated LLC Agreement was forged, decided in the last year or so that MBC needed a large infusion of new capital to succeed. J & J referred the New Capital Provider (“NCP”)⁴ to MBC as a possible source of capital. Willie Gary negotiated with NCP, apparently without involving J & J, in order to secure \$56 million in financing for MBC. The terms of the proposed contract with NCP, however, call for it to receive a 31% membership interest in MBC as part of the consideration for the capital infusion.

Willie Gary then asked J & J to agree that the 31% interest sought by NCP would be generated from a pro rata reduction in the membership interests of both Willie Gary and J & J. J & J refused, contending that any equity granted to NCP should reduce only Willie Gary’s ownership interest in MBC. J & J premised this position on the provisions of the LLC Agreement that call for Willie Gary to provide MBC with capital at least until it hits the Revenue Trigger. Under § 9.1 of the LLC Agreement, new members of MBC may be admitted only with the unanimous consent of the existing members. Therefore, the refusal of J & J stymied Willie Gary in consummating the financing transaction with NCP on terms Willie Gary found acceptable. If Willie Gary agreed that all of the new

⁴ The parties have treated the identity of this possible provider of capital as confidential.

equity sought by NCP would come out of its share of MBC, its interest would be reduced to 49%.

Willie Gary found that option unpalatable. To expand its options, it brought suit in this court on November 14, 2005. In its original complaint, Willie Gary sought a mandatory injunction ordering J & J to assent to NCP's admission as a new equity member and reducing J & J's membership interest pro rata with the reduction that would be suffered by Willie Gary. Willie Gary argued that J & J's refusal to assent to admission of NCP and a reduction of its own share of MBC violated the implied covenant of good faith and fair dealing inherent in the LLC Agreement. In support of that contention, Willie Gary asserted that J & J agreed that MBC desperately needed new capital and believed that the agreement with NCP was attractive to MBC. But, J & J simply refused to assent to sharing the cost of the financing pro rata with Willie Gary. According to Willie Gary, this was a bad faith reason for refusing to provide its assent, motivated by J & J's desire to reduce Willie Gary to a minority position and to attempt to gain control of MBC for itself, in concert with NCP.

In response to the filing of Willie Gary's complaint in this court, J & J hurriedly filed a demand for arbitration. That demand only contained the most cursory explanation of the relief sought by J & J, stating simply: "This demand includes, but is not limited to, requests for declaratory relief regarding the continued wrongful conduct of Willie Gary LLC in seeking to dilute the interests of J & J."⁵ At oral argument, counsel for J & J

⁵ J & J Op. Br. Ex. 1.

candidly admitted that its filing was responsive and designed to move the dispute Willie Gary brought to this court into the arbitral forum.

Soon thereafter, this court heard an application by Willie Gary to expedite consideration of a motion for a preliminary injunction on its claim. The court denied that application, noting that the injunctive relief sought by Willie Gary was mandatory in nature and should be considered after a trial. The court also noted the unusual nature of the claim and suggested that the inability of Willie Gary and J & J to agree on a method to fund MBC, at a time when both agreed that MBC needs a capital infusion, might more traditionally give rise to a claim for dissolution. At that same hearing, J & J surfaced its contention that the dispute between itself and Willie Gary belonged in arbitration.

After that, Willie Gary filed a first amended complaint, raising a claim for dissolution under § 18-802 of the LLC Act. Then, Willie Gary again amended its complaint, with J & J's assent, to assert a claim for specific performance. The specific performance claim involved an assertion that the members of the managing board of the LLC, which includes certain members of J & J, agreed to personally guarantee the interest portion of a monetary judgment that had been entered against MBC. According to Willie Gary, J & J reneged on that agreement and Willie Gary seeks specific performance.

Taken in its entirety, the operative complaint in this action seeks: 1) a mandatory injunction requiring J & J to assent to the admission of NCP as a member on terms that dilute J & J on a pro rata basis with Willie Gary; and 2) an order of specific performance requiring the board members from J & J to guarantee the monetary judgment along with

Willie Gary. Alternatively, if the first two forms of relief are not granted, Willie Gary seeks dissolution of MBC because it is not practicable for the business of the company to continue in light of the dispute between itself and J & J over how to meet the company's admitted need for capital.

The parties agreed to brief on an expedited basis a motion by J & J to dismiss this case in favor of arbitration. The central issue raised by this motion is where the underlying dispute between Willie Gary and J & J ought to be heard. The LLC Agreement has a few provisions that bear on that question. The most obviously relevant is § 12.12, which provides as follows:

Any conflict or claim arising out of or relating to this Agreement or the breach of this Agreement shall be settled by arbitration . . . in accordance with the then-existing rules of the American Arbitration Association . . . [and] in addition to any other remedy to which the nonbreaching Members may be entitled . . . the nonbreaching Members shall be entitled to injunctive relief to prevent breaches of the provisions of this Agreement and specifically to enforce the terms and provisions hereof . . . in any court . . . having subject matter jurisdiction thereof.

Also relevant is § 11.1(a)(ii), which provides that MBC shall be dissolved upon a “judicial determination that an event has occurred that makes it unlawful, impossible or impractical to carry on the Business.” This language largely tracks § 18-802 of the LLC Act, which states that: “[O]n application . . . the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement.”

Later in § 11.1(b) of the LLC Agreement, there is a reference to a “court of competent jurisdiction” determining that MBC was dissolved before a “Dissolution

Event” defined in the LLC Agreement (which includes a judicially determined dissolution in accordance with § 11.1(a)(ii) and provides in that situation for a period when the members can reconstitute the company). In § 11.2, the LLC Agreement provides for the process by which MBC should be dissolved and liquidated when a dissolution has either occurred as a result of a Dissolution Event or a determination by a court of competent jurisdiction that the company was dissolved before a Dissolution Event.

With the pertinent provisions in mind, I turn to resolving the parties’ dispute regarding whether Willie Gary’s claims must be arbitrated.

II. Legal Analysis

The legal standards governing this motion are familiar. J & J is moving to dismiss on the ground that the LLC Agreement requires Willie Gary to arbitrate the claims it seeks to litigate in this court. Because the LLC Agreement involves interstate commerce and does not fall within the scope of the Delaware Uniform Arbitration Act, this dispute implicates the Federal Arbitration Act (“FAA”), which “preempts state law that would require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”⁶ The policies of the FAA do not complicate my analysis as the federal policy in favor of voluntarily-chosen arbitration is identical to the policy of this State, which requires this court to enforce contracts to arbitrate and to resolve doubts about whether a claim must be arbitrated in favor of arbitration.⁷

⁶ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995).

⁷ *See SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (1998).

The FAA does not create a body of federal contract law; rather, it simply requires that contracts with arbitration clauses be interpreted in accordance with the ordinary principles of contract interpretation that would otherwise govern and that no anti-arbitration state law policies override the intentions of commercial parties to contract to have their disputes resolved by arbitration.⁸ In other words, “[a]rbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which they have agreed not to submit.”⁹

Equally uncontroversial are the principles of contract interpretation that apply. By its explicit terms, “the laws of the State of Delaware shall govern . . . the construction of [the LLC Agreement’s] terms, and the interpretation of the rights and duties arising [t]hereunder.”¹⁰ Under Delaware law, the interpretation of a contract is ordinarily a matter of law, which turns on the meaning that emerges from the contract’s words. Contracts are to be interpreted as written, and effect must be given to their clear and unambiguous terms.¹¹ Ordinarily, if a contract can be read in one of two reasonable ways, the court should look to parol evidence and, in the end, give the contract the most

⁸ See *First Options*, 514 U.S. at 944; *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); see also *Dresser Indus., Inc. v. Global Indus. Tech., Inc.*, 1999 WL 413401, at *4 (Del. Ch. June 9, 1999) (indicating that even though federal policy is implicated by the FAA, state law applies to the interpretation of the contract and arbitration clause itself).

⁹ *Bonham v. HBW Holdings, Inc.*, 2005 WL 3589419, at *9 (Del. Ch. Dec. 23, 2005) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

¹⁰ LLC Agreement, § 12.10.

¹¹ *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 704 (Del. Ch. 2004), *aff’d*, 861 A.2d 1251 (Del. 2004); see also *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

reasonable interpretation that best reflects the parties' apparent intent.¹² In the case of contracts containing arbitration clauses, however, the policy in favor of arbitration requires that doubts regarding whether a claim should be arbitrated, rather than litigated, be resolved in favor of arbitration.¹³ Here, neither of the parties have suggested that parol evidence either is necessary to interpret the LLC Agreement or that any is available that sheds useful meaning on the dispute at hand. Rather, both Willie Gary and J & J believe that their disagreement about arbitrability turns on the court's examination of the words within the four corners of the LLC Agreement. Before I can address that disagreement, however, I must address a preliminary argument.

A. Should The Issue Of Arbitrability Be Decided By This Court Or The Arbitrator?

J & J contends that the fact that the LLC Agreement provides that any matter committed to arbitration under § 12.12 will be decided "in accordance with the then-existing rules of the American Arbitration Association" means that the question of whether Willie Gary must arbitrate its claims must be decided by an arbitrator. The reason for this is American Arbitration Association ("AAA") Rule R-7(a), which states that an arbitrator "shall have the power to rule on his or her own jurisdiction, including any objection with regard to the existence, scope, or validity of the arbitration agreement." In support of that argument, J & J points to decisions, predominantly of

¹² *Judge v. Rago*, 570 A.2d 253, 257 (Del. 1990); see also *USA Cable v. World Wrestling Fed'n Entm't, Inc.*, 2000 WL 875682, at *12 (Del. Ch. June 27, 2000), *aff'd*, 766 A.2d 462 (Del. 2000).

¹³ *SBC Interactive, Inc.*, 714 A.2d at 761. Our contract law has other tie-breakers, of course. For example, in the case of a contract drafted by one of the parties without any genuine back-and-forth negotiation, ambiguities are to be resolved against the drafter. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398 (Del. 1996).

federal courts, that have found that contracts providing for arbitration in accordance with the AAA Rules have, by that simple reference, evinced an intent that an arbitrator, rather than a judge, determine whether claims must be arbitrated.¹⁴

I will address those decisions, but only after performing what I believe to be the proper analysis to decide the question before me. In the 1990s, the United States Supreme Court decided an important case that has relevance here. In *First Options of Chicago, Inc. v. Kaplan*, the Supreme Court made clear that the question of arbitrability itself was one that was presumed, by default, to be a matter that the parties intended would be decided by a court. Therefore, “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.”¹⁵ The analysis of whether such evidence existed, the Supreme Court emphasized, did not involve the application of federal common law, but instead an

¹⁴ See, e.g., *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005); *Terminix Int’l Co., L.P. v. Palmer Ranch L.P.*, 2005 U.S. App. LEXIS 27766 (11th Cir. Dec. 16, 2005); *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 371 F.Supp.2d 571 (S.D.N.Y. 2005); *JSC Surgutneftegaz v. President and Fellows of Harvard College*, 2005 WL 1863676 (S.D.N.Y. Aug. 3, 2005). But see *Diesselhorst v. Munsey Building, L.L.L.P.*, 2005 WL 327532 (D. Md. Feb. 9, 2005) (holding that a provision stating that arbitration shall proceed under the Construction Industry Arbitration Rules of the AAA did not provide clear and unmistakable evidence of an intent to empower the arbitrator to determine arbitrability); *Martek Biosciences Corp. v. Zuccaro*, 2004 WL 2980741 (D. Md. Dec. 23, 2004) (holding that a provision stating that arbitration shall proceed under the rules of the Judicial Arbitration and Mediation Services, which provided the arbitrator with the authority to determine arbitrability, did not provide clear and unmistakable evidence of the parties’ intent to empower the arbitrator to determine arbitrability).

¹⁵ *First Options of Chicago*, 514 U.S. at 944 (citing *AT&T Tech., Inc. v. Comm. Workers*, 475 U.S. 643, 649 (1986)).

analysis of the parties' contract using the principles of the state law that governed their agreement's interpretation.¹⁶ In justifying its reasoning, the Supreme Court noted that:

[the] 'who . . . should decide arbitrability question' . . . is rather arcane . . . [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.¹⁷

The *First Options* decision is consistent with the law of this State. As articulated by our own Supreme Court, Delaware law is that "the question of whether parties agreed to arbitrate . . . is generally one for the courts and not for the arbitrators."¹⁸ "[A] question of substantive arbitrability is decided by the Court of Chancery" unless the parties "agree [in their contract] to submit the question of arbitrability to arbitration" in a clear and unmistakable manner.¹⁹

For that reason, I believe my duty in the first instance is to look at the MBC LLC Agreement and determine whether the words used reflect a clear and unmistakable intent to have disputes about arbitrability arbitrated. When I do so, I conclude that the LLC Agreement does not express that intent with clarity. In my view, the mere fact that the LLC Agreement provides that any claim required to be arbitrated shall be arbitrated "in

¹⁶ *First Options of Chicago*, 514 U.S. at 944-45.

¹⁷ *Id.* at 945.

¹⁸ *SBC Interactive, Inc.*, 714 A.2d at 761.

¹⁹ *DMS Properties-First*, 748 A.2d at 392; *see also SBC Interactive, Inc.*, 714 A.2d 758; *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149 (Del. 2002); *Mehiel v. Solo Cup Co.*, 2005 WL 3074723 (Del. Ch. Nov. 3, 2005); *Burton v. PFPC Worldwide*, 2003 WL 22682327 (Del. Ch. Oct. 20, 2003); *Board of Educ. of Caesar Rodney School Dist. v. Caesar Rodney Educ. Ass'n*, 2003 WL 22232608 (Del. Ch. Sep. 17, 2003)

accordance with the” AAA rules does not “clearly and unmistakably” provide that an arbitrator should determine whether a claim must be arbitrated. Rather, it more obviously means that the parties were merely identifying the AAA as the arbitrator and agreeing that when the parties under the LLC Agreement arbitrate a claim, the AAA Rules would provide the procedural roadmap for them to follow. After all, the parties to the LLC Agreement, if they wished to arbitrate some disputes, had to provide for the organization or person to conduct arbitrations within that class.

To the extent that the parties had wished to clearly invest an arbitrator with the power to decide questions of substantive arbitrability, it would have been easy to do so plainly by simply stating that: “Any dispute among the parties regarding whether a claim or controversy must be arbitrated shall be decided by an arbitrator under the AAA Rules.”²⁰ The LLC Agreement does not plainly state this. In this respect, it also bears on this question that the AAA Rules contemplate that an arbitrator may award equitable relief, such as specific performance of contracts.²¹ But, as I soon shall focus upon more directly, the LLC Agreement specifically refers to those types of relief as ones that may be sought from a “court of competent jurisdiction.” In sum, the mere fact that claims and controversies that must be arbitrated, or that the parties agree to arbitrate, will proceed under the procedural rules of the AAA does not plainly divest the judiciary of its

²⁰ In *Johnson v. Polaris Sales, Inc.*, 257 F.Supp.2d 300 (D. Me. 2003) a real world example of a clear clause was at issue. That clause referred all disputes regarding a dealer agreement to arbitration “including . . . the arbitrability of any issue . . .” *Id.* at 308.

²¹ AAA Commercial Arbitration Rule R-43(a).

authority to determine whether a controversy among parties to the LLC Agreement must be arbitrated.

In so ruling, I recognize that I reach a result that is at odds with the weight of federal precedent that has emerged since *First Options*. Following that decision, the AAA amended its commercial arbitration rules to grant the arbitrator power to rule on his or her own jurisdiction. AAA Rule R-8(a), now Rule R-7(a), went into effect on January 1, 1999. Based on the theory that “[a] party who consents to be bound by contract to arbitration before the AAA also consents to be bound by the procedural rules of the AAA,”²² courts have held that a party “cannot sign a document that states that AAA procedures will govern disputes between the parties, and then claim [it] did not understand that AAA procedures will govern disputes between the parties.”²³ Therefore, several courts have held that “when . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator.”²⁴

²² *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 867-8 (10th Cir. 1999).

²³ *Citifinancial, Inc. v. Newton*, 359 F.Supp.2d 545, 551 (S.D.Miss 2005).

²⁴ *Contec*, 398 F.3d at 208. See also *Terminix*, 2005 U.S. App. LEXIS 27766, at *6; *Pres. and Fellows of Harvard*, 2005 WL 1863676, at *6. In fact, one court determined this sort of general incorporation was “clear and unmistakable” evidence of intent to arbitrate arbitrability even though AAA Rule R-8(a) was not in existence when the parties signed the agreement that court was interpreting. *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPARTNERS, Inc.*, 203 F.R.D. 677, 684-5 (S.D. Fla. Sept. 20, 2001). Rather, the agreement incorporated the AAA Rules, and AAA Rule R-1 stated that the rules “shall apply in the form obtaining at the time the demand for arbitration” is made. *Id.* at 684. Because the demand for arbitration was made in 1999, Rule R-8(a) was in effect, and the court found that by incorporating Rule R-1, the parties agreed to use the rules in effect in 1999, which included Rule R-8(a).

Although I concede that this line of cases has a rational basis, I do not believe they are persuasive exercises in contractual interpretation. They are instead illustrative of the continuing policy preference, even after *First Options*, of federal courts with burgeoning dockets to refer even the question of arbitrability to arbitration. In essence, these decisions hold that, irrespective of *First Options*, if parties to a contract want an organization like the AAA to arbitrate some, but not necessarily all, disputes, they must expressly indicate that the arbitrator may not determine questions of arbitrability but must only decide those substantive claims within her jurisdiction as determined by a court. In other words, if parties wish that a certain class of disputes be arbitrated by an organization whose arbitration rules permit an arbitrator to rule on arbitrability, they must explicitly indicate that disputes about arbitrability are reserved to the judiciary. That appears to reverse the command of *First Options*, which required a clear and unmistakable expression of the intent to divest the judiciary of the power to decide arbitrability.²⁵

It is only by applying a strong policy gloss in favor of referring arbitrability questions to arbitration that I could construe the LLC Agreement to require AAA arbitration on that issue. As I understand our law, I should not apply such a policy gloss but should interpret the LLC Agreement as written. Given that requirement, I cannot find

²⁵ One scholar contends that the Supreme Court rejected the argument that an arbitration clause referring matters to arbitration under rules that empower an arbitrator to determine arbitrability is sufficient to satisfy the *First Options* standard. He contends that this sort of “incorporation by reference” argument was presented to the Supreme Court in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), and implicitly rejected. See Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 868-70 (2003).

that the LLC Agreement clearly and unmistakably requires disputes about arbitrability to be arbitrated. The LLC Agreement simply does not speak with the required clarity on, as *First Options* puts it, the “arcane . . . ‘who should decide arbitrability’” question.²⁶ In that regard, I note that our courts have dealt with several disputes about arbitrability since the AAA changed its rule. In those disputes, which were vigorously contested, the mere fact that the contract called for certain classes of disputes to be arbitrated under the AAA rules did not even inspire the party seeking to secure arbitration to argue that this court had to refer the question of arbitrability to the AAA.²⁷ In other words, it was not obvious to those parties, who were represented by sophisticated counsel, that they had procured an arbitral forum already, simply by inserting a clause mentioning the AAA rules in the contract.

It may be that our Supreme Court might, for good reason, wish to follow the weight of federal authority by holding as a matter of law that a contractual clause calling for arbitration of a class of disputes under the AAA Rules evinces a clear and

²⁶ *First Options of Chicago*, 514 U.S. at 945.

²⁷ See *Mehiel v. Solo Cup Co.*, 2005 WL 3074723 (Del. Ch. Nov. 3, 2005) (addressing and deciding the issue of substantive arbitrability when the arbitration clause contained a provision that called for AAA arbitration); *The Town of Smyrna v. Kent County Levy Court*, 2004 WL 2671745 (Del. Ch. Nov. 9, 2004) (determining the issue of substantive arbitrability when the arbitration agreement provided for disputes to be resolved by “binding arbitration in accordance with the Rules of the American Arbitration Association”); *Karish v. SI Int’l, Inc.*, 2002 WL 1402303 (Del. Ch. June 24, 2002) (deciding that a claim was covered by an arbitration clause, which stated that the parties would arbitrate disputes in accordance with AAA Rules); *IMO Ind. v. Sierra Int’l, Inc.*, 2001 WL 1192201 (Del. Ch. Oct. 1, 2001) (determining the issue of substantive arbitrability when the arbitration clause stated that disputes would be decided in an arbitration proceeding “conforming to the Rules of the American Arbitration Association”); *Bayless v. Davox Corp.*, 2000 WL 268310 (Del. Ch. Mar. 1, 2000) (determining the issue of substantive arbitrability when the arbitration clause provided that disputes would be resolved “in accordance with the applicable Commercial Arbitration Rules of the [AAA] . . .”).

unmistakable intent to arbitrate arbitrability questions. Such a ruling would turn such a reference into a term of art on the subject of arbitrability and arguably be economically efficient as a general policy rule. To date, our Supreme Court has not done so, and I cannot rest my ruling on the notion that the parties to the LLC Agreement knew that merely by choosing AAA to handle certain disputes, they therefore also were binding themselves to the AAA arbitrator's ruling on questions of arbitrability.

B. May Willie Gary Seek An Injunction, Specific Performance, Or, In The Alternative, Dissolution Before This Court, Or Must Those Claims Be Arbitrated?

I now turn to the central issue on this motion. J & J bottoms its argument that Willie Gary's claims must be arbitrated largely on a truism. As to Willie Gary's claim that J & J is breaching the implied covenant of good faith and fair dealing by refusing to accede to the admission of NCP as a member on terms that will dilute J & J's interest pro rata with the dilution of Willie Gary, J & J says that claim is plainly one "for breach of this Agreement" and thus "shall" — i.e., must — be "settled by arbitration" under § 12.12. Likewise, J & J argues that Willie Gary's claim that J & J's members are breaching an agreement made at a management board meeting personally to guarantee the interest portion of a judgment against MBC obtained by the Florida News Channel clearly arises out of or relates to the LLC Agreement and must also be arbitrated. Finally, J & J contends that Willie Gary's assertion that it is impractical for MBC to continue implicates § 11.1(a)(ii) of the LLC Agreement's plain terms, which refer to that standard, and also clearly relates to the LLC Agreement, insofar as it touches on the relationship

between the two members and their inability to forge a path for proceeding forward under the Agreement. As such, J & J claims that the dissolution claim must also be arbitrated.

The problem for J & J, however, is that one can agree, for the sake of argument, with all of those arguments and still not reach the conclusion that Willie Gary must arbitrate its claims. Why? Because § 12.12 plainly states that a member of the LLC who is not in breach of the agreement “shall be entitled to injunctive relief to prevent breaches of the provisions of this Agreement and specifically to enforce the terms and provisions” of the LLC Agreement “in any action instituted in any court of the United States or any state thereof having subject matter jurisdiction thereof.” That entitlement is “in addition to any other remedy to which the nonbreaching Members may be entitled, at law or in equity” Although J & J would like me to conclude that this sentence of § 12.12 simply provides a party that has prevailed in arbitration to seek enforcement from a court, that reading is not convincing because of the earlier portion of § 12.12 that provides that “judgment upon the [arbitration] award rendered may be entered in any court having jurisdiction concerning the matter.”

Alternatively, J & J says that the sentence seeming to permit an application to a court for injunctive relief or specific performance is designed to provide a safety valve for a party if, after the party attempts to get such relief in arbitration, more immediate action is required. But that argument is a litigator’s invention that is not supported in any manner by the text of the LLC Agreement. Essentially, it is speculation about what the drafters might have been thinking. In that regard, one could speculate that the drafters of

the LLC Agreement were unaware that the AAA Rule R-43(a) empowered arbitrators to grant equitable relief²⁸ and specific performance.

Speculation in that direction has more of a textual basis, however. By its plain terms, the last sentence of § 12.12 authorizes Willie Gary to do what it has done — come to a court with subject matter jurisdiction and press claims for injunctive relief and specific performance. I admit that there is some color to J & J’s argument. The reference to “the nonbreaching Members” might be thought of as the beginnings of a rational approach to setting up a sequential dispute resolution process, whereby the parties first had to complete arbitration regarding whether there was a breach of the LLC Agreement and that then allowed the party found to be correct to proceed with a broader action in court for additional injunctive relief and/or specific performance. But the reference does not refer back to the arbitration in this manner. Instead, the sentence addressing the right to proceed in a court with subject matter jurisdiction, when read in the context of § 12.12 as a whole, gives a party believing itself aggrieved by a breach to seek non-monetary relief in a judicial forum, and not simply in arbitration. In a sense, § 12.12 accords the first filing party a choice of forum, at least in cases when the claim involves one for injunctive relief or specific performance. As applied here, I find it impossible to say that Willie Gary must arbitrate its claims for an injunction and specific performance. Willie Gary has simply done what the plain terms of § 12.12 authorize it to do, which is seek injunctive relief and specific performance in a court with subject matter jurisdiction over its claims.

²⁸ Injunctions are, of course, a quintessential equitable remedy.

As to Willie Gary's claim for dissolution, another provision of the LLC Agreement bears on whether it must arbitrate. By its explicit terms, § 11 of the LLC Agreement contemplates judicial involvement in the dissolution process. One of the "Dissolution Events" defined in the Agreement occurs when there is a "judicial determination that an event has occurred that makes it unlawful, impossible or impractical to carry on MBC's business." As noted, this language tracks § 18-802 of the LLC Act, which provides that "the Court of Chancery may decree dissolution . . . whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement." In the overall structure of the LLC Agreement, I find it impossible to conclude that Willie Gary must press a claim for dissolution before an arbitrator in the first instance, when the Agreement itself expressly refers to a "judicial determination" of whether grounds for dissolution exist, and when the dissolution provisions of the Agreement then go on to refer to the involvement of a "court of competent jurisdiction."²⁹ That conclusion is strengthened by my preceding discussion of § 12.12, which notes that the drafters of the LLC Agreement contemplated judicial consideration of claims for injunctions and specific performance. This contemplation, when coupled with the specific references to judicial involvement in the dissolution process, suggests that the drafters believed that a judicial, rather than arbitral, forum would be available when the parties sought relief involving compulsion, rather than a mere award of monetary damages.

²⁹ LLC Agmt., §§ 11.1(b), 11.2.

In so finding, I acknowledge that there is some tension between my decision and the brief decision rendered recently in *Terex Corp. v. STV USA, Inc.*³⁰ That decision was entered on a very expedited basis, being issued the same day as argument, and given the exigencies, the court was understandably unable to provide much context that enables a non-party to the case to discern exactly the nature of the dispute, the arbitrability of which was at issue. What is clear is that one party sought to dissolve an LLC through a proceeding in this court. The other party argued that the dissolution claim should be arbitrated in accordance with a clause that provided that all claims arising out of or relating to that LLC agreement had to be arbitrated. This court accepted that argument and found that a reference to a decree of judicial dissolution under the LLC Act did not mean that a dissolution claim was not subject to mandatory arbitration in the first instance, reasoning that such a judicial dissolution could be “entered in accordance with, and following, dissolution proceedings before an arbitrator”³¹

The current dispute, however, involves an LLC Agreement that is different in material respects from the one in *Terex*. For starters, § 11.1(a)(ii) of the MBC LLC Agreement explicitly refers to a “judicial determination that an event has occurred that makes it . . . impracticable to carry on the Business.” This language is different in that it does not refer simply to entry of a decree of dissolution, which the Chancellor found could be done by a judge in an action seeking the enforcement of an arbitrator’s finding that the statutory grounds for dissolution existed, but to a judicial determination that the

³⁰ *Terex Corp. v. STV USA, Inc.*, 2005 WL 2810717 (Del. Ch. Oct. 20, 2005).

³¹ *Terex*, 2005 WL 2810717, at *1.

statutory grounds existed. The *Terex* language also did not refer repeatedly to judicial involvement in the dissolution section, as the MBC LLC Agreement does. Given the importance of the right to seek dissolution, I am frankly chary about holding that a party to an LLC Agreement that specifically provides that the company may be dissolved upon certain “judicial determination[s]” must arbitrate that precise claim.³² The more specific provision of the LLC Agreement addressing that cause of action should, in normal contract law terms, trump the more general provisions of the LLC Agreement.³³ As important, the *Terex* LLC Agreement did not provide parties with a right to seek injunctive relief or specific performance from a court but instead appeared to contemplate that any requests for such relief would be made to an arbitrator. The MBC LLC Agreement provides explicitly for actions seeking specific performance and injunctions to proceed in a judicial forum. Reading the MBC LLC Agreement as enabling a party who seeks dissolution to go to a court therefore results in a harmonious outcome, whereby claims for compulsory relief may be litigated.

For all these reasons, I conclude that J & J’s motion to dismiss must be denied.

Ultimately, the question before me is not whether Willie Gary could have arbitrated the claims it seeks to press here, but whether it had a contractual obligation to do so.

³² By so stating, I am in no way saying that parties cannot contract to have an arbitrator hear claims for dissolution arising under § 18-802. *See, e.g., Johnson v. Foulk Road Medical Center P’ship*, 2001 WL 1563693 (Del. Ch. Nov. 21, 2001) (holding that the general partnership dissolution statute with similar language did not foreclose arbitration of dissolution). I am only concluding that when the LLC Agreement at issue explicitly defines a dissolution event as involving a “judicial determination” that certain events require that the business be dissolved, it is difficult to conclude that the parties had agreed that any party seeking such a determination was duty-bound to proceed before an arbitrator, rather than a member of the judiciary who could make a “judicial determination.”

³³ *See Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1184 (Del. 1992).

Because all of Willie Gary's claims are claims that, absent any binding agreement to arbitrate them, would be within the subject matter jurisdiction of this court, the determinative question is whether the LLC Agreement mandates that Willie Gary press those claims before an arbitrator. I have concluded that the LLC Agreement does not force Willie Gary to proceed in arbitration and that the LLC Agreement reserved to Willie Gary the right to press certain claims in this court that are within our traditional jurisdiction.

Moreover, I also deny J & J's motion to stay this litigation until the arbitration initiated by J & J is completed. That arbitration was a reflexive reaction to the filing of this suit and simply involves an attempt by J & J to fight on a ground not chosen by Willie Gary. Because the LLC Agreement does not require Willie Gary to arbitrate, Willie Gary, which filed its action first, need not defer to its adversary's preferred choice of forum. If, down the road, there are aspects of this dispute that should be resolved exclusively in arbitration (such as a residual claim for monetary damages), that can be dealt with then. Because Willie Gary's desire for relief in the form of an injunction, specific performance, and/or dissolution is not incidental to its objectives, but primary, that eventuality is not even a probability and is of little moment at this stage of the proceedings.

III. Conclusion

J & J's motion to dismiss and/or stay is DENIED. The parties shall confer on a schedule for the completion of the case and seek a conference with the court. IT IS SO ORDERED.