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Dish vs. Univision: Is Parol Evidence Rule in the Game?

BY [MARIYA DEKHTYAR](#)/ ON SEPTEMBER 19, 2018



Dish Network has taken Univision, a broadcast television network, to court over Univision's Facebook streaming of the Liga MX soccer games.^[1] In simplistic form, the issue before the District Court in the Southern District of New York, was whether a difference in the telecast language makes the same soccer match into two different telecasts.^[2] Univision streamed soccer matches in English on Facebook, and Dish Network provided the same games in Spanish on television.^[3] Univision asserts that this is not a problem because the agreement between the two companies was limited to Spanish games. Therefore, in Univision's view, it is free to provide these matches in English.^[4] Additionally, Univision claims that there are other differences, such as the announcers, the commentary, the audio production, audio path, and graphics.^[5] Dish Network, however, argues that their rights under the contract do not have these limitations.^[6] When Univision moved for a motion to dismiss, U.S. District Court Judge Nathan agreed with Dish Network in a sealed decision and denied Univision's motion.^[7] Until Judge Nathan's decision is redacted and unsealed, we can only surmise how the contract was

interpreted.^[8] Nevertheless, and please excuse the puns, is New York contract law shielding Dish Network and preventing Univision from scoring the goal?

In New York, to prevail on a breach of contract claim, the plaintiff must show: “(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages.”^[9] Plaintiffs cannot make general claims of breach, but have the burden of pointing to the exact provision that was breached.^[10] Here, to determine whether the disputed third element is met, the Judge must interpret whether the parties intended the contract to include games in both Spanish and English.^[11] If we assume that the court found the contract ambiguous on this point, could Univision have submitted parol evidence to aid the interpretation?^[12] That is, could Univision have produced evidence of an agreement outside of the four-corners of the licensing agreement to show that the parties only intended to cover Spanish? Yes, but New York courts are not so quick to say that a contract is ambiguous and allow in evidence that is not the agreement itself.^[13] Instead, New York courts will rely on the “plain and ordinary meaning” in contract interpretation.^[14] New York courts will not look to outside evidence to determine whether a contract is ambiguous.^[15] We do not know whether either of the parties did in fact try to bring in evidence outside of the licensing agreement, but, unless the contract between the parties expressly limited the language to Spanish, a New York court will not be inclined to read this limitation into the contract.

New York’s high parole evidence bar is not shared in all states and is not the approach of the Second Restatement of Contracts.^[16] For example, Comment b to Restatement (Second) of Contracts § 214 allows courts to consider the negotiations process when interpreting contracts.^[17] Additionally, Restatement (Second) of Contracts § 216 looks to whether the omitted term is “such a term as in the circumstances might naturally be omitted from the writing.”^[18] If this case were filed in a jurisdiction that does not subscribe to New York’s stringent contract interpretation, would it be possible to admit evidence that shows that, the language of the game is a term that would “naturally be admitted,” when it is not specified in the contract itself?^[19] It is reasonable to assume that, if the parties did in fact intend to limit the contract to Spanish, they would have included that in the licensing agreement. For one, the Liga MX matches, the center of this dispute, are enjoyed not just in Mexico, but in the United States as well.^[20] However, it is true that fans of baseball and football outnumber fans of soccer in the United States, and that Liga MX is viewed in the United States predominantly in Spanish.^[21] If the intention of the parties was not merely to give rights in Spanish, the parties most likely thought about Liga MX in English as well and would have included this specification in the licensing agreement. This is especially likely given that a little less than one-third of Liga MX social media followers are individuals from the United States.^[22] With

this kind of online presence and the spread of following and watching sport events on social media, the parties would have expressly included English and Spanish in the contract, if that was truly the sealed deal.^[23]

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[1] Mariella Moon, *Judge OKs Dish lawsuit over Univision's soccer livestreams*, engadget (Sept. 9, 2018), <https://www.engadget.com/2018/09/09/dish-univision-facebook-livestream-lawsuit/>.

[2] Eriq Gardner, *Univision Must Face Lawsuit for Streaming Soccer Matches on Facebook*, The Hollywood Reporter (Sept. 7, 2018), <https://www.hollywoodreporter.com/thr-esq/univision-face-lawsuit-streaming-soccer-matches-facebook-1141060>.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Gary Dinges, *Groups ask Paxton to intervene in Univesion, Dish Network fight*, myStatesman (Sept. 14, 2018), <https://www.mystatesman.com/business/groups-ask-paxton-intervene-univision-dish-network-fight/PRZaqz39bloCRzUcjDuEdO/>.

[9] *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 188, 188-189 (S.D.N.Y. 2011) (affirming the elements of a breach of contract claim).

[10] See *Ellington*, 837 F. Supp. 2d at 189 (identifying the burdens on the plaintiff to prevail).

[11] *State of New York v. Panex Indus., Inc.*, No. 94-CV-0400E(F), 2001 WL 241791, *at 1 (W.D.N.Y. Mar. 8, 2001) (citation omitted).

[12] See *Marine Midland Bank-S. v. Thurlow*, 53 N.Y.2d 381, 386, 425 N.E.2d 805, 807 (1981) (stating that the parole evidence rule “operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing) (citations omitted).

[13] See *Panex Indus, Inc.*, 94-CV-0400E(F), 2001 WL 241791, *at 1 (affirming that ambiguity is not just that the parties say a term or clause means different things. The interpretations cannot be beyond “reasonable and ordinary meaning) (citation omitted); *Lake Const. & Dev. Corp. v. City of New York*, 211 A.D.2d 514, 515, 621 N.Y.S.2d 337 (1995) (stating that if the intent can be understood from the contract, then parole evidence is not permissible); *Non-Instruction Adm’rs, Sup’rs Retirees Ass’n ex rel. Tattersall v. Sch. Dist. of City of Niagara Falls*, 118 A.D.3d 1280, 988 N.Y.S.2d 343, 344-345 (2014) (stating that parole evidence cannot be used to show that a document is ambiguous).

[14] *Bassuk Bros. v. Utica First Ins. Co.*, 1 A.D.3d 470, 768 N.Y.S.2d 479, 481 (2003) (holding that “the court may not disregard the plain meaning of the policy’s language in order to find an ambiguity where none exists) (citation omitted).

[15] See *id.*; *Kass v. Kass*, 91 N.Y.2d 554, 566, 567 (1998) (holding that Ambiguity is determined by looking within the four corners of the document, not to outside sources).

[16] See *Masterson v. Sine*, 68 Cal. 2d 222, 227-228 (stating that evidence outside of the contract is not allowed where the agreement “is such as might naturally be made as a separate agreement by the parties...”; Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. Pa. L. Rev. 533 (1998) (explaining the distinction between “hard-PER” and “soft-PER).

[17] Restatement (Second) of Contracts § 214 cmt. b (Am. Law Inst. 1981) (“The expressions and general tenor of speech used in negotiations are admissible to show the conditions existing when the writing was made, the application of the words, and the meaning or meanings of the parties.”).

[18] Restatement (Second) of Contracts § 216 (2)(b) (Am. Law Inst. 1981).

[19] *Id.*

[20] See Kevin Baxter, *Mexico’s Liga MX has the lion’s share of soccer viewers in the U.S.*, Los Angeles Times (Apr. 30, 2016), <http://www.latimes.com/sports/soccer/la-sp-soccer-baxter-20160501-story.html>.

[21] *Id.*

[22] Jose Miguel Burgos, *Liga MX: USA's most popular soccer league*, LinkedIn (Feb. 7, 2018) <https://www.linkedin.com/pulse/liga-mx-usas-most-popular-soccer-league-jos%C3%A9-miguel-burgos>.

[23] Karl Kaufman, *Will Facebook Become The Preferred Way for Fans To Watch Sports?*, Forbes (Jun. 15, 2018), <https://www.forbes.com/sites/karlkaufman/2018/06/15/will-facebook-become-the-preferred-way-for-fans-to-watch-sports/#3f00828e2746> (stating that "Facebook has become such a dominate disruptor that potential rivals might have no choice but to play ball and provide content for Facebook Watch.").