

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**
3

4 **SUMMARY ORDER**
5

6 **RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS**
7 **FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND**
8 **FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES**
9 **A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST**
10 **EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)."**
11 **A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH**
12 **THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL**
13 **UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY**
14 **ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT**
15 **HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE**
16 **ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE**
17 **DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.**
18

19 **At a stated term of the United States Court of Appeals for the Second Circuit, held**
20 **at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of**
21 **New York, on the 27th day of October, two thousand nine.**
22

23 **PRESENT:**

24 **WILFRED FEINBERG,**
25 **DEBRA ANN LIVINGSTON,**
26 *Circuit Judges,*
27 **JOHN G. KOELTL,**
28 *District Judge.**
29

30
31 **ISC Holding AG,**

32 *Petitioner-Appellant,*

33
34
35 **v.**

09-1442-cv

36
37 **Nobel Biocare Investments N.V.,**

38 *Respondent-Appellee.*
39
40

*The Honorable John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

1 FOR APPELLANT: IRA MATETSKY, Ganfer & Shore LLP
2
3 FOR APPELLEES: ADAM SILVERSTEIN, Golenbock Eiseman Assor Bell & Peskoe
4 LLP
5

6 Appeal from a judgment of the United States District Court for the Southern District of
7 New York (Stanton, J.).

8 **UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND**
9 **DECREED** that the judgment of the district court be **VACATED** and the case **REMANDED** to
10 the district court for further proceedings consistent with this opinion.

11 Petitioner-Appellant ISC Holding AG (“ISC Holding”) appeals from an April 3, 2009
12 memorandum and order of the district court denying its petition to compel arbitration pursuant to
13 the Asset Management Facilitation Agreement (“AMFA”), a purported agreement between ISC
14 Holding and Respondent-Appellee Nobel Biocare Investments N.V. (“Nobel Biocare”) dated
15 January 21, 2008. The district court found that because the dispute could not be arbitrated before
16 the American Arbitration Association, and because the AMFA’s alternative specification that
17 disputes could be resolved in “any other US court” meant a judicial court in the United States,
18 the agreement was not an enforceable agreement to arbitrate. Because we find that the clause
19 purporting to bind the parties to submit disputes “to binding arbitration through The American
20 Arbitration Association or to any other US court” is ambiguous, we vacate and remand. We
21 assume the parties’ familiarity with the underlying facts, procedural history, and specification of
22 the issues on appeal.

23 We review *de novo* a district court’s denial of a motion to compel arbitration. *Arciniaga*
24 *v. General Motors Corp.*, 460 F.3d 231, 234 (2d Cir. 2006); *Jacobs v. USA Track & Field*, 374

1 F.3d 85, 88 (2d Cir. 2004).

2 We have held that “arbitration is a matter of contract, and . . . parties cannot be compelled
3 to arbitrate issues that they have not specifically agreed to submit to arbitration.” *Shaw Group*
4 *Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 120 (2d Cir. 2003) (internal citations and quotation
5 marks omitted). Thus, “[n]otwithstanding the strong federal policy favoring arbitration as an
6 alternative means of dispute resolution,” we will “treat agreements to arbitrate like any other
7 contract.” *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 146 (2d Cir.
8 2001). Without a meeting of the minds such that an enforceable agreement to arbitrate was
9 formed, we will not compel arbitration. *Dreyfuss v. Etelecare Global Solutions-US Inc.*, No. 08-
10 5903-cv, 2009 WL 3004111, at *3 (2d Cir. Sept. 21, 2009).

11 Under “familiar rules of contract interpretation,” when “an agreement is clear and
12 complete,” its meaning “is determined by reference only to the contract’s terms.” *JA Apparel*
13 *Corp. v. Abboud*, 568 F.3d 390, 404 (2d Cir. 2009) (Sack, *J.*, concurring) (internal quotation
14 marks omitted) (applying New York contract law). However, “[w]hen a contract term is
15 reasonably susceptible to more than one interpretation . . . it is ambiguous as to the parties’
16 intent.” *Id.* (internal quotation marks omitted). A word or phrase in a contract is ambiguous
17 when it is “capable of more than one meaning when viewed objectively by a reasonably
18 intelligent person who has examined the context of the entire integrated agreement and who is
19 cognizant of the customs, practices, usages and terminology as generally understood in the
20 particular trade or business.” *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 617 (2d
21 Cir. 2001) (internal quotation marks omitted) (applying New York contract law).

1 “The objective of contract interpretation is to give effect to the expressed intentions of the
2 parties.” *Record Club of Am., Inc. v. United Artists Records, Inc.*, 890 F.2d 1264, 1271 (2d Cir.
3 1989) (applying New York contract law). When “the contract language creates ambiguity,
4 extrinsic evidence as to the parties’ intent may properly be considered.” *JA Apparel Corp.*, 568
5 F.3d at 397. *See also* 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of*
6 *Contracts* § 30:7 (4th ed. 1999) (“Where a written contract is ambiguous, a factual question is
7 presented as to the meaning of its provisions, requiring a factual determination as to the intent of
8 parties in entering the contract. Thus, the fact finder must interpret the contract’s terms, in light
9 of the apparent purpose of the contract as a whole, the rules of contract construction, and
10 extrinsic evidence of intent and meaning.”)¹

11 The purported arbitration clause in the contract at issue reads:

12 **22. Arbitration:**² In the event of disputes concerning any aspect of
13 the Agreement, including claim of breach, remedy shall first be
14 sought by communication between parties. If such communication
15 fails to resolve the dispute then the parties agree in advance to have
16 the dispute submitted to binding arbitration through The American
17 Arbitration Association or to any other US court. The prevailing
18 party shall be entitled to attorney’s fees and costs. The arbitration
19 may be entered as a judgment in any court of competent jurisdiction.
20 The arbitration shall be conducted based upon the Rules and
21 Regulations of the International Chamber of Commerce (ICC 500).
22

¹ To the extent that Swiss law applies to the dispute over the enforceability of the purported arbitration clause, our analysis would not change. Nobel Biocare has asserted, and ISC Holding has not contested, that “Swiss law principles of contract interpretation are similar to principles of contract interpretation under New York law.”

² The contract specifies that paragraph “headings are not part of this Agreement and shall not be used in the interpretation of this Agreement.”

1 Based on this clause, ISC Holding argues that Nobel Biocare agreed to arbitrate any dispute
2 arising pursuant to the purported contract at issue. It urges us to interpret the phrase “any other
3 US court” to mean a court of arbitration and to hold that the agreement binds Nobel Biocare to
4 arbitrate the present dispute. Nobel Biocare instead contends that even if it had entered into the
5 AMFA and this agreement were otherwise binding—which Nobel Biocare says it is not—“any
6 other US court” may be reasonably interpreted only to mean a judicial court in the United States.
7 It asks us to affirm the district court.

8 We find that it is not clear from the text of the purported contract, considering the
9 agreement as a whole, whether “any other US court” refers to, as ISC Holding contends, a court of
10 arbitration or, as Nobel Biocare maintains, a judicial court. The use of the word “other” implies
11 that “US court” is related to its antecedent, “The American Arbitration Association.” However, it
12 is also true that, as the district court found, a “US court” is not necessarily a “US *arbitral* court.”
13 Although “court” is used elsewhere in the agreement, it does not resolve this ambiguity. We
14 therefore find that the purported arbitration clause at issue is ambiguous and, accordingly, vacate
15 and remand to the district court for further proceedings consistent with this order. We leave
16 Nobel Biocare’s alternative argument regarding personal jurisdiction to be resolved by the district
17 court in the first instance.

18 For the foregoing reasons, the judgment of the district court is hereby **VACATED** and
19 **REMANDED** for proceedings consistent with this order.

20
21 FOR THE COURT:
22 Catherine O’Hagan Wolfe, Clerk
23

24 By: _____