

Does the Arbitrator Have Jurisdiction? And Who Decides?

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2018 Spring Conference

Dispute Resolution Section

Issues presented

- Does the arbitrator have authority to decide arbitrability issues? Does the court or the arbitrator decide? For example:
 - *Existence of an arbitration agreement*
 - *Non-signatories' obligation to arbitrate*
 - *Joinder of a non-party*
 - *Consolidation of related cases*
- What does the arbitration agreement permit?
 - *Including the "delegation clause"*
- How do you decide arbitrability once you determine you have the power?
- Can the Award be vacated for exceeding powers if arbitrator decides these issues?

Does the Arbitrator or the Court Decide Arbitrability?

It Depends on the Type of Challenge.

Formation/existence of contract

The court decides. Some examples:

- Party did not sign the contract. *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995).
- Signor of contract not authorized. *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 101 (3d Cir. 2000).
- Signor lacked mental capacity to sign. *Spahr v. Secco*, 330 F.3d 1266, 1271 (10th Cir. 2003); contra, *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472-473 (5th Cir. 2002).
- Contract was fraudulently induced. (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), cf, *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010).

Non-signatories: where clear delegation clause, arbitrator can decide

Where the agreement incorporates provider rules containing a clear and unmistakable delegation of arbitrability to the arbitrator (“the delegation clause”), arbitrator decides whether non-signatories can compel a signor to arbitrate with it. For example:

- Contract incorporated AAA Construction Rules, which delegate to arbitrator signor’s obligation to arbitrate with non-signatories. *Eckert/Wordell Architects, Inc. v. FJM Properties of Willmar, LLC*, 756 F.3d 1098 (8th Cir. 2014).
- Parent Guaranty incorporated ICC Procedural Rules, which delegate to arbitration panel issue of signor’s obligation to arbitrate with non-signatories. *Portland General Electric Company v. Liberty Mutual Insurance Co.*, 862 F.3d 981 (9th Cir. 2017).
- But when a non-signatory contests the existence of the arbitration agreement, the delegation clause is also contested, and the court decides.

Non-signatories: where court orders arbitration

Fact pattern determines when the court orders a non-signatory to arbitrate:

- Non-signatory that knowingly accepts benefits of the contract with arbitration clause can be compelled to arbitrate by equitable estoppel. *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993).
- Non-signatory can compel arbitration against signatory under equitable estoppel theory. *Sunkist Softdrinks v. Sunkist Growers*, 10 F.3d 753 (11th Cir. 1993, cert. den., 313 U.S. 869).
- Non-signatory is alter ego of signatory. *MAG Portfolio Consultant, GMBH v. Merlin Biomed Group, LLC*, 268 F.3d 58 (2d Cir. 2001).
- Third party beneficiary can compel arbitration against signatory. *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 59-61 (2d Cir. 2001) (NASD Rules).

Enforceability/validity of arbitration agreement

The arbitrator decides. Some examples:

- Contract illegal because usurious. *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006).
- Contract illegal because signor not licensed. *Preston v. Ferrer*, 552 U.S. 346 (2008).
- Contract unconscionable. *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010).

Scope of Arbitration Agreement

Court decides - unless delegated in the arbitration agreement.

In a 1986 labor case, SCOTUS held that the court must determine whether a particular grievance is arbitrable unless the parties have clearly delegated the matter to the arbitrator. *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986).

Claims arbitrable at all? (subject matter arbitrability); court decides.

- Rare issue because most claims are arbitrable under the liberal policy pursuant to the FAA favoring arbitration.
- However, Congress has precluded arbitration of some claims: i.e. seamen, rail employees & other interstate workers (FAA), vehicle franchises and insurance businesses.
- Absent delegation, arguably, courts should decide the issue of subject matter arbitrability, as this is a challenge to the arbitration clause.

Preconditions to arbitration

- The arbitrator decides – no delegation clause needed.
- Negotiation & mediation preconditions / Statute of Limitations defenses.
- Whether a pre-condition has been fulfilled, waived or is estopped is ordinarily made by the arbitrator. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002).

Does a delegation clause give the arbitrator authority to decide arbitrability?

Depends on the circumstances. The case law is mixed.

Delegation: the clause

But first: What is a delegation clause?

Examples:

- *“The arbitrator has authority to determine threshold issues of arbitrability and jurisdiction”*
- *“The parties agree to submit to binding arbitration in accordance with the rules of the American Arbitration Association.”*

See [Eckert](#), 756 F.3d at 1100 (incorporation of AAA rules clear indication of parties’ intent to delegate).

Delegation – provider rules

- **AAA Commercial Arb. Rule 7(a):**

“The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.”

- **CPR Non-Administered and Administered Rule 8.1:**

“The tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”

- **JAMS Rule 11(b):**

“Jurisdiction and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the Agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be brought to and ruled on by the Arbitrator. The Arbitrator has the authority to determine arbitrability and jurisdiction issues as a preliminary matter.”

Delegation – the Separability Doctrine

And second, the framework for delegation:

- The Separability Doctrine (aka Severability Doctrine or competence-competence).
- Arbitration clauses are analyzed separate from the contract in which they are included.
- *Prima Paint Corporation v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967) (arbitration required where fraudulent inducement challenge is to the underlying contract, not the arbitration clause).

Delegation: Challenges

- Challenge to the validity of the arbitration clause as a whole is *not* a challenge to the delegation clause. [Rent-A-Center West v. Jackson, 561 U.S. 63 \(2010\)](#).
- Sub-delegation Test: Delegation is allowed unless the challenge implicates the delegation clause itself:
 - Contract is unconscionable: decided by arbitrator
 - *Delegation* clause is unconscionable: decided by court

Delegation: Application of state law

- Courts apply state law principles of contract formation.
- Arbitrability should not be assumed unless there is “clear and unmistakable evidence” that the parties agreed to arbitrate the jurisdiction issue. *First Options* (presumption in favor of arbitration reversed where contract silent or ambiguous as to delegation).
- “Clear and unmistakable” delegation is usually not an issue – Delegation pursuant to adoption of AAA Commercial Rules upheld in six jurisdictions. *See, e.g., Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015).

When will a delegation clause ‘work’?

Delegation clauses of limited use for challenges to:

- contract existence/formation
- statutory prohibitions to arbitration

Delegation clauses often of use for challenges to:

- enforceability of arbitration agreement:
(unconscionability / fraud/illegality)
- scope of the arbitration agreement
- preconditions to arbitration

Making the Arbitrability Decision

Apply common law contract interpretation principles

- The law does not ‘favor’ arbitration. It simply says that arbitration agreements should be placed on an even footing with other contracts. *See, e.g., Perry v. Thomas*, 482 U.S. 483, 490 (1987).
- The relevant question to ask is what did the parties intend when they drafted the arbitration agreement. Did the parties intend to include the dispute in question in the arbitration agreement? *See Granite Rock v. IBT*, 561 U.S. 287, 302 (2010).
- However, when determining the *scope* of the arbitration agreement, where the parties have already agreed to arbitrate, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Mitsubishi Motor Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Who Decides Joinder and Consolidation?

It depends on...

The provider rules, and whether state or federal law apply.

- The FAA, UAA & RUAA are all silent.
- California statutes authorize the court to decide consolidation of related arbitrations. (e.g., Cal. Code Civ. Proc. Sec. 1281.3).
- Under AAA Rules and the FAA, the arbitrator decides whether related cases should be consolidated. *Yuen v. Superior Court*, 121 Cal. App. 4th 1133 (2004).
- Some Circuit Courts have held that consolidation is a procedural matter for the arbitrator to decide. See, e.g., *Certain Underwriters at Lloyds London v. Westchester Fire Ins. Co*, 489 F.3d 580, 582 (3d Cir 2007) (reinsurance contracts); *Shaw's Supermarkets, Inc. v. Food and Commercial Workers Union*, 321 F.3d 251, 254 (1st Cir. 2003) (union contracts).
- Some provider rules authorize an independent arbitrator to decide issues of joinder and consolidation. (see e.g., AAA Construction Industry Rule R-7; CPR Administrated Rule 3.13; JAMs Consolidated Rule 6(e)) .

Can the Award be Vacated if Arbitrator
Mistakenly Decides Arbitrability?

Yes: on the basis of “exceeding powers”

Most frequent basis of vacatur (although vacatur is still rare). FAA § 10 (a)(4), and similar state arbitration statutes. Here’s how it may arise:

- Non-signatories. *See, e.g., Terrace View Estates Homeowners Ass’n, Inc. v. Bates Drive Condo., III*, 128 A.D.3d 975 (2015) (Award vacated as against condo owner not party to arbitration agreement). But, c.f., *Hellmich v. Mastiff Contracting*, Case No. SACV 14-1354 DOC (Anx) (C.D. Cal. 2015) (non-signatory properly bound).
- Disregarding clear contractual provision. *See, e.g., Poolre Ins. Corp. v. OSI*, 783 F.3d 256 (5th Cir. 2015) (arbitrator exceeded powers; joined two related cases under AAA rules when one of the contracts called for ICC rules).
- Deciding an issue outside the arbitration agreement. *See, e.g., City of Arlington v. Kovacs*, 2015 WL 4776100 (Tex. App. 2015) (exceeded powers by considering post-termination evidence not permitted by arbitration agreement).
- Awarding, or refusing to award attorney’s fees. *See, e.g., Magenis v. Bruner*, 187 P.3d 1222 (Colo. App. 2008) (exceeded powers where refused to award attorney’s fee when agreement said “shall” award fees to prevailing party).

Techniques for protecting the Award

- Stipulation at preliminary hearing re arbitrability of claims and defenses.
- Stipulation at preliminary hearing re arbitrator's authority to decide arbitrability issues.
- Stipulation to apply provider rules which have delegation provision and/or joinder/consolidation provisions.

International arbitration considerations

- Look to the *lex arbitri* to determine who decides
 - US rules do not necessarily apply
- Most nation-states recognize the competence-competence doctrine.
 - But it is not an exclusive path.
- National courts in the seat (and in enforcing states) may re-examine Tribunal's decision on jurisdiction.
- Consolidation: largely consent-based.
 - Look to the *lex arbitri and rules*, e.g., ICDR – Consolidation Arbitrator.

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