



Judge Elizabeth R. Feffer (Ret.)
ADR SERVICES, INC.

Arbitrability

WHO DECIDES WHETHER THE MATTER IS SUBJECT TO THE CONTRACT'S ARBITRATION CLAUSE?

When you first read an arbitration agreement involved with your client's dispute, you should determine the exact issues the parties have agreed to submit to arbitration. Although threshold questions of arbitrability (e.g., whether there is a valid agreement to arbitrate) are typically decided by the court, the parties to an arbitration agreement may agree to delegate questions regarding the enforceability of the agreement itself to the arbitrator. If so, the arbitrator, and not the court, determines the validity and other delegated issues (such as the scope) of the arbitration agreement.

Agreement of the parties

The issue of "who decides" is "a matter of party agreement." Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, "so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 243, citing *First Options of Chicago, Inc., v. Kaplan* (1995) 514 U.S. 938, 943.) That is, whether the parties have submitted a particular dispute to arbitration, or even have a valid arbitration agreement at all, i.e., the "question of arbitrability," is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." (*AT&T Technologies, Inc. v. Communications Workers* (1986) 475 U.S. 648, 649.)

Federal Arbitration Act and California

The Federal Arbitration Act (FAA) places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms. (9 U.S.C. § 2; see, e.g., *Rent-A-*

Center, West, Inc. v. Jackson (2010) 561 U.S. 63.) California law is in accord with the FAA and reflects a presumption in favor of arbitrability. (*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 502; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 235-236.) Because arbitration is a matter of contract, of "consent, not coercion," parties cannot be required to submit to arbitration any dispute which they have not agreed to submit. (*Steelworkers v. Warrior & Gulf Nav. Co.* (1960) 363 U.S. 574, 582; *Pinnacle, supra*, at p. 236.)

Court as a gatekeeper

Thus, there is a presumption that a court, and not an arbitrator, will ordinarily decide a threshold "arbitrability" question. The court acts as a "gatekeeper," and decides if a contract to arbitrate exists; and then, arbitrators, as fact finders, decide disputes allowed under the controlling contract. (*Sandquist, supra*, at p. 249; Code Civ. Proc., § 1281.2.) If the arbitration agreement does, however, "clearly and unmistakably" state that gateway questions of "arbitrability," such as whether the parties have agreed to arbitrate, or whether their agreement covers a particular controversy, then courts will allow these issues to be delegated to the arbitrator to decide. (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83.)

So, if the parties have delegated to the arbitrator the jurisdiction to resolve any dispute relating to the threshold issue of enforceability of the arbitration agreement itself, the arbitrator, and not the court, determines whether the arbitration agreement is valid. Therefore, it is important to determine whether an

arbitration agreement contains any delegation of the threshold issues of arbitrability, including determining the validity of the arbitration agreement, to the arbitrator. If it does not, then the court decides those issues.

"Clear and unmistakable" delegation is required

The trial court decides whether the arbitration agreement contains a "clear and unmistakable" delegation of arbitrability issues. For example, language that gives the arbitrator "exclusive authority" to resolve any dispute relating to the enforceability of the arbitration agreement's enforceability, including any claim that all or any part of the arbitration agreement is void or voidable, may be "clear and unmistakable" evidence of the parties' intent. Any challenge to the delegation language must, therefore, be brought before the trial court.

In addition, language in an arbitration agreement stating that the parties agree to be bound by a certain body of rules, such as that the agreement incorporates a private arbitration company's procedural rules, may be sufficient to show that the parties "clearly and unmistakably agreed" that arbitrators would decide their jurisdiction.

In *Portland General Electric Company v. Liberty Mutual Insurance Company* (9th Cir. 2017) 862 F.3d 981, the subject arbitration agreement incorporated procedural rules of a private arbitration company, which in turn provided that "the arbitral tribunal," and not the court, would "decide directly" the "gateway" arbitrability issues. The court found that the parties had therefore "clearly and unmistakably" agreed that the parties had

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delegated the adjudication of gateway issues to the arbitrator, and that the FAA required that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration.

Language that required the parties to “utilize binding arbitration to resolve all disputes that may arise out of the employment context” was sufficient to delegate the issue of whether the arbitration was to be conducted on an individual or a class-wide basis. (*Muller v. Roy Miller Freight Lines, LLC* (2019) 34 Cal.App.5th 1056, 1070-1071.)

Recently, in *Moritz v. Universal City Studios LLC* (2020) 54 Cal.App.5th 238, the Court of Appeal agreed with the trial court, that the parties had not “clearly and unmistakably” agreed in written producer contracts pertaining to the “Fast

& Furious” film franchise, that the parties had delegated authority to an arbitrator to determine arbitrability. Therefore, the issue of whether there was a valid agreement to arbitrate was properly before the trial court. Likewise, in *Sandoval-Ryan v. Oleander Holdings LLC* (2020) 58 Cal.App.5th 217, the Court of Appeal affirmed the trial court’s finding that there was no statement, in a medical facility’s admission agreement, “clearly and unmistakably” delegating to the arbitrator the resolution of threshold questions regarding the validity of the arbitration agreement itself.

In sum, if the court finds that there has been a “clear and unmistakable” delegation of arbitrability, and the delegation clause is otherwise valid, the court will enforce the agreement to

arbitrate, and allow the arbitrator to determine whether the arbitration agreement is valid.

An overall challenge to the validity of the entirety of the arbitration agreement is not sufficient to challenge the delegation of arbitrability

Where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement (e.g., the parties have delegated arbitrability), if a party challenges specifically the enforceability of *that particular delegation agreement*, the trial court will entertain that challenge to the delegation clause. If, however, a party

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challenges the enforceability of the agreement as a whole (e.g., arguing that the arbitration agreement is unconscionable and therefore unenforceable under *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83), courts will allow the arbitrator to decide that dispute.

Simply put, if the delegation clause is valid, the court will allow the arbitrator to determine whether the arbitration agreement itself is valid. This prompts two questions: why do courts enforce a delegation clause contained in an otherwise unconscionable and therefore unenforceable contract? Why must there be a separate, specific challenge to the delegation language?

Courts have turned to the language of the FAA to answer these questions, specifically the language in Section 2 that a “written provision... to settle by arbitration a controversy” is “valid, irrevocable, and enforceable.” Thus, because Section 2 does not mention the validity of the contract in which the arbitrability provision is contained, courts have held that a party’s challenge to another provision of the contract, or to the contract as a whole (e.g., such as arguing unconscionability under *Armendariz, supra*) does not prevent a court from enforcing a specific agreement to arbitrate.

As a practical matter, unless a party specifically challenges the delegation provision, the court will treat the delegation provision as valid (FAA § 2), and will enforce the agreement to arbitrate (FAA §§ 3-4.). This necessarily leaves any challenge to the validity of the arbitration agreement as a whole (e.g., unconscionability) for the arbitrator.

If a party specifically challenges the validity of the arbitrability delegation, such as arguing that there was fraud in the inducement of the arbitration agreement itself, that challenge must be raised before the trial court, for judicial determination. If a party does not specifically challenge the validity of the delegation clause, but instead challenges the validity of the arbitration agreement as a whole, if the delegation language is clear and

unmistakable, the court will defer the issue of the validity of the arbitration agreement to the arbitrator. This means the arbitrator will entertain the arbitrability arguments, such as unconscionability.

There are circumstances when a trial court rules on a petition to compel arbitration and, on appeal, the losing party raises for the first time that there is a valid delegation clause, so the arbitrator and not the court should have decided any interpretation or enforcement issue. A review of case law reflects that appellate courts are generally not receptive to an appellant asserting delegation for the first time on appeal.

Recognizing that the fundamental attribute of arbitration is its efficient, streamlined procedure, state and federal courts have held that an unreasonable delay in the assertion of the right to arbitrate is a waiver of the right to demand arbitration. (*AT&T Mobility v. Concepcion* (2011) 563 U.S. 333, 346; *Iskarian v. CLS Transp. L.A., Inc.* (2014) 59 Cal.4th 348, 374-375.) This assertion includes submitting the issue of arbitrability of the dispute to an arbitrator, through a delegation clause. Therefore, a party who intends to raise any issue regarding the threshold issue, of arbitrability and delegation to the arbitrator, should do so at the trial court level. Otherwise, the appellate court may find that it is too late to argue that the arbitrator should have been the one to determine the validity or scope of the arbitration agreement.

But...shouldn't a trial court deny a "wholly groundless" arbitration demand because sending it to arbitration is wasteful?

Answer: No!

Recently, the United States Supreme Court unanimously answered this question, in *Henry Schein, Inc., v. Archer and White Sales, Inc.* (2019) 139 S.Ct. 524, 529. When a pre-arbitration agreement specifically delegates arbitrability issues to an arbitrator, a court does not have the power to decide those issues, even when the court believes the argument for

arbitrability is “wholly groundless.” This is because the FAA “does not contain a ‘wholly groundless’ exception to the basic rule that it is a question of contract as to who decides arbitrability.”

A party seeking to compel arbitration need only show that the parties’ contract delegates the arbitrability question to an arbitrator. Once it has done so, “a court may not override the contract...[and] possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.” (*Id.* at p. 529.)

The Supreme Court also noted that arbitrators are capable of efficiently disposing of frivolous cases and deterring frivolous motions, including imposing fee-shifting and cost-shifting sanctions. (*Id.* at p. 531.)

Conclusion

It is important to carefully read an arbitration agreement and determine the scope of the application of all agreements therein. There may be a delegation of threshold issues of “arbitrability,” to an arbitrator. This means that the arbitrator, and not the court, determines whether there has been a valid agreement to arbitrate.

Absent “clear and unmistakable” language in the arbitration agreement delegating arbitrability issues to the arbitrator, the court decides arbitrability. Any specific challenges to the delegation of arbitrable issues must be raised before the trial court. Otherwise, such a challenge may be waived. A valid delegation of arbitrability means that the arbitrator, and not the court, determines whether the arbitration agreement is valid.

Judge Elizabeth Feffer served on the Los Angeles Superior Court for 13 years, presiding over more than 75 civil jury trials, more than 500 civil bench trials, hundreds of evidentiary hearings, and numerous settlement conferences. Now a mediator, arbitrator, referee, and private judge with ADR Services, Inc., Judge Feffer handles a diverse range of complex cases.