KANE RUSSELL COLEMAN LOGAN

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Agreements to Arbitrate

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A key issue in commercial litigation is determining whether the claims to be asserted are within the scope of an arbitration agreement. An arbitration provision might broadly include all disputes in connection with the contract or narrowly cover only certain types of disputes (for example, only disputes regarding specific paragraphs of the contract). When a dispute eventually arises between the contractual parties, the issue of whether the parties agreed to arbitrate a certain type of dispute is often an initial point of contention. This issue is a matter of interpreting the arbitration language in light of the facts—usually a closer call than the parties had envisioned at the time of contracting.

As such, the question of who determines whether claims are within the scope of an arbitration provision is often as important as the arguments for either side. A court may sympathize with a plaintiff seeking to have its day in court,[1] while an arbitrator has a monetary incentive for disputes to be arbitrable. While this may be a cynical view of the law, "people are people, and they respond to incentives."[2]

The General Rule: The Court Decides Arbitrability

The general rule is that the court decides the preliminary questions of arbitrability, including the validity and scope of the arbitration agreement. Usually, issues of validity and scope are initially raised in court *via* a motion to compel arbitration filed by a defendant in response to the plaintiff's lawsuit. Sometimes, a party initiates a suit for the purpose of compelling arbitration when the other party has refused. Under both the Federal Arbitration Act (FAA) and the Texas General Arbitration Act (the "Texas Act") the court typically has the authority to determine whether claims are arbitrable.[3]

However, the U.S. Supreme Court has recognized an exception to this general rule where the parties agree that the arbitrator shall determine questions of arbitrability, but only if there is "clear and unmistakable" evidence of such an agreement.[4]

The Exception: Parties May "Clearly and Unmistakably" Agree to Have the Arbitrator Decide Arbitrability

The Paradigm of the Exception – Express Delegating Language in Agreement

The obvious application of this exception is where the parties expressly state within the arbitration provision that the arbitrator has the authority to determine arbitrability. For example:

> "Arbitration. Any dispute, claim, or conflict of any kind arising from, relating to, or in connection with this Agreement, *including any question of whether a dispute, claim, or conflict is within the scope of this agreement to arbitrate*, or any questions regarding the existence, validity, enforceability, breach, termination, or waiver of this Agreement, or the construction or interpretation of this Agreement or any term or provision herein, *including this agreement to arbitrate*, shall be resolved by final and binding arbitration in accordance with any procedures set forth herein."

On this language, courts applying the "clear and unmistakable" standard would likely defer to the arbitrator on the preliminary question of arbitrability and compel arbitration of the dispute.

The Not-So-Obvious Exception – Agreeing to Arbitrate Before a Specific Body May Constitute Agreement for Arbitrator to Decide Arbitrability

In addition to this express delegation of authority within the arbitration clause, many courts hold that the parties' adoption of arbitration rules that vest arbitrators with the right to determine their own jurisdiction constitutes "clear and unmistakable" evidence of the parties' intent to arbitrate the issue of arbitrability.

Most arbitration rules (including those of the American Arbitration Association (AAA), JAMS, CPR, International Chamber of Commerce (ICC), National Arbitration and Mediation (NAM), and UNCITRAL) vest the arbitrators with authority to determine issues of arbitrability. Notably, many of these arbitration rules include a rule that the parties' agreement to conduct arbitration with the organization constitutes full adoption of the organization's rules.

For example, the AAA Commercial Rule of Arbitration R-1 provides that "[t]he parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association … ." Rule R-7 provides:

> 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.

Many standard arbitration provisions include language by which the parties agree to arbitrate before a specific organization and/or pursuant to specific rules, in order to avoid later disputes over the arbitrating body. For example, a construction contract may require arbitration before the AAA under its Construction Industry Rules to assure subject-matter knowledge and rules tailored to the industry. The result of agreeing upon an arbitral tribunal may be that the parties have unknowingly submitted the question of scope of arbitrability to the arbitrator.

State of the Law in Texas Regarding Rule Incorporation

Although the line of cases holding that incorporation of the rules of the arbitration tribunal vests the arbitrability question with the arbitrators is not new,[5] there has been a recent movement among courts to approve this reasoning. Nearly every federal circuit court faced with the issue, including the Fifth Circuit, has determined that incorporating rules such as the AAA's constitutes "clear and unmistakable" evidence of the parties' intent for the arbitrator to decide the arbitrability question.[6]

Unfortunately, the Texas Supreme Court has not yet considered the issue. Texas appellate courts are currently split on whether incorporation of arbitration rules mandates that the arbitrator determine arbitrability,[7] creating uncertainty within the State on this point. The Dallas and Houston courts have enforced the majority view, while the Fort Worth and San Antonio courts have made exceptions to the exception, declining to send the question to the arbitrators.

Conclusion

Parties and their attorneys should closely consider arbitration language early in litigation because there may be hidden avenues (or pitfalls) to achieving the preferred forum. Awareness of evolving issues such as those discussed above often affect initial decisions that cannot be undone, including where to file the lawsuit, how to frame claims, and what arguments to make in a motion to compel arbitration or in a response. Further, it is important for parties to be aware of these issues when drafting and negotiating contracts in order to assure a preferred outcome even if a worst-case scenario later arises.

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[1] Generally, the party seeking to enforce arbitration has the right to interlocutory appeal of the denial of its motion, but this may cost significant time and resources.

[2] Levitt, SD and Dubner, SJ. *Superfreakanomics: Global Cooling, Patriotic Prostitutes and Why Suicide Bombers Should Buy Life Insurance*. Harper Collins. 2009.

[3] Section 3 of the FAA provides that "the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration" shall stay the action pending arbitration, 9 U.S.C. § 3, which includes the question of whether a claim is arbitrable. *AT&T Techs., Inc. v. Comms. Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). The Texas Act provides that "the court shall summarily determine the issue." Tex. Civ. Prac. & Rem. Code Ann., § 171.021 (b).

[4] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

[5] *See Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989).

[6] *See Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High–Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed.Cir. 2006); *Terminix Int'l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *but see Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 777 & n. 1, 780 (10th Cir. 1998).

[7] *Compare Schlumberger Tech. Corp. v. Baker Hughes Inc.*, 355 S.W.3d 791, 802 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Saxa Inc. v. DFD Architecture Inc.*, 312 S.W.3d 224, 230 (Tex. App.—Dallas 2010, pet. denied) (following majority rule) *with* Haddock v. Quinn, 287 S.W.3d 158, 172 (Tex. App.—Fort Worth 2009, pet. denied) (holding incorporation of AAA rules does not mandate arbitration of arbitrability); *In re Ford Motor Co.*, 220 S.W.3d 21, 23 (Tex. App.—San Antonio 2006, orig. proceeding) (same).