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Who Decides, Court or Arbitrator, Whether a Nonsignator May or Must Arbitrate?

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An **arbitration provider**, such as JAMS or AAA, will institute an action for arbitration when it is presented with an arbitration agreement that purports to require arbitration between a named claimant and a named respondent. If, in addition to signatory parties, a nonsignator (a person or entity who did not sign the arbitration agreement) is also named, objections as to arbitrability or jurisdiction usually follow. These cases raise complex questions of arbitration law and the allocation of powers between judges and arbitrators. This article discusses the limited question of who decides whether a nonsignator may or must arbitrate—the arbitrator or the court.

Although a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, it does not follow that an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. "Traditional principles of state law" may allow "a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009). However, absent agreement of the parties or waiver, the question of whether a nonsignator may or must arbitrate is a question for the court, not the arbitrator. Accordingly, the arbitrator may stay the arbitration as to the nonsignator, or the entire case, until a court has decided the issue.

Imprecise use of the term "arbitrability" in the case law and in providers' arbitral rules has caused confusion. The catchall term "arbitrability" actually covers several elements of the arbitrator's power to hear a dispute, including whether the person alleged to be bound did indeed agree to arbitration and the scope of the arbitration clause—whether it encompasses the claims asserted.

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Joyce B. Klemmer, Esq.

Almost 30 years ago, in *First Options of Chicago v. Kaplan*,**[1]** the issue was whether the Kaplans, who were nonsignators, agreed to arbitrate and were bound by the arbitrators' final award. The U.S. Supreme Court ruled that if "the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently." 514 U.S. 938, 943 (1995). In *First Options*, the court used the term "arbitrability" narrowly, meaning "whether they agreed to arbitrate the merits." The court held that there must be "clear and unmistakable" evidence that the parties agreed to have an arbitrator decide arbitrability issues.

Is a delegation clause "clear and unmistakable evidence" that the arbitrator decides whether a nonsignator may assert or must defend against claims in arbitration? An arbitration agreement may have a delegation clause, or it may reference arbitral rules that provide that the arbitrator the power to decide

"jurisdictional and arbitrability disputes," including "who are proper Parties to the Arbitration."**[2]** Eleven out of 12 circuit courts to address the issue have found that the "incorporation of the AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability.'"**[3]**

So, if there is a delegation clause, does the arbitrator decide if the nonsignator may or must arbitrate? The short answer is no. The Third Circuit described the issue as "mind-bending" and "the queen of all threshold issues" in arbitration law. "Who decides—a court or an arbitrator—whether an agreement exists, when the putative agreement includes an arbitration provision empowering an arbitrator to decide whether an agreement exists?" *MZM Construction Co. v. New Jersey Building Laborers Statewide Benefit Funds,* 974 F.3d 386 (3d Cir. 2020). In *MZM*, both parties had signed an agreement that incorporated by reference another agreement containing an arbitration clause. The party opposing arbitration contended her signature had been obtained by fraud. The court concluded that section 4 of the FAA—mandating that the court be "satisfied" that an arbitration agreement exists—tilted the scale "in favor of a judicial forum when a party rightfully resists arbitration on grounds that it never agreed to arbitrate at all. Indeed, it can hardly be said that contracting parties clearly and unmistakably agreed to have an arbitrator decide the existence of an arbitration agreement when one of the parties has put the existence of that very agreement in dispute." *Id.* at 401. Other circuit courts have reached the same conclusion.**[4]**

Thus, if the challenge is "I am not, directly or inferably, a party to the agreement containing the arbitration clause," that is a contract formation or contract existence challenge, and a delegation clause is "typically useless."**[5]** Although the case law addressing "contract formation" and "contract existence" can get muddled,**[6]** one thing is clear: The nonsignator did not delegate that decision to the arbitrator.

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[1] 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

[2] *See, e.g.,* JAMS Rule 11 and R-7 of the AAA Rules.

[3] *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 -848 (6th Cir. 2020) (and cases cited therein) (however, if "the question goes to the very existence of a valid arbitration agreement, the court must itself resolve the question even if the agreement incorporates the AAA Rules").

[4] *In re: Auto. Parts Antitrust Litig.,* 951 F.3d 377, 385-86 (6th Cir. 2020*)* (incorporation of AAA's Rules does not constitute "clear and unmistakable evidence" to delegate arbitrability to arbitrator because plaintiffs did not consent to any type of arbitration); *Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234, fn 9 (4th Cir. 2019) (delegation clause does not preclude a court from deciding that a party never made an agreement to arbitrate any issue); *Nebraska Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 741 & n.2 (8th Cir. 2014) (court, not arbitrator, "must determine whether a valid arbitration agreement exists between the parties").

[5] CCA Guide to Best Practices in Commercial Arbitration, pp. 87 and 104.

[6] *See, e.g.* **Arbitration Contract Formation Challenges: Putting the Cart before the Horse,** N.Y. L.J., Dec. 10, 2021.