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Are We Going to Arbitration? Who Decides?

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Whether an arbitration agreement covers the current dispute is a gateway question in many cases. A related question is whether the court or the arbitrator makes this decision. Although these questions have been discussed for years, surprisingly, two recent cases show that the answer is not always clear and may depend on wording of the arbitration clause.

If parties want all disputes to be subject to arbitration and they want the arbitrator (and not a judge) to make this decision, the arbitration clause should include specific language stating that. Also, when entering subsequent contracts, parties should confirm that the dispute resolution clauses are compatible and should provide that arbitration clauses will apply to subsequent contracts to prevent inconsistencies.

While the U.S. Supreme Court has held arbitrability questions should be decided by a court,^[1] there is long-standing precedent that referencing JAMS' or the American Arbitration Association's (AAA) arbitration rules is "clear and unmistakable evidence" of the parties' intent to delegate this gateway decision to an arbitrator. However, recent cases show adding specific language regarding delegation and priority of arbitration clauses over forum selection clauses in subsequent agreements may be advisable.



In *McInnis Elec. Co. v. Brasfield & Gorrie, L.L.C.*, Nos. 2021-CA-01115-SCT and 2021-CA-01300-SCT, 2023 WL 6889119 (Miss. Sup. Ct. Oct. 19, 2023), a subcontractor filed suit against a general contractor alleging breach of contract for, among other things, failure to provide a safe workplace because of COVID-19 issues. The subcontract contained an arbitration clause that stated "any disputes" between the parties would be determined by binding arbitration in accordance with the AAA's Construction Industry Arbitration Rules and Mediation Procedures. The trial court granted the general contractor's motion to compel arbitration and stay litigation. The subcontractor appealed. McInnis admitted

the subcontract contained an arbitration clause, but asserted its claims were outside the clause's scope.

The Mississippi Supreme Court held the arbitration clause covered McInnis' claims and specifying the AAA's construction industry rules constituted "clear and unmistakable evidence" that the parties delegated authority to the arbitrator to decide questions of arbitrability. However, there was a vigorous dissent, disputing that merely specifying the AAA's rules was sufficient evidence of delegating arbitrability questions to the arbitrator. Further, the dissent questioned whether the arbitration clause covered McInnis' claims related to the pandemic, because this was outside the parties' contemplation when the subcontract was signed.

In *Suski v. Coinbase, Inc.* 55 F.4th 1227 (9th Cir. 2022), *pet. rev. granted*, Nov. 23, 2023), plaintiffs created Coinbase cryptocurrency accounts through a user agreement containing an arbitration clause with a delegation clause. Later, they opted in to the Coinbase Dogecoin Sweepstakes through its official rules, which contained a forum selection clause (but no arbitration agreement) providing that California courts had exclusive jurisdiction for disputes.

In the lawsuit, Coinbase moved to compel arbitration under the user agreement. The district court denied the motion to compel, finding that the delegation clause did not delegate to the arbitrator the question of which contract governed the dispute. The district court held that the official rules superseded the user agreement, so the arbitration agreement did not apply.

The Ninth Circuit affirmed the district court's ruling, holding the issue presented was the existence of, rather than the scope of, an arbitration agreement. This issue could not be delegated to an arbitrator but was for the court to decide.

The Ninth Circuit also upheld the district court's ruling that the forum selection clause in the official rules superseded the arbitration clause in the user agreement. "A contract containing a forum selection clause supersedes an arbitration agreement where 'the forum selection clause [] ... sufficiently demonstrate[s] the parties' intent to do so,'" citing ***Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733 (9th Cir. 2014) at 741.**

Oral argument before the U.S. Supreme Court is scheduled for Feb. 28. It will be interesting to see how the court rules on these issues. Regardless of the ruling, these cases demonstrate that potential arbitrability questions should be addressed at the drafting stage. While dispute resolution clauses are often the last things discussed in contract negotiation, thoughtful drafting regarding arbitrability issues may save the parties considerable time and attorney's fees by clearly stating who should decide these questions and which clauses take priority.

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[1] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)

