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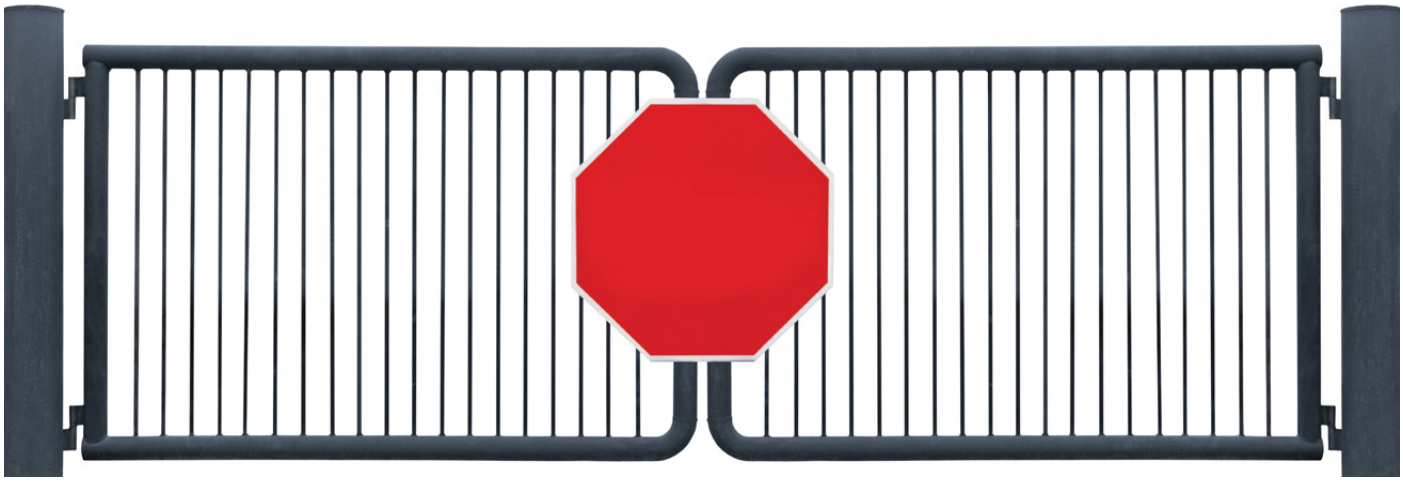

Supreme Court and Arbitrability: The Arbitrator as Gatekeeper

BY JOHN FELLAS

In recent years, the U.S. Supreme Court has granted certiorari in an unusually large number of arbitration cases. While there has been much commentary on the decisions addressing class arbitration, there has been less discussion of those on the subject of arbitrability. This article discusses some of the Supreme Court's arbitrability decisions to show that, over the last decade or so, the court has been gradually reshaping the legal landscape to grant more authority to arbitrators to resolve questions of arbitrability and to make it harder, in some circumstances, to argue that certain of those questions should be resolved by courts.

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Before considering those decisions, however, it is worth saying a word about the term "arbitrability." A party might assert that a dispute is not arbitrable on any number of grounds: It did not sign the contract; the arbitration clause does not cover the dispute; a condition precedent to arbitration (e.g., mediation) was not met; the contract is not valid on grounds of illegality; a statute requires that the subject matter of the dispute be resolved by the courts. The term "arbitrability" could, from the linguistic standpoint, cover all these issues, i.e., every legal issue requiring resolution before a case can proceed to arbitration on the merits. Some commentators have lamented the broad use of that term, finding it problematic to lump together issues that raise analytically distinct questions. This is no doubt true. The question of whether a state law prohibits the arbitration of a particular subject matter, for example, raises issues of preemption distinct from the issues of contract interpretation that arise when addressing whether a particular dispute falls within the scope of an arbitration clause.

While in *First Options v. Kaplan*, 514 U.S. 938 (1995), the Supreme Court appeared to use the term "arbitrability" in the broad sense, it has, in more recent decisions, tried to provide some clarity by relying on the metaphor of a "gateway"—which calls to mind a gate through which a party must pass in order to proceed with an arbitration on the merits. In *Howsam v. Dean Witter Reynolds*, 123 S. Ct. 588, 592 (2002), Justice Stephen Breyer, writing for the court, stated that use of the phrase a "question of arbitrability" should be limited to gateway matters decided by a court rather than by an arbitrator. This, of course, raises the question of how to distinguish between the

two. Here, Breyer stated that it is necessary to look at the expectations of the parties: "[T]he Court has found the phrase [a question of arbitrability] applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to decide the gateway matter" and "*not* applicable…where parties would likely expect that an arbitrator would decide the gateway matter." Id.

Unfortunately, there is something circular in this approach. The expectations of parties to contracts are shaped by the background law; change that law and you change those expectations. If the Supreme Court were to hold that a court should always decide a particular gateway matter (e.g., whether a contract was unconscionable), that would no doubt alter the expectations of parties going forward. It thus provides only limited guidance for the Supreme Court to say that one must look to the expectations of the parties in order resolve the "who decides" question when the court, through its pronouncements, is itself partly responsible for what those expectations might be.

Putting aside these difficulties, it is clear that in its recent decisions the court has rendered pro-arbitration decisions in two broad respects.

First, where the court has itself addressed a gateway matter, it has required arbitration in the face of an objection that the arbitration of a particular claim is barred by statute. Thus, the court has shown no hesitation in holding that state laws deeming certain subjects not to be arbitrable are preempted by the Federal Arbitration Act (FAA), reasoning that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Marmet Health Care Center v. Brown*, 132 S. Ct. 1201, 1204 (2012) (striking down West Virginia statute barring the arbitration of personal injury or wrongful death claims against nursing homes) (citation omitted). Similarly, it found a federal statute to be silent on whether it bars the resolution of claims in arbitration, and thus required claims to proceed in arbitration. *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012) (disclosure provision of Credit Repair Organizations Act requiring credit repair organizations to provide consumers with statement "[y]ou have a right to sue…" insufficient to override mandate of FAA that arbitration agreements be enforced according to their terms). The court has also cautioned lower courts to examine a complaint with care to assess whether any of the claims set forth therein is subject to arbitration, since a lawsuit that has both arbitrable and non-arbitrable claims must proceed to arbitration even if the result is piecemeal litigation. *KPMG v. Cocchi*, 132 S. Ct. 23 (2011).

'Rent-A-Center' is an unusual case in that the arbitration agreement in question was not part of larger contract dealing with the substantive rights and duties of the parties—in that case an employment relationship—but was itself a separate contract.

Second, where it has addressed the question of who should decide a particular gateway matter, the court has relied upon two well-established principles to shift more authority to arbitrators. One principle—most famously articulated in *Prima Paint v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967)—holds that an arbitration clause is separate from the contract in which it is contained, and that attacks on the validity of the entire contract are to be resolved by the arbitrator, whereas attacks on the arbitration clause itself are to be resolved by the court. In reaching many of its recent decisions on the "who decides" question, the court has applied the separability doctrine in a manner that allocates an increasing number of gateway matters to an arbitrator. See, e.g., *Buckeye Check Cashing v. Cardegna*, 126 S. Ct. 1204 (2006) (assertion that agreement is void ab initio under Florida law on grounds of illegality (usury) should be resolved by arbitrator since challenge was not to the arbitration provision specifically, but to the contract as a whole); *Preston v. Ferrer*, 128 S. Ct. 978 (2008) (assertion that agreement was unenforceable under California's Talent Agencies Act should be resolved by arbitrator for the same reason); *Nitro-Lift Technologies v. Howard*, 133 S. Ct. 500 (2012) (assertion that non-competition provision in employment contract was void under Oklahoma law should be resolved by arbitrator for the same reason).

The second principle relied on by the court in recent cases addressing the "who decides" question was set forth in *First Options*, which held that where parties have "clearly and unmistakably" delegated to an arbitrator the authority to resolve a gateway question, for example, the validity of a contract, that is a question for the arbitrator rather than the court. See, e.g., *Howsam*, 123 S. Ct. at 588 (finding clear and unmistakable evidence that parties to NASD arbitration intended to authorize arbitrators to interpret NASD rule imposing a six-year time limit for arbitration since parties would expect arbitrators to decide procedural questions growing out of the dispute).

In some sense, in its recent decisions, the court has done little more than apply principles established in earlier decisions in a manner that has allocated an increasing number of gateway issues to arbitrators. However, in one recent decision, *Rent-A-Center West v. Jackson*, 130 S. Ct. 2772 (2010), the court took matters further by reading together the separability doctrine from *Prima Paint* and the delegation doctrine from *First Options* in a manner that makes it easier to argue that the arbitrator stands as the gatekeeper for particular issues.

Rent-A-Center is an unusual case in that the arbitration agreement in question was not part of larger contract dealing with the substantive rights and duties of the parties—in that case an employment relationship—but was itself a separate contract. That agreement also contained a "delegation provision"—a provision explicitly delegating to the arbitrator the exclusive authority to resolve questions about the enforceability of that agreement. Id. at 2777.

The employee, Jackson, argued that his unconscionability challenge to the arbitration agreement had to be decided by a court. The Ninth Circuit agreed. It found that the separability doctrine did not require arbitration of that challenge since it was directed to the arbitration agreement (which happened to be the entire agreement) rather "to the validity of the contract setting forth other substantive contractual obligations between the parties." *Jackson v. Rent-A-Center West*, 581 F.3d 912, 916 n.2 (9th Cir. 2009), rev'd, 130 S. Ct. 2772 (2010). It held that the delegation principle of *First Options* was inapplicable because, even though the arbitration agreement delegated to the arbitrator the exclusive authority to resolve questions about the enforceability of the contract, precisely what was in issue was whether Jackson had "meaningfully agreed to the terms of the form of Agreement to Arbitrate." 581 F.3d

at 917. The implication was that the clear and unmistakable evidence required by *First Options* was lacking. Certainly, that is how Justice John Paul Stevens, in dissent, read the Ninth Circuit's ruling: "If respondent's unconscionability claim is correct—i.e., if the terms of the agreement are so one-sided and the process of its making so unfair—it would contravene the existence of clear and unmistakable assent to arbitrate the very question petitioner now seeks to arbitrate." 130 S. Ct. at 2785.

Whereas the Ninth Circuit dealt with the doctrines from *First Options* and *Prima Paint* separately, Justice Antonin Scalia, writing for the court, read those two doctrines in combination and found that the unconscionability challenge had to be resolved by the arbitrator. Id. at 2785.

Insofar as *First Options* was concerned, Scalia found in the language of the delegation provision clear and unmistakable evidence that the parties intended to delegate to the arbitrator the authority to decide whether that agreement was enforceable. To the objection that this clear and unmistakable textual evidence was outweighed by Jackson's claims of unconscionability, Scalia responded that "[t]his mistakes the subject of *First Options* 'clear and unmistakable' requirement. It pertains to the parties' *manifestation of intent*, not the agreement's validity." 130 S. Ct. 2778.

In so far as *Prima Paint* was concerned, Scalia applied the separability doctrine in a novel way. In the prior separability cases considered by the court, the arbitration clause was contained in a larger contract dealing with the substantive right and duties of the parties. "To be sure, this case differs from *Prima Paint*, *Buckeye* and *Preston*, in that the arbitration provisions sought to be enforced in those cases were contained in contracts unrelated to arbitration." 130 S. Ct at 2779. Whereas, in these earlier cases, the court applied the separability doctrine to distinguish *between* the underlying contract and the arbitration clause within it, in *Rent-A-Center*, Scalia applied that doctrine to make distinctions *within* the arbitration clause itself, finding in that clause both "an agreement to arbitrate one controversy (an employment-discrimination claim)…[and] an agreement to arbitrate a different controversy (enforceability)"—the latter being located in the delegation provision. 130 S. Ct. at 2778 n.1.

Having used the separability doctrine to sever the delegation provision from the rest of the arbitration agreement, Scalia held that in order for Jackson's unconscionability challenge to be resolved by a court, that challenge had to be directed to the delegation provision specifically, rather than the arbitration agreement in its entirety. "[U]nless Jackson challenged the delegation provision specifically, we must treat it as valid under §2 [of the FAA], and must enforce it…." 130 S. Ct. at 2779. And because the court found that Jackson had challenged the arbitration agreement as a whole, the court held that the unconscionability challenge had to be resolved by the arbitrator.

By combining the delegation and separability doctrines, the effect of *Rent-A-Center* is to make it easier for a party seeking to enforce an arbitration agreement to get before an arbitrator. This is because when a party resists arbitration in a case where the arbitration agreement contains a provision that clearly and unmistakably delegates to the arbitrator the authority to resolve questions about the validity of that agreement (the delegation doctrine), *Rent-A-Center* holds that those questions must be resolved by an arbitrator unless the party challenges the validity of the delegation provision itself (the separability doctrine).

But it is inevitably more difficult to challenge a delegation provision in an arbitration clause than that clause in its entirety. Scalia acknowledged as much, noting that an argument by Jackson that the delegation provision was unconscionable on grounds that only limited discovery was permitted "would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his fact-bound employment-discrimination claim unconscionable." 130 S. Ct. at 2780.

It might be said that *Rent-A-Center* will have only a limited impact on arbitrability jurisprudence because, first, unlike other arbitration clauses, the arbitration clause there specifically contained a delegation provision, and, second, the arbitration clause in that case was contained in a separate agreement. This view is incorrect.

The first point overlooks the fact that parties often agree to arbitrate in accordance with arbitration rules like those of the American Arbitration Association (AAA) or the International Chamber of Commerce (ICC), which contain provisions delegating authority to arbitrators to determine objections to the validity of an arbitration agreement. Courts have held that an agreement to arbitrate under such rules satisfies the clear and unmistakable evidence requirement of *First Options*. See, e.g., *Republic of Ecuador v. Chevron*, 638 F.3d 384 (2d Cir. 2011) (UNCITRAL Rules); *Contec v. Remote Solution*, 398 F.3d 205 (2d Cir. 2005) (AAA Rules); *Shaw Group v. Triplefine, Int'l*, 322 F.3d 115 (2d Cir. 2003) (ICC Rules). Thus parties seeking to arbitrate under commonly used arbitration rules will be able to point to a "delegation provision" in those rules similar to that in *Rent-A-Center*.

As far as the second point is concerned, the fact that the arbitration clause in *Rent-A-Center* was itself a separate contract is not material to the holding of that case. The logic of the court's decision in *Rent-A-Center* is that one can find within an arbitration clause (and thus sever from each other) agreements to arbitrate more than one controversy—for example, an agreement to arbitrate the merits of a dispute about the parties' substantive rights and duties and one to arbitrate a dispute about the validity of the clause itself. That logic applies whether that arbitration clause is itself a separate contract or part of a larger contract.

Parties often agree to arbitrate under rules with a delegation provision, like those of the AAA or ICC. *Rent-A-Center* will make it harder for a party resisting arbitration in such cases to argue that particular gateway issues should be resolved by a court. What is important is that the party seeking to arbitrate makes clear—either in a petition to compel arbitration or motion to stay litigation brought in breach of an arbitration agreement—that it is asking the court specifically to the enforce the delegation provision in that agreement. The result is that the party resisting arbitration must bear the more difficult burden of challenging the delegation provision itself.