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Delineating When Arbitrability May Be Delegated

By **Gilbert Samberg** (June 22, 2018, 5:45 PM EDT)


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"Gateway" arbitration issues, including the validity, enforceability and scope of an arbitration agreement, are presumptively to be decided by a court, rather than by an arbitrator. However, such gateway issues may be "delegated" to an arbitrator — for example, AT&T Technologies v. Communications Workers[1] — if the pertinent arbitration agreement clearly and unmistakably manifests the parties' intention to do so. See also First Options of Chicago v. Kaplan;[2] Howsam v. Dean Witter Reynolds;[3] Greentree Financial v. Bazzle.[4] But what if the arbitration agreement is in doubt? Could such a purported delegation be enforced if one of the concerned parties did not execute the arbitration agreement in question? Spoiler alert: Arguably not.

When one of the named arbitration parties is not a signatory of the arbitration agreement, two questions arise seemingly simultaneously: (1) is the nonsignatory to be deemed bound by the arbitration agreement (the arbitrability question), and (2) who (judge or arbitrator) is to decide that issue (the delegation question)? But the threshold question concerns "delegation" — who decides what?

Delegation

A federal court has jurisdiction to determine whether questions of arbitrability are to be decided by it or by an arbitrator.[5] And it is presumed (rebuttably) that a court should decide issues of arbitrability.[6] In determining whether that presumption is rebutted, the court must determine whether "there is clear and unmistakable evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator[s]."[7]

If an arbitration agreement clearly and unmistakably indicates the parties' intention that an arbitrator should decide arbitrability issues, then a court must enforce that agreement,[8] unless the assertion that an issue is arbitrable is "wholly groundless."[9]

Parties may "clearly and unmistakably" manifest their intention to delegate arbitrability questions to an arbitrator by, for example, incorporating by reference institutional arbitration rules that empower an arbitrator to decide such gateway issues.[10] Thus, the incorporation by reference in an arbitration agreement of the Commercial Arbitration Rules ("CAR") of the AAA would suffice for that purpose.[11] Those rules provide that an arbitrator has "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."[12]

In the international arbitration arena, the principle that arbitrators have the power to decide their own jurisdiction — called "kompetenz-kompetenz" — is more or less the general rule, and it is so provided in various relevant institutional rules, including the International Chamber of Commerce arbitration rules (Arts. 6(3), 6(5), 6(9)), the London Court of International Arbitration rules (Art. 23.1), the United Nations Commission on International Trade Law arbitration rules (Art. 21), etc.

No Delegation

On the other hand, if a court finds that the parties did not clearly and unmistakably delegate arbitrability issues to the arbitrator, then the court must address those issues.[13] For example, in principle, silence on the subject in an arbitration agreement is not a clear and unmistakable indication of an intention to delegate.[14]

The Threshold Question vis-à-vis a Nonsignatory

And what if one of the identified arbitration parties did not sign the arbitration agreement in question? What would be the effect of the incorporation of kompetenz-kompetenz rules, as described above, in such an agreement?

Generally speaking, the main concern of a court considering an arbitration agreement "is to faithfully reflect the reasonable expectations of those who commit themselves to be bound."[15] A nonsignatory has not apparently committed him or herself to be bound. Nevertheless, an arbitration agreement may be deemed to bind a party who did not sign it,[16] by the operation of regular principles of state law — contract, agency, estoppel, etc.[17] But that analysis typically concerns the later arbitrability question, not the threshold delegation question.

Could a nonsignatory to an arbitration agreement be deemed to have clearly and unmistakably delegated arbitrability issues in the first instance to an arbitrator? Arguably, not without illogically putting the cart (the arbitrability question) before the horse (the delegation question). While it may ultimately be determined that the nonsignatory is bound by the arbitration agreement, it seems difficult to rationalize the enforcement of a delegation provision in that arbitration clause before such a determination can be made.

That is, it seems prudent and logical for a court not to simply postulate a binding arbitration agreement, especially before determining who should decide that question. And so, as with an agreement that is silent on delegation, and therefore does not speak to that matter with unmistakable clarity, the presumption favoring the judicial determination of gateway issues arguably could not be overcome in such circumstances with "unmistakable clarity," and the arbitrability question therefore should be determined by the court.

Consistent with that analysis, the Texas Supreme Court ruled in Jody James Farms v. Altman Group[18] that the incorporation of AAA rules in an arbitration clause did not delegate arbitrability issues to an arbitrator when one of the parties to that dispute was a nonsignatory to the arbitration agreement in question. In that circumstance, "questions related to the existence of an arbitration agreement with a non-signatory are for the court, not the arbitrator."

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[1] AT&T Technologies Inc. v. Communications Workers, 475 U.S. 643, 106 S.Ct. 1415 (1986)

[2] First Options of Chicago v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920 (1995)

[3] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S.Ct. 588 (2002)

[4] Greentree Financial Corp. v. Bazzle, 539 U.S. 444, 123 S.Ct. 2402 (2003)

[5] Supra note 2

[6] Cf. FAA §4 (9 U.S.C. §4)

[7] Alliance Bernstein Investment Research and Management Inc. v. Schaffran, 445 F.3d 121 (2d Cir. 2006); see also, e.g., John Hancock Life Insurance Co. v. Wilson, 254 F.3d 48 (2d Cir. 2001); Scott v. Prudential Securities Inc., 141 F.3d 1007 (11th Cir. 1998).

[8] Supra note 2

[9] Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366 (Fed. Cir. 2006)

[10] See, e.g., T.Co Metals v. Dempsey Pipe & Supply, 592 F.3d 329 (2d Cir. 2010); Supra note 9

[11] Contec Corp. v. Remote Solution Co. Ltd., 398 F.3d 205, 207-08 (2d Cir. 2005)

[12] AAA CAR Rule 7(a)

[13] Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 S.Ct. 1927 (1983)

[14] E.g., Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966 (8th Cir. 2017)

[15] Leadertex Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 28 (2d Cir. 1995)

[16] Supra note 2

[17] Arthur Andersen LLP v. Carlisle, 129 S.Ct. 1896 (2009)

[18] Jody James Farms v. Altman Group[18], 2018 Tex. LEXIS 405 (Tex. May 11, 2018)
