New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 88
THURSDAY, NOVEMBER 5, 2015

International Arbitration

Expert Analysis

Enforcing Arbitration Agreements: Two Lessons From Recent Cases

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Parties don't always respect their arbitration agreements. Sometimes they commence litigation even though they agreed to resolve their disputes by arbitration. Other times, they refuse to participate in an ongoing arbitration. Frequently, they do both. And often the only reliable way to deal with a party that sidesteps its obligation to arbitrate is to seek the assistance of the courts.

That recourse to the courts may at times be indispensable to the enforcement of an arbitration agreement creates for arbitration a very particular predicament. One way of understanding an arbitration clause, after all, is as an agreement by which parties give up a right they would otherwise have to resolve their disputes in court; their intent is to resolve those disputes by arbitration instead of in the courts. And herein lies the predicament. On the one hand, I may have no choice but to go to court to compel a party to arbitrate. On the other, my invocation of the judicial process to enforce my arbitration rights is fundamentally at odds with my rationale for having entered into an arbitration agreement in the first place; the precise court involvement required to give effect to my intent to arbitrate in some fundamental sense subverts it.

It is essential to the efficacy of arbitration, therefore, that parties who need the assistance of the courts to enforce their arbitration agreements do not have to spend too long in the courts to secure it. If parties are required to engage in protracted litigation simply to get an arbitration going, arbitration would lose its appeal. Indeed, in the United States, the federal policy in favor of arbitration is animated precisely by the desire "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

Broadly speaking, the Federal Arbitration Act (FAA), which applies to international arbitrations as well as those involving interstate commerce, contemplates two ways to enforce an agreement to arbitrate: a motion to stay litigation brought in breach of an arbitration clause under section 3 of the FAA or a motion to compel arbitration under sections 4, 206 or 303 of the FAA. These are distinct applications, although they can be, and often are, made together.

This article discusses some recent cases helpful to parties seeking to minimize the time spent in court to enforce an agreement to arbitrate. More specifically these cases provide guidance to parties regarding the relief to request from a court in the context of a motion to stay or compel under the FAA. These can be briefly summarized as: (i) ask the court to stay rather than dismiss a lawsuit brought in breach of an arbitration clause; and (ii) ask the court to enforce the delegation provision in an arbitration clause if it has one.

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Asking to Stay a Lawsuit

Although section 3 of the FAA contemplates a court granting only one type of relief—a "stay" [of] the trial of the action until…arbitration has been had…"—some circuits have held that it grants courts the discretion to dismiss instead of a stay. *Dialysis Access Ctr. v. RMS Lifeline*, 638 F.3d 367 (1st Cir. 2011); *Choice Hotels Int'l v. BSR Tropicana Resort*, 252 F.3d 707, 709-10 (4th Cir. 2001); *Alford v. Dean Witter Reynolds*, 975 F.2d 1161, 1164 (5th Cir. 1992); *Green v. Ameritech Corp.*, 200 F.3d 967, 973 (6th Cir. 2000).

From the standpoint of the party seeking to enforce its right to arbitrate, however, a stay is preferable to a dismissal. This is because, under section 16 of the FAA, an order dismissing a lawsuit in favor of arbitration is immediately appealable, whereas one staying that lawsuit is not. Compare FAA, §16(a)(3) with FAA, §16(b)(1). Thus, if the court dismisses a lawsuit, a recalcitrant party can continue the battle in court by taking an appeal. If the court stays the lawsuit, it can't.

While some circuits have held that section 3 permits a dismissal, others have held that courts can only grant a stay. See, e.g., *Cont'l Cas. Co. v. Am. Nat'l Ins.*, 417 F.3d 727, 732 n.7 (7th Cir. 2005); *Lloyd v. HOVENSA*, 369 F.3d 263, 269-71 (3d Cir. 2004); *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953, 955-56 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons*, 971 F.2d 698, 699 (11th Cir. 1992) (per curiam).

Until recently, there were conflicting views on this issue in the U.S. Court of Appeals for the Second Circuit. Compare *McMahan Sec. Co. v. Forum Capital Mkts.*, 35 F.3d 82, 85-86 (2d Cir. 1994) with *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002). In *Katz v. Cellco Partnership*, 794 F.3d 341 (2015), the Second Circuit recently came down on one side of the circuit split: Where a party requests a stay, a court has no discretion; it must grant a stay. The Second Circuit offered three reasons for this holding.

First, the court relied upon the mandatory language of section 3, which provides that a court "shall" stay proceedings. Second, the court relied upon the structure of section 16 of the FAA, which governs appeals. Section 16 does not permit appeals of orders favorable to arbitration. Thus, orders granting a stay or a motion to compel are interlocutory orders which cannot be immediately appealed. (FAA, §16(b)1 and (b)2.) By contrast, orders hostile to arbitration—those refusing a stay or denying a motion to compel—are immediately appealable. (FAA, §16(a)1(A) and (B)).

Third, the court relied on the federal policy in favor of arbitration—the notion of getting parties out of court and into arbitration as quickly as possible. "A stay enables parties to proceed to arbitration directly, unencumbered by the uncertainty and expense of additional litigation, and generally precludes judicial interference until there is a final award." 794 F.3d at 346.

The lesson: When faced with a lawsuit brought in breach of an arbitration clause, the party seeking to arbitrate should specifically request that the court stay that lawsuit.

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Delegation Provision

Parties seeking to avoid arbitration often object that the dispute that is the subject of a motion to stay or compel does not in fact belong in arbitration. For example, they may object that the underlying contract is invalid (e.g., unconscionable or illegal) or that the dispute falls outside the scope of the arbitration clause. There are two potential responses to such an objection. The first is to ask the court to resolve the objection and determine that the dispute actually does belong in arbitration. The second is to argue that the very objection advanced by the party resisting arbitration—e.g., that the dispute falls outside the scope of the clause—should itself be resolved in arbitration instead of by the court.

For the party seeking to arbitrate its dispute, the second response is more effective since it gets one into arbitration more quickly. It is typically easier and quicker for a court to find that an objection to arbitration should be resolved by an arbitrator than for it itself to resolve that objection. The question, therefore, arises: How do you establish that an issue should be resolved by an arbitrator rather than the court? While it depends on the issue, when it comes to certain objections to arbitration, a line of cases is emerging that make it easier to establish that the arbitrator should resolve those objections.

U.S. arbitration law on the "who decides" question is nuanced and cannot be fully discussed in space allotted here. But, crudely, it is underpinned by two doctrines: the separability doctrine and what may be referred to as the delegation doctrine. The separability doctrine, which was first articulated in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), holds that (i) an arbitration clause is separate from the contract in which it is contained and (ii) objections to 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.

What this means is that many objections to the arbitration of a claim, e.g., that the entire contract is illegal or unconscionable, should go to the arbitrator rather than the court for resolution. See, e.g., *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006) (objection that agreement is void ab initio on grounds of illegality (usury) should be resolved by arbitrator since challenge was not to arbitration provision specifically, but to entire contract).

In order to explain the delegation doctrine, it is necessary to consider a metaphor, a distinction, and an exception. The metaphor is that of a "gateway." The U.S. Supreme Court has used that metaphor in recent years in discussing the issue of who, as between court or arbitrator, should decide whether a case belongs in arbitration. *Howsam v. Dean Witter Reynolds*, 123 S.Ct. 588, 592 (2002). According to the Supreme Court, "who decides"—court or arbitrator—depends on the specific type of question that is raised at the "gateway" to arbitration. The distinction is one drawn by the court between those gateway questions that are to be resolved by a court and those to be resolved by arbitrators. How do we know which is which?

The court tells us that this depends on the expectations of the parties. Gateway matters that raise "'question[s] of arbitrability' are for a court to decide." Id. at 592. These involve those "narrow circumstance[s] where contracting parties would likely have expected a court to have decided the gateway matter…," which involve such issues as the validity (but not the formation) of the arbitration agreement or its scope. Id. Gateway matters that go to arbitrators are those "where parties would likely expect that an arbitrator would decide the gateway matter." Id. These include "'procedural' questions which grow out of the dispute and bear on its final disposition" and defenses of "waiver, delay, or a like defense to arbitrability." Id.

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This brings us to the exception. While gateway matters that raise questions of arbitrability are presumptively for a court to decide, there is an exception when the parties clearly and unmistakably agreed to delegate those questions to the arbitrators. *First Options v. Kaplan*, 514 US 938 (1995). This is the delegation doctrine.

These two doctrines—the separability doctrine and the delegation doctrine—operated independently until Justice Antonin Scalia, writing for the majority, united them in the case of *Rent-A-Center, West v. Jackson*, 561 U.S. 63 (2010). In that case, an employee opposed a motion to stay and to compel under the FAA on the ground that the arbitration agreement was unconscionable. The arbitration agreement in that case contained a provision explicitly delegating to the arbitrator the "exclusive authority to resolve any dispute relating to the…enforceability" of that agreement—the "delegation provision." Id. at 63.

In prior cases, courts applied the separability doctrine to distinguish between the underlying contract and the arbitration clause within it, holding that certain challenges were for an arbitrator to decide unless directed at the arbitration clause itself. In *Rent-A-Center*, Scalia relied upon the separability doctrine to make distinctions within the arbitration clause itself. In that case, he found more than one agreement to arbitrate in that clause: [i] "an agreement to arbitrate one controversy (an employment-discrimination claim)" and, [ii] in the delegation provision, "an agreement to arbitrate a different controversy (enforceability)." Id. at 72 n.3.

Having characterized the delegation provision as a separate arbitration agreement, Scalia held that Jackson, the employee, had to direct his unconscionability challenge to the delegation provision specifically because that provision was "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." Id. at 70.

Justice Scalia's approach raises the hurdle for a party resisting arbitration because it is inevitably more difficult to challenge a specific delegation provision in an arbitration clause than that clause in its entirety. For example, in that case, the employee, Antonio Jackson, argued that certain limits to discovery made the arbitration of his employment claim procedurally unconscionable. Whatever the merits of that objection as to the arbitration clause in its entirety, it is a far harder argument to direct against a delegation provision specifically: The arbitration of Jackson's employment claim is likely to turn on disputed facts, which discovery may be essential to resolve; by contrast, the question of whether an arbitrator has authority, under the delegation provision, to resolve whether Jackson's employment agreement is unconscionable is not likely to turn on disputed facts.

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." Id. at 74.

In *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015), the U.S. Court of Appeals for the Ninth Circuit took *Rent-A-Center* a step further. It might have been suggested that *Rent-A-Center* was limited to cases where the arbitration clause contained a specific delegation provision. However, *Brennan* makes it clear that the Rent-A-Center holding extends to cases where the parties agreed to arbitrate under arbitration rules which themselves contain provisions delegating to arbitrators the authority to resolve disputes about their jurisdiction. The specific rules at issue in *Brennan* were those of the American Arbitration Association (AAA), which, as the court noted, provide that the "arbitrator shall have the power to rule on his or her own jurisdiction…." Id. at 1128.

Courts in the Second Circuit (and other circuits) have found that the use of the AAA and other rules that contain such provisions constitutes the type of clear and unmistakable evidence required by *First Options* to have arbitrators resolve certain gateway issues. See, e.g., *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011) (UNCITRAL Rules); *Contec Corp. v. Remote Solution, Co.*, 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*.

The lesson: Where a party challenges the validity or scope of an arbitration agreement the party seeking to enforce that agreement should ask the court to enforce the delegation provision specifically, if there is one, and bear in mind that such provisions are contained in certain commonly used arbitration rules.