When Your Contract Includes an Arbitration Clause: Who Decides the Arbitrability of the Dispute?

07.27.2018

It is a common situation in the world of construction project disputes ? the parties? contract includes an arbitration clause. One party files a lawsuit in a court over a dispute, and the other party files a motion to stay or dismiss the lawsuit and compel arbitration, citing the contract?s arbitration clause. Who decides the arbitrability of the dispute ? the court in which the lawsuit was filed, or an arbitrator?

You would think the answer to this ?gateway? question to be easy; instead, the answer only comes after a multi-step inquiry.

The Inquiry

A court resolving an arbitrability dispute must engage in a two-step inquiry. Peabody Holding Co., LLC v. United Mine Workers of Am., 665 F.3d 96, 101 (4th Cir. 2012). First, the court must determine who decides whether a particular dispute is arbitrable ? an arbitrator or the court. Second, if the court determines that it is the proper forum to adjudicate the arbitrability of the dispute, then the court must decide whether the dispute is in fact arbitrable.

As the starting point is the principle that arbitrability is an issue for judicial determination unless the agreement ??clearly and unmistakably? provide[s] that the arbitrator shall determine what disputes the parties agreed to arbitrate.? Id. at 102. Although this is an exacting standard, ?[v]itrually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association?s (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.? Oracle Am., Inc. v. Myriad Grp. A.G., 724F.3d 1069, 1074 (9th Cir. 2013).

In December, 2017, the U.S. Court of Appeals for the Fourth Circuit adopted the reasoning of the majority of its sister circuits with respect to another category of arbitration rules, holding that ?the explicit incorporation of JAMS [Comprehensive Rules & Procedures] serves as ?clear and unmistakable? evidence of the parties? intent to arbitrate arbitrability.? Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522, 528 (4th Cir. 2017).

This, however, is not the end of the inquiry. If a dispute between the parties does not relate to the contract containing the arbitration clause, is the inclusion of an organization?s rules of arbitration (e.g. AAA) in an arbitration clause nonetheless a binding agreement to have an arbitrator decide the arbitrability of each and every dispute no matter how separate and distinct from that contract containing the arbitration clause? The answer is no.

The U.S. Courts of Appeals for the Fourth, Fifth, Sixth and Federal Circuits have adopted the ?wholly groundless? test as part of their inquiry on the arbitrability of a dispute. In Simply Wireless, the Fourth Circuit reasoned that the Court should not leave the issue of arbitrability to an arbitrator if ?a party?s assertion that a claim falls within an arbitration clause is frivolous or otherwise illegitimate.? Simply Wireless, 877 F.3d at 529. In fact, where parties have agreed to arbitrate only some issues, an arbitrator does not have authority to decide the arbitrability of a party?s claim that clearly falls outside the scope of the arbitration clause. See Douglas v. Regions Bank, 757 F.3d 460, 464 (5th Cir. 2014) (?[E]ven if there is a delegation provision (step one), the court must ask whether the averment that the claim falls within the scope of the arbitration agreement is wholly groundless (step two).?); Turi v. Main Street Adoption Servs., LLP, 633 F.3d 496, 511 (6th Cir. 2011 (?[E]ven where the parties expressly delegate to the arbitrator the authority to decide the arbitrability of the claims related to the parties? arbitration agreement, this delegation applies only to claims that are at least arguably covered by the agreement.?) (?If . . . the court concludes that the parties to the agreement did clearly and unmistakably intend to delegate the power to decide arbitrability to an arbitrator, then the court should perform a second, more limited inquiry to determine whether the assertion of arbitrability is wholly groundless.?) Accordingly, a court may not delegate the question of arbitrability to an arbitrator if it is clear that the claim of arbitrability is wholly groundless. Local No. 358, Bakery & Confectionery Workers Union v. Nolde Bros., Inc., 530 F2d 548, 553 (4th Cir. 1975, aff?d, 430 U.S. 243 (1977); *see*, Evans v. Building Materials Corporation of America, 858 F.3d 1377 (Fed. Cir. 2017).

The Take Away

Parties wishing to ensure resolution of ?gateway? questions of arbitrability by a specific decision-maker ?whether the court or arbitrator ?should spell out their preference as clearly as possible in the arbitration clause.

If the parties want an arbitrator to decide the arbitrability of a dispute: 1) write that into the arbitration clause (best choice), or 2) include in the arbitration clause that an arbitration organization?s rules authorizing the arbitrator to decide the arbitrability of disputes are the governing rules of arbitration (second best choice). The courts will still likely apply the ?wholly groundless? test, but assuming the dispute arises from the construction contract, that should not cause the court, rather than the arbitrator, to decide the arbitrability of the dispute.

If, however, the parties want the court to decide all ?gateway? questions of arbitrability, then the parties should include an ?anti-delegation? provision that clearly states a court must decide all questions regarding the scope and applicability of an arbitration clause to a dispute.

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