The Power of Arbitrators To Decide Arbitrability-Delegation Clauses and Lessons from Caselaw

By Robert S. Amador

Introduction

Mandatory binding contractual arbitration clauses are ubiquitous in American commerce today. They are found in the agreements of many common businesses, including real estate, healthcare, construction, insurance, retail sales and rental, cell phones, telecommunications, credit cards and investments, among many others. They are also very common in employment agreements, regardless of the industry. Their popularity stems from the many perceived desirable benefits of arbitration versus court litigation, namely confidentiality, lower expense, more efficiency and more conservative awards than jury verdicts.

Arbitration clauses in these agreements usually delegate to the arbitrator the power to decide so-called "gateway" or "arbitrability" issues, including whether the arbitration provision governs the dispute at issue, whether the agreement is valid and enforceable, and whether the party against whom the agreement is being enforced is bound by it. Delegation clauses are enforceable according to their terms under both federal and California law. *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 139 S. Ct. 524; *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938; *Aanderud v. Superior Court* (2017) 13 Cal. App. 5th 880. But how enforceable are they really? This article explores some of the challenges they face.

The rules of most arbitration provider organizations grant that power to arbitrators. For example, a JAMS sample arbitration clause reads as follows: "Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, *enforcement, interpretation or validity thereof*, *including the determination of the scope or applicability of this agreement to arbitrate*, shall be determined by arbitration." (Emphasis added). Similarly Rule 7 of the Rules for Commercial Arbitration of the American Arbitration Association provides: "(a) The arbitrator shall have 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 or to the arbitrability of any claim or counterclaim*. (b) The arbitrator shall have the power *to determine the existence or validity of a contract of which an arbitration clause forms a part*." (Emphasis added). Many arbitration clauses expressly state these powers in the agreement; others simply incorporate by reference the rules of the provider organization.

Despite these powers given to arbitrators contractually, and under the rules of most arbitration organizations, when successful challenges are made to them in

court arbitrators often are deprived of their powers, despite the underlying legal policy favoring of arbitration both under California and federal law.

Did the Parties Agree To Arbitrate The Dispute?

A common theme among parties challenging a petition to compel arbitration of a written agreement to arbitrate is their client never actually agreed to arbitrate, or never agreed to arbitrate the dispute at issue. Before a court can enforce an agreement to arbitrate it must of course first determine this threshold issue, particularly since a party who allegedly agreed to arbitrate arguably voluntarily waived that party's inviolate right to trial by jury guaranteed under the California Constitution. A party petitioning a court to compel arbitration, therefore, has the burden of proving the existence of a valid arbitration agreement by a preponderance of evidence. Yet once the moving party has done so, a party opposing a petition to compel arbitration bears the burden of proving by a preponderance of evidence any fact necessary to defeat the agreement the party allegedly signed.

This ostensibly straightforward inquiry as to whether an enforceable written agreement to arbitrate exists is seldom straightforward. Gleaning intent by reviewing documents retrospectively, as a court often is asked to do, can be a very subjective inquiry, made more difficult by after-the-fact self-serving declarations. Even if a court finds, applying ordinary state-law principles governing formation of an agreement, that the parties intended to arbitrate the dispute, the dispute is not necessarily arbitrable. Grounds may exist that make the agreement as a whole, or the arbitration agreement itself, unenforceable. The California Arbitration Act (C.C.P. §1280 et. seq.) requires a court to order the parties to arbitration, unless it finds the moving party waived the right to compel arbitration or grounds exist for rescission of the agreement**.** Civil Code 1670.5 provides that a court can refuse to enforce a contract or part of it if the court finds as a matter of law the contract to have been unconscionable at the time it was made. Similarly, the Federal Arbitration Act requires the enforcement of an arbitration agreement "save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. §2). Under this FAA 'savings clause', an arbitration agreement is not enforceable if a party establishes a state law contract defense, such as fraud, duress, unconscionability, or illegality. *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.

Is The Delegation Clause "Clear and Unmistakable"?

Once a court determines the parties did contractually agree to arbitrate and agreed further to grant the arbitrator the power to decide arbitrability issues shouldn't the court grant the petition to compel and allow the arbitrator to make those decisions as the parties intended? Not so fast, say the courts. Courts hold

delegation clauses to a higher standard than the arbitration agreement as a whole. A court will order arbitrability issues to the arbitrator only if it finds the parties "clearly and unmistakably agreed" to the delegation. *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68-69; *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643,649.

The clear and unmistakable requirement is a heightened standard of the parties manifestation of intent based on an assumption by the courts that the parties would have expected a court, and not an arbitrator, to decide if an agreement is arbitrable, and reverses the typical presumption in favor of arbitration. *First Options of Chicago, Inc. v. Kaplan, supra,* 514 U.S. at p. 944-945; *Wilson-Davis SSP America, Inc.* (2021) 62 Cal. App. 5th 1080. For practitioners this is a high standard to overcome when drafting arbitration provisions (and for litigators trying to compel arbitration). The standard does not exist under California contract interpretation rules. (See Civ. Code §§1635-1663; CACI 314-320). There is relatively little judicial California guidance as to what it really means, and each case must be evaluated on its own facts and circumstances. There is no California Supreme Court precedent on the issue.

There are, however, some helpful clues from the caselaw. A delegation clause deemed ambiguous by a court is not clear and unmistakable. Courts find ambiguity in contradictory provisions within the arbitration language itself. For example, in *Nelson v. Dual Diagnosis Treatment Center, Inc.,* (2022) No. G059565, Cal. App. LEXIS 325 *and Baker v. Osborne Development Corp.* (2008) 159 Cal. App. 4th 884 a provision that stated both an arbitrator was to decide arbitrability issues and a court could find the provision unenforceable, was deemed ambiguous. Language giving a court the power to sever a provision it deems unenforceable in the arbitration agreement or in the rules of the provider organization also may run afoul of the standard. See *Najarro v. Superior Court* (2021) 70 Cal. App. 5th 871. A delegation clause does not become ambiguous, however, where parties agree to seek provisional remedies in court, as such remedies are deemed not affecting the arbitrator's ability to decide arbitrability issues. See *Aanderud v. Superior Court*, *supra,* 13 Cal. App. 5th at p. 895. Where the delegation clause is part of lengthy stand-alone arbitration agreement and contains explicit delegation language it meets the standard. See *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal. App. 4th 221. Delegation clauses buried in employer policies and procedures not specifically signed by the employee clearly do not meet the standard. See *Ajamian v. CantorCOe, L.P.* (2012) 203 Cal. App. 4th 771, 787. The heightened standard may also be used to invalidate a delegation clause for other reasons, such as it was not contained in the agreement containing the arbitration language. See *Sandoval-Ryan v. Oleander Holdings LLC* (2020) 58 Cal. App. 5th 217. And yet a delegation clause lucky enough to survive the heightened standard scrutiny can still be

challenged on the grounds it is procedurally and substantively unconscionable. See *Malone v. Superior Court* (2014) 226 Cal. App. 4th 1551.

Suffice it to say, delegation clauses are difficult to enforce and need to be especially well drafted and understood to increase the chances of having an arbitrator decide threshold issues of arbitrability, even if it appears the parties so agreed in writing.

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