KeyCite Yellow Flag - Negative Treatment
Declined to Extend by American General Financial Services v. Jape, Ga., October 1, 2012

115 S.Ct. 834
Supreme Court of the United States

ALLIED-BRUCE TERMINIX COMPANIES, INC., and Terminix International Company, Petitioners
v.
G. Michael DOBSON et al.

No. 93-1001.
|
Argued Oct. 4, 1994.
|
Decided Jan. 18, 1995.

Synopsis

Homeowners brought action against termite control company under termite bond. Company moved to compel arbitration. The Baldwin Circuit Court, No. CV-91-796, James H. Reid, Jr., J., denied the motion. Company appealed. The Alabama Supreme Court, Almon, J., 628 So.2d 354, affirmed. Certiorari was granted. The Supreme Court, Justice Breyer, held that Federal Arbitration Act section making enforceable a written arbitration provision in a contract evidencing a transaction involving commerce is written broadly, extending Act's reach to limits of Congress' commerce clause power.

Reversed and remanded.

Justice O'Connor, filed a concurring opinion.

Justice Scalia, filed a dissenting opinion.

Justice Thomas filed a dissenting opinion in which Justice Scalia joined.

West Headnotes (4)

[1] Commerce
Arbitration
83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 Arbitration

For purposes of Federal Arbitration Act section making enforceable a written arbitration provision in a contract evidencing a transaction involving commerce, the words "involving commerce" are broader than the often-found words of art "in commerce"; therefore, they cover more than "only persons or activities within the flow of interstate commerce." 9 U.S.C.A. § 2.

229 Cases that cite this headnote

[2] Commerce
Arbitration
83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 Arbitration

For purposes of Federal Arbitration Act section making enforceable a written arbitration provision in a contract evidencing a transaction involving commerce, the word "involving" is broad and is the functional equivalent of "affecting commerce" which normally signals Congress' intent to exercise its commerce power to the full; a broad interpretation of this language is consistent with the Act's basic purpose, to put arbitration provisions on the same footing as a contract's other terms. 9 U.S.C.A. § 2.

794 Cases that cite this headnote

[3] Commerce
Arbitration
83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 Arbitration

For purposes of Federal Arbitration Act section making enforceable a written arbitration provision in a contract evidencing a transaction involving commerce, "evidencing a transaction" means that the "transaction" must turn out, in fact, to have

involved interstate commerce, even if the parties did not contemplate an interstate commerce connection. 9 U.S.C.A. § 2.

578 Cases that cite this headnote

[4] Commerce
Arbitration

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 Arbitration

Use in Federal Arbitration Act section, making enforceable a written arbitration provision in a contract evidencing a transaction involving commerce, of the words "evidencing" and "involving" does not restrict Act's application so as to allow a state to apply its antiarbitration law or policy. 9 U.S.C.A. § 2.

579 Cases that cite this headnote

West Codenotes

Preempted
Code 1975, § 8-1-41(3).

****835** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The termite prevention contract between petitioner exterminators and respondent Gwin, a homeowner, specified that any controversy thereunder would be settled exclusively by arbitration. After respondents Dobson, who had purchased Gwin's home, sued in state court following a termite infestation, petitioners asked for, but were denied, a stay to allow for arbitration under the contract and § 2 of the Federal Arbitration Act, which makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce." The Alabama Supreme Court affirmed on the basis of a state statute invalidating predispute arbitration agreements, ruling that the federal Act applies only if, at the time the parties entered into the contract and accepted the arbitration clause, they "contemplated" substantial interstate activity. Despite some such activities, the court found that these parties "contemplated" a transaction that was primarily local and not "substantially" interstate.

Held: Section 2's interstate commerce language should be read broadly to extend the Act's reach to the limits of Congress' Commerce Clause power. The use of the words "evidencing" and "involving" does not restrict the Act's application and thereby allow a State to apply its antiarbitration law or policy. Pp. 837-843.

(a) The legal background demonstrates that the Act has the basic purpose of overcoming judicial hostility to arbitration agreements and applies in both federal diversity cases and state courts, where it pre-empts state statutes invalidating such agreements. See, *e.g., Southland Corp. v. Keating,* 465 U.S. 1, 15-16, 104 S.Ct. 852, 860-61, 79 L.Ed.2d 1. It would be inappropriate to overrule *Southland* and permit Alabama to apply its antiarbitration statute, since the Court in that case considered the basic arguments now raised, and nothing significant changed subsequently; since, in the interim, private parties have likely written contracts relying on *Southland;* and since Congress, both before and after *Southland,* has enacted legislation extending, not retracting, the scope of arbitration. Pp. 837-839.

(b) The statute's language, background, and structure establish that § 2's "involving commerce" words are the functional equivalent of the phrase "affecting commerce," which normally signals Congress' intent to exercise its commerce power to the full, see ***266** *Russell v. United States,* 471 U.S. 858, 859, 105 S.Ct. 2455, 2456, 85 L.Ed.2d 829. The linguistic permissibility of this interpretation is demonstrated by dictionary definitions in which "involve" and "affect" mean the same thing. Moreover, the Act's legislative history, to the extent that it is informative, indicates an expansive congressional intent, and this Court has described the Act's ****836** reach expansively as coinciding with that of the Commerce Clause, see, *e.g., Southland, supra,* 465 U.S., at 14-15, 104 S.Ct., at 860. Finally, a broad interpretation of this language is consistent with the Act's basic purpose, while a narrower interpretation would create a new, unfamiliar test that would unnecessarily complicate the law and breed

litigation. For these reasons, the Act's scope can be said to have expanded along with the commerce power over the years, even though the Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be so. *Mine Workers v. Coronado Coal Co.,* 259 U.S. 344, 410, 42 S.Ct. 570, 583, 66 L.Ed. 975; *Leather Workers v. Herkert & Meisel Trunk Co.,* 265 U.S. 457, 470, 44 S.Ct. 623, 627, 68 L.Ed. 1104; and *Bernhardt v. Polygraphic Co. of America, Inc.,* 350 U.S. 198, 200-202, 76 S.Ct. 273, 275-276, 100 L.Ed. 199, distinguished. Pp. 839-841.

(c) Section 2's "evidencing a transaction" phrase means that the "transaction" (that the contract "evidence") must turn out, in fact, to have involved interstate commerce. For several reasons, this "commerce in fact" interpretation is more faithful to the statute than the "contemplation of the parties" test adopted below and in other courts. First, the latter interpretation, when viewed in terms of the statute's basic purpose, seems anomalous because it invites litigation about what was, or was not, "contemplated," because it too often would turn the validity of an arbitration clause upon the happenstance of whether the parties thought to insert a reference to interstate commerce in their document or to mention it in an initial conversation, and because it fits awkwardly with the rest of § 2. Second, the statute's language permits the "commerce in fact" interpretation. Although that interpretation concededly leaves little work for the word "evidencing," nothing in the Act's history suggests any other, more limiting, task for the language. Third, the force of the basic practical argument underlying the "contemplation of the parties" test, *i.e.,* that encroaching on powers reserved to the States must be avoided, has diminished following this Court's holdings that the Act displaces contrary state law. Finally, despite an *amicus*' claim, it is unclear whether an "objective" version of that test would better protect consumers asked to sign form contracts by businesses. In any event, § 2 authorizes States to invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract," and thereby gives them a method for protecting consumers against unwanted arbitration provisions. Pp. 841-843.

***267** d) The parties do not contest that the transaction in this case, in fact, involved interstate commerce. P. 843.

628 So.2d 354, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post,* p. 843. SCALIA, J., filed a dissenting opinion, *post,* p. 844. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 845.

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Opinion

***268** Justice BREYER delivered the opinion of the Court.

This case concerns the reach of § 2 of the Federal Arbitration Act. That section makes enforceable a written arbitration provision in "a contract *evidencing* a transaction *involving* commerce." 9 U.S.C. § 2 (emphasis added). Should we read this phrase broadly, extending the Act's reach to the limits of Congress' Commerce Clause power? Or, do the two italicized words-"involving" and "evidencing"-significantly restrict the Act's application? We conclude that the broader reading of the Act is the correct one, and we reverse a State Supreme Court judgment to the contrary.

****837** I

In August 1987, Steven Gwin, a respondent who owned a house in Birmingham, Alabama, bought a lifetime "Termite Protection Plan" (Plan) from the local office of Allied-Bruce Terminix Companies, a franchise of Terminix International Company. In the Plan, Allied-Bruce promised "to protect" Gwin's house "against the attack of subterranean termites," to reinspect periodically, to provide any "further treatment found necessary," and to repair, up to $100,000, damage caused by new termite infestations. App. 69. Terminix International "guarantee[d] the fulfillment of the terms" of the Plan. *Ibid.* The Plan's contract document provided in writing that

> "*any controversy or claim* ... arising out of or relating to the interpretation, performance or breach of any provision of this agreement *shall be settled exclusively by arbitration.*" *Id.,* at 70 (emphasis added).

In the spring of 1991, Mr. and Mrs. Gwin, wishing to sell their house to Mr. and Mrs. Dobson, had Allied-Bruce reinspect the house. They obtained a clean bill of health. But no sooner had they sold the house and transferred the Plan to Mr. and Mrs. Dobson than the Dobsons found the house swarming with termites. Allied-Bruce attempted to treat ***269** and repair the house, but the Dobsons found Allied-Bruce's efforts inadequate. They therefore sued the Gwins, and (along with the Gwins, who cross-claimed) also sued Allied-Bruce and Terminix in Alabama state court. Allied-Bruce and Terminix, pointing to the Plan's arbitration clause and § 2 of the Federal Arbitration Act, immediately asked the court for a stay, to allow arbitration to proceed. The court denied the stay. Allied-Bruce and Terminix appealed.

The Supreme Court of Alabama upheld the denial of the stay on the basis of a state statute, Ala.Code § 8-1-41(3) (1993), making written, predispute arbitration agreements invalid and "unenforceable." 628 So.2d 354, 355 (1993). To reach this conclusion, the court had to find that the Federal Arbitration Act, which pre-empts conflicting state law, did not apply to the termite contract. It made just that finding. The court considered the federal Act inapplicable because the connection between the termite contract and interstate commerce was too slight. In the court's view, the Act applies to a contract only if " 'at the time [the parties entered into the contract] and accepted the arbitration clause, they *contemplated* substantial interstate activity.' " *Ibid.* (emphasis in original) (quoting *Metro Industrial Painting Corp. v. Terminal Constr. Co.,* 287 F.2d 382, 387 (CA2) (Lumbard, C.J., concurring), cert. denied, 368 U.S. 817, 82 S.Ct. 31, 7 L.Ed.2d 24 (1961)). Despite some interstate activities (*e.g.,* Allied-Bruce, like Terminix, is a multistate firm and shipped treatment and repair material from out of state), the court found that the parties "contemplated" a transaction that was primarily local and not "substantially" interstate.

Several state courts and Federal District Courts, like the Supreme Court of Alabama, have interpreted the Act's language as requiring the parties to a contract to have "contemplated" an interstate commerce connection. See, *e.g., Burke County Public Schools Bd. of Ed. v. Shaver Partnership,* 303 N.C. 408, 417-420, 279 S.E.2d 816, 822-823 (1981); ***270** *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.,* 7 Kan.App.2d 363, 367, 642 P.2d 127, 130 (1982); *Lacheney v. Profitkey Int'l, Inc.,* 818 F.Supp. 922, 924 (ED Va.1993). Several federal appellate courts, however, have interpreted the same language differently, as reaching to the limits of Congress' Commerce Clause power. See, *e.g., Foster v. Turley,* 808 F.2d 38, 40 (CA10 1986); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F.2d 402, 406-407 (CA2 1959), cert. dism'd, 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37 (1960); cf. *Snyder v. Smith,* 736 F.2d 409, 417-418 (CA7), cert. denied, 469 U.S. 1037, 105 S.Ct. 513, 83 L.Ed.2d 403 (1984). We granted certiorari to resolve this conflict, 510 U.S. 1190, 114 S.Ct. 1292, 127 L.Ed.2d 646 (1994); and, as we said, we conclude that the broader reading of the statute is the right one.

II

Before we can reach the main issues in this case, we must set forth three items of legal background.

****838** First, the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 474, 109 S.Ct. 1248, 1253, 103 L.Ed.2d 488 (1989). The origins of those refusals apparently lie in " 'ancient times,' " when the English courts fought " 'for extension of jurisdiction-all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.' " *Bernhardt v. Polygraphic Co. of America, Inc.,* 350 U.S. 198, 211, n. 5, 76 S.Ct. 273, 280, n. 5, 100 L.Ed. 199 (1956) (Frankfurter, J., concurring) (quoting *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.,* 222 F. 1006, 1007 (SDNY 1915, in turn quoting *Scott v. Avery,* 5 H.L.Cas. 811 (1856) (Campbell, L.J.)). American courts initially followed English practice, perhaps just " 'stand[ing] ... upon the antiquity of the rule' " prohibiting arbitration clause enforcement, rather than " 'upon its excellence or reason.' " *Bernhardt v. Polygraphic*

Co., supra, 350 U.S., at 211, n. 5, 76 S.Ct., at 280, n. 5 (quoting *United States Asphalt Refining Co., supra,* at 1007). Regardless, when Congress passed the Arbitration Act in 1925, it was "motivated, first and foremost, by a ***271** ... desire" to change this antiarbitration rule. *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 220, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985). It intended courts to "enforce [arbitration] agreements into which parties had entered," *ibid.* (footnote omitted), and to "place such agreements 'upon the same footing as other contracts,' " *Volt Information Sciences, Inc., supra,* 489 U.S., at 474, 109 S.Ct., at 1253 (quoting *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 511, 94 S.Ct. 2449, 2453, 41 L.Ed.2d 270 (1974)).

Second, some initially assumed that the Federal Arbitration Act represented an exercise of Congress' Article III power to "ordain and establish" federal courts, U.S. Const., Art. III, § 1. See *Southland Corp. v. Keating,* 465 U.S. 1, 28, n. 16, 104 S.Ct. 852, 867, n. 16, 79 L.Ed.2d 1 (1984) (O'CONNOR, J., dissenting) (collecting cases). In 1967, however, this Court held that the Act "is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.' " *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 405, 87 S.Ct. 1801, 1807, 18 L.Ed.2d 1270 (1967) (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). The Court considered the following complicated argument: (1) The Act's provisions (about contract remedies) are important and often outcome determinative, and thus amount to "substantive," not "procedural," provisions of law; (2) *Erie R. Co. v. Tompkins,* 304 U.S. 64, 71-80, 58 S.Ct. 817, 819-823, 82 L.Ed. 1188 (1938), made clear that federal courts must apply *state* substantive law in diversity cases, see also *Hanna v. Plumer,* 380 U.S. 460, 465, 85 S.Ct. 1136, 1140-41, 14 L.Ed.2d 8 (1965); therefore (3) federal courts must not apply the Federal Arbitration Act in diversity cases. This Court responded by agreeing that the Act set forth substantive law, but concluding that, nonetheless, the Act applied in diversity cases because Congress had so intended. The Court wrote: "Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate." *Prima Paint, supra,* 388 U.S., at 405, 87 S.Ct., at 1806.

Third, the holding in *Prima Paint* led to a further question. Did Congress intend the Act also to apply in state courts? Did the Federal Arbitration Act pre-empt conflicting ***272** state antiarbitration law, or could state courts apply their antiarbitration rules in cases before them, thereby reaching results different from those reached in otherwise similar federal diversity cases? In *Southland Corp. v. Keating, supra,* this Court decided that Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases. The Court concluded that the Federal Arbitration Act pre-empts state law; and it held that state courts cannot apply state statutes that invalidate arbitration agreements. *Id.,* 465 U.S., at 15-16, 104 S.Ct., at 860-861.

We have set forth this background because respondents, supported by 20 state attorneys general, now ask us to overrule *Southland* and thereby to permit Alabama to apply its ****839** antiarbitration statute in this case irrespective of the proper interpretation of § 2. The *Southland* Court, however, recognized that the pre-emption issue was a difficult one, and it considered the basic arguments that respondents and *amici* now raise (even though those issues were not thoroughly briefed at the time). Nothing significant has changed in the 10 years subsequent to *Southland;* no later cases have eroded *Southland* 's authority; and no unforeseen practical problems have arisen. Moreover, in the interim, private parties have likely written contracts relying upon *Southland* as authority. Further, Congress, both before and after *Southland,* has enacted legislation extending, not retracting, the scope of arbitration. See, *e.g.,* 9 U.S.C. § 15 (eliminating the Act of State doctrine as a bar to arbitration); 9 U.S.C. §§ 201-208 (international arbitration). For these reasons, we find it inappropriate to reconsider what is by now well-established law.

We therefore proceed to the basic interpretive questions aware that we are interpreting an Act that seeks broadly to overcome judicial hostility to arbitration agreements and that applies in both federal and state courts. We must decide in this case whether that Act used language about interstate commerce that nonetheless limits the Act's application, ***273** thereby carving out an important statutory niche in which a State remains free to apply its antiarbitration law or policy. We conclude that it does not.

III

[1] The Federal Arbitration Act, § 2, provides that a

> "written provision in any maritime transaction or *a contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added).

The initial interpretive question focuses upon the words "involving commerce." These words are broader than the often-found words of art "in commerce." They therefore cover more than " 'only persons or activities *within the flow* of interstate commerce.' " *United States v. American Building Maintenance Industries,* 422 U.S. 271, 276, 95 S.Ct. 2150, 2154, 45 L.Ed.2d 177 (1975) (quoting *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 195, 95 S.Ct. 392, 398, 42 L.Ed.2d 378 (1974)) (defining "in commerce" as related to the "flow" and defining the "flow" to include "the generation of goods and services for interstate markets and their transport and distribution to the consumer"); see also *FTC v. Bunte Brothers, Inc.,* 312 U.S. 349, 351, 61 S.Ct. 580, 582, 85 L.Ed. 881 (1941). But how far beyond the flow of commerce does the word "involving" reach? Is "involving" the functional equivalent of the word "affecting"? That phrase-"affecting commerce"-normally signals Congress' intent to exercise its Commerce Clause powers to the full. See *Russell v. United States,* 471 U.S. 858, 859, 105 S.Ct. 2455, 2456, 85 L.Ed.2d 829 (1985). We cannot look to other statutes for guidance for the parties tell us that this is the only federal statute that uses the word "involving" to describe an interstate commerce relation.

[2] After examining the statute's language, background, and structure, we conclude that the word "involving" is broad ***274** and is indeed the functional equivalent of "affecting." For one thing, such an interpretation, linguistically speaking, is permissible. The dictionary finds instances in which "involve" and "affect" sometimes can mean about the same thing. V Oxford English Dictionary 466 (1st ed. 1933) (providing examples dating back to the mid-19th century, where "involve" means to "include or affect in ... operation"). For another, the Act's legislative history, to the extent that it is informative, indicates an expansive congressional intent. See, *e.g.,* H.R.Rep. No. 96, *supra,* at 1 (the Act's "control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce"); 65 Cong.Rec. 1931 (1924) (the Act "affects contracts relating to interstate subjects and contracts in admiralty") (remarks of Rep. Graham); Joint Hearings on S. 1005 and ****840** H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 7 (1924) (hereinafter Joint Hearings) (testimony of Charles L. Bernheimer, chairman of the Committee on Arbitration of the Chamber of Commerce of the State of New York, agreeing that the proposed bill "relates to contracts arising in interstate commerce"); *id.,* at 16 (testimony of Julius H. Cohen, drafter for the American Bar Association of much of the proposed bill's language, that the Act reflects part of a strategy to rid the law of an "anachronism" by "get[ting] a Federal law to cover interstate and foreign commerce and admiralty"); see also 9 U.S.C. § 1 (defining the word "commerce" in the language of the Commerce Clause itself).

Further, this Court has previously described the Act's reach expansively as coinciding with that of the Commerce Clause. See, *e.g., Perry v. Thomas,* 482 U.S. 483, 490, 107 S.Ct. 2520, 2525-26, 96 L.Ed.2d 426 (1987) (the Act "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause"); *Southland Corp. v. Keating,* 465 U.S., at 14-15, 104 S.Ct., at 860 (the " 'involving commerce' " requirement is a constitutionally "necessary qualification" on the Act's reach, ***275** marking its permissible outer limit); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S., at 407, 87 S.Ct., at 1807-08 (Harlan, J., concurring) (endorsing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F.2d 402, 407 (CA2 1959) (Congress, in enacting the FAA, "took pains to utilize as much of its power as it could")).

Finally, a broad interpretation of this language is consistent with the Act's basic purpose, to put arbitration provisions on " 'the same footing' " as a contract's other terms. *Scherk v. Alberto-Culver Co.,* 417 U.S., at 511, 94 S.Ct., at 2453. Conversely, a narrower interpretation is not consistent with the Act's purpose, for (unless unreasonably narrowed to the flow of commerce) such an interpretation would create a new, unfamiliar test lying somewhere in a no man's land between "in commerce" and "affecting commerce," thereby unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it.

We recognize arguments to the contrary: The pre-New Deal Congress that passed the Act in 1925 might well have

thought the Commerce Clause did not stretch as far as has turned out to be the case. But, it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively-as, for the reasons set forth above, we do here. See, *e.g., McLain v. Real Estate Bd. of New Orleans, Inc.,* 444 U.S. 232, 241, 100 S.Ct. 502, 508-509, 62 L.Ed.2d 441 (1980); *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 743, n. 2, 96 S.Ct. 1848, 1852, n. 2, 48 L.Ed.2d 338 (1976).

Further, the Gwins and Dobsons point to two cases containing what they believe to be favorable language. In *Mine Workers v. Coronado Coal Co.,* 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975 (1922), and then again in *Leather Workers v. Herkert & Meisel Trunk Co.,* 265 U.S. 457, 44 S.Ct. 623, 68 L.Ed. 1104 (1924), they say, this Court said that one might draw a distinction between, on the one hand, cases that "*involve* interstate commerce intrinsically," and, on the other hand, cases "*affecting* interstate commerce so directly ***276** as to be within the federal regulatory power." *Mine Workers, supra,* 259 U.S., at 410, 42 S.Ct., at 583 (emphasis added); *Leather Workers, supra,* 265 U.S., at 470, 44 S.Ct., at 627 (same). One could read these cases as driving a wedge between "involve" and "affecting." Yet, in these cases, the Court was not construing a statute containing the words "involving commerce." Furthermore, nothing suggests the drafters of the Act looked to these cases as a source. And, these cases themselves use the phrase "involve ... intrinsically," not the word "involving" alone. In sum, these cases do not support respondents' position.

The Gwins and Dobsons, with far better reason, point to a different case, *Bernhardt v. Polygraphic Co. of America, Inc.,* 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956). In that case, Bernhardt, a New York resident, ****841** had entered into an employment contract (containing an arbitration clause) in New York with Polygraphic, a New York corporation. But, Bernhardt "was to perform" that contract after he "later became a resident of Vermont." *Id.,* at 199, 76 S.Ct., at 274. This Court was faced with the question whether, in light of *Erie,* a federal court should apply the Federal Arbitration Act in a diversity case when faced with state law hostile to arbitration. 350 U.S., at 200, 76 S.Ct., at 274-75. The Court did not reach that question, however, for it decided that the contract itself did not "involv[e]" interstate commerce and therefore fell outside the Act. *Id.,* at 200-202, 76 S.Ct., at 274-276. Since Congress, constitutionally speaking, *could* have applied the Act to Bernhardt's contract, say the parties, how then can we say that the Act's word "involving" reaches as far as the Commerce Clause itself?

The best response to this argument is to point to the way in which the Court reasoned in *Bernhardt,* and to what the Court said. It said that the *reason* the Act did not apply to Bernhardt's contract was that there was

> "*no showing that petitioner* while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or *was engaging in activity that affected commerce,* within the ***277** meaning of our decisions." *Id.,* at 200-201, 76 S.Ct., at 274-275 (emphasis added) (footnote omitted).

Thus, the Court interpreted the words "involving commerce" as broadly as the words "affecting commerce"; and, as we have said, these latter words normally mean a full exercise of constitutional power. At the same time, the Court's opinion does not discuss the implications of the "interstate" facts to which the respondents now point. For these reasons, *Bernhardt* does not require us to narrow the scope of the word "involving." And, we conclude that the word "involving," like "affecting," signals an intent to exercise Congress' commerce power to the full.

IV

[3] Section 2 applies where there is "a contract *evidencing a transaction* involving commerce." 9 U.S.C. § 2 (emphasis added). The second interpretive question focuses on the italicized words. Does "evidencing a transaction" mean only that the transaction (that the contract "evidences") must turn out, *in fact,* to have involved interstate commerce? Or, does it mean more?

Many years ago, Second Circuit Chief Judge Lumbard said that the phrase meant considerably more. He wrote:

> "The significant question ... is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, *at the time they entered into it* and accepted the arbitration clause, they *contemplated* substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, and if it, on its face, evidences interstate traffic ..., the contract should come within § 2. In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated." *Metro Industrial Painting Corp.* ***278** *v. Terminal Constr. Co.,* 287 F.2d 382, 387 (CA2 1961) (concurring opinion) (second emphasis added).

The Supreme Court of Alabama and several other courts have followed this view, known as the "contemplation of the parties" test. See *supra,* at 837.

We find the interpretive choice difficult, but for several reasons we conclude that the first interpretation ("commerce in fact") is more faithful to the statute than the second ("contemplation of the parties"). First, the "contemplation of the parties" interpretation, when viewed in terms of the statute's basic purpose, seems anomalous. That interpretation invites litigation about what was, or was not, "contemplated." Why would Congress intend a test that risks the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the Act to help the parties avoid? See *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.,* 460 U.S. 1, 29, 103 S.Ct. 927, 944, 74 L.Ed.2d 765 (1983) (the Act "calls for a summary and speedy disposition ****842** of motions or petitions to enforce arbitration clauses").

Moreover, that interpretation too often would turn the validity of an arbitration clause on what, from the perspective of the statute's basic purpose, seems happenstance, namely, whether the parties happened to think to insert a reference to interstate commerce in the document or happened to mention it in an initial conversation. After all, parties to a sales contract with an arbitration clause might naturally think about the goods sold, or about arbitration, but why should they naturally think about an interstate commerce connection?

Further, that interpretation fits awkwardly with the rest of § 2. That section, for example, permits parties to agree to submit to arbitration "an existing controversy arising out of" a contract made earlier. Why would Congress want to risk nonenforceability of this *later* arbitration agreement (even if fully connected with interstate commerce) simply because the parties did not properly "contemplate" (or write ***279** about) the interstate aspects of the earlier contract? The first interpretation, requiring only that the "transaction" *in fact* involve interstate commerce, avoids this anomaly, as it avoids the other anomalous effects growing out of the "contemplation of the parties" test.

Second, the statute's language permits the "commerce in fact" interpretation. That interpretation, we concede, leaves little work for the word "evidencing" (in the phrase "a contract evidencing a transaction") to perform, for every contract evidences some transaction. But, perhaps Congress did not want that word to perform much work. The Act's history, to the extent informative, indicates that the Act's supporters saw the Act as part of an effort to make arbitration agreements universally enforceable. They wanted to "get a Federal law" that would "cover" areas where the Constitution authorized Congress to legislate, namely, "interstate and foreign commerce and admiralty." Joint Hearings 16 (testimony of Julius H. Cohen). They urged Congress to model the Act after a New York statute that made enforceable a written arbitration provision "in a written contract," Act of Apr. 19, 1920, ch. 275, § 2, 1920 N.Y.Laws 803, 804. Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923) (testimony of Charles L. Bernheimer). Early drafts made enforceable a written arbitration provision "in *any contract* or maritime transaction *or* transaction involving commerce." S. 4214, 67th Cong., 4th Sess., § 2 (1922) (emphasis added); S. 1005, 68th Cong., 1st Sess. (1923); H.R. 646, 68th Cong., 1st Sess. (1924). Members of Congress, looking at that phrase, might have thought the words "any contract" standing alone went beyond Congress' constitutional authority. And, if so, they might have simply connected those words with the later words "transaction involving commerce," thereby creating the phrase that became law. Nothing in the Act's history suggests any other, more limiting, task for the language.

***280** Third, the basic practical argument underlying the "contemplation of the parties" test was, in Chief Judge

Lumbard's words, the need to "be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states." *Metro Industrial Painting Corp., supra,* at 386 (concurring opinion). The practical force of this argument has diminished in light of this Court's later holdings that the Act does displace state law to the contrary. See *Southland Corp. v. Keating,* 465 U.S., at 10-16, 104 S.Ct., at 858-861; *Perry v. Thomas,* 482 U.S., at 489-492, 107 S.Ct., at 2525-2527.

Finally, we note that an *amicus curiae* argues for an "objective" ("reasonable person" oriented) version of the "contemplation of the parties" test on the ground that such an interpretation would better protect consumers asked to sign form contracts by businesses. We agree that Congress, when enacting this law, had the needs of consumers, as well as others, in mind. See S.Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding "the delay and expense of litigation," will appeal "to big business and little business alike, ... corporate interests [and] ... individuals"). Indeed, arbitration's advantages often would seem helpful to individuals, ****843** say, complaining about a product, who need a less expensive alternative to litigation. See, *e.g.,* H.R.Rep. No. 97-542, p. 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices ..."). And, according to the American Arbitration Association (also an *amicus* here), more than one-third of its claims involve amounts below $10,000, while another third involve claims of $10,000 to $50,000 (with an average processing time of less than six ***281** months). App. to Brief for American Arbitration Association as *Amicus Curiae* 26-27.

We are uncertain, however, just how the "objective" version of the "contemplation" test would help consumers. Sometimes, of course, it would permit, say, a consumer with potentially large damages claims to disavow a contract's arbitration provision and proceed in court. But, if so, it would equally permit, say, local business entities to disavow a contract's arbitration provisions, thereby leaving the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set) without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.

[4] In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent. See *Volt Information Sciences, Inc.,* 489 U.S., at 474, 109 S.Ct., at 1253.

For these reasons, we accept the "commerce in fact" interpretation, reading the Act's language as insisting that the "transaction" in fact "involv [e]" interstate commerce, even if the parties did not contemplate an interstate commerce connection.

***282** V

The parties do not contest that the transaction in this case, in fact, involved interstate commerce. In addition to the multistate nature of Terminix and Allied-Bruce, the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama.

Consequently, the judgment of the Supreme Court of Alabama is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O'CONNOR, concurring.

I agree with the Court's construction of § 2 of the Federal Arbitration Act. As applied in federal courts, the Court's interpretation comports fully with my understanding of congressional intent. A more restrictive definition of "evidencing" and "involving" would doubtless foster prearbitration litigation that would frustrate the very

purpose of the statute. As applied in state courts, however, the effect of a broad formulation of § 2 is more troublesome. The reading of § 2 adopted today will displace many state statutes carefully calibrated to protect consumers, see, *e.g.,* Mont.Code Ann. § 27-5-114(2)(b) (1993) (refusing to enforce arbitration clauses in consumer contracts where the consideration is $5,000 or less), and state procedural requirements aimed at ensuring knowing and voluntary consent, see, *e.g.,* S.C.Code Ann. § 15-48-10(a) (Supp.1993) (requiring that notice of arbitration provision be prominently placed on first page of contract). I have long adhered to the view, discussed below, that Congress designed the Federal Arbitration Act to apply only in federal ****844** courts. But if we are to apply the Act in state courts, it makes little sense to read § 2 differently in that context. In the end, my agreement with the Court's construction of § 2 rests largely on the wisdom of maintaining a uniform standard.

***283** I continue to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass. See *Southland Corp. v. Keating,* 465 U.S. 1, 21-36, 104 S.Ct. 852, 863-871, 79 L.Ed.2d 1 (1984) (O'CONNOR, J., dissenting); see also *Perry v. Thomas,* 482 U.S. 483, 494-495, 107 S.Ct. 2520, 2528, 96 L.Ed.2d 426 (1987) (O'CONNOR, J., dissenting); *York International v. Alabama Oxygen Co.,* 465 U.S. 1016, 104 S.Ct. 1260, 79 L.Ed.2d 668 (1984) (O'CONNOR, J., dissenting from remand). We have often said that the pre-emptive effect of a federal statute is fundamentally a question of congressional intent. See, *e.g., Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992); *English v. General Elec. Co.,* 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2274-2275, 110 L.Ed.2d 65 (1990); *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 299, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316 (1988); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Indeed, we have held that " '[w]here ... the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.' " *English, supra,* 496 U.S., at 79, 110 S.Ct., at 2275, quoting *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Yet, over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation. See *Perry v. Thomas, supra,* 482 U.S., at 493, 107 S.Ct., at 2527-2528 (STEVENS, J., dissenting) ("It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend"). I have no doubt that Congress could enact, in the first instance, a federal arbitration statute that displaces most state arbitration laws. But I also have no doubt that, in 1925, Congress enacted no such statute.

Were we writing on a clean slate, I would adhere to that view and affirm the Alabama court's decision. But, as the Court points out, more than 10 years have passed since *Southland,* several subsequent cases have built upon its reasoning, and parties have undoubtedly made contracts in reliance ***284** on the Court's interpretation of the Act in the interim. After reflection, I am persuaded by considerations of *stare decisis,* which we have said "have special force in the area of statutory interpretation," *Patterson v. McLean Credit Union,* 491 U.S. 164, 172-173, 109 S.Ct. 2363, 2370-2371, 105 L.Ed.2d 132 (1989), to acquiesce in today's judgment. Though wrong, *Southland* has not proved unworkable, and, as always, "Congress remains free to alter what we have done." *Ibid.*

Today's decision caps this Court's effort to expand the Federal Arbitration Act. Although each decision has built logically upon the decisions preceding it, the initial building block in *Southland* laid a faulty foundation. I acquiesce in today's judgment because there is no "special justification" to overrule *Southland. Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 2310-11, 81 L.Ed.2d 164 (1984). It remains now for Congress to correct this interpretation if it wishes to preserve state autonomy in state courts.

Justice SCALIA, dissenting.

I have previously joined two judgments of this Court that rested upon the holding of *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); *Perry v. Thomas,* 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). In neither of those cases, however, did any party ask that *Southland* be overruled, and it was therefore not necessary to consider the question. In the present case, by contrast, one of respondents' central arguments is that *Southland*

was wrongly decided, and their ****845** request for its overruling has been supported by an *amicus* brief signed by the attorneys general of 20 States. For the reasons set forth in Justice THOMAS' opinion, which I join, I agree with the respondents (and belatedly with Justice O'CONNOR) that *Southland* clearly misconstrued the Federal Arbitration Act.

I do not believe that proper application of *stare decisis* prevents correction of the mistake. Adhering to *Southland* ***285** entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes. Abandoning it does not impair reliance interests to a degree that justifies this evil. Primary behavior is not affected: No rule of conduct is retroactively changed, but only (perhaps) the forum in which violation is to be determined and remedied. I doubt that many contracts with arbitration clauses would have been forgone, or entered into only for significantly higher remuneration, absent the *Southland* guarantee. Where, moreover, reliance on *Southland* did make a significant difference, rescission of the contract for mistake of law would often be available. See 3 A. Corbin, Corbin on Contracts § 616 (1960 ed. and Supp.1992); Restatement (Second) of Contracts § 152 (1979).

I shall not in the future dissent from judgments that rest on *Southland.* I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time, the course of future lawmaking seems unlikely to be affected by its existence, cf. *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 34-35, 109 S.Ct. 2273, 2298-2299, 105 L.Ed.2d 1 (1989) (SCALIA, J., concurring in part and dissenting in part), and the accumulated private reliance will not likely increase beyond the level it has already achieved (few contracts not terminable at will have more than a 5-year term).

For these reasons, I respectfully dissent from the judgment of the Court.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

I disagree with the majority at the threshold of this case, and so I do not reach the question that it decides. In my view, the Federal Arbitration Act (FAA) does not apply in state courts. I respectfully dissent.

I

In *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), this Court concluded that § 2 of the FAA "appl[ies] in state as ***286** well as federal courts," *id.,* at 12, 104 S.Ct., at 859, and "withdr [aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," *id.,* at 10, 104 S.Ct., at 858. In my view, both aspects of *Southland* are wrong.

A

Section 2 of the FAA declares that an arbitration clause contained in "a contract evidencing a transaction involving commerce" shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; see also § 1 (defining "commerce," as relevant here, to mean "commerce among the several States or with foreign nations"). On its face, and considered out of context, § 2 draws no apparent distinction between federal courts and state courts. But not until 1959-nearly 35 years after Congress enacted the FAA-did any court suggest that § 2 applied in state courts. See *Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F.2d 402, 407 (CA2 1959), cert. dism'd, 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37 (1960). No state court agreed until the 1960's. See, *e.g., REA Express v. Missouri Pacific R. Co.,* 447 S.W.2d 721, 726 (Tex.Civ.App.1969) (stating that the FAA applies but noting that it had been waived in the case at hand); cf. *Rubewa Products Co. v. Watson's Quality Turkey Products, Inc.,* 242 A.2d 609, 613 (D.C.1968) (same). This Court waited until 1984 to conclude, over a strong dissent by Justice O'CONNOR, that § 2 extends to the States. See *Southland, supra,* 465 U.S., at 10-16, 104 S.Ct., at 858-861.

The explanation for this delay is simple: The statute that Congress enacted actually applies only in federal courts. At the time of the FAA's passage in 1925, laws governing the enforceability of arbitration agreements ****846** were generally thought to deal purely with matters of procedure rather than substance, because they were directed solely to the mechanisms for resolving the underlying disputes. As then-Judge Cardozo explained: "Arbitration is a form of procedure whereby differences may be settled. It is not a definition of ***287** the rights and wrongs out of which

differences grow." *Berkovitz v. Arbib & Houlberg, Inc.,* 230 N.Y. 261, 270, 130 N.E. 288, 290 (1921) (holding the New York arbitration statute of 1920, from which the FAA was copied, to be purely procedural).[1] It would have been extraordinary for Congress to ***288** attempt to prescribe procedural rules for *state* courts. See, *e.g., Ex parte Gounis,* 304 Mo. 428, 437, 263 S.W. 988, 990 (1924) (describing the rule that Congress cannot "regulate or control [state courts'] modes of procedure" as one of the "general principles which have come to be accepted as settled constitutional law"). And because the FAA was enacted against this general background, no one read it as such an attempt. See, *e.g.,* Baum & Pressman, The Enforcement of Commercial Arbitration Agreements in the Federal Courts, 8 N.Y.U.L.Q.Rev. 428, 459 (1931) (noting that the FAA "does not purport to extend its teeth to state proceedings," though arguing that it constitutionally could have done so); 6 S. Williston & G. Thompson, Law of Contracts 5368 (rev. ed. 1938) ("Inasmuch as arbitration acts are deemed procedural, the [FAA] applies only to the federal courts ..." (footnote omitted)); cf. *Southland,* 465 U.S., at 25-29, 104 S.Ct., at 865-868 (O'CONNOR, J., dissenting) (describing "unambiguous" legislative history to this effect).

1 See also, *e.g., Atlantic Fruit Co. v. Red Cross Line,* 276 F. 319, 323 (SDNY 1921) ("Arbitration statutes or judicial recognition of the enforceability of such provisions do not confer a substantive right, but a remedy for the enforcement of the right which is created by the agreement of the parties"), aff'd, 5 F.2d 218 (CA2 1924); Cohen & Dayton, The New Federal Arbitration Law, 12 Va.L.Rev. 265, 276 (1926) ("[W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought. That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts" (footnote omitted)); Baum & Pressman, The Enforcement of Commercial Arbitration Agreements in the Federal Courts, 8 N.Y.U.L.Q.Rev. 428, 430 (1931) (referring uncritically to "the prevalent notions that arbitration legislation affects merely the remedy or procedural aspects and not substance"); 2 J. Beale, Conflict of Laws 1245-1246 (1935) ("American courts, without exception, hold that arbitration agreements pertain to remedy or procedure. Consequently, the law of the for[u]m determines their enforceability ..." (footnote omitted)); cf. *Alexandria Canal Co. v. Swann,* 46 U.S. (5 How.) 83, 87-88, 12 L.Ed. 60 (1847) (whether a court should grant the parties' motion to refer a lawsuit to a panel of arbitrators, and then should enter judgment on the arbitrators' award, was "not [a question] upon the rights of the respective parties, but upon the mode of proceeding by which they were determined," and hence was governed by the law of the forum).

The prevalent view that arbitration statutes were purely procedural does conflict with this Court's reasoning in *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924), a case that in other respects undermines *Southland* 's position. See *infra,* Part I-B. Without analyzing the question, our opinion in *Red Cross Line* assumed that the threshold validity of an arbitration agreement (like the validity of other sorts of contracts) is a matter of "substantive" law. See 264 U.S., at 122-123, 44 S.Ct., at 276-277. But our actual holding-that the remedies available to enforce a valid arbitration agreement do *not* involve "substantive" law, see *id.,* at 124-125, 44 S.Ct., at 277-278-was perfectly consistent with the customary view. As discussed below, moreover, the FAA's text clearly reflects Congress' view that the statute it enacted was purely procedural.

Indeed, to judge from the reported cases, it appears that no state court was even *asked* to enforce the statute for many years after the passage of the FAA. Federal courts, for their part, refused to apply state arbitration statutes in cases to which the FAA was inapplicable. See, *e.g., California Prune & Apricot Growers' Assn. v. Catz American Co.,* 60 F.2d 788 (CA9 1932). Their refusal was not the outgrowth of this Court's decision in *Swift v. Tyson,* 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842), which held that certain categories of state judicial decisions were not "laws" for purposes of the Rules of Decisions Act and hence were not binding in federal courts; even under *Swift,* state statutes unambiguously constituted "laws." Rather, federal courts did not apply the state arbitration statutes because the statutes were not considered *substantive* laws. See *California* ****847** *Prune, supra,* at 790 ("It is undoubtedly true that a federal court in proper cases may enforce state laws; but this principle is applicable only when the state legislation invoke[d] creates or establishes a substantive ***289** or general right"). In short, state arbitration statutes prescribed rules for the state courts, and the FAA prescribed rules for the federal courts.

It is easy to understand why lawyers in 1925 classified arbitration statutes as procedural. An arbitration agreement is a species of forum-selection clause: Without laying down any rules of decision, it identifies the adjudicator of disputes. A strong argument can be made that such forum-selection clauses concern procedure rather than substance. Cf. Fed.Rules Civ.Proc. 73 (district court, with consent of the parties, may refer case to magistrate for resolution), 53 (district court may refer issues to special master). And if a contractual provision deals purely with matters of judicial procedure, one might well conclude that questions about whether and how it will be enforced also relate to procedure.

The context of § 2 confirms this understanding of the FAA's original meaning. Most sections of the statute plainly have no application in state courts, but rather prescribe rules either for federal courts or for arbitration proceedings themselves. Thus, § 3 provides:

> "If any suit or proceeding be brought in *any of the courts of the United States* upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3 (emphasis added).

Section 4 addresses the converse situation, in which a party breaches an arbitration agreement not by filing a lawsuit but rather by refusing to submit to arbitration:

> ***290** "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition *any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties,* for an order directing that such arbitration proceed in the manner provided for in such agreement.... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." (Emphasis added.)

The Act then turns its attention to the covered arbitration proceedings themselves, treating the arbitration forum as an extension of the federal courts. Section 7, for instance, provides that the fees for witnesses "shall be the same as the fees of witnesses before masters of the United States courts"; it adds that if a witness neglects a summons to appear at an arbitration hearing,

> "upon petition the United States district court for the district in which such arbitrators ... are sitting may compel the attendance of such person ... or punish said person ... for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States."

Likewise, when the arbitrator eventually issues an award, either party (absent contrary directions in the agreement) may apply to "the United States court in and for the district within which such award was made" for an order confirming the award. § 9. The district court may also vacate or modify the award in a few specified circumstances, §§ 10-11, but ***291** generally it will simply enter a confirmatory judgment, § 9, which is then docketed and given the same effect as a judgment in an ordinary civil case, § 13.

Despite the FAA's general focus on the federal courts, of course, § 2 itself contains ****848** no such explicit limitation. But the text of the statute nonetheless makes clear that § 2 was not meant as a statement of substantive law binding on the States. After all, if § 2 really was understood to "creat[e] federal substantive law requiring the parties to honor arbitration agreements," *Southland, supra,* 465 U.S., at 15, n. 9, 104 S.Ct., at 860, n. 9, then the breach of an arbitration agreement covered by § 2 would give rise to a federal question within the subject-matter jurisdiction of the federal district courts. See 28 U.S.C. § 1331. Yet the ensuing provisions of the Act, without expressly taking away this jurisdiction, clearly rest on the

assumption that federal courts have jurisdiction to enforce arbitration agreements only when they would have had jurisdiction over the underlying dispute. See 9 U.S.C. §§ 3, 4, 8. In other words, the FAA treats arbitration simply as one means of resolving disputes that lie within the jurisdiction of the federal courts; it makes clear that the breach of a covered arbitration agreement does not itself provide any independent basis for such jurisdiction. Even the *Southland* majority was forced to acknowledge this point, conceding that § 2 "does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." 465 U.S., at 15, n. 9, 104 S.Ct., at 860, n. 9. But the *reason* that § 2 does not give rise to federal-question jurisdiction is that it was enacted as a purely procedural provision. For the same reason, it applies only in the federal courts.

The distinction between "substance" and "procedure" acquired new meaning after *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Thus, in 1956 we held that for *Erie* purposes, the question whether a court should stay litigation brought in breach of an arbitration agreement is one of "substantive" law. ***292** *Bernhardt v. Polygraphic Co. of America, Inc.,* 350 U.S. 198, 203-204, 76 S.Ct. 273, 276-277, 100 L.Ed. 199. But this later development could not change the original meaning of the statute that Congress enacted in 1925. Although *Bernhardt* classified portions of the FAA as "substantive" rather than "procedural," it does not mean that they were so understood in 1925 or that Congress extended the FAA's reach beyond the federal courts.

When Justice O'CONNOR pointed out the FAA's original meaning in her *Southland* dissent, see 465 U.S., at 25-30, 104 S.Ct., at 865-868, the majority offered only one real response. If § 2 had been considered a purely procedural provision, the majority reasoned, Congress would have extended it to *all* contracts rather than simply to maritime transactions and "contract[s] evidencing a transaction involving [interstate or foreign] commerce." See *id.,* at 14, 104 S.Ct., at 860. Yet Congress might well have thought that even if it *could* have called upon federal courts to enforce arbitration agreements in every single case that came before them, there was no federal interest in doing so unless interstate commerce or maritime transactions were involved. This conclusion is far more plausible than *Southland* 's idea that Congress both viewed § 2 as a statement of substantive law and believed that it created no federal-question jurisdiction.

Even if the interstate commerce requirement raises uncertainty about the original meaning of the statute, we should resolve the uncertainty in light of core principles of federalism. While "Congress may legislate in areas traditionally regulated by the States" as long as it "is acting within the powers granted it under the Constitution," we assume that "Congress does not exercise [this power] lightly." *Gregory v. Ashcroft,* 501 U.S. 452, 460, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991). To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather, we must be "absolutely certain" that Congress intended such displacement before we give preemptive effect to a federal statute. *Id.,* at 464, 111 S.Ct., at 2403. In 1925, the enactment of a "substantive" arbitration statute ***293** along the lines envisioned by *Southland* would have displaced an enormous body of state law: Outside of a few States, predispute arbitration agreements either were wholly unenforceable or at least were not subject to specific performance. See generally Note to *Williams v. Branning Mfg. Co.,* 47 L.R.A. (n.s.) 337 (1914) (detailed listing of state cases). Far from being "absolutely certain" ****849** that Congress swept aside these state rules, I am quite sure that it did not.

B

Suppose, however, that the first aspect of *Southland* was correct: § 2 requires States to enforce the covered arbitration agreements and pre-empts all contrary state law. There still would be no textual basis for *Southland* 's suggestion that § 2 requires the States to enforce those agreements through the remedy of specific performance-that is, by forcing the parties to submit to arbitration. A contract surely can be "valid, irrevocable, and enforceable" even though it can be enforced only through actions for damages. Thus, on the eve of the FAA's enactment, this Court described executory arbitration agreements as being "valid" and as creating "a perfect obligation" under federal law even though federal courts refused to order their specific performance. See *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109, 120-123, 44 S.Ct. 274, 275-277, 68 L.Ed. 582 (1924). [2]

2 At the time, indeed, federal courts would award only *nominal* damages for the breach of such agreements. See *Aktieselskabet Korn-Og Foderstof Kompagniet v.*

Rederiaktiebolaget Atlanten, 250 F. 935, 937 (CA2 1918), aff'd on other grounds *sub nom. The Atlanten,* 252 U.S. 313, 40 S.Ct. 332, 64 L.Ed. 586 (1920); *Munson v. Straits of Dover S. S. Co.,* 99 F. 787, 790-791 (SDNY), aff'd, 102 F. 926 (CA2 1900).

To be sure, §§ 3 and 4 of the FAA require that *federal* courts specifically enforce arbitration agreements. These provisions deal, respectively, with the potential plaintiffs and the potential defendants in the underlying dispute: § 3 holds ***294** the plaintiffs to their promise not to take their claims straight to court, while § 4 holds the defendants to their promise to submit to arbitration rather than making the other party sue them. Had this case arisen in one of the "courts of the United States," it is § 3 that would have been relevant. Upon proper motion, the court would have been obliged to grant a stay pending arbitration, unless the contract between the parties did not "evidenc[e] a transaction involving [interstate] commerce." See *Bernhardt, supra,* 350 U.S., at 202, 76 S.Ct., at 275-276 (holding that § 3 is limited to the arbitration agreements that § 2 declares valid). Because this case arose in the courts of Alabama, however, petitioners are forced to contend that § 2 imposes precisely the same obligation on *all* courts (both federal and state) that § 3 imposes solely on *federal* courts. Though *Southland* supports this argument, it simply cannot be correct, or § 3 would be superfluous.

Alabama law brings these issues into sharp focus. Citing "public policy" grounds that reach back to *Bozeman v. Gilbert,* 1 Ala. 90 (1840), Alabama courts have declared that predispute arbitration agreements are "void." See, *e.g., Wells v. Mobile County Bd. of Realtors,* 387 So.2d 140, 144 (Ala.1980). But a separate state statute also includes "[a]n agreement to submit a controversy to arbitration" among the obligations that "cannot be specifically enforced" in Alabama. Ala.Code § 8-1-41 (1975). Especially in light of the *Gregory v. Ashcroft* presumption, § 2-even if applicable to the States-is most naturally read to pre-empt only Alabama's common-law rule and not the state statute; the statute does not itself make executory arbitration agreements invalid, revocable, or unenforceable, any more than the inclusion of "[a]n obligation to render personal service" in the same statutory provision means that employment contracts are invalid in Alabama. In the case at hand, the specific-enforcement statute appears to provide an adequate ground for the denial of petitioners' motion for a stay.

***295** II

Rather than attempting to defend *Southland* on its merits, petitioners rely chiefly on the doctrine of *stare decisis* in urging us to adhere to our mistaken interpretation of the FAA. See Reply Brief for Petitioners 3-6. In my view, that doctrine is insufficient to save *Southland.*

The majority (*ante,* at 838-839) and Justice O'CONNOR (*ante,* at 844) properly focus on whether overruling *Southland* would frustrate the legitimate expectations of people who have drafted and executed contracts in the belief that even state courts will strictly enforce arbitration clauses. I do not doubt ****850** that innumerable contracts containing arbitration clauses have been written since 1984, or that arbitrable disputes might yet arise out of a large proportion of these contracts. Some of these contracts might well have been written differently in the absence of *Southland.* Still, I see no reason to think that the costs of overruling *Southland* are unacceptably high. Certainly no reliance interests are involved in cases like the present one, where the applicability of the FAA was not within the contemplation of the parties at the time of contracting. In many other cases, moreover, the parties will simply comply with their arbitration agreement, either on the theory that they should live up to their promises or on the theory that arbitration is the cheapest and best way of resolving their dispute. In a fair number of the remaining cases, the party seeking to enforce an arbitration agreement will be able to get into federal court, where the FAA will apply. And even if access to federal court is impossible (because § 2 creates no independent basis for federal-question jurisdiction), many cases will arise in States whose own law largely parallels the FAA. Only Alabama, Mississippi, and Nebraska still hold all executory arbitration agreements to be unenforceable, though some other States refuse to enforce particular classes of such agreements. See Strickland, The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State ***296** Arbitration Law?, 21 Hofstra L.Rev. 385, 401-403, and n. 93 (1992).

Quoting *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 2310-2311, 81 L.Ed.2d 164 (1984), Justice O'CONNOR nonetheless acquiesces in the majority's judgment "because there is no 'special justification' to overrule *Southland.*" *Ante,* at 844. Even under this

approach, the necessity of "preserv[ing] state autonomy in state courts," *ibid.,* seems sufficient to me.

But suppose that *stare decisis* really did require us to abide by *Southland* 's holding that § 2 applies to the States. The doctrine still would not require us to follow *Southland* 's suggestion that § 2 requires the specific enforcement of the arbitration agreements that it covers. We accord no precedential weight to mere dicta, and this latter suggestion was wholly unnecessary to the decision in *Southland.* The arbitration agreement at issue there, if valid at all with respect to the particular claims in dispute, clearly was subject to specific performance under state law; indeed, the state trial court had already compelled arbitration for all the other claims raised in the complaint. See *Southland,* 465 U.S., at 4, 104 S.Ct., at 855; Cal.Civ.Proc.Code Ann. §§ 1281.2, 1281.4 (West 1982). Accordingly, the only question properly before the *Southland* Court was whether § 2 pre-empted a separate state law declaring the arbitration agreement "void" as applied to the remaining claims. See 465 U.S., at 10, 104 S.Ct., at 858 (discussing Cal.Corp.Code Ann. § 31512 (West 1977)). The same can be said for *Perry v. Thomas,* 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), in which we again held that § 2 pre-empted a California statute that (as we had observed in a prior case, see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117, 133, 94 S.Ct. 383, 392-393, 38 L.Ed.2d 348 (1973)) made certain arbitration clauses "unenforceable." We have subsequently reserved judgment about the extent to which state courts must enforce arbitration agreements through the mechanisms that §§ 3 and 4 of the FAA prescribe for the *federal* courts. See ***297** *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 477, 109 S.Ct. 1248, 1254-1255, 103 L.Ed.2d 488 (1989). Cf. *McDermott Int'l, Inc. v. Lloyds Underwriters of London,* 944 F.2d 1199, 1210 (CA5 1991) ("We conclude from the Supreme Court's opinions that state courts do not necessarily have to grant stays of conflicting litigation or compel arbitration in compliance with the FAA's sections 3 and 4"). In short, we have never actually held, as opposed to stating or implying in dicta, that the FAA requires a state court to stay lawsuits brought in violation of an arbitration agreement covered by § 2.

Because I believe that the FAA imposes no such obligation on state courts, and indeed that the statute is wholly inapplicable in ****851** those courts, I would affirm the Alabama Supreme Court's judgment.

All Citations

513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753, 63 USLW 4079

87 S.Ct. 1801
Supreme Court of the United States

PRIMA PAINT CORPORATION, Petitioner,
v.
FLOOD & CONKLIN MFG. CO.

No. 343.
|
Argued March 16, 1967.
|
Decided June 12, 1967.

Synopsis

Action to rescind contract, wherein plaintiff moved to stay arbitration and defendant moved to stay action pending arbitration. The United States District Court for the Southern District of New York, 262 F.Supp. 605, granted defendant's motion, and plaintiff appealed. The United States Court of Appeals for the Second Circuit, 360 F.2d 315, dismissed the appeal, and plaintiff obtained certiorari. The Supreme Court, Mr. Justice Fortas, held that under United States Arbitration Act, claim of fraud in inducement of entire contract was for arbitrators under arbitration clause providing for reference of any controversy or claim arising out of or relating to agreement or breach thereof, in absence of evidence that contracting parties intended to withhold that issue from arbitration.

Affirmed.

Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Stewart dissented.

West Headnotes (8)

[1] Alternative Dispute Resolution
Constitutional and statutory provisions and rules of court

Commerce
Arbitration

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 Constitutional and statutory provisions and rules of court
(Formerly 33k2.1 Arbitration, 95k284(1))
83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 Arbitration
(Formerly 33k2.1 Arbitration, 95k284(1))

Agreement whereunder defendant sold paint business, serving at least 175 wholesale clients in a number of states, and plaintiff secured defendant's assistance in arranging transfer of manufacturing and selling operations from New Jersey to Maryland, with defendant to render consultation services, was a transaction in "commerce", within United States Arbitration Act. 9 U.S.C.A. §§ 1, 2.

385 Cases that cite this headnote

[2] Alternative Dispute Resolution
Constitutional and statutory provisions and rules of court

Commerce
Arbitration

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 Constitutional and statutory provisions and rules of court
(Formerly 33k2.1 Arbitration, 95k284(1))
83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 Arbitration
(Formerly 33k2.1 Arbitration, 95k284(1))

Transactions in "commerce", within United States Arbitration Act, are not limited to contracts between merchants for interstate shipment of goods. 9 U.S.C.A. §§ 1, 2.

325 Cases that cite this headnote

[3] Alternative Dispute Resolution
Proceedings

25T Alternative Dispute Resolution

25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk190 Stay of Proceedings Pending Arbitration
25Tk194 Proceedings
(Formerly 33k23.13, 33k23.12 Arbitration, 95k2921/2, 95k292)

In passing on application for stay pending arbitration, federal court may consider only issues relating to making and performance of agreement to arbitrate. 9 U.S.C.A. § 3.

1168 Cases that cite this headnote

[4] Federal Courts
State Courts and Their Decisions in General

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision;Erie Doctrine
170BXV(A) In General
170Bk3006 Sources of Authority
170Bk3008 State Courts and Their Decisions in General
170Bk3008(1) In general
(Formerly 170Bk381, 106k365(1))

Federal courts are bound in diversity cases to follow state rules of decision in matters which are "substantive" rather than "procedural" or where matter is "outcome determinative."

16 Cases that cite this headnote

[5] Constitutional Law
Remedies and procedure in general

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2357 Remedies and procedure in general
(Formerly 92k55)

Congress may prescribe how federal courts are to conduct themselves with respect to subject matter of which Congress plainly has power to legislate.

4 Cases that cite this headnote

[6] Admiralty
Effect of United States Constitution; powers of Congress

Commerce
Arbitration

16 Admiralty
16I Jurisdiction
16k1.6 Effect of United States Constitution; powers of Congress
(Formerly 16k1)
83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 Arbitration
(Formerly 83k80)

United States Arbitration Act is constitutional as based upon and confined to federal foundations of control over interstate commerce and over admiralty. 9 U.S.C.A. §§ 1–14.

54 Cases that cite this headnote

[7] Constitutional Law
Nature and scope in general

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2450 Nature and scope in general
(Formerly 92k67)

Federal courts are bound to apply rules enacted by Congress with respect to matters over which it has legislative power.

12 Cases that cite this headnote

[8] Alternative Dispute Resolution
Existence and validity of agreement

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 Existence and validity of agreement
(Formerly 25Tk143, 33k7.5 Arbitration, 95k285(2))

Under United States Arbitration Act, claim of fraud in inducement of entire contract was for arbitrators under arbitration clause

providing for reference of any controversy or claim arising out of or relating to agreement or breach thereof, in absence of evidence that contracting parties intended to withhold that issue from arbitration. 9 U.S.C.A. §§ 1–14.

2228 Cases that cite this headnote

Attorneys and Law Firms

****1802** ***396** Robert P. Herzog, New York City, for petitioner.

Martin A. Coleman, New York City, for respondent.

Gerald Aksen, New York City, for the American Arbitration Assn., as amicus curiae.

Opinion

Mr. Justice FORTAS delivered the opinion of the Court.

This case presents the question whether the federal court or an arbitrator is to resolve a claim of 'fraud in ***397** the inducement,' under a contract governed by the United States Arbitration Act of 1925,[1] where there is no evidence that the contracting parties intended to withhold that issue from arbitration.

1 9 U.S.C. ss 1—14.

The question arises from the following set of facts. On October 7, 1964, respondent, Flood & Conklin Manufacturing Company, a New Jersey corporation, entered into what was styled a 'Consulting Agreement,' with petitioner, Prima Paint Corporation, a Maryland corporation. This agreement followed by less than three weeks the execution of a contract pursuant to which Prima Paint purchased F & C's paint business. The consulting agreement provided that for a six-year period F & C was to furnish advice and consultation 'in connection with the formulae, manufacturing operations, sales and servicing of Prima Trade Sales accounts.' These services were to be performed personally by F & C's chairman, Jerome K. Jelin, 'except in the event of his death or disability.' F & C bound itself for the duration of the contractual period to make no 'Trade Sales' of paint or paint products in its existing sales territory or to current customers. To the ****1803** consulting agreement were appended lists of F & C customers, whose patronage was to be taken over by Prima Paint. In return for these lists, the covenant not to compete, and the services of Mr. Jelin, Prima Paint agreed to pay F & C certain percentages of its receipts from the listed customers and from all others, such payments not to exceed $225,000 over the life of the agreement. The agreement took into account the possibility that Prima Paint might encounter financial difficulties, including bankruptcy, but no corresponding reference was made to possible financial problems which might be encountered by F & C. The agreement stated that it 'embodies the entire understanding of the parties ***398** on the subject matter.' Finally, the parties agreed to a broad arbitration clause, which read in part:

'Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association * * *.'

The first payment by Prima Paint to F & C under the consulting agreement was due on September 1, 1965. None was made on that date. Seventeen days later, Prima Paint did pay the appropriate amount, but into escrow. It notified attorneys for F & C that in various enumerated respects their client had broken both the consulting agreement and the earlier purchase agreement. Prima Paint's principal contention, so far as presently relevant, was that F & C had fraudulently represented that it was solvent and able to perform its contractual obligations, where as it was in fact insolvent and intended to file a petition under Chapter XI of the Bankruptcy Act, 52 Stat. 905, 11 U.S.C. s 701 et seq., shortly after execution of the consulting agreement. Prima Paint noted that such a petition was filed by F & C on October 14, 1964, one week after the contract had been signed. F & C's response, on October 25, was to serve a 'notice of intention to arbitrate.' On November 12, three days before expiration of its time to answer this 'notice,' Prima Paint filed suit in the United States District Court for the Southern District of New York, seeking rescission of the consulting agreement on the basis of the alleged

fraudulent inducement. [2] The complaint asserted that the federal court had diversity jurisdiction.

[2] Although the letter to F & C's attorneys had alleged breaches of both consulting and purchasing agreements, and the fraudulent inducement of both, the complaint did not refer to the earlier purchase agreement, alleging only that Prima Paint had been 'fraudulently induced to accelerate the execution and closing date of the (consulting) agreement herein, from October 21, 1964 to October 7, 1964. * * *'

***399** Contemporaneously with the filing of its complaint, Prima Paint petitioned the District Court for an order enjoining F & C from proceeding with the arbitration. F & C cross-moved to stay the court action pending arbitration. F & C contended that the issue presented —whether there was fraud in the inducement of the consulting agreement—was a question for the arbitrators and not for the District Court. Cross-affidavits were filed on the merits. On behalf of Prima Paint, the charges in the complaint were reiterated. Affiants for F & C attacked the sufficiency of Prima Paint's allegations of fraud, denied that misrepresentations had been made during negotiations, and asserted that Prima Paint had relied exclusively upon delivery of the lists, the promise not to compete, and the availability of Mr. Jelin. They contended that Prima Paint had availed itself of these considerations for nearly a year without claiming 'fraud,' noting that Prima Paint was in no position to claim ignorance of the bankruptcy proceeding since it had participated therein in February of 1965. They added that F & C was revested with its assets in March of 1965.

The District Court, 262 F.Supp. 605, granted F & C's motion to stay the action ****1804** pending arbitration, holding that a charge of fraud in the inducement of a contract containing an arbitration clause as broad as this one was a question for the arbitrators and not for the court. For this proposition it relied on Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (C.A.2d Cir. 1959), cert. granted, 362 U.S. 909, 80 S.Ct. 682, 4 L.Ed.2d 618, dismissed under Rule 60, 364 U.S. 801 (1960). The Court of Appeals for the Second Circuit dismissed Prima Paint's appeal, 2 Cir., 360 F.2d 315. It held that the contract in question evidenced a transaction involving interstate commerce; that under the controlling ***400** Robert Lawrence Co. decision a claim of fraud in the inducement of the contract generally—as opposed to the arbitration clause itself—is for the arbitrators and not for the courts; and that this rule—one of 'national substantive law'—governs even in the face of a contrary state rule. [3] We agree, albeit for somewhat different reasons, and we affirm the decision below.

[3] Whether a party seeking rescission of a contract on the ground of fraudulent inducement may in New York obtain judicial resolution of his claim is not entirely clear. Compare Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 334, 214 N.Y.S.2d 353, 174 N.E.2d 463, 465 (1961), and Amerotron Corp. v. Maxwell Shapiro Woolen Co., 3 A.D.2d 899, 162 N.Y.S.2d 214 (1957), aff'd, 4 N.Y.2d 722, 148 N.E.2d 319 (1958), with Fabrex Corp. v. Winard Sales Co., 23 Misc.2d 26, 200 N.Y.S.2d 278 (1960). In light of our disposition of this case, we need not decide the status of the issue under New York law.

The key statutory provisions are ss 2, 3, and 4 of the United States Arbitration Act of 1925. Section 2 provides that a written provision for arbitration 'in any maritime transaction or a contract evidencing a transaction involving commerce * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'[4] Section 3 requires a federal court in which suit has been brought 'upon any issue referable to arbitration under an agreement in writing for such arbitration' to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement. Section 4 provides a federal remedy for a party 'aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration,' and directs the federal court to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored. [5]

[4] The meaning of 'maritime transaction' and 'commerce' is set forth in s 1 of the Act.

[5] See, infra, at 1806.

***401** **[1]** **[2]** In Bernhardt v. Polygraphic Co., 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956), this Court held that the stay provisions of s 3, invoked here by respondent F & C, apply only to the two kinds of contracts specified in ss 1 and 2 of the Act, namely those in admiralty or evidencing transactions in 'commerce.' Our first question, then, is whether the consulting agreement between F & C and Prima Paint is such a contract. We agree with the Court of Appeals that it is. Prima Paint acquired a New Jersey paint business serving at least 175 wholesale

clients in a number of States, and secured F & C's assistance in arranging the transfer of manufacturing and selling operations from New Jersey to Maryland.[6] The consulting agreement **1805 was inextricably tied to this interstate transfer and to the continuing operations of an interstate manufacturing and wholesaling business. There could not be a clearer case of a contract evidencing a transaction in interstate commerce.[7]

6 This conclusion is amply supported by an affidavit submitted to the District Court by Prima Paint's own president, which read in part:
'The agreement entered into between the parties on October 7, 1964, contemplated and intended an orderly transfer of the assets of the defendant to the plaintiff, and further contemplated and intended that the defendant would consult, advise, assist and help the plaintiff so as to insure a smooth transition of manufacturing operations to Maryland from New Jersey, together with the sales and servicing of customer accounts and the retention of the said customers.'
The affidavit's references to a 'transfer of the assets' cannot fairly be read to mean only 'expertise and know-how * * * and a covenant not to compete,' as argued by counsel for petitioner.

7 It is suggested in dissent that, despite the absence of any language in the statute so indicating, we should construe it to apply only to 'contracts between merchants for the interstate shipment of goods.' Not only have we neither the desire nor the warrant so to amend the statute, but we find persuasive and authoritative evidence of a contrary legislative intent. See, e.g., the House Report on this legislation which proclaims that '(t)he control over interstate commerce (one of the bases for the legislation) reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.' H.R.Rep.No.96, 68th Cong., 1st Sess., 1 (1924). We note, too, that were the dissent's curious narrowing of the statute correct, there would have been no necessity for Congress to have amended the statute to exclude certain kinds of employment contracts. See s 1. In any event, the anomaly urged upon us in dissent is manifested by the present case. It would be remarkable to say that a contract for the purchase of a single can of paint may evidence a transaction in interstate commerce, but that an agreement relating to the facilitation of the purchase of an entire interstate paint business and its re-establishment and operation in another State is not.

*402 Having determined that the contract in question is within the coverage of the Arbitration Act, we turn to the central issue in this case: whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators. The courts of appeals have differed in their approach to this question. The view of the Court of Appeals for the Second Circuit, as expressed in this case and in others,[8] is that—except where the parties otherwise intend—arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.[9] The Court of Appeals for the First *403 Circuit, on the other hand, has taken the view that the question of 'severability' is one of state law, and that where a State regards such a clause as inseparable a claim of fraud in the inducement must be decided by the court. Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915, 923—924 (C.A.1st Cir.), cert. denied, 364 U.S. 911, 81 S.Ct. 274, 15 L.Ed.2d 225 (1960).[10]

8 In addition to Robert Lawrence Co., supra, see In re Kinoshita & Co., 287 F.2d 951 (C.A.2d Cir. 1961). With respect to claims other than fraud in the inducement, the court has followed a similar process of analysis. See, e.g., Metro Industrial Painting Corp. v. Terminal Constr. Co., 287 F.2d 382 (C.A.2d Cir. 1961) (dispute over performance); El Hoss Engineer. & Transport Co. v. American Ind. Oil Co., 289 F.2d 346 (C.A.2d Cir. 1961) (where, however, the court found an intent not to sumbit the issue in question to arbitration).

9 The Court of Appeals has been careful to honor evidence that the parties intended to withhold such issues from the arbitrators and to reserve them for judicial resolution. See El Hoss Engineer. & Transport Co. v. American Ind. Oil Co., supra. We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See s 1.

10 These cases and others are discussed in a recent Note, Commercial Arbitration in Federal Courts, 20 Vand.L.Rev. 607, 622—625 (1967).

**1806 [3] With respect to cases brought in federal court involving maritime contracts or those evidencing transactions in 'commerce,' we think that Congress has provided an explicit answer. That answer is to be found in s 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration agreement. Under s 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.' [11] Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which *404 goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. [12] But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a s 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

11 Section 4 reads in part: 'The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * * If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.'

12 This position is consistent both with the decision in Moseley v. Electronic & Missile Facilities, 374 U.S. 167, 171, 172, 83 S.Ct. 1815, 1817, 1818, 10 L.Ed.2d 818 (1963), and with the statutory scheme. As the 'saving clause' in s 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract—a situation inconsistent with the 'saving clause.'

[4] [5] [6] There remains the question whether such a rule is constitutionally permissible. The point is made that, whatever the nature of the contract involved here, this case is in federal court solely by reason of diversity of citizenship, and that since the decision in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal courts are bound in diversity cases to follow state rules of decision in matters which are 'substantive' rather than 'procedural,' *405 or where the matter is 'outcome determinative.' Guaranty Trust Co. of New York v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. See Bernhardt v. Polygraphic Co., supra, 350 U.S. at 202, and concurring opinion, at 208, 76 S.Ct. at 275 and at 279. Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute **1807 is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.' H.R.Rep.No.96, 68th Cong., 1st Sess., 1 (1924); S.Rep.No.536, 68th Cong., 1st Sess., 3 (1924). [13]

13 It is true that the Arbitration Act was passed 13 years before this Court's decision in Erie R. Co. v. Tompkins, supra, brought to an end the regime of Swift v. Tyson, 16 Pet. 1, 10 L.Ed. 865 (1842), and that at the time of enactment Congress had reason to believe that it still had power to create federal rules to govern questions of 'general law' arising in simple diversity cases—at least, absent any state statute to the contrary. If Congress relied at all on this 'oft-challenged' power, see Erie R. Co., 304 U.S., at 69, 58 S.Ct., at 818, it was only supplementary to the admiralty and commerce powers, which formed the principal bases of the legislation. Indeed, Congressman Graham, the bill's sponsor in the House, told his colleagues

that it 'only affects contracts relating to interstate subjects and contracts in admiralty.' 65 Cong.Rec. 1931 (1924). The Senate Report on this legislation similarly indicated that the bill '(relates) to maritime transactions and to contracts in interstate and foreign commerce.' S.Rep.No.536, 68th Cong., 1st Sess., 3 (1924).

Non-congressional sponsors of the legislation agreed. As Mr. Charles L. Bernheimer, chairman of the Arbitration Committee of the New York Chamber of Commerce, told the Senate subcommittee, the proposed legislation 'follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal jurisdiction. These fields are in admiralty and in foreign and interstate commerce.' Hearing on S. 4213 and S. 4214, before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923). In the joint House and Senate hearings, Mr. Bernheimer answered 'Yes; entirely,' to the statement of the chairman, Senator Sterling, that 'What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce.' Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 7 (1924). Mr. Julius Henry Cohen, draftsman for the American Bar Association of the proposed bill, said the sponsor's goals were: '(F)irst * * * to get a State statute, and then to get a Federal law to cover interstate and Foreign commerce and admiralty, and, third, to get a treaty with Foreign countries.' Joint Hearings, supra, at 16 (emphasis added). See also Joint Hearings, supra, at 27—28 (statement of Mr. Alexander Rose). Mr. Cohen did submit a brief to the Subcommittee urging a jurisdictional base broader than the commerce and admiralty powers, Joint Hearings, supra, at 37—38, but there is no indication in the statute or in the legislative history that this invitation to go beyond those powers was accepted, and his own testimony took a much narrower tack.

***406** **[7]** **[8]** In the present case no claim has been advanced by Prima Paint that F & C fraudulently induced it to enter into the agreement to arbitrate '(a)ny controversy or claim arising out of or relating to this Agreement, or the breach thereof.' This contractual language is easily broad enough to encompass Prima Paint's claim that both execution and acceleration of the consulting agreement itself were procured by fraud. Indeed, no claim is made that Prima Paint ever inteded that 'legal' issues relating to the contract be excluded from arbitration, or that it was not entirely free so to contract. Federal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power. The question which Prima Paint requested the District Court to adjudicate preliminarily to allowing arbitration to proceed is one ***407** not intended by Congress to delay the granting of a s 3 stay. Accordingly, the decision below dismissing Prima Paint's appeal is affirmed.

Affirmed.

Mr. Justice HARLAN:

In joining the Court's opinion I desire to note that I would also affirm the judgment below on the basis of Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (C.A.2d Cir. 1959), cert. granted, ****1808** 362 U.S. 909, 80 S.Ct. 682, 4 L.Ed.2d 618, dismissed under Rule 60, 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37 (1960).

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS and Mr. Justice STEWART join, dissenting.

The Court here holds that the United States Arbitration Act, 9 U.S.C. ss 1—14, as a matter of federal substantive law, compels a party to a contract containing a written arbitration provision to carry out his 'arbitration agreement' even though a court might, after a fair trial, hold the entire contract—including the arbitration agreement—void because of fraud in the inducement. The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so. I am by no means sure that thus forcing a person to forgo his opportunity to try his legal issues in the courts where, unlike the situation in arbitration, he may have a jury trial and right to appeal, is not a denial of due process of law. I am satisfied, however, that Congress did not impose any such procedures in the Arbitration Act. And I am fully satisfied that a ***408** reasonable and fair reading of that Act's language and history shows that both Congress and the framers of the Act were at great pains to emphasize that nonlawyers designated to adjust and arbitrate factual controversies

arising out of valid contracts would not trespass upon the courts' prerogative to decide the legal question of whether any legal contract exists upon which to base an arbitration.

I.

The agreement involved here is a consulting agreement in which Flood & Conklin agreed to perform certain services for and not to compete with Prima Paint. The agreement contained an arbitration clause providing that '(a)ny controversy or claim arising out of or relating to this Agreement * * * shall be settled by arbitration in the City of New York.' F & C, contending that Prima had failed to make a payment under the contract, sent Prima a 'Notice of Intention to Arbitrate' pursuant to the New York Arbitration Act.[1] Invoking diversity jurisdiction, Prima brought this action in federal district court to rescind the entire consulting agreement on the ground of fraud. The fraud allegedly consisted of F & C's misrepresentation at the time the contract was made, that it was solvent and able to perform the agreement, while in fact it was completely insolvent. Prima alleged that it would not have made any contract at all with F & C but for this misrepresentation. Prima simply contended that there was never a meeting of minds between the parties. F & C moved to stay Prima's lawsuit for rescission pending arbitration of the fraud issue raised by Prima. The lower courts, relying on the ***409** Second Circuit's decision in Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, cert. granted, 362 U.S. 909, 80 S.Ct. 682, 4 L.Ed.2d 618, dismissed, 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37, held that, as a matter of 'national substantive law,' the arbitration clause in the contract is 'separable' from the rest of the contract and that allegations that go to the validity of the contract in general, as opposed to the arbitration clause in particular, are to be decided by the arbitrator, not the court.

1 N.Y.Civ.Prac. s 7503 (1963) provides that once a party is served with a notice of intention to arbitrate, 'unless the party served applies to stay the arbitration within ten days after such service he shall thereafter be precluded from objecting that a valid agreement was not made * * *.'

The Court today affirms this holding for three reasons, none of which is supported ****1809** by the language or history of the Arbitration Act. First, the Court holds that because the consulting agreement was intended to supplement a separate contract for the interstate transfer of assets, it is itself a 'contract evidencing a transaction involving commerce,' the language used by Congress to describe contracts the Act was designed to cover. But in light of the legislative history which indicates that the Act was to have a limited application to contracts between merchants for the interstate shipment of goods,[2] and in light of the express failure of Congress to use language ***410** making the Act applicable to all contracts which 'affect commerce,' the statutory language Congress normally uses when it wishes to exercise its full powers over commerce,[3] I am not at all certain that the Act was intended to apply to this consulting agreement. Second, the Court holds that the language of s 4 of the Act provides an 'explicit answer' to the question of whether the arbitration clause is 'separable' from the rest of the contract in which it is contained. Section 4 merely provides that the court must order arbitration if it is 'satisfied that the making of the agreement for arbitration * * * is not in issue.' That language, considered alone, far from providing an 'explicit answer,' merely poses the further question of what kind of allegations put the making of the arbitration agreement in issue. Since both the lower courts assumed that but for the federal Act, New York law might apply and that under New York law a general allegation of fraud in the inducement puts into issue the making of the agreement to arbitrate (considered inseparable ***411** under New York law from the rest of the contract),[4] the ****1810** Court necessarily holds that federal law determines whether certain allegations put the making of the arbitration agreement in issue. And the Court approves the Second Circuit's fashioning of a federal separability rule which overrides state law to the contrary. The Court thus holds that the Arbitration Act, designed to provide merely a procedural remedy which would not interfere with state substantive law, authorizes federal courts to fashion a federal rule to make arbitration clauses 'separable' and valid. And the Court approves a rule which is not only contrary to state law, but contrary to the intention of the parties and to accepted principles of contract law—a rule which indeed elevates arbitration provisions above all other contractual provisions. As the Court recognizes, that result was clearly not intended by Congress. Finally, the Court summarily disposes of the problem raised by Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, recognized as a serious constitutional problem in Bernhardt v. Polygraphic Co., 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199, by insufficiently

supported assertions that it is 'clear beyond dispute' that Congress based the Arbitration Act on its power to regulate commerce and that '(i)f Congress relied at all on' its power to create federal law for diversity cases, such reliance 'was only supplementary.'

[2] The principal support for the Act came from trade associations dealing in groceries and other perishables and from commercial and mercantile groups in the major trading centers. 50 A.B.A.Rep. 357 (1925). Practically all who testified in support of the bill before the Senate subcommittee in 1923 explained that the bill was designed to cover contracts between people in different States who produced, shipped, bought, or sold commodities. Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 3, 7, 9, 10 (1923). The same views were expressed in the 1924 hearings. When Senator Sterling suggested, 'What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce,' Mr. Bernheimer, a chief exponent of the bill, replied: 'Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance.' Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Con., 1st Sess., 7. See also id., at 27.

[3] In some Acts Congress uses broad language and defines commerce to include even that which 'affects' commerce. Federal Employers' Liability Act, 35 Stat. 65, s 1, as amended, 45 U.S.C. s 51; National Labor Relations Act, 49 Stat. 450, s 2, as amended, 29 U.S.C. s 152(7). In other instances Congress has chosen more restrictive language. Fair Labor Standards Act of 1938, 52 Stat. 1062, s 6, as amended, 29 U.S.C. s 206. Prior to this case, this Court has always made careful inquiry to assure itself that it is applying a statute with the coverage that Congress intended, so that the meaning in that statute of 'commerce' will be neither expanded nor contracted. The Arbitration Act is an example of carefully limited language. It covers only those contracts 'involving commerce,' and nowhere is there a suggestion that it is meant to extend to contracts 'affecting commerce.' The Act not only uses narrow language, but also is completely without any declaration of some national interest to be served or some nationwide comprehensive scheme of regulation to be created, and this absence suggests that Congress did not intend to exert its full power over commerce.

[4] Although F & C requested arbitration pursuant to New York law, n. 1, supra, it is not entirely clear that New York law would apply in absence of the federal Act. And, as the Court points out, it is not entirely clear whether New York courts would consider Prima's promise to arbitrate inseparable from the rest of the contract. But, since Robert Lawrence held and the lower courts here assumed that application of New York law would produce a different result, and since the Court deems the status of state law immaterial to this case, I have assumed throughout this opinion that, in the absence of the Arbitration Act, Prima would have been able to obtain judicial resolution of its fraud allegations under New York law.

***412** II.

Let us look briefly at the language of the Arbitration Act itself as Congress passed it. Section 2, the key provision of the Act, provides that '(a) written provision in * * * a contract * * * involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' (Emphasis added.) Section 3 provides that '(i)f any suit * * * be brought * * * upon any issue referable to arbitration under an agreement in writing for such arbitration, the court * * * upon being satisfied that the issue involved in such suit * * * is referable to arbitration under such an agreement, shall * * * stay the trial of the action until such arbitration has been had * * *.'[5] (Emphasis added.) The language of these sections could not, I think, raise doubts about their meaning except to someone anxious to find doubts. They simply mean this: an arbitration agreement is to be enforced by a federal court unless the court, not the arbitrator, finds grounds 'at law or in equity for the revocation of any contract.' Fraud, of course, is one of the most common grounds for revoking a contract. If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated. Sections 2 and 3 of the Act assume the existence of a valid contract. They merely provide for enforcement where such a valid contract ***413** exists. These provisions were plainly designed to protect a person against whom arbitration is sought to be enforced from having to submit his legal issues as to validity of the contract to the arbitrator. The legislative history of the Act makes this clear. Senator Walsh of Montana, in hearings on the bill in 1923, observed, 'The court has

got to hear and determine **1811 whether there is an agreement of arbitration, undoubtedly, and it is open to all defenses, equitable and legal, that would have existed at law * * *.'[6] Mr. Piatt, who represented the American Bar Association which drafted and supported the Act, was even more explicit: 'I think this will operate something like an injunction process, except where he would attack it on the ground of fraud.'[7] And then Senator Walsh replied: 'If he should attack it on the ground of fraud, to rescind the whole thing. * * * I presume that it merely (is) a question of whether he did make the arbitration agreement or not, * * * and then he would possibly set up that he was misled about the contract and entered into it by mistake * * *.'[8] It is evident that Senator Walsh was referring to situations in which the validity of the entire contract is called into question. And Mr. Bernheimer, who represented one of the chambers of commerce in favor of the bill, assured the Senate subcommittee that '(t)he constitutional right to jury trial is adequately safeguarded' by the Act.[9] Mr. Cohen, the American Bar Association's draftsman of the bill, assured the members of Congress that the Act would not impair the right to a jury trial, because it deprives a person of that right only when he has voluntarily and validly waived it by agreeing to submit certain *414 disputes to arbitration.[10] The court and a jury are to determine both the legal existence and scope of such an agreement. The members of Congress revealed an acute awareness of this problem. On several occasions they expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees.[11] He noted that such contracts 'are really not voluntarily (sic) things at all' because 'there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court * * *.'[12] He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases. The significant thing is that Senator Walsh was not thinking in terms of the arbitration provisions being 'separable' parts of such contracts, parts which should be enforced without regard to why the entire contracts in which they were contained were agreed to. The issue for him was not whether an arbitration provision in a contract was made, but why, in the context of the entire contract and the circumstances *415 of the parties, the entire contract was made. That is precisely the issue that a general allegation of fraud in the inducement raises: Prima contended that it would not have executed any contract, including the arbitration clause, if it were not for the fraudulent representations of F & C. Prima's agreement to an arbitration clause in a contract obtained by fraud was no more 'voluntary' than an **1812 insured's or employee's agreement to an arbitration clause in a contract obtained by superior bargaining power.

5 This section, unlike s 4, is expressly applicable to situations like the present one where a defendant in a case already pending in federal court moves for a stay of the lawsuit. In finding an 'explicit answer' in a provision 'not expressly' applicable, the Court almost completely ignores the language of s 3 and the proviso to s 2, a section which Bernhardt held to 'define the field in which Congress was legislating.' 350 U.S., at 201, 76 S.Ct. at 275.

6 Senate Hearing, supra, at 5.

7 Ibid.

8 Ibid.

9 Senate Hearing, supra, at 2.

10 'The one constitutional provision we have got is that you have a right of trial by jury. But you can waive that. And you can do that in advance. Ah, but the question whether you waive it or not depends on whether that is your signature to the paper, or whether yu authorized that signature, or whether the paper is a valid paper or not, whether it was delivered properly. So there is a question there which you have not waived the right of trial by jury on.' Joint Hearings, supra, at 17.
It seems quite clear to me that Mr. Cohen was referring to a jury trial of allegations challenging the validity of the entire contract.

11 Senate Hearing, supra, at 9—11. See also Joint Hearings, supra, at 15.

12 Senate Hearing, supra, at 9.

Finally, it is clear to me from the bill's sponsors' understanding of the function of arbitration that they never intended that the issue of fraud in the inducement be resolved by arbitration. They recognized two special values of arbitration: (1) the expertise of an arbitrator

to decide factual questions in regard to the day-to-day performance of contractual obligations,[13] and (2) the speed with which arbitration, as contrasted to litigation, could resolve disputes over performance of contracts and thus mitigate the damages and allow the parties to continue performance under the contracts.[14] Arbitration serves neither of these functions where a contract is sought to be rescinded on the ground of fraud. On the one hand, courts have far more expertise in resolving legal issues which go to the validity of a contract than ***416** do arbitrators.[15] On the other hand, where a party seeks to rescind a contract and his allegation of fraud in the inducement is true, an arbitrator's speedy remedy of this wrong should never result in resumption of performance under the contract. And if the contract were not procured by fraud, the court, under the summary trial procedures provided by the Act, may determine with little delay that arbitration must proceed. The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation. Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749.

13 'Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned.' Cohen & Dayton, The New Federal Arbitration Law, 12 Va.L.Rev. 265, 281 (1926).

14 See e.g., Senate Hearing, supra, at 3.

15 'It (arbitration) is not a proper remedy for * * * questions with which the arbitrators have no particular experience and which are better left to the determination of skilled judges with a background of legal experience and established systems of law.' Cohen & Dayton, supra, at 281.

III.

With such statutory language and legislative history, one can well wonder what is the basis for the Court's surprising departure from the Act's clear statement which expressly excepts from arbitration 'such grounds as exist at law or in equity for the revocation of any contract.' Credit for the creation of a rationalization to justify this statutory mutilation apparently must go to the Second Circuit' opinion in Robert Lawrence Co. v. Devonshire Fabrics, Inc., supra. In that decision Judge Medina undertook to resolve the serious constitutional problem which this Court had avoided in Bernhardt by holding the Act inapplicable to a diversity case involving an intrastate contract. That problem was whether the Arbitration ***417** Act, passed 13 years prior to Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, could be constitutionally applied in a diversity case even though its application would require the federal court to enforce an agreement to arbitrate which the state court across the street would not enforce. Bernhardt's holding that arbitration is 'outcome determinative,' ****1813** 350 U.S., at 203, 76 S.Ct., at 276, and its recognition that there would be unconstitutional discrimination if an arbitration agreement were enforceable in federal court but not in the state court, id., at 204, 76 S.Ct., at 276, posed a choice of two alternatives for Judge Medina. If he held that the Arbitration Act rested solely on Congress' power, widely recognized in 1925 but negated in Erie, to prescribe general federal law applicable in diversity cases, he would be compelled to hold the Act unconstitutional as applied to diversity cases under Erie and Bernhardt.[16] If he held that the Act rested on Congress' power to enact substantive law governing interstate commerce, then the Erie-Bernhardt problem would be avoided and the application of the Act to diversity cases involving commerce could be saved.

16 Mr. Justice Frankfurter chose this alternative in his concurring opinion in Bernhardt, 350 U.S., at 208, 76 S.Ct., at 279, and even the Court there suggested that its pre-Erie decision in Shanferoke Coal & Supply Corp. of Delaware v. Westchester Service Corp., 293 U.S. 449, 55 S.Ct. 313, 79 L.Ed. 583, which applied the Act to an interstate contract in a diversity case, might be decided differently under the Bernhardt holding that arbitration is outcome-determinative, 350 U.S., at 202, 76 S.Ct., at 275.

The difficulty in choosing between these two alternatives was that neither, quite contrary to the Court's position, was 'clear beyond dispute' upon reference to the Act's legislative history.[17] As to the first, it is clear that Congress intended the Act to be applicable in diversity cases involving interstate commerce and maritime ***418** contracts,[18] and to hold the Act inapplicable in diversity cases would be severely to limit its impact. As to the second alternative, it is clear that Congress in passing the Act relied primarily on its power to create general federal rules to govern federal courts. Over and over again the drafters of the Act assured Congress: 'The statute establishes a procedure in the Federal courts * * *. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power.'[19] And again: 'The primary purpose of the statute is to make enforcible in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe ***419** the jurisdiction and ****1814** duties of the Federal courts.'[20] One cannot read the legislative history without concluding that this power, and not Congress' power to legislate in the area of commerce, was the 'principal basis' of the Act.[21] Also opposed to the view that Congress intended to create substantive law to govern commerce and maritime transactions are the frequent statements in the legislative history that the Act was not intended to be 'the source of * * * substantive law.'[22] As Congressman Graham explained the Act to the House:

17 For an analysis of these alternatives, see generally, Symposium, Arbitration and the Courts, 58 Nw.U.L.Rev. 466 (1963); Note, 69 Yale L.J. 847 (1960).

18 The House Report accompanying the Act expressly stated: 'The purpose of this bill is to make valid and enforcible agreements for arbitration contained in contracts involving interstate commerce * * * or which may be the subject of litigation in the Federal courts.' H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (emphasis added). Mr. Cohen, and a colleague, commenting on the Act after its passage, explained: 'The Federal courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would have had jurisdiction * * *. Where the basis of jurisdiction is diversity of citizenship, the dispute must involve $3000 as in suits at law.' Cohen & Dayton, supra, at 267. See, e.g., Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A.B.A.J. 153, 156; Note, 20 Ill.L.Rev. 111 (1925). The bill, as originally drafted by the American Bar Association, 49 A.B.A.Rep. 51—52 (1924), and introduced in the House, H.R. No. 646, 68th Cong., 1st Sess. (1924), 65 Cong.Rec. 11081—11082 (1924), expressly provided in s 8 '(t)hat if the basis of jurisdiction be diversity of citizenship * * * the district court * * * shall have jurisdiction * * * hereunder notwithstanding the amount in controversy is unascertained * * *.' Though that provision was deleted by the Senate, the omission was not intended substantially to alter the law. 66 Cong.Rec. 3004 (1925).

19 Committee on Commerce, Trade & Commercial Law, supra, 11 A.B.A.J., at 154.

20 Joint Hearings, supra, at 38.

21 Although Mr. Cohen, in a brief filed with Congress, suggested that Congress might rely on its power over commerce, he added that there were 'questions which apparently can be raised in this connection,' id., at 38, and expressly denied that 'the proposed law depends for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress,' id., at 37. And when he testified, he made the point clearer: 'So what we have done * * * (in New York) is that we have * * * made it a part of our judicial machinery. That is what we have done. But it can not be done under our constitutional form of government and cover the great fields of commerce until you gentlemen do it, in the exercise of your power to confer jurisdiction on the Federal courts. The theory on which you do this is that you have the right to tell the Federal courts how to proceed.' Id., at 17.
The legislative history which the Court recites to support its assertion that Congress relied principally on its power over commerce consists mainly of statements that the Act was designed to cover only contracts in commerce, and that is certainly true. But merely because the Act was designed to enforce arbitration agreements only in contracts in commerce, does not mean that Congress was primarily relying on its power over commerce in supplying that remedy of enforceability.

22 Cohen & Dayton, supra, at 276.

'It does not involve any new principle of law except to provide a simple method * * * in order to give enforcement

* * *. It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in ***420** admiralty contracts.' 65 Cong.Rec. 1931 (1924). (Emphasis added.)

Finally, there are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts[23] or to provide an independent federal-question basis for jurisdiction in federal courts apart from diversity jurisdiction.[24] The absence of both of these effects—which normally follow from legislation of federal substantive law—seems to militate against the view that Congress was creating a body of federal substantive law.

23 See, e.g., Cohen & Dayton, supra, at 277; Committee on Commerce, Trade & Commercial Law, supra, at 155, 156. Mr. Rose, representing the Arbitration Society of America, suggested that the Act might have the beneficial effect of encouraging States to enact similar laws. Joint Hearings, supra, at 28, but Mr. Cohen assured Congress:
'Nor can it be said that the Congress of the United States, directing its own courts * * *, would infringe upon the provinces or prerogatives of the States. * * * (T)he question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced * * *. There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.' Id., at 39—40.

24 This seems implicit in s 3's provision for a stay by a 'court in which such suit is pending' and s 4's provision that enforcement may be ordered by 'any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties.'

Suffice it to say that Judge Medina chose the alternative of construing the Act to create federal substantive law in order to avoid its emasculation under Erie and Bernhardt. But Judge Medina was not content to stop there with a ****1815** holding that the Act makes arbitration agreements in a contract involving commerce enforceable in federal court even though the basis of jurisdiction is diversity and state law does not enforce such ***421** agreements. The problem in Robert Lawrence, as here, was not whether an arbitration agreement is enforceable, for the New York Arbitration Act, upon which the federal Act was based, enforces an arbitration clause in the same terms as the federal Act. The problem in Robert Lawrence, and here, was rather whether the arbitration clause in a contract induced by fraud is 'separable.' Under New York law, it was not: general allegations of fraud in the inducement would, as a matter of state law, put in issue the making of the arbitration clause. So to avoid this application of state law, Judge Medina went further than holding that the federal Act makes agreements to arbitrate enforceable: he held that the Act creates a 'body of law' that 'encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs.' 271 F.2d at 409.

Thus, 35 years after the passage of the Arbitration Act, the Second Circuit completely rewrote it. Under its new formulation, s 2 now makes arbitration agreements enforceable 'save upon such grounds as exist at federal law for the revocation of any contract.' And under s 4, before enforcing an arbitration agreement, the district court must be satisfied that 'the making of the agreement for arbitration, as a matter of federal law, is not in issue.' And then when Judge Medina turned to the task of 'the formulation of the principles of federal substantive law necessary for this purpose,' 271 F.2d, at 409, he formulated the separability rule which the Court today adopts—not because s 4 provided this rule as an 'explicit answer,' not because he looked to the intention of the parties, but because of his notion that the separability rule would further a 'liberal policy of promoting arbitration.' 271 F.2d, at 410.[25]

25 It should be noted that the New York courts apparently do not find any inconsistency between application of a nonseparability rule and that State's policy of enforcing arbitration agreements, a policy embodied in a statute from which the federal Act was copied.

***422** Today, without expressly saying so, the Court does precisely what Judge Medina did in Robert Lawrence. It is not content to hold that the Act does all it was intended to do: make arbitration agreements enforceable in federal courts if they are valid and legally existent under state law. The Court holds that the Act gives federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement was made and what it means. Even if Congress intended to create

substantive rights by passage of the Act, I am wholly convinced that it did not intend to create such a sweeping body of federal substantive law completely to take away from the States their power to interpret contracts made by their own citizens in their own territory.

First. The legislative history is clear that Congress intended no such thing. Congress assumed that arbitration agreements were recognized as valid by state and federal law.[26] Courts would give damages for their breach, but would simply refuse to specifically enforce them. Congress thus had one limited purpose in mind: to provide a party to such an agreement 'a remedy formerly denied him.'[27] 'Arbitration under the Federal * * * (statute) is simply a new procedural remedy.'[28] The Act 'creates no new legislation, grants no new rights, except a remedy to enforce * * *.'[29] **1816 The drafters of the Act were very explicit:

26 S.Rep.No.536, 68th Cong., 1st Sess., 2 (1924); Joint Hearings, supra, at 38.

27 Cohen & Dayton, supra, at 271.

28 Id., at 279.

29 65 Cong.Rec. 1931 (1924).

'A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure *423 of the Federal courts. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made.' Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A.B.A.J. 153, 154. (Emphasis added.)
'Neither is it true that such a statute, declaring arbitration agreements to be valid, is the source of their existence as a matter of substantive law. * * *

'So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual States.' Cohen & Dayton, The New Federal Arbitration Law, 12 Va.L.Rev. 265, 276—277.

All this indicates that the s 4 inquiry of whether the making of the arbitration agreement is in issue is to be determined by reference to state law, not federal law formulated by judges for the purpose of promoting arbitration.

Second. The avowed purpose of the Act was to place arbitration agreements 'upon the same footing as other contracts.'[30] The separability rule which the Court applies to an arbitration clause does not result in equality between it and other clauses in the contract. I had always thought that a person who attacks a contract on the ground of fraud and seeks to rescind it has to seek rescission of the whole, not tidbits, and is not given the option of denying the existence of some clauses and affirming the existence of others. Here F & C agreed both to perform consulting services for Prima and not to *424 compete with Prima. Would any court hold that those two agreements were separable, even though Prima in agreeing to pay F & C not to compete did not directly rely on F & C's representations of being solvent? The simple fact is that Prima would not have agreed to the covenant not to compete or to the arbitration clause but for F & C's fraudulent promise that it would be financially able to perform consulting services. As this Court held in United States v. Bethlehem Steel Corp., 315 U.S. 289, 298, 62 S.Ct. 581, 587, 86 L.Ed. 855:

30 H.R.Rep.No.96, 68th Cong., 1st Sess. (1924).

'Whether a number of promises constitute one contract (and are non-separable) or more than one is to be determined by inquiring 'whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.''
Under this test, all of Prima's promises were part of one, inseparable contract.

Third. It is clear that had this identical contract dispute been litigated in New York courts under its arbitration act, Prima would not be required to present its claims of fraud to the arbitrator if the state rule of nonseparability applies. The Court here does not hold today, as did Judge Medina,[31] that the body of federal substantive law created by federal judges under the Arbitration Act is required to be applied by state courts. A holding to that effect—which the Court seems to leave up in the air—would flout the intention of the framers of the Act.[32] Yet under this Court's opinion today—that the Act supplies not only the remedy of enforcement but a body

of federal doctrines to determine the validity ****1817** of an arbitration agreement—failure to make the Act ***425** applicable in state courts would give rise to 'forum shopping' and an unconstitutional discrimination that both Erie and Bernhardt were designed to eliminate. These problems are greatly reduced if the Act is limited, as it should be, to its proper scope: the mere enforcement in federal courts of valid arbitration agreements.

31 'This is a declaration of national law equally applicable in state or federal courts.' 271 F.2d, at 407.

32 See n. 23, supra.

IV.

The Court's summary treatment of these issues has made it necessary for me to express my views at length. The plain purpose of the Act as written by Congress was this and no more: Congress wanted federal courts to enforce contracts to arbitrate and plainly said so in the Act. But Congress also plainly said that whether a contract containing an arbitration clause can be rescinded on the ground of fraud is to be decided by the courts and not by the arbitrators. Prima here challenged in the courts the validity of its alleged contract with F & C as a whole, not in fragments. If there has never been any valid contract, then there is not now and never has been anything to arbitrate. If Prima's allegations are true, the sum total of what the Court does here is to force Prima to arbitrate a contract which is void and unenforceable before arbitrators who are given the power to make final legal determinations of their own jurisdiction, not even subject to effective review by the highest court in the land. That is not what Congress said Prima must do. It seems to be what the Court thinks would promote the policy of arbitration. I am completely unable to agree to this new version of the Arbitration Act, a version which its own creator in Robert Lawrence practically admitted was judicial legislation. Congress might possibly have enacted such a version into law had it been able to foresee subsequent legal events, but I do not think this Court should do so.

I would reverse this case.

All Citations

388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270, 1969 A.M.C. 222

KeyCite Yellow Flag - Negative Treatment
Distinguished by Hansalik v. Wells Fargo Advisors, LLC, Cal.App. 2 Dist., April 25, 2012

9 Cal.4th 362
Supreme Court of California,
In Bank.

ADVANCED MICRO DEVICES, INC., Plaintiff and Respondent,
v.
INTEL CORPORATION, Defendant and Appellant.

No. S033874.
|
Dec. 30, 1994.

Synopsis
Computer chip manufacturer petitioned for confirmation of arbitration award giving plaintiff the right to use certain of defendant's intellectual property. The Superior Court, Santa Clara County, No. 626879, Read Ambler, J., confirmed award. On appeal, the Court of Appeal reversed, and review was granted. The Supreme Court, Werdegar, J., held that remedy fashioned by arbitrator was within scope of his authority.

Reversed.

Kennard, J., filed dissenting opinion in which Mosk, J., and Spencer, J., assigned, joined.

Opinion, 20 Cal.Rptr.2d 73, vacated.

West Headnotes (10)

[1] Alternative Dispute Resolution
Scope of Relief

25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk228 Nature and Extent of Authority
25Tk235 Scope of Relief
(Formerly 33k29.6 Arbitration)

In absence of more specific restrictions in arbitration agreement, submission or rules of arbitration, the remedy an arbitrator fashions does not exceed his or her powers if it bears rational relationship to underlying contract as interpreted, expressly or impliedly, by arbitrator and to breach of contract found, expressly or impliedly, by arbitrator. West's Ann.Cal.C.C.P. §§ 1286.2(d), 1286.6(b).

182 Cases that cite this headnote

[2] Alternative Dispute Resolution
Scope and Standards of Review

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(1) In General
(Formerly 33k73.7(4) Arbitration)

Courts may not review for sufficiency the evidence supporting an arbitrator's award.

35 Cases that cite this headnote

[3] Alternative Dispute Resolution
Scope and Standards of Review

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(1) In General
(Formerly 33k73.7(1) Arbitration)

Courts should generally defer to arbitrator's finding that determination of particular question is within scope of his or her contractual authority.

21 Cases that cite this headnote

[4] Alternative Dispute Resolution
Scope and Standards of Review

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(1) In General
(Formerly 33k73.7(1) Arbitration)

Unless parties have conferred upon arbitrator the unusual power of determining his own jurisdiction, courts retain ultimate authority to overturn awards as beyond arbitrator's powers, whether for unauthorized remedy or decision on unsubmitted issue.

99 Cases that cite this headnote

[5] **Alternative Dispute Resolution**
Discretion

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(6) Discretion
(Formerly 33k73.7(6) Arbitration)

Arbitrators, unless expressly restricted by the agreement or the submission to arbitration, have substantial discretion to determine scope of their contractual authority to fashion remedies, and judicial review of their awards must be correspondingly narrow and deferential.

111 Cases that cite this headnote

[6] **Alternative Dispute Resolution**
Error of Judgment or Mistake of Law

Alternative Dispute Resolution
Mistake of Fact and Miscalculation

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk327 Mistake or Error
25Tk329 Error of Judgment or Mistake of Law
(Formerly 33k63.1 Arbitration)
25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk327 Mistake or Error
25Tk330 Mistake of Fact and Miscalculation
(Formerly 33k63.2 Arbitration)

Arbitration award generally may not be vacated or corrected for errors of fact or law.

10 Cases that cite this headnote

[7] **Alternative Dispute Resolution**
Actions Exceeding Arbitrator's Authority

Alternative Dispute Resolution
Particular Issues or Questions

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk316 Actions Exceeding Arbitrator's Authority
(Formerly 33k29.6 Arbitration)
25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk228 Nature and Extent of Authority
25Tk231 Particular Issues or Questions
(Formerly 33k29.6 Arbitration)

Arbitrators are not obligated to read contracts literally, and award may not be vacated merely because court is unable to find relief granted was authorized by specific term of contract.

26 Cases that cite this headnote

[8] **Alternative Dispute Resolution**
Scope of Relief

25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk228 Nature and Extent of Authority
25Tk235 Scope of Relief
(Formerly 33k29.6 Arbitration)

Arbitrator may not award remedies expressly forbidden by arbitration agreement or submission.

92 Cases that cite this headnote

[9] **Alternative Dispute Resolution**
Scope of Relief

25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk228 Nature and Extent of Authority

25Tk235 Scope of Relief
(Formerly 33k29.6 Arbitration)
Arbitrator's award for breach of contract need not correspond exactly with particular benefits injured party would have received had contract been fully performed.

3 Cases that cite this headnote

[10] Alternative Dispute Resolution
Scope of Relief

25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk228 Nature and Extent of Authority
25Tk235 Scope of Relief
(Formerly 33k29.6 Arbitration)
Upon finding that defendant computer chip manufacturer breached covenant of good faith and fair dealing in technology exchange agreement by secretly deciding not to accept any more of plaintiff's products, while maintaining the public position that plaintiff would be second source for defendant's new 32–bit microprocessor, arbitrator was within his authority in awarding plaintiff a permanent, nonexclusive and royalty-free license to any of defendant's intellectual property embodied in plaintiff's own reverse-engineered 32–bit chip and awarding plaintiff further two-year extension of patent and copyright licenses related to its chip, even though license awarded did not correspond in all its terms with license that could have been earned through performance of agreement; remedy had clear and rational relationship to contract and affects of defendant's breach. West's Ann.Cal.C.C.P. §§ 1282.2(d), 1286.6(b).

69 Cases that cite this headnote

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Opinion

WERDEGAR, Justice.

California law allows a court to correct or vacate a contractual arbitration award if the arbitrators "exceeded their powers." (Code Civ.Proc., §§ 1286.2, subd. (d), 1286.6, subd. (b).) In *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 28, 10 Cal.Rptr.2d 183, 832 P.2d 899, we held arbitrators do not exceed their powers merely by erroneously deciding a contested issue of law or fact; we did not, however, have occasion there to further delineate the standard for measuring the scope of arbitrators' authority. This case requires us to decide the standard by which courts are to determine whether a contractual arbitrator has exceeded his or her powers in awarding relief for a breach of contract.

*367 An arbitrator determined the Intel Corporation (Intel) had breached portions of its 1982 technology exchange agreement with Advanced Micro Devices, Inc. (AMD), including the implied covenant of good faith and fair dealing. The superior court confirmed the award, but the Court of Appeal, holding the arbitrator had exceeded his authority in awarding AMD the right to use certain Intel intellectual property, ordered the award corrected by eliminating the disputed relief.

[1] [2] We conclude that, in the absence of more specific restrictions in the arbitration agreement, the submission or the rules of arbitration, the remedy an arbitrator fashions does not exceed his or her powers if it bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator and to the breach of contract found, expressly or impliedly, by the arbitrator. The remedy fashioned by the arbitrator

here was within the scope of his authority as measured by that standard. We therefore reverse the contrary judgment of the Court of Appeal.

FACTS AND PROCEEDINGS [1]

[1] The facts stated are taken primarily from the arbitrator's award and memoranda of decision. As the parties recognize, courts may not review for sufficiency the evidence supporting an arbitrator's award. (*Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 11, 10 Cal.Rptr.2d 183, 832 P.2d 899.) We therefore take the arbitrator's findings as correct without examining a record of the arbitration hearings themselves; indeed, the appellate record contains neither a reporter's transcript of the hearings nor the exhibits introduced therein.

AMD and Intel are both engaged in the creation, design, production and marketing of complex integrated circuits, also known as computer chips. In the period 1978–1981 both AMD and Intel were pursuing strategies for producing and marketing 16–bit microprocessors and the 32–bit microprocessors that were expected to follow. AMD was attempting to secure entry into this market through an agreement with a third chip maker, Zilog, while Intel had developed its own 16–bit microprocessor, the 8086. Intel, needing another producer to "second source" [2] the 8086, approached AMD.

[2] The chip makers' customers, computer manufacturers, frequently prefer a product be made by more than one source, as this helps ensure competition and a reliable supply. Hence the common practice of second sourcing, in which the company developing a product licenses to another company the right, for a royalty, to make and sell it.

Intel hoped to establish the 8086's basic architecture, known as iAPX, as the market standard, guaranteeing future sales of the 8086's expected progeny as well. AMD, having had what it saw as a bad experience in a previous second-source agreement with Intel, wanted to be sure it would not be cut off from second sourcing future generations of the 8086 family. In addition, reaching an agreement with Intel would mean abandoning ***584 **997 AMD's relationship with Zilog; AMD therefore sought a long-term arrangement.

*368 The parties entered into the contract at issue in February 1982. According to its preamble the agreement was intended "to establish a mechanism for exchanging technical information so that each party acquires the capability to develop products suitable for sale as an alternate source for products developed by the other party." During the ten-year term of the contract (cancelable after five years on one year's notice by either party), either company could elect to be a second source for products offered it by the other. The nondeveloping company would receive technical information and licenses needed for it to make and sell the part. The developing company would receive a royalty. In addition, the developing company would earn the right to be a second source for products developed by the other party. The terms of exchange—the respective value of the products—were to be calculated by a specified equation from the complexity and size of the parts.

The parties had fundamentally different views of the contract. AMD believed the agreement created a partnership or joint venture under which the two companies would agree in advance on products to be developed by each of them, avoiding duplicative research expenditures and guaranteeing each a more complete product line. Intel, on the other hand, saw the agreement as "little more than an armed truce," in which each proposed second-source agreement was to be the subject of combative bargaining with no continuing obligations from episode to episode. The arbitrator rejected both extremes, finding that, "while a party was not obligated to act substantially against its self interest in deciding to transfer or accept a part, there was an *implied covenant* to make the relationship work which obligated a party to consider in good faith ... the purposes of the contractual relationship ... and to *negotiate reasonably* to accomplish this purpose. If it could not do this it should terminate the arrangement—as Intel finally did." [3] The purposes of the agreement, according to the arbitrator, were expansion of product line and savings on research and development.

[3] Intel gave notice of termination in April 1987, after AMD petitioned for arbitration.

The contract provided for arbitration of "disagreements aris[ing] under this Agreement...." Arbitration was to be by a single arbitrator, whose decision would be considered "a final and binding resolution of the disagreement." Disagreements over product exchanges led AMD to

petition the superior court to compel arbitration in April 1987. The parties agreed on an arbitrator and to the rules he would follow, including section 42, entitled "Scope of the Award," which provided: "The Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." Section 41 further instructed the arbitrator to "interpret and apply these Rules insofar as they relate to his powers ***369** and duties." After hearings in superior court, a temporary judge (who was also the chosen arbitrator) made an order of reference stating the issues for arbitration and providing, as to each issue, that "the Arbitrator is authorized to fashion such remedy as he may in his discretion determine to be fair and reasonable but not in excess of his jurisdiction."

The arbitration lasted four and one-half years and included three hundred and fifty-five days of hearings. As the current dispute focuses narrowly on two items of relief awarded, only a small portion of the arbitrator's extensive findings need be summarized here.

Under the contract AMD could initially obtain second-source rights to Intel's 8086 chip and other specified products for cash. After 1985, AMD would have open access to Intel's product line if Intel accepted AMD products of sufficient value, as determined from the complexity-size formula. In 1984 the parties negotiated an amendment to the contract, under which AMD was to second source the successors of the 8086—the 80186 and 80286—in exchange for substantial royalties to Intel. Intel also agreed at that time to accept certain AMD products then in development, conditional in some instances on final specifications. The arbitrator found *****585** ****998** that "[i]f Intel took all these products, or even some of them, AMD would have access to the Intel line of products without restriction—and no royalties."

The arbitrator found Intel extensively breached its obligations to act in good faith and deal fairly. Beginning in mid–1984 Intel, anxious to be the sole source for the 80386 (its 32–bit chip, which was to prove vastly successful) and convinced the contract was to its disadvantage, decided to frustrate the operation of the contract by taking no more products from AMD. Intel also resolved to keep this decision from AMD and the public, leaving AMD and others in the industry with the belief AMD would be a second source for the 80386. This "ke[pt] AMD in the Intel competitive camp" and avoided public knowledge of Intel's sole-source strategy for the 80386, a strategy Intel feared could limit its market if known.[4] The plan succeeded: AMD continued for about two years to believe, incorrectly, its agreement with Intel "had a future."

4 The arbitrator relied on numerous Intel internal memoranda produced during the arbitration. An October 1984 memorandum states the Intel strategy succinctly: " *Assure AMD they are our primary source through regular management contact and formal meetings. [¶]* Take no more AMD products under the current agreement." In 1985 an Intel manager described the company's objective this way: "Keep AMD in the Intel camp." The same note continues: "Key point—we are in no hurry. We don't need a 386 2nd source, especially since everyone assumes AMD will be one." A 1986 memorandum articulates this strategy: "Maintain a second-source, business as usual posture in the marketplace.... Our strategy is to keep talking.... We do not want them [AMD] to go on to Hitachi or NEC, and should not stimulate them to do so."

***370** One concrete example of Intel's failure to negotiate in good faith was its treatment of AMD's Quad Pixel Display Manager (QPDM), a graphics chip. Although Intel promised in 1984 to accept the QPDM from AMD provided the parties agreed on its specifications, the arbitrator found Intel made no actual attempt to negotiate the remaining differences as to specifications. Instead, partly in order to avoid having both to give AMD the 80386 and to eliminate royalties on other products, Intel summarily rejected the QPDM. In doing so, the arbitrator found, Intel breached the implied covenant of good faith and fair dealing as well as "its implied covenant to negotiate reasonably to further the goals of the relationship between the parties...."

The arbitrator also found, however, Intel was not obliged under the contract to accept the QPDM or other products that would have earned AMD the 80386 rights. Apart from Intel's breach, moreover, the arbitrator found AMD had unnecessarily delayed in seeking alternative ways to enter the 32–bit chip market. Having inferred by mid–1985 that Intel was not going to accept the AMD parts that could earn AMD the 80386, AMD should have sought arbitration at that time or immediately begun reverse engineering the 80386 when it became available in July

1986.[5] Instead, AMD did not begin reverse engineering the 80386 until a later time and did not produce its own 80386 chip—known as the Am386—until March 1991. "In short, Intel's plan succeeded ... because of AMD's inertia." For this reason, the arbitrator declined to award AMD the hundreds of millions of dollars it sought in lost 80386 profits.

5 A chip may be "reverse engineered" by disassembling, studying and analyzing its structure. "This knowledge may be used to create an original chip having a different design layout, but which performs the same or equivalent function as the existing chip, without penalty or prohibition [under the federal Semiconductor Chip Protection Act]." (*Brooktree Corp. v. Advanced Micro Devices, Inc.* (Fed.Cir.1992) 977 F.2d 1555, 1565.)

Despite AMD's delay, the arbitrator found AMD had actually been damaged by Intel's breach: "One *knows* that AMD lost *some* goodwill as the result of the Intel conduct; one *knows* that AMD lost *some* profits from not having the 80386 as the result of the Intel conduct.... The actual damages are immeasurable; and nominal damages only are inequitable." (Underlining in original.) The proper remedy, the arbitrator decided, was to relieve AMD from "legal harassment by Intel over AMD's alleged use of Intel intellectual property in the reverse engineered AMD 386."

The arbitrator therefore awarded AMD a permanent, nonexclusive and royalty-free license *****586 **999** to any Intel intellectual property embodied in the Am386 (paragraph 5 of the award). He also awarded AMD a further two-year extension of certain patent and copyright licenses, insofar as they related to ***371** the Am386, that originated in a 1976 agreement between the parties, which had been extended under the 1982 contract to 1995 (paragraph 6 of the award).[6] The arbitrator designated these items as remedies for breach of the covenant of good faith and fair dealing, as well as for failure to negotiate in good faith over the QPDM specifications and for other breaches.

6 For Intel breaches involving other products, AMD was awarded more than $10 million plus prejudgment interest, as well as manufacturing rights to the Intel 8087 chip. These aspects of the award are no longer in dispute.

Paragraphs 5 and 6 of the award, the relief at issue here, state more fully: "[¶] 5. AMD is hereby awarded a permanent, royalty-free, non-exclusive, non-transferable, worldwide right (but not the right to assign, license or sublicense such right to any other party) under any and all Intel copyrights, patents, trade secrets and maskwork rights contained in the current versions of AMD's reverse-engineered 80386 family of microprocessors, to make, have made by a third party solely for AMD, use and sell the prior, current and future revisions and modifications of those products.... The intent of this paragraph is to provide a complete and dispositive defense to AMD as to the Intel claims against AMD regarding the technology and intellectual property used in AMD's current versions of the 80386 in such lawsuits as *Intel Corp. v. Advanced Micro Devices, Inc.* (A 91 CA 800) in the United States District Court for the Norther[n] District of California, and *Intel Corp. v. Advanced Micro Devices, Inc.* (C 90 20572 WAI) in the United States District Court for the Northern District of California, and to preclude and defeat other potential Intel intellectual property infringement claims with respect to the technology used in AMD's aforedescribed past and current versions, and future revisions and modifications, of the 80386.... [¶] By this award, I do not intend to express or imply an opinion as to whether any Intel intellectual property rights are incorporated in any of the AMD 80386 family of microprocessors or whether any of the AMD 80386 family of microprocessors infringes any Intel intellectual property rights, the intent of the award (as indicated above) being to grant AMD all rights necessary to allow AMD to produce and sell its AMD 80386 family of microprocessors, and revisions and modifications, thereof, free from harassment by Intel. [¶] 6. In addition to the nominal damages awarded AMD for Intel's breaches as set forth in paragraphs 1 and 4 hereof it is ordered that the rights conferred upon AMD under the 1982 AMD/Intel Agreement (which extended until 1995 the patent and copyright licenses originally granted by an agreement between the parties in 1976) are hereby extended two years from their present date of expiration only insofar as they relate to or concern the AMD 80386 and its revisions or modifications, if any."

AMD petitioned the superior court to confirm the award (Code Civ.Proc., § 1286); Intel petitioned for the award to be corrected (Code Civ.Proc., § 1286.6) by vacating paragraphs 5 and 6, on the ground they exceeded the

arbitrator's powers. The superior court confirmed the award, but the Court of Appeal reversed. Although it recognized the scope of judicial review did not extend to redeciding the merits of the controversy, the court believed the extent of the arbitrator's remedial powers was reviewable "de novo." The Court of Appeal found itself unable to locate a "rational nexus" between paragraphs 5 and 6 of the award and the contract itself. Therefore, the court concluded, the arbitrator had improperly "rewr[itten] the parties' agreement" in paragraphs 5 and 6 of the award. Determining those paragraphs could be treated as surplusage without affecting the merits of the decision, the court ***372** ordered the award corrected and confirmed rather than vacated. We granted review.

DISCUSSION

I. Standard of Review of the Remedies Fashioned by a Private Arbitrator

A. Review of Arbitrability

[3] Although this court has not previously articulated a detailed standard for review of the remedies fashioned by an arbitrator, we have considered the related question how to review determinations of arbitrability, that is, whether an arbitrator exceeded his or her authority by deciding a particular issue. On that point, our decisions teach that courts should generally defer to an arbitrator's finding that determination of a particular question is within the scope of his or her contractual authority.

Code of Civil Procedure section 1283.4[7] provides the arbitrator's written award shall *****587** ****1000** determine all submitted questions "necessary in order to determine the controversy." Construing that section in *Morris v. Zuckerman* (1968) 69 Cal.2d 686, 690, 72 Cal.Rptr. 880, 446 P.2d 1000 this court held it is for the arbitrators to determine what issues are "necessary" to the ultimate decision. We continued: "Likewise, any doubts as to the meaning or extent of an arbitration agreement are for the arbitrators and not the court to resolve." (*Ibid.;* accord, *Taylor v. Crane* (1979) 24 Cal.3d 442, 450, 155 Cal.Rptr. 695, 595 P.2d 129; *Van Tassel v. Superior Court* (1974) 12 Cal.3d 624, 627, 116 Cal.Rptr. 505, 526 P.2d 969.)

[7] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

Although section 1286.2 permits the court to vacate an award that exceeds the arbitrator's powers, the deference due an arbitrator's decision on the merits of the controversy requires a court to refrain from substituting its judgment for the arbitrator's in determining the contractual scope of those powers. (*Morris v. Zuckerman, supra,* 69 Cal.2d at p. 691, 72 Cal.Rptr. 880, 446 P.2d 1000; see also *O'Malley v. Wilshire Oil Co.* (1963) 59 Cal.2d 482, 493, 30 Cal.Rptr. 452, 381 P.2d 188 [contractual clause precluding arbitrator from modifying contract did not permit court to reach merits of controversy in deciding limits of arbitrability]; *Weiman v. Superior Court* (1959) 51 Cal.2d 710, 714, 336 P.2d 489 [court's duty to determine if there was a "disagreement" to be arbitrated did not authorize prior judicial decision on merits of dispute].)

***373** Giving substantial deference to arbitrators' own assessments of their contractual authority is consistent with the general rule of arbitral finality we recently reaffirmed in *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at pages 8–13, 10 Cal.Rptr.2d 183, 832 P.2d 899 (hereafter *Moncharsh*). As we stated there, parties to private, nonjudicial arbitration typically expect " 'their dispute will be resolved without necessity for any contact with the courts.' " (*Id.* at p. 9, 10 Cal.Rptr.2d 183, 832 P.2d 899, quoting *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 402, fn. 5, 212 Cal.Rptr. 151, 696 P.2d 645.) The decision to arbitrate disputes is motivated in part by the desire to avoid the delay and cost of judicial trials and appeals. "Ensuring arbitral finality thus requires that judicial intervention in the arbitration process be minimized." (*Moncharsh, supra,* 3 Cal.4th at p. 10, 10 Cal.Rptr.2d 183, 832 P.2d 899.) A rule of judicial review under which courts would independently redetermine the scope of an arbitration agreement already interpreted by the arbitrator would invite frequent and protracted judicial proceedings, contravening the parties' expectations of finality. (See *Van Tassel v. Superior Court, supra,* 12 Cal.3d at p. 627, 116 Cal.Rptr. 505, 526 P.2d 969 [trial "de novo" of jurisdictional facts would defeat purposes of choosing arbitration].)

B. Review of Remedies

Intel contends that even if California precedents require deference to an arbitrator's assessment of arbitrability, a

different, less deferential rule applies to an arbitrator's choice of *remedies.* Intel's position is neither logically persuasive nor supported by precedent.

In providing for judicial vacation or correction of an award, our statutes (§§ 1286.2, subd. (d), 1286.6, subd. (b)) do not distinguish between arbitrators' power to decide an issue and their authority to choose an appropriate remedy; in either instance the test is whether arbitrators have "exceeded their powers." Because determination of appropriate relief also constitutes decision on an issue, these two aspects of the arbitrators' authority are not always neatly separable.

Morris v. Zuckerman, supra, 69 Cal.2d 686, 72 Cal.Rptr. 880, 446 P.2d 1000 illustrates this overlap between arbitrability and remedies. A contract required plaintiff and defendant to sell jointly owned land on demand of another party. When the demand was made, however, the plaintiff proposed selling to a company he controlled, and the defendant refused to comply. (*Id.* at pp. 687–689, 72 Cal.Rptr. 880, 446 P.2d 1000.) The arbitrators decided the plaintiff and defendant were fiduciaries, and the proposed sale to a company controlled only by the plaintiff was an inequitable attempt to " 'squeeze out' " the defendant. The arbitrators therefore declined to require the defendant to sign the new sale contract as written; *****588 *374 **1001** instead they found he was obliged to execute the contract only if it was modified to include him as a one-half partner in the purchase. (*Id.* at pp. 689, 691–694 & fn. 4, 72 Cal.Rptr. 880, 446 P.2d 1000.) This court, upholding the award, held it was within the arbitrators' power to decide the parties were fiduciaries, to consider that relationship in fashioning their award, and to make an award designed to prevent one party from taking "unfair advantage" of the other. (*Id.* at pp. 693–694, 72 Cal.Rptr. 880, 446 P.2d 1000.)

Although in *Morris v. Zuckerman* we did not explicitly state the issue in such terms, we there in fact upheld the arbitrators' choice of relief against a claim they exceeded their contractual authority. (69 Cal.2d at pp. 690–691, 72 Cal.Rptr. 880, 446 P.2d 1000.) The plaintiff contended the arbitrators had no authority to add conditions to the new sale contract; we held they could do so if they found equity and the parties' relationship required such relief. In reaching this conclusion we applied a rule of substantial deference to the arbitrators' jurisdictional determinations. (*Morris v. Zuckerman, supra,* 69 Cal.2d at p. 690, 72 Cal.Rptr. 880, 446 P.2d 1000.) *Morris* thus implies an arbitrator's discretion to determine the extent of remedies is as great as his or her discretion to determine the related question of what issues are necessary to the decision.

Deference to the arbitrator is also required by the character of the remedy decision itself. Fashioning remedies for a breach of contract or other injury is not always a simple matter of applying contractually specified relief to an easily measured injury. It may involve, as in the present case, providing relief for breach of implied covenants, as to which the parties have not specified contractual damages. It may require, also as in this case, finding a way of approximating the impact of a breach that cannot with any certainty be reduced to monetary terms. Passage of time and changed circumstances may have rendered any remedies suggested by the contract insufficient or excessive. As the United States Supreme Court explained in the leading case on review of arbitral remedies in the collective bargaining context, the arbitrator is required "to bring his informed judgment to bear to reach a fair solution of a problem.... There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency." (*Steelworkers v. Enterprise Corp.* (1960) 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424.)

The choice of remedy, then, may at times call on any decision maker's flexibility, creativity and sense of fairness. In private arbitrations, the parties have bargained for the relatively free exercise of those faculties. Arbitrators, unless specifically restricted by the agreement to following legal rules, ***375** " 'may base their decision upon broad principles of justice and equity....' [Citations.] As early as 1852, this court recognized that, 'The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].' [Citation.]" (*Moncharsh, supra,* 3 Cal.4th at pp. 10–11, 10 Cal.Rptr.2d 183, 832 P.2d 899.)[8] Were courts to reevaluate independently the merits of a particular remedy, the parties' contractual expectation of a decision according to the arbitrators' best judgment would be defeated.

8 Intel asserts *Moncharsh* held questions regarding remedies, unlike other arbitrated questions, are

reserved to the courts. Apparently Intel's allusion is to our statement in *Moncharsh, supra,* 3 Cal.4th at page 12, 10 Cal.Rptr.2d 183, 832 P.2d 899, that the statutes provide for review "in circumstances involving serious problems with the award itself...." Neither that statement, however, nor our actual holdings in *Moncharsh,* suggest any different standard of review for choice of remedies. Like other "serious problems with the award," a remedial choice is subject to judicial vacation or correction if it exceeded the arbitrators' powers. Intel also cites *Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 436, 22 Cal.Rptr.2d 376, for the same proposition, but that case offers no support, as it drew no such distinction between judicial review of remedies and judicial review of arbitrability.

Independent reevaluation by a court, moreover, is unlikely to be either expeditious or accurate. Arbitrations may, as this case demonstrates, be lengthy and complicated. *****589** ****1002** The proceedings may be informal and a complete stenographic record may not be prepared. A reviewing court is thus not in a favorable position to substitute its judgment for that of the arbitrators as to what relief is most just and equitable under all the circumstances. Further, independent review of remedies, no less than of other arbitrated questions, would tend to increase the cost and delay involved. "If the courts were free to intervene on these grounds [disagreement with the arbitrators' "honest judgment" as to remedy] the speedy resolution of grievances by private mechanisms would be greatly undermined." (*United Paperworkers v. Misco* (1987) 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L.Ed.2d 286.)

[4] We do not, by the above, intend to suggest an arbitrator's exercise of discretion in ordering relief is unrestricted or unreviewable. Such an extreme position enjoys no support in our statutes or cases. The powers of an arbitrator derive from, and are limited by, the agreement to arbitrate. (*Moncharsh, supra,* 3 Cal.4th at p. 8, 10 Cal.Rptr.2d 183, 832 P.2d 899.) Awards in excess of those powers may, under sections 1286.2 and 1286.6, be corrected or vacated by the court. Unless the parties "have conferred upon the arbiter the unusual power of determining his own jurisdiction" (*McCarroll v. L.A. County etc. Carpenters* (1957) 49 Cal.2d 45, 65–66, 315 P.2d 322), the courts retain the ultimate authority to overturn awards as beyond the arbitrator's powers, whether for an unauthorized remedy or decision on an unsubmitted issue.

[5] What does follow from the considerations discussed above is that review of remedies cannot be, as the Court of Appeal characterized it in this case, ***376** "de novo." [9] Nor are Intel and allied amici curiae correct in describing judicial review of remedies as "independent." To the contrary, an appropriately deferential review starts not from the beginning, but from the arbitrator's own rational assessment of his or her contractual powers and is dependent on (that is, rests on acceptance of) this and any other factual or legal determination made by the arbitrator. The principle of arbitral finality, the practical demands of deciding on an appropriate remedy for breach, and the prior holdings of this court all dictate that arbitrators, unless expressly restricted by the agreement or the submission to arbitration, have substantial discretion to determine the scope of their contractual authority to fashion remedies, and that judicial review of their awards must be correspondingly narrow and deferential.

9 The Court of Appeal cited *Southern Cal. Rapid Transit Dist. v. United Transportation Union* (1992) 5 Cal.App.4th 416, 423, 6 Cal.Rptr.2d 804 as holding that whether an award is in excess of the arbitrator's powers " 'is a question of law we review de novo on appeal.' " The *Southern Cal. Rapid Transit Dist.* court's reference to the "de novo" standard as one applied "on appeal," accompanied by a citation to *Hacienda Hotel v. Culinary Workers Union* (1985) 175 Cal.App.3d 1127, 1133–1134, 223 Cal.Rptr. 305, in which the Court of Appeal reversed a superior court decision vacating an award, indicates the *Southern Cal. Rapid Transit Dist.* court intended its "de novo" standard to describe its review of the *superior court's* order rather than the arbitrator's award. To that extent it was correct. (See *Anderman/Smith Co. v. Tenn. Gas Pipeline Co.* (5th Cir.1990) 918 F.2d 1215, 1218, fn. 2 [court of appeals reviews award deferentially, but reviews district court order confirming award "*de novo* "].)

C. Standard of Review

Having rejected the extremes of "de novo" review on the one hand, and complete unreviewability on the other, we must attempt to articulate a standard capturing the middle ground of deferential yet meaningful review. We begin by surveying similar efforts in the Courts of Appeal and in other jurisdictions.

Recent decisions in the Courts of Appeal have employed two formulas to determine whether an arbitrator's award exceeded his or her powers. The courts have asked whether the award rests on a "completely irrational" construction of the contract (e.g., *Tate v. Saratoga Savings & Loan Assn.* (1989) 216 Cal.App.3d 843, 855, 265 Cal.Rptr. 440; *Summit Industrial Equipment, Inc. v. Koll/Wells Bay Area* (1986) 186 Cal.App.3d 309, 320, 230 Cal.Rptr. 565; *Hacienda Hotel v. Culinary Workers Union, supra,* 175 Cal.App.3d 1127, 1133, 223 Cal.Rptr. 305) or whether it amounts to an "arbitrary remaking" of the contract (e.g., ***590 **1003 *Blue Cross of California v. Jones* (1993) 19 Cal.App.4th 220, 228, 23 Cal.Rptr.2d 359; *Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 592, 19 Cal.Rptr.2d 295; *Southern Cal. Rapid* *377 *Transit Dist. v. United Transportation Union, supra,* 5 Cal.App.4th at p. 423, 6 Cal.Rptr.2d 804). These tests were combined in *Southern Cal. Rapid Transit Dist. v. United Transportation Union, supra,* 5 Cal.App.4th at page 423, 6 Cal.Rptr.2d 804, into a single formula: "Generally, a decision exceeds the arbitrator's powers only if it is so utterly irrational that it amounts to an arbitrary remaking of the contract between the parties."

[6] These statements of the standard tend to focus the inquiry on the arbitrator's construction of the contract. Useful as such an examination may sometimes be, it is incomplete as a test of whether arbitrators have exceeded their powers in awarding a particular item of damages or other relief.[10] The critical question with regard to remedies is not whether the arbitrator has rationally interpreted the parties' agreement, but whether the remedy chosen is rationally drawn from the contract as so interpreted. This case illustrates the distinction; Intel argues not that the arbitrator misconstrued the contract, but that the remedy he fashioned bore an insufficient relationship to the agreement as he interpreted it.

10 We need not decide here whether an arbitrator's interpretation of a contract is subject to review for "irrationality" or "arbitrariness." The present case involves an arbitrator's choice of remedies, rather than interpretation of the agreement. We reiterate, however, that an award generally may not be vacated or corrected, under California law, for errors of fact or law. For this reason one Court of Appeal has referred to the "completely irrational" standard as "a questionable pre-*Moncharsh* statement of law." (*Hall v. Superior Court, supra,* 18 Cal.App.4th at p. 434, 22 Cal.Rptr.2d 376.)

In contrast to the California cases, decisions from the federal courts applying the "essence" test announced in *Steelworkers v. Enterprise Corp., supra,* 363 U.S. at page 597, 80 S.Ct. at page 1361 (hereafter *Enterprise*) properly focus on the *source* of the arbitrators' chosen remedy.[11]

11 Despite the subsequent divergence in wording, both the "arbitrary remaking" and "completely irrational" formulas used by the Courts of Appeal are related in their origins to *Enterprise* 's "essence" test. In *Posner v. Grunwald–Marx, Inc.* (1961) 56 Cal.2d 169, 14 Cal.Rptr. 297, 363 P.2d 313, this court held California labor arbitration law was in conformity with the federal law as stated in *Enterprise.* (*Id.* at p. 185, 14 Cal.Rptr. 297, 363 P.2d 313.) At the same time we joined in criticism of other federal cases that could be interpreted "as indicating a complete judicial retreat from the field of arbitration in collective bargaining cases, which could result in the *arbitrary remaking* of the collective bargaining agreement by an arbitrator contrary to the intentions of the parties." (*Id.* at p. 184, 14 Cal.Rptr. 297, 363 P.2d 313; italics added.) The "completely irrational" language was first quoted in *Lesser Towers, Inc. v. Roscoe–Ajax Constr. Co.* (1969) 271 Cal.App.2d 675, 701, 77 Cal.Rptr. 100, from a New York case (*National Cash Register Co. v. Wilson* (1960) 8 N.Y.2d 377, 208 N.Y.S.2d 951, 955, 171 N.E.2d 302, 305), which in turn cited other New York cases and *Enterprise.*

In *Enterprise,* a labor arbitrator ordered several workers reinstated with backpay upon finding their dismissal improper. The collective bargaining agreement authorizing the arbitration, however, had expired after the workers' dismissal but before the award. The company argued the award of *378 reinstatement, and of backpay after expiration of the agreement, was therefore unenforceable. (*Enterprise, supra,* 363 U.S. at pp. 595–596, 80 S.Ct. at page 1360.) The high court held the award could not be refused enforcement on this ground. If the arbitrator was relying solely on statutory requirements extraneous to the contract, he exceeded his powers under the submission. But if the award derived from the arbitrator's construction of the agreement, even an erroneous construction, it was within his authority. Ambiguity on this point, which the court found to exist, was insufficient grounds to refuse enforcement. (*Id.* at pp. 597–599, 67 S.Ct. at pp. 1361–1362.)

In reaching its holding the high court explained the limits on an arbitrator's authority to fashion remedies as follows: "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet *his award is legitimate only so long as it draws its essence from the collective bargaining agreement.* *****591** ****1004** . When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (*Enterprise, supra,* 363 U.S. at p. 597, 80 S.Ct. at p. 1361, italics added.)

Judicial review of remedies as outlined in the *Enterprise* decision thus looks not to whether the arbitrator correctly *interpreted* the agreement, but to whether the award is drawn from the agreement *as the arbitrator interpreted it* or derives from some extrinsic source. As the court explained in a later labor case, where an arbitrator is authorized to determine remedies for contract violations, "courts have no authority to disagree with his honest judgment in that respect.... [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." (*United Paperworkers v. Misco, supra,* 484 U.S. at p. 38, 108 S.Ct. at p. 371 (hereafter *Misco*).)

In addition to governing federal court review of labor arbitration awards, the standard enunciated in *Enterprise* and *Misco* has been applied by federal courts reviewing commercial arbitration awards, as well as by state courts. (See, e.g., *Anderman/Smith Co. v. Tenn. Gas Pipeline Co., supra,* 918 F.2d at p. 1218; *Pacific Reinsurance v. Ohio Reinsurance* (9th Cir.1991) 935 F.2d 1019, 1024; *Engis Corp. v. Engis Ltd.* (N.D.Ill.1992) 800 F.Supp. 627, 629; *Malekzadeh v. Wyshock* (Del.Ch.1992) 611 A.2d 18, 22; *Beaver Cty. Comm. Col. v. Society of the Faculty* (1986) 99 Pa.Cmwlth. 641, 513 A.2d 1125, 1127.) Indeed, the "essence" test "has displaced all its rivals in the marketplace of judicial formulas." (*Ethyl Corp. v. United Steelworkers of America* (7th Cir.1985) 768 F.2d 180, 184.)

***379** The dissent argues the *Enterprise*/*Misco* standard should not be applied in the commercial context, apparently on the ground commercial arbitrators do not have the same need for flexibility in fashioning remedies as labor arbitrators. (Dis. opn., *post,* p. 602 of 36 Cal.Rptr.2d, p. 1015 of 885 P.2d) The dissent, we think, overstates the difference: while many commercial arbitrations involve single transactions in which a finding of breach suggests well-defined contractual damages, others—including the present one—involve lengthy and complicated dealings between the parties, in which the breaches are numerous, extended or repeated, and monetary damages are either indeterminable or inadequate. We nonetheless recognize differences do exist, and our employment of the *Enterprise/ Misco* formulation does not, as the dissent suggests, incorporate the entire body of labor arbitration law applying that test.

The need for expeditious and informal procedures to resolve disputes—and hence for a deferential standard that will minimize judicial intrusion—is at least as great in the commercial context as in labor relations. Although the present parties may both be able to bear the costs of fully litigating their claims, many commercial arbitrations involve small businesses and consumers, for whom avoiding the court system's high cost is of utmost importance. The more rigorous the standard of judicial review of arbitral remedies, the more time and money consumer plaintiffs, for example, will be forced to spend confirming and preserving awards in their favor.

We recognize certain aspects of labor arbitration may be unique, and not all rules established for resolution of disputes over collective bargaining agreements are applicable to commercial contracts. On the issues discussed here, however, *Enterprise* and other federal labor decisions have been influential in the commercial arbitration context because they are grounded on "considerations of judicial policy" equally applicable to review of commercial arbitration awards. (*Hecla Min. Co. v. Bunker Hill Co.* (1980) 101 Idaho 557, 617 P.2d 861, 866, fn. 4.) In both labor and commercial arbitrations, the choice of remedies calls on the arbitrator's flexibility and informed judgment (*Enterprise, supra,* 363 U.S. at p. 597, 80 S.Ct. at p. 1361); in both areas, independent judicial reevaluation of remedies would tend to defeat the contractual intent to resolve disputes efficiently and by private mechanisms (*Misco, supra,* 484 U.S. at p. 38, 108 S.Ct. at p. 371).

Two federal appellate decisions provide useful elaborations on the *Enterprise*/*Misco* test. In *****Cal.Rptr.2d592** ****1005** *Ethyl Corp. v. United Steelworkersof America, supra,* 768 F.2d 180, 184, the

arbitrator had awarded vacation pay for the year 1982 to workers laid off from a plant at the end of 1981, although under a literal reading of the collective bargaining agreement they could not have earned ***380** the vacation pay, since they did not work 200 hours during 1982 as the contract required. (*Id.* at pp. 182–183.) The Court of Appeals held the district court erred in setting aside this award as beyond the arbitrator's powers. (*Id.* at pp. 183–184.)

The court explained an award does not exceed the arbitrator's powers if it is based on an interpretation —"unsound though it may be"—of the contract: "It is only when the arbitrator *must* have based his award on some body of thought, feeling, or policy, or law that is outside the contract ... that the award can be said not to 'draw its essence from the collective bargaining agreement'...." (*Ethyl Corp. v. United Steelworkers of America, supra,* 768 F.2d at pp. 184–185.)

Although the *Enterprise* test emphasizes the source from which the arbitrator drew the award, it nevertheless is objective. The arbitrator cannot shield his decision from scrutiny "simply by making the right noises—noises of contract interpretation...." (*Ethyl Corp. v. United Steelworkers of America, supra,* 768 F.2d at p. 187.) Rather, the question is whether the award is "so *outré* that we can infer that it was driven by a desire to do justice beyond the limits of the contract." (*Ibid.*) Restated, the test asks " 'whether the arbitrator's solution can be rationally derived from some plausible theory of the general framework or intent of the agreement.' " (*Id.* at p. 186.)

Local 120 v. Brooks Foundry, Inc. (6th Cir.1990) 892 F.2d 1283 is particularly instructive, as it deals with the difficult problem of choosing remedies for a real but unquantifiable injury. After the union agreed to a wage concession for all workers, the company improperly protected one favored employee from the reduction. In the arbitrated grievance, the union requested an award of $130,000, the aggregate amount of the wage concession for all employees. The arbitrator found such a massive award would be inappropriate and beyond the company's ability to pay and instead awarded 10 percent of the amount, $13,000, which he stated was intended as " 'damages' " to " 'cushion' " the harm to the union from the company's breach. (*Id.* at pp. 1284, 1287.)

The Court of Appeals reversed the district court's ruling vacating the award. Acknowledging the amount of the award was not drawn directly from measurement of the injury done the union (*Local 120 v. Brooks Foundry, Inc., supra,* 892 F.2d at p. 1288), the court held it was nonetheless within the arbitrator's powers. "[D]etermining damages appropriate for an inchoate injury is not always an exact exercise, susceptible to strict logical explication." (*Id.* at p. 1287.) The arbitrator did not abuse his authority in taking ***381** into account "the economic facts of life which prompted the pay cut provision" or in viewing it in "the realistic light of the history that brought it about." (*Id.* at p. 1288.) The court concluded the award, although "unusual and even bizarre," drew its essence from the contract because it was "related to arguably proper compensatory damages...." (*Ibid.*)

[7] We distill from these cases what we believe is a meaningful, workable and properly deferential framework for reviewing an arbitrator's choice of remedies. Arbitrators are not obliged to read contracts literally, and an award may not be vacated merely because the court is unable to find the relief granted was authorized by a specific term of the contract. (*Ethyl Corp. v. United Steelworkers of America, supra,* 768 F.2d at pp. 184, 186.) The remedy awarded, however, must bear some rational relationship to the contract and the breach. The required link may be to the contractual terms as actually interpreted by the arbitrator (if the arbitrator has made that interpretation known), to an interpretation implied in the award itself, or to a plausible theory of the contract's general subject matter, framework or intent. (*Ibid.*) The award must be related in a rational manner to the breach (as expressly or impliedly found by the arbitrator).[12] *****593** ****1006** Where the damage is difficult to determine or measure, the arbitrator enjoys correspondingly broader discretion to fashion a remedy. (*Local 120 v. Brooks Foundry, Inc., supra,* 892 F.2d at p. 1287.)

12 The award is rationally related to the breach if it is aimed at compensating for or alleviating the effects of the breach. We need not decide here under what circumstances a contractual arbitrator is authorized to award punitive damages. (See *Tate v. Saratoga Savings & Loan Assn., supra,* 216 Cal.App.3d at p. 855, 265 Cal.Rptr. 440, *Todd Shipyards Corp. v. Cunard Line, Ltd.* (9th Cir.1991) 943 F.2d 1056, 1062–1063.)

The award will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is *compelled* to infer the award was based on an extrinsic source. (*Enterprise, supra,* 363 U.S. at p. 598, 80 S.Ct. at p. 1361; *Misco, supra,* 484 U.S. at p. 38, 108 S.Ct. at p. 371; *Ethyl Corp. v. United Steelworkers of America, supra,* 768 F.2d at pp. 184–185.) In close cases the arbitrator's decision must stand. (*Local 120 v. Brooks Foundry, Inc., supra,* 892 F.2d at p. 1289.)

D. Relationship of Relief to Rights Under Contract

[8] Intel maintains that, whatever the general standard, the cases establish one "bright-line" rule: "arbitrators may not award a remedy that conflicts with express terms of the arbitrated contract." To the extent this means arbitrators may not award remedies expressly forbidden by the arbitration agreement or submission, the point is well taken. How the violation of " 'an express and ***382** explicit restriction on the arbitrator's power' " (*Hecla Min. Co. v. Bunker Hill Co., supra,* 617 P.2d at p. 869) could be considered rationally related to a plausible interpretation of the agreement is difficult to see.

Thus, for example, where a collective bargaining agreement provided for arbitration solely of " 'grievance[s],' " and defined a grievance as " 'a complaint or claim against the employer,' " the arbitrator was without power to award the employer damages against the union. (*Carpenter Local 1027 v. Lee Lumber & Bldg. Material* (7th Cir.1993) 2 F.3d 796, 798–799.) [13] Even where the parties' original contract included a broad arbitration clause, the arbitrator's powers may be restricted by the limitation of issues submitted. (See, e.g., *Totem Marine Tug & Barge v. North Am. Towing* (5th Cir.1979) 607 F.2d 649, 650–651 [where arbitrated claim sought only "return expenses," and claimant's brief in arbitration conceded "charter hire" was not at issue, arbitrator exceeded powers in awarding charter hire as damages].)

13 In contrast to the broad remedial authority the parties gave the arbitrator here, commercial arbitration agreements sometimes direct the arbitrator to award very specific damages for specific breaches. For example, an arbitration rule of the American Spice Trade Association, incorporated into trading agreements, provides: " 'Whenever it shall be decided by arbitration that either party has failed to fulfill the terms of the contract, and is therefore in default, arbitrators shall determine the difference between the contract price and market value on the date of default as found by them (on the basis of contract weight without leeway) and award such difference to the seller or to the buyer as the case may be.' " (1 Domke on Commercial Arbitration (1984) § 30.02, p. 444.)

[9] To the extent Intel is advocating a broader rule—that arbitrators may not award a party benefits different from those the party could have acquired through performance of the contract—the cases do not support its position. No exact correspondence is required between the rights and obligations of a party had the contract been performed and the remedy an arbitrator may provide for the other party's breach.

In *Morris v. Zuckerman, supra,* 69 Cal.2d 686, 72 Cal.Rptr. 880, 446 P.2d 1000, for example, we held it within the arbitrator's power, as a remedy for the plaintiff's breach of fiduciary duties, to excuse the defendant from executing a document the parties' underlying contract required him to execute; the arbitrator properly created a condition to the required sale, although the original contract had no such limitation. (*Id.* at pp. 688, 694, 72 Cal.Rptr. 880, 446 P.2d 1000.) Similarly, the union in *Local 120 v. Brooks Foundry, Inc., supra,* 892 F.2d 1283, had no contractual right to a payment of $13,000, but the award was proper to alleviate the effects of the company's breach. In *****594** ****1007** *Anderman/Smith Co. v. Tenn. Gas Pipeline Co., supra,* 918 F.2d 1215, a dispute over the pricing of natural gas, the court approved an award requiring certain prices to remain in effect for one year and ***383** requiring any future price changes to be approved by the arbitrators, although the contract contained different, comprehensive provisions for price changes. (*Id.* at pp. 1217, 1219–1220; see also *Engis Corp. v. Engis Ltd., supra,* 800 F.Supp. at pp. 629–630 [arbitrator within powers in requiring one party to delete "Engis" from its corporate name, even though contract specifically granted it right to use name]; *Hecla Min. Co. v. Bunker Hill Co., supra,* 617 P.2d at p. 870 [arbitrator could invalidate price schedule imposed by party while in breach although schedule was otherwise valid under contract]; *Malekzadeh v. Wyshock, supra,* 611 A.2d at pp. 22–23 [in dispute between general and limited partners, arbitrator could, as practical necessity, delegate managerial duties to independent third party, although contract assigned those duties to general partner].)

As these examples demonstrate, arbitrators, unless expressly restricted by the agreement of the parties, enjoy the authority to fashion relief they consider just and fair under the circumstances existing at the time of arbitration, so long as the remedy may be rationally derived from the contract and the breach. The rights and obligations of the parties under the contract as it was to be performed are not an unfailing guide to the remedies available when the contract has been breached. It follows that parties entering into commercial contracts with arbitration clauses, if they wish the arbitrator's remedial authority to be specially restricted, would be well advised to set out such limitations explicitly and unambiguously in the arbitration clause. Because parties to arbitration agreements do have the power to limit possible remedies in this manner (as the dissent acknowledges), we do not believe our holding will, as the dissent speculates, discourage arbitration.

II. Application to this Case

As mentioned, section 42 of the rules of arbitration agreed upon by the parties authorized the arbitrator to grant "any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement...." The order of reference similarly empowered him to "fashion such remedy as he may in his discretion determine to be fair and reasonable but not in excess of his jurisdiction." The arbitration clause itself contained no special limitations.

Section 42 is identical to a provision of the Commercial Arbitration Rules of the American Arbitration Association (AAA). (AAA, Commercial Arbitration Rules (1993) rule 43, p. 17.) The AAA rule has been described as "a broad grant of authority to fashion remedies" (*Totem Marine Tug & Barge v.* ***384** *North Am. Towing, supra,* 607 F.2d 649 at p. 651), and as giving the arbitrator "broad scope" in choice of relief (*Malekzadeh v. Wyshock, supra,* 611 A.2d at p. 22; see also *De Laurentiis v. Cinematografica De Las Americas,* S.A. (1961) 9 N.Y.2d 503, 215 N.Y.S.2d 60, 64, 174 N.E.2d 736, 738–739 [AAA rule was grant of authority so broad no particular items of damages claimed could be eliminated in advance of arbitration]). Nothing in the contract's arbitration clause, section 42 of the rules adopted here, or the order of reference indicates an intent to place any special restrictions on the arbitrator's discretion to fashion remedies.

Intel emphasizes that the question of what remedies could be awarded was discussed prior to arbitration by the parties and the arbitrator (sitting as a temporary judge of the superior court), and that all concerned agreed the arbitrator's choice of remedies would be subject to later judicial review. A review of the cited portions of the record, however, reveals the parties and the arbitrator agreed only that any relief awarded could be judicially reviewed for *excess of jurisdiction.* The record does not reflect an agreement for any heightened review beyond that already available by statute, namely, review to determine if the award "exceeded [the arbitrator's] powers." (§§ 1286.2, subd. (d), 1286.6, subd. (b).)

[10] Paragraphs 5 and 6 of the award did not exceed the arbitrator's power under the standard previously stated. The contested items of relief were rationally drawn from the arbitrator's conception of the contract's *****595** ****1008** subject matter and the effects on AMD of Intel's breach. The available facts do not compel the conclusion the arbitrator fashioned a remedy by reaching outside the contract to some extrinsic source; we are not constrained, in other words, to find he attempted "to dispense his own brand of industrial justice." (*Enterprise, supra,* 363 U.S. at p. 597, 80 S.Ct. at p. 1361.)

In this case the arbitrator, somewhat atypically, explained at length his understanding of the contract and Intel's breach, as well as his reasons for making the award at issue. Although the following discussion consequently compares the award and breach in some detail, not all cases will allow or require such an analysis. In general arbitrators enjoy greater flexibility than juries and courts in fashioning remedies, and relief that could legally have been ordered by a trial court or jury is also within the normal authority of a contractual arbitrator. Indeed, in many cases the required rational relationship between breach and award may be found in the fact the arbitrator has awarded the injured party relief of the same general type as that a jury or court could have provided had the claim been litigated, even if the quantity, extent or parameters of the award differ in some respects from that to which ***385** the party was legally entitled. (See *Moncharsh, supra,* 3 Cal.4th at p. 28, 10 Cal.Rptr.2d 183, 832 P.2d 899 [arbitrator does not exceed his powers merely by making legal error].)

As already explained, the arbitrator found the framework of the contract required good-faith negotiation over

technology exchanges, for the purpose of allowing both parties to expand their product lines. In particular, AMD, having foregone other alliances that might have gained it entry into the 32–bit chip market in order to help Intel establish the iAPX architecture as the industry leader, required a mechanism by which it could reasonably hope to become a second source for the successors of the 8086, as well as for the 8086 itself. If a party could or would not negotiate in good faith, it should terminate the agreement pursuant to the cancellation clause.

Intel breached this implied covenant, as well as the implied covenant of good faith and fair dealing, by secretly deciding not to accept any more AMD products, while maintaining the public posture that AMD would be a second source for the 80386. One example of this breach was its summary rejection of the QPDM, as to which it was obliged to negotiate specifications in good faith. Intel's strategy succeeded, in that for about two years AMD continued to believe the contract offered it future rewards. Although AMD also delayed unnecessarily in turning to alternative strategies (e.g., reverse engineering the 80386 or forming an alliance with a different chip maker) after concluding it would not be able to obtain the 80386 under the contract, the arbitrator found AMD had indeed lost some "immeasurable" amount of profits and goodwill as a result of Intel's bad faith conduct.

Paragraph 6 of the award, which extends for two years (insofar as they related to the Am386) certain licenses to Intel patents and copyrights originally granted AMD in 1976 and extended to 1995 under the 1982 agreement, bears a clear and rational relationship to the contract and the effects of Intel's breach. Having found Intel succeeded in keeping AMD in the Intel camp for about two years through its bad-faith conduct, the arbitrator extended for that same period rights that AMD had enjoyed under the contract and that could be useful to it in recovering from the breach's effects.

Paragraph 5 awards AMD a nonexclusive, royalty-free license to any Intel copyrights, patents, trade secrets or maskwork rights contained in the Am386. Because the question whether AMD had appropriated any Intel intellectual property in creating the Am386 was apparently one of the issues between the parties in federal litigation at the time this award was made, Intel contends the arbitrator went outside the scope of the arbitration in ***386** fashioning paragraph 5 of the award. Intel points to language the arbitrator used that suggests extrinsic concerns. In the award itself the arbitrator stated he intended paragraph 5 to provide AMD a defense in the pending federal litigation. In the accompanying opinion he explained paragraphs 5 and 6 were intended to end "the incessant warfare" between the parties, and *****596 **1009** in his final summary he added his "hope[ ]" the additional competition "will be beneficial to the parties ... and to the consumer world wide through lower prices." [14]

14 Intel also complains the arbitrator referred to his own remedial powers as "awesome, magisterial ..." Although the accuracy *vel non* of his claim to "awesome" powers is immaterial, we note the President of the American Arbitration Association, for one, agrees with that characterization: "An arbitrator is given awesome powers by the parties and by the law." (Coulson, Business Arbitration: What You Need to Know (1980) p. 21.) Intel fails to note the arbitrator went on to say he would use his powers sparingly, following the law as much as possible. Indeed, the arbitrator feared his restraint —the fact he did not award AMD the very large monetary damages it requested—would lead some to believe Intel "has been dealt with too lightly...." He explained he was aware of the problem but believed he had reached the only just result: "Were [I] permitted by contract law to award punitive damages [I] would have imposed some; and were [I] permitted by law to slice out arbitrarily from Intel's bountiful income from the 80386 a share of money to 'even out the balance' ... for AMD [I] would have done that too. But neither of these things can be done without sacrificing the integrity of this decision. There is no lawful way to compensate AMD other than those set forth herein...."

Whatever optimism the arbitrator expressed about the effects of his award, the record demonstrates paragraph 5 derived rationally from his interpretation of the contract and the breach he found Intel to have committed. As already discussed, the arbitrator found AMD had been damaged by Intel's breach: the breach "to some extent contributed to AMD's delay in reverse engineering the 80386." Finding the amount of actual damages indeterminable and nominal damages alone inequitable, the arbitrator determined the "proper remedy" was to block Intel's interference with AMD's own attempts to mitigate its damage by marketing its reverse-engineered 32–bit chip. The award was thus rationally related to the arbitrator's plausible findings as to the subject matter of

the contract and the effects of the breach. We repeat that in doubtful cases the arbitrator's choice of remedies must stand. (*Local 120 v. Brooks Foundry, Inc., supra,* 892 F.2d at p. 1289.)

Intel emphasizes paragraph 5 gave AMD rights it had not earned in performance of the contract. As we have explained, however (see part I.D., *ante*), a valid award for *breach* of contract does not require exact correspondence with the particular benefits the injured party would have received had the contract been fully *performed.* The arbitrator acted within his powers by fashioning a remedy rationally designed to alleviate the unfair results of Intel's breach, a breach that was not specifically anticipated in the parties' ***387** agreement. The parties' general restriction on the arbitrator's powers—that he fashion relief he deemed "just and equitable and within the scope of the agreement"—did not preclude him from choosing a remedy consonant with his construction of the contract's implied covenants and rationally related to the effects of a breach he found to have occurred. [15]

15 Intel argues more specifically the arbitrator deviated from the contract in four ways: (1) by not requiring AMD to have created an exchange product that earned it the 80386; (2) by not requiring AMD to pay royalties on the licensed Intel intellectual property; (3) by giving AMD "have-made" rights to the Intel intellectual property; and (4) by giving AMD rights to Intel "custom circuitry." As to all four points, we repeat that the award was designed not to implement contractual performance, but to prevent further damage to AMD from Intel's breach of the contract; that purpose did not require imposition of royalties, further technology exchanges, or exact correspondence with the terms of a technology exchange license described in the contract. In addition, "have-made" rights—the right of a licensee to have a chip made for it by a third party foundry—were not expressly excluded under the 1982 contract, and in the absence of any finding by the arbitrator we cannot say they were not included in the contractual right to make and sell a licensed product. Rights to "custom circuitry"—special circuitry used for emulation, diagnostics and development—*were* excluded from the transfer provisions in the 1984 amendment, but are nowhere mentioned in paragraphs 5 and 6 of the award; without a finding by the arbitrator, this court could not find these were among the rights licensed in the award. In any event, for the reasons already given, the award was valid despite any divergence between it and the exchange license described in the contract. We therefore deny as containing irrelevant material the parties' motions for judicial notice received October 18, 1994, and October 28, 1994. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, 31 Cal.Rptr.2d 358, 875 P.2d 73.) We have examined the materials; they would not affect our decision.

*****597** ****1010** That the arbitrator found AMD had not "earned" the Intel 80386 is, under the circumstances, not significant. The award sought not to implement a technology exchange required by the contract, but to alleviate the effects of Intel's breach of the contract's implied covenants. Because of Intel's breach, AMD had been delayed for an indeterminate period in finding another way of entering the 32–bit chip market, whether by reverse-engineering the 80386 or by allying itself with another company. While AMD should have mitigated its damages from the breach by beginning the reverse engineering process earlier, the arbitrator reasonably determined fairness now required AMD be free to proceed on its own path without "legal harassment" from the breaching party. By interfering with—and further delaying—AMD's exploitation of its own chip, Intel would keep AMD in the non-competitive posture Intel had imposed partly through its deliberate breach of contract. The arbitrator, empowered to decide the controversy *ex aequo et bono,* had the power to make an award he believed would protect AMD from interference as it attempted to recover from Intel's breach by exploiting its own 32–bit chip. He did not exceed his jurisdiction in fashioning a remedy to prevent Intel from taking advantage of its own bad-faith conduct. (See Civ.Code, § 3517.)

***388** Finally, Intel argues the award "sanction[s] illegal conduct," to wit, AMD's (hypothetical) appropriation of Intel intellectual property in the Am386. This attack also fails. The arbitrator awarded AMD a license to use Intel intellectual property in the future to the undetermined extent such property was contained in the Am386. Awarding such a license, as has been seen, was within the scope of authority the parties gave the arbitrator. AMD's use, if any, of the property *under license* is not misappropriation; nor is it illegal or against public policy for any other reason. [16]

16 Because we conclude the award should have been confirmed, we do not reach AMD's further

> contention vacation and rehearing, rather than correction, was the proper course if the challenged remedies exceeded the arbitrator's powers.

The dissent, while accepting the principle an award must be rationally linked to the contract or breach, would hold in addition that "the potential remedies available to an arbitrator are limited to those that a court could award on the same claim." (Dis. opn., *post,* at p. 605 of 36 Cal.Rptr.2d, page 1018 of 885 P.2d.) In the present dispute over a breach of the implied covenant of good faith and fair dealing, the dissent would limit the possible equitable remedies to specific performance as it could have been ordered by a court, and would vacate the award because it does not order performance in the exact terms of the contract, i.e. because the licenses awarded in paragraphs 5 and 6 do not correspond precisely to licenses that could have been earned under the contract's technology exchange provisions. (*Id.* at pp. 606–607 of 36 Cal.Rptr.2d, pages 1019–1020 of 885 P.2d.)

We believe this approach is inconsistent with the principles of contractual arbitration and with the agreement of the parties in this case. As already discussed, arbitrators are not generally limited to making their award " 'on principles of dry law.' " (*Moncharsh, supra,* 3 Cal.4th at p. 11, 10 Cal.Rptr.2d 183, 832 P.2d 899.) For that reason, parties who submit their disputes to arbitration " 'may expect not only to reap the advantages that flow from the use of that nontechnical, summary procedure, but also to find themselves bound by an award reached by paths neither marked nor traceable and not subject to judicial review.' [Citations.]" (*Ibid.*)

As New York's highest court expressed the same idea, "[i]n the final analysis 'Arbitrators may do justice' and the award may well reflect the spirit rather than the letter of the agreement [citation].... In other words *a court may not vacate an award because the arbitrator has exceeded the power the court would have,* or would have had if the parties had chosen to litigate, rather than arbitrate the dispute. Those who have chosen arbitration as their forum should recognize that arbitration procedures *and awards* often differ from what may be expected in courts of law." (***598 **1011 *Rochester City School Dist. v.* *389 *Rochester Teachers Assn.* (1977) 41 N.Y.2d 578, 394 N.Y.S.2d 179, 182, 362 N.E.2d 977, 981; italics added.)

This principle applies fully to arbitral awards of nonmonetary relief. "Arbitrators have broad discretion in fashioning a remedy for the injustice which is found to have occurred." (*Baltimore County v. Mayor & City Council of Baltimore* (1993) 329 Md. 692, 621 A.2d 864, 871.) Because the parties to an arbitration have the freedom to determine the rules by which their dispute will be resolved, including the scope of available relief, "courts will uphold awards of specific performance by arbitrators in instances in which the equitable remedy would not have been available if the dispute had originally been litigated in court." (1 Domke on Commercial Arbitration (rev. ed. 1994) § 30.01, p. 441.) As one federal court succinctly stated, "[a]n arbitration panel may grant equitable relief that a Court could not." (*Sperry International Trade, Inc. v. Government of Israel* (S.D.N.Y.1982) 532 F.Supp. 901, 905, *affd.* 689 F.2d 301 (2d Cir.1982).)

The parties in the present case did not by agreement restrict the arbitrator to remedies available in a court of law. To the contrary, they adopted an AAA rule authorizing the arbitrator to grant "any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement...." Although the dissent cites *Thompson v. Jespersen* (1990) 222 Cal.App.3d 964, 272 Cal.Rptr. 132 for the proposition the AAA rule restricts the arbitrator to remedies authorized by law or express agreement (dis. opn., *post,* p. 606 of 36 Cal.Rptr.2d, p. 1019 of 885 P.2d) that case neither states nor stands for such a rule. The *Thompson* court vacated an arbitral award of attorney fees on the ground the fee issue was neither submitted to arbitration nor within the " 'terms' " of the parties' contract. The award thus bore, in the court's view, an insufficient relationship to the agreement itself. (*Id.* at pp. 967–968, 272 Cal.Rptr. 132.) At issue in *Thompson* was an award of litigation "expenses" (*id.* at p. 968, 272 Cal.Rptr. 132), not *damages* for breach of contract; the decision does not articulate any general rule that an arbitrator is limited to substantive relief available to a court. (See also *Swift Ind., Inc. v. Botany Ind., Inc.* (3d Cir.1972) 466 F.2d 1125, 1135–1136 [upholding an award of attorney fees, as a matter of contract interpretation within the authority of the arbitrator, despite the lack of any explicit reference to fees in the parties' agreement or the AAA rules]; *Raytheon v. Automated Business Systems, Inc.* (1st Cir.1989) 882 F.2d 6, 10 [under the AAA rule, damages or relief available to a court is the "minimum" available to arbitrator].)

Nor, contrary to the dissent's contention, does the AAA's published guide for commercial arbitrators suggest

arbitrators are limited to relief available ***390** from a court. The guide first states a general standard governing relief: "The award must be consistent with the agreement of the parties." (AAA, A Guide for Commercial Arbitrators (1991) p. 23, reprinted in Oehmke, Commercial Arbitration (1994 cum.supp.) App. 5, p. 821.) The guide states no particular standard for consistency; AAA rule 43, as previously noted, requires only that the remedy must be one the arbitrator deems "within the scope" of the agreement. The general guidance is followed by three "example [s]" of appropriate relief: monetary damages, specific performance of the contract, and an injunction against breach. Nothing in the brief and general guidance suggests these examples are intended to be exclusive.

The test proposed by the dissent would impermissibly embroil the courts in reviewing the legal correctness of an arbitrator's decision on submitted issues. To determine whether a remedy is within the range a court could award on the same claim, a reviewing court would inevitably have to interpret the contract and resolve factual and legal disputes on questions such as the nature of the breach and the extent of the cognizable injury to the nonbreaching party. Reference to "normal contract remedies" (dis. opn., *post,* at p. 607 of 36 Cal.Rptr.2d, page 1020 of 885 P.2d) is not sufficient, because what remedies are legally and equitably available for breach of contract may depend on the nature of the contract, the breach and the injury. Consequently, the dissent's approach would require judicial reexamination of the award's legal and factual sufficiency, an enterprise we disapproved in *Moncharsh.* In addition, to measure the award of an arbitrator, who may *****599** ****1012** have been chosen for practical experience or technical expertise rather than legal training, strictly against the legal limits of contract damages is, we believe, unrealistic and contrary to the parties' expectations.

Equitable relief is by its nature flexible, and the maxim allowing a remedy for every wrong (Civ.Code, § 3523) has been invoked to justify the invention of new methods of relief for new types of wrongs. (11 Witkin, Summary of Cal.Law (9th ed. 1990) Equity, § 3, p. 681.) In actions founded on contract, courts have available for use in appropriate cases, in addition to specific performance, equitable remedies based on reformation, excuse of conditions and rescission (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 382, 772, 883–885, pp. 347–348, 697, 791–794), as well as quasi-specific performance by constructive trust (11 Witkin, Summary of Cal.Law, *supra,* Equity, § 28, pp. 706–707), and indirect enforcement of a covenant by negative decree (*id.,* § 61, pp. 737–738).

In light of the inherently flexible nature of equitable remedies, the principle of arbitral finality which forbids judicial inquiry into the legal correctness of the arbitrator's decisions on submitted issues, and the related principle that remedies available to a court are only the *minimum* available to an ***391** arbitrator (unless restricted by agreement), we cannot agree with the dissent the relief in this case was beyond the arbitrator's powers simply because the license awarded did not correspond in all its terms with a license that could have been earned through performance of the agreement.

CONCLUSION

We conclude the challenged portions of the arbitrator's award were within his authority to fashion remedies for a breach of contract. The superior court correctly confirmed the award under section 1286. The judgment of the Court of Appeal, reversing that of the superior court, is reversed.

LUCAS, C.J., and ARABIAN and GEORGE, JJ., concur.

KENNARD, Justice, dissenting.

In *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10 Cal.Rptr.2d 183, 832 P.2d 899, a majority of this court held that an arbitrator's error in deciding the merits of a claim cannot be judicially reviewed or corrected, even when the error is manifest on the face of the arbitrator's decision and causes substantial injustice. In this case, the majority takes another major step in the direction of turning arbitration into a game of chance and an instrument of injustice. With *Moncharsh* having removed all protection against an arbitrator's errors in deciding the merits of a claim, the majority in this case in turn abolishes any meaningful limitations on the scope of the remedies that an arbitrator may award in deciding a contract dispute: "The award will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is *compelled* to infer the award was based on an extrinsic source." (Maj. opn., *ante,* at p.

593 of 36 Cal.Rptr.2d, page 1006 of 885 P.2d, italics in original.)

Under the majority's decision an arbitrator in a commercial contract dispute may award an essentially unlimited range of remedies, whether or not a court could award them if it decided the same dispute, so long as it can be said that the relief draws its "essence" from the contract and not some other source. This standard, taken from the far different realm of federal labor law, imposes only the most minimal scrutiny on an arbitration award. In particular, it permits an arbitrator to award a remedy that a court would be prohibited from awarding.

The majority's decision will make businesses think twice about whether they should agree to resolve disputes by arbitration. Businesses choose arbitration for the same reasons they make any business decision—because they believe that, on balance, arbitration maximizes benefits and minimizes risks and costs. By permitting arbitrators deciding commercial contract ***392** disputes to award relief beyond that which a court could award and by imposing no limitation on the relief an arbitrator may award other than the minimal requirement that the award draw its essence from the contract, the majority has *****600** ****1013** greatly increased the risks and uncertainty of arbitration.

In my view, an arbitrator's award must both fall within the range of remedies that a court could award for the same claim and, in the case of a contract dispute, bear a rational relationship to the contract. Because the arbitrator's award in this case does not meet either test, I dissent.

I

In 1982, Advanced Micro Devices, Inc. (AMD) and Intel Corporation (Intel) entered into a contract setting forth conditions under which each could acquire from the other the right to become a "second source" manufacturer for semiconductor products initially developed by the other. Under the agreement, each party could "earn" the right to manufacture and sell a particular product developed by the other party by offering in exchange to the other party, and by the other party accepting, the manufacturing rights to a product of equivalent technical complexity developed by the first party. For example, AMD could acquire the right to manufacture a particular microprocessor that Intel had developed by offering to Intel, and by having Intel accept, the rights to an AMD-developed microprocessor of equivalent technical complexity. For each product the non-developing party acquired the right to manufacture and sell, it would pay a royalty to the developing party. The non-developing party could not subcontract any right it acquired to manufacture and sell products developed by the other party. The contract included an arbitration clause.

In 1987, AMD alleged that Intel was breaching the contract and petitioned the superior court for arbitration. The parties selected an arbitrator and agreed on a series of rules for the arbitration. All of the claims referred to arbitration were for breach of contract.

After five years of arbitration, the arbitrator, a retired judge, found that Intel had breached the contract in several respects. Among other breaches, he found that Intel had breached the covenant of good faith and fair dealing when it decided that it would no longer accept any AMD products under the agreement but concealed this decision from AMD. AMD asserted that by this action Intel had prevented AMD from "earning" the right under the agreement to manufacture the Intel-developed 80386 microprocessor. AMD also asserted that Intel's actions had delayed AMD's efforts to independently develop, as it eventually did, its own competitive microprocessor, the Am386, by reverse engineering the 80386.

***393** The arbitrator, however, concluded that the cause of AMD's failure to earn the right to the 80386 was not Intel's breach but AMD's own failure to develop microprocessor products acceptable to Intel that would have earned AMD the right to manufacture the 80386. The arbitrator determined that while Intel's breach had caused AMD some delay in developing the Am386, AMD's delays were largely attributable to its own "inertia" and "myopia." Nonetheless, the arbitrator stated that Intel's breach had damaged AMD "immeasurably"—apparently using the term to mean not that damages were immeasurably large (he found AMD's calculation of lost 80386 profits in the amount of $268 million to be accurate but refused to award those lost profits for lack of causation) but that the damages were not capable of ready and certain calculation.

The arbitrator awarded money damages to AMD for Intel's breaches other than the breach of the covenant of good faith and fair dealing. For Intel's breach of the covenant of good faith and fair dealing, the arbitrator awarded nominal damages of $1 plus equitable relief set forth in paragraphs 5 and 6 of the award. Intel had sued AMD separately in federal court, claiming that the Am386 infringed Intel's intellectual property rights, and the arbitrator intended paragraphs 5 and 6 of his award to provide AMD with a complete defense to this litigation.

In paragraph 5 of the award, the arbitrator granted AMD a permanent, royalty-free license to all Intel patents, copyrights, and other intellectual property used in the Am386. The rights granted to AMD in paragraph 5 included both the right to make the Am386 and the right to have others make the Am386 for AMD. In paragraph 6, the arbitrator ***601 **1014 extended for two additional years, with respect to the Am386 only, a 1976 grant of certain patent and copyright licenses from Intel to AMD that the 1982 AMD–Intel agreement had extended until 1995. (Because paragraph 5 grants AMD an indefinite license to *all* Intel patents and copyrights used in the Am386, it is not immediately apparent what additional rights AMD gained by paragraph 6.)

After the arbitrator made his award, AMD petitioned the superior court to confirm the award and Intel petitioned to have the award corrected by deleting paragraphs 5 and 6. The court confirmed the award as made.

Intel appealed. On appeal, the Court of Appeal concluded that the arbitrator had exceeded his powers in fashioning the relief in paragraphs 5 and 6 because those paragraphs did not draw their essence from the AMD–Intel contract and lacked any rational nexus to it. The Court of Appeal corrected *394 the award by deleting paragraphs 5 and 6 and confirmed the award as corrected, determining that it was unnecessary to vacate the award because the correction did not affect the merits of the decision.

II

Under Code of Civil Procedure section 1286.2, subdivision (d), a party may petition the court to vacate an arbitrator's award on the ground that "the arbitrator[ ] exceeded [his or her] powers." In my view, there are two sources of limitations on the remedial powers of an arbitrator deciding a contract dispute. First, because our arbitration statutes merely establish a different procedure for resolving disputes, and do not create new substantive claims or remedies, an arbitrator lacks the power to award a remedy outside the scope of those that a court could award for the same claim. Second, an arbitrator deciding a contract dispute lacks the power to make an award that has no rational linkage to the agreement or its breach. To guard against such arbitrary and irrational awards, courts have recognized that in contract disputes there should be a rational relationship between the arbitrator's interpretation of the contract and the relief awarded. This inquiry focuses on whether there is some connection between the award, on the one hand, and, on the other hand, the arbitrator's interpretation of the agreement and his or her findings of breach. [1]

[1] The parties can by agreement vary the standard of court review of an arbitrator's award, just as they can vary other aspects of arbitration. (See *Pacific Gas & Elec. Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 588, 19 Cal.Rptr.2d 295.)

Accordingly, in judicially reviewing a commercial contract arbitration, both a scope-of-available-remedies test and a rational relationship test are necessary to assess whether a remedy exceeds the arbitrator's powers. Either alone is incomplete. For example, an award of attorney fees may be a completely rational remedy for breach of a contract that is silent as to them, yet exceed the arbitrator's powers because the governing law precludes attorney fees as a remedy for breach of contract. Conversely, an award of compensatory damages may be within the scope of the potential remedies available for a breach of contract claim, yet lack any rational relationship to the arbitrator's interpretation of the contract if the arbitrator interprets the contract to find that there was no breach.

A rational relationship test alone is insufficient as a standard to judge whether an arbitrator has exceeded his or her powers. Because a rational relationship test looks solely to the connection between the arbitrator's view of the contract and the remedies he or she has selected, it fails to capture all of the ways that an arbitrator may be said to exceed his or her powers.

*395 First, as noted above, a rational relationship test ignores the limitations that exist as a matter of law on the scope of relief available for a given type of claim. Using

only a rational relationship test would permit arbitrators to award remedies that courts could not. [2]

[2] For instance, under the majority's test it is theoretically possible for an arbitrator to order the losing party to be placed in the stocks or the pillory, or to direct that the contractual relationship be repaired by ordering the marriage of the parties' first-born children. Although it is, of course, highly unlikely that any arbitrator would ever select any of these remedies, it is not difficult to conceive of less drastic but still bizarre forms of equitable relief that would be permitted by the majority's "essence" test, and which an arbitrator might order to settle a contract dispute, but which were uncontemplated by the contracting parties.

*****602 **1015** Second, a rational relationship test can only be applied to review an arbitration award in a contract dispute; it cannot be applied to the arbitration of non-contract (e.g., statutory or tort) claims because there is no contract that the award can be measured against.

Third, even in contract dispute arbitrations a rational relationship test is of limited or no utility when the arbitrator does not issue a written decision, for an understanding of the arbitrator's interpretation of the contract and his or her findings of how the contract was breached is necessary before the question of whether the remedies have their essence in the contract can be answered in a meaningful fashion. Arbitrations rarely result in the sort of extensive written decision that the arbitrator prepared here. Many, if not most, arbitrations result in only a written award of money damages without any written statement of decision giving supporting reasons and analysis. Indeed, the American Arbitration Association (AAA) encourages arbitrators to dispense with written decisions in order to immunize their awards against court challenges. (AAA, A Guide for Commercial Arbitrators (1991) p. 24 reprinted in Oehmke, Commercial Arbitration (1994 Cum.supp.) app. 5.) Without a statement of the arbitrator's understanding of the contract, a rational relationship test cannot be meaningfully applied.

III

The majority holds that arbitration awards in commercial contract disputes should be judicially reviewed under the "essence" test of federal labor arbitration law. (Maj. opn., *ante,* at pp. 590–593 of 36 Cal.Rptr.2d, pages 1003–1006 of 885 P.2d.) Under this extremely deferential test, the only requirement is that "[t]he remedy awarded ... must bear some rational relationship to the contract and the breach." (Maj. opn., *ante,* at p. 592 of 36 Cal.Rptr.2d, page 1005 of 885 P.2d.) "The award will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is *compelled* to infer the award was based on an extrinsic source." (Maj. opn., *ante,* at p. 593 of 36 Cal.Rptr.2d, page 1006 of 885 P.2d, original italics.)

***396** For the following reasons, the majority's "essence" test is an inadequate test for reviewing whether an arbitration award is within the arbitrator's remedial powers. First, it is incomplete because it does not address whether the arbitration award is within the range of remedies authorized by law or by agreement for the claim decided by the arbitrator. Second, the "essence" test is an unsatisfactory measure of arbitration awards in commercial contract disputes because the degree of relationship it requires between an arbitrator's award and the contract giving rise to the dispute is about the most minimal imaginable.

The "essence" test adopted by the majority originated in the federal law of collective bargaining, and as used in that field gives arbitrators an extremely broad power to fashion remedies. (See *United Steelworkers of America v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (hereinafter *Enterprise*) [in which the United States Supreme Court created the "essence" test].) Under the "essence" test, any award is within the arbitrator's power so long as it can be said to "draw[ ] its essence" from the contract that gives rise to the dispute, and not from some other source outside the contract. (*Id.* at p. 597, 80 S.Ct. at p. 1361.)

The minimal level of scrutiny that the majority's "essence" test imposes on arbitration awards may not be immediately apparent from the abstract words in which the test is phrased. As it has evolved in the field of labor law, however, the "essence" test is a broad grant of power to arbitrators that provides only the barest scrutiny of the relationship between an arbitrator's award and the collective bargaining agreement on which it is based. The "essence" test authorizes any arbitration award, no matter how "unusual and even bizarre" *****603 **1016** (*Local*

120 v. Brooks Foundry, Inc. (6th Cir.1990) 892 F.2d 1283, 1288), unless it can be said with assurance that "the arbitrator *must* have based his award on some body of thought, or feeling, or policy, or law that is outside the contract" (*Ethyl Corp. v. United Steelworkers of America* (7th Cir.1985) 768 F.2d 180, 184–185, original italics).

Like the commercial contract arbitration cases from other jurisdictions on which it relies, the majority has uncritically adopted the "essence" test as the standard of review for commercial contract dispute arbitration awards, and thereby imported wholesale the specialized body of labor arbitration law interpreting that test, without rigorously analyzing whether the reasons that gave rise to the "essence" test in labor arbitration also hold true in the quite ***397** different world of commercial contract arbitration.[3] As I discuss below, the policy reasons that led to the adoption and broad scope of the "essence" test in the collective bargaining arena do not support its use in the commercial contract context.[4]

[3] The majority claims that although it is adopting the *Enterprise* "essence" test of federal labor arbitration, it is not thereby "incorporat [ing] the entire body of labor arbitration law applying that test." (Maj. opn., *ante,* at p. 591 of 36 Cal.Rptr.2d, page 1004 of 885 P.2d.) The majority, however, nowhere explains what aspects of the "essence" test it is not adopting. In this case, for example, the majority relies extensively and unqualifiedly on federal labor arbitration cases in formulating and applying its test for reviewing commercial contract arbitration awards. (Maj. opn., *ante,* at pp. 590–593, 595, 596 of 36 Cal.Rptr.2d, pages 1004–1006, 1008, 1009 of 885 P.2d.)

[4] None of the cases on which the majority relies offers any comparative analysis of labor arbitration and commercial contract arbitration or any reasoned explanation as to why the "essence" test used to review labor arbitration awards should also be used to review commercial contract awards. (See *Pacific Reinsurance v. Ohio Reinsurance* (9th Cir.1991) 935 F.2d 1019, 1024; *Anderman/Smith Co. v. Tenn. Gas Pipeline Co.* (5th Cir.1990) 918 F.2d 1215, 1218; *Engis Corp. v. Engis Ltd.* (N.D.Ill.1992) 800 F.Supp. 627, 629; *Hecla Mining Co. v. Bunker Hill Co.* (1980) 101 Idaho 557, 617 P.2d 861, 866, fn. 4; *Malekzadeh v. Wyshock* (Del.Ch.1992) 611 A.2d 18, 22; *Beaver Cty. Comm. Col. v. Society of the Faculty* (1986) 99 Pa.Cmwlth. 641, 513 A.2d 1125, 1127.)

The broad powers and deference granted to labor arbitrators by the "essence" test reflect "[t]he federal policy of settling labor disputes by arbitration...." (*Enterprise, supra,* 363 U.S. at p. 596, 80 S.Ct. at p. 1360.) "The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations." (*United Paperworkers Int'l Union v. Misco, Inc.* (1987) 484 U.S. 29, 37, 108 S.Ct. 364, 370, 98 L.Ed.2d 286.)

One policy reason why arbitrators in the collective bargaining context are given extraordinarily broad remedial powers is the impossibility of reducing to writing all aspects of a collectively bargained employment relationship between an employer and what may be hundreds or thousands of employees in numerous job classifications at numerous locations. "The collective bargaining agreement.... is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. [Citation.] The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.... [¶] '... There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages....' [¶] A collective bargaining agreement is an effort to erect a system of industrial self-government." ***398** (*United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 578–580, 80 S.Ct. 1347, 1350–1352, 4 L.Ed.2d 1409 (hereinafter *Warrior & Gulf*), fn. omitted.)

Another policy reason supporting the "essence" test in the collective bargaining context is the difference in function between labor arbitration and commercial contract arbitration. As the United States Supreme Court recognized in a companion case to the decision in which it created the "essence" test, "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement...." (*Warrior & Gulf, supra,* 363 U.S. at p. 578, 80 S.Ct. at p. 1352.) Labor arbitration is typically *****604** ****1017** an ongoing process during the life of a collective bargaining agreement that adjusts and modifies the agreement to meet the changing conditions of the workplace. "[A]rbitrators under these collective agreements are indispensable

agencies in a continuous collective bargaining process." (*Enterprise, supra,* 363 U.S. at p. 596, 80 S.Ct. at p. 1360.)

"Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable.... The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. [¶] ... The grievance procedure is, in other words, a part of the continuous collective bargaining process.... [¶] ... [¶] ... The parties expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished." (*Warrior & Gulf, supra,* 363 U.S. at pp. 581–582, 80 S.Ct. at pp. 1352–1353.)

In *O'Malley v. Wilshire Oil Co.* (1963) 59 Cal.2d 482, 486, 30 Cal.Rptr. 452, 381 P.2d 188, this court recognized both the unique nature of labor arbitration and the fact that the United States Supreme Court's decision in *Enterprise* was based on "the special nature of the collective bargaining agreement and the crucial role of the arbitrator in resolving disputes arising under it...." (See also *O'Malley v. Wilshire Oil Co., supra,* at pp. 490, 30 Cal.Rptr. 452, 381 P.2d 188 [referring again to "the unique nature of the collective bargaining contract and to the vital and dynamic role of the arbitrator in the area of industrial relations"], 494, 30 Cal.Rptr. 452, 381 P.2d 188 [noting "the differences between a collective bargaining agreement and a standard commercial contract"].)

***399** Because of these twin policy reasons—the impossibility of reducing all aspects of a labor-management relationship to writing and the need for an ongoing process of amendment during the life of a collective bargaining agreement—the "essence" test gives labor arbitrators an expansive power to create remedies beyond those that would otherwise be available for a breach of contract. Of great significance, labor arbitrators can create additional rights and duties for the parties so long as those rights and duties are within the general framework of the agreement and are not contrary to any plain and unambiguous term of the agreement. (See *Desert Palace, Inc. v. Local Joint Executive Board* (9th Cir.1982) 679 F.2d 789, 793; *Morgan Services, Inc. v. Local 323, Chicago and Cent. States Joint Bd.* (6th Cir.1984) 724 F.2d 1217, 1220.)

Neither of these policy reasons supporting the "essence" test exists in the realm of commercial contracts, however. With respect to the first reason, parties to a commercial contract, in contrast to a collective bargaining agreement, normally expect that the contract, and the contract alone, will be the complete and final expression of their duties and obligations.

As to the second reason, parties to a commercial contract do not expect that matters outside the contract will later be brought within the contract by an arbitrator in an ongoing process of contract amendment and modification continuing throughout the life of the contract. (See *Raytheon Co. v. Automated Business Systems, Inc.* (1st Cir.1989) 882 F.2d 6, 10–11 ["Labor arbitration is an integral aspect of the entire collective bargaining process; it is intended to be a part of a continuing and ameliorating enterprise between parties who maintain an ongoing working relationship.... [¶] Commercial arbitration, by contrast ..., is normally considered a one-shot endeavor, in which the parties have chosen arbitration not as a means of ongoing dispute resolution, but as a 'simpl[e], informal[ ], and expeditio[us]' method of resolving a particular dispute."].)

Nor are there other policy reasons in the commercial arbitration context that would support granting commercial arbitrators the *****605** ****1018** broad authority of labor arbitrators for fashioning remedies or creating additional rights and duties under the contract. In choosing to arbitrate a dispute, parties to a commercial contract expect to receive both a speedier resolution of their dispute and a simpler procedure for resolving their dispute than would be the case if they instead went to court. Parties to an arbitration, however, would not generally expect that the arbitrator has the power to award relief that a court resolving the same dispute could not award. The possibility of unlimited and unpredictable forms of relief is not one of the "advantages" that a party normally expects to receive from choosing to arbitrate.

***400** Thus, the "essence" test was designed to grant labor arbitrators broad remedial powers in order to further policies and concerns unique to the law of collective bargaining. Because these policies and concerns conflict with the policies and concerns underlying commercial contract arbitration, the "essence" test is an inappropriate test for reviewing commercial contract arbitration awards.

IV

As discussed above, our arbitration statutes create a different process for deciding legal disputes, not different remedies for those disputes. For that reason, the potential remedies available to an arbitrator are limited to those that a court could award on the same claim. [5] Thus, in reviewing an arbitration award to determine whether it exceeds the arbitrator's powers, a court must determine whether the award falls within the remedies authorized by law or by agreement for the legal claim the arbitrator has decided.

5 Contrary to the majority's assertion, a scope-of-available-remedies analysis is quite deferential to the arbitrator. It does not seek to determine whether the award is legally or factually justified, either on its face or in light of the evidence, but only whether it falls within the outer limit of relief potentially available from a court for the claim being litigated. Accordingly, the scope-of-available-remedies analysis is consistent with *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th 1, 10 Cal.Rptr.2d 183, 832 P.2d 899, and does not seek to reexamine the factual or legal sufficiency of the arbitrator's decision, either on its face or in light of the evidence supporting it. It asks only the legal question of whether the arbitrator's remedy is within the range of potential remedies made available by law or by agreement of the parties (as the agreement is interpreted by the arbitrator) for the claims submitted. Nor does the scope-of-available-remedies analysis permit second-guessing of an arbitrator's decision to award any remedy within the scope of the arbitrator's powers.

An arbitrator's remedial powers, and limitations on those powers, can arise from a number of different sources. The substantive law underlying the claim being arbitrated, the contract allegedly breached (in a breach of contract case), the arbitration agreement, and the rules adopted by the parties to govern the arbitration are all potential sources that may either expand or limit the scope of the remedies available to an arbitrator. In particular, because arbitration is a creature of contract, the parties by agreement may expand the arbitrator's arsenal of remedies to include novel and creative equitable remedies.

In deciding what remedies are potentially available to the arbitrator in a given case, a court should first look at the nature of the claims being arbitrated. Unless the parties have by agreement otherwise expanded or restricted the scope of remedies available, the nature of the claims should ordinarily determine the nature of the remedies available. The reason for this ***401** is, as stated above, that parties who have agreed to a commercial arbitration are seeking a different process, not a different remedy, than they would get in court.

Here, the claims were all for breach of contract. Thus, unless the parties agreed otherwise, the scope of remedies for those claims should be limited to the normal contract remedies available in court for a breach of contract. As this court recently explained in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514–17, 520, 28 Cal.Rptr.2d 475, 869 P.2d 454, when it refused to make tort remedies available for a breach of contract, there are fundamental public policy reasons for limiting the scope of remedies available for contractual breaches. These reasons are equally applicable whether the remedies are awarded by a court or an *****606** ****1019** arbitrator. Awarding equitable remedies other than specific performance to remedy a breach of contract would, like awarding tort or other non-contract damages, make the consequences of a breach of contract "uncertain and unpredictable" (*id.* at p. 520, 28 Cal.Rptr.2d 475, 869 P.2d 454) and thwart "the vital commercial importance of foreseeability limitations on contract damages" (*id.* at p. 517, 28 Cal.Rptr.2d 475, 869 P.2d 454). Moreover, even when the amount of contract damages are difficult to calculate, courts award damages rather than some novel equitable remedy that they might believe to be fairer than a sum of money because to do otherwise would make the consequences of a breach of contract unacceptably unforeseeable.

In this case, paragraphs 5 and 6 of the arbitrator's award are not normal contract remedies because they are a form of equitable relief other than specific performance. Paragraph 5 authorizes AMD to use any of Intel's intellectual property in the manufacture of AMD's Am386 microprocessor; paragraph 6 extends for two years a separate 1976 agreement licensing certain Intel patents

and copyrights, but only to the extent that AMD used those patents and copyrights in the Am386. These remedies are not specific performance because, under the contract, all that AMD could have earned was the right to manufacture *Intel's* version of the 80386 microprocessor in exchange for royalties. Paragraphs 5 and 6 go beyond specific performance because AMD could not have earned the right to use Intel's intellectual property (including intellectual property that may not be embodied in Intel's 80386) to create its own Am386, AMD could not have earned the right to manufacture without royalty Intel's 80386 or the Am386, and AMD could not have earned the right to have others make Intel's 80386 or the Am386 for AMD. [6]

6 As a second source for the Intel 80386, AMD would not only have paid royalties to Intel but also would have offered the identical product that Intel sold, both factors that would limit the competitive effect on Intel of AMD's sale of the 80386. By contrast, the award to AMD of rights to Intel's intellectual property used in the Am386 gives AMD a greater competitive advantage than it would have received under the contract, not only because it does not pay royalties to Intel but also because, according to AMD, the Am386 is superior in performance to the Intel 80386.

The arbitrator himself apparently viewed the equitable relief he was awarding as something other than specific performance. The arbitrator rejected other requests by AMD for specific performance on the ground that ***402** AMD was not entitled to specific performance because it was unable to tender its performance. He did not characterize paragraphs 5 and 6 as specific performance but as a "depart[ure] from a conventional approach to relief." Thus, unless the parties have by agreement authorized the arbitrator to award equitable remedies other than specific performance, the award of paragraphs 5 and 6 is beyond his powers.

AMD and Intel did not authorize the arbitrator to award equitable remedies beyond the traditional contract remedies of damages and specific performance. The arbitration clause of the AMD–Intel contract does not authorize equitable remedies other than specific performance. Nor does the remedies limitation clause of the AMD–Intel contract address the issue one way or the other.

In section 42 of the "Informal Rules" that the parties adopted to govern the arbitration, the parties provided: "The Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." This provision is taken from what is now rule 43 (formerly rule 42, and before that § 42) of the AAA Commercial Arbitration Rules.

Parties who incorporate the AAA rules by reference in their arbitration agreements intend by doing so merely to establish the procedure by which the arbitration will be conducted, and do not intend to substantively expand the scope of remedies beyond those that otherwise exist by law or by agreement. Accordingly, section 42 does not authorize the arbitrator to award additional forms of relief for a breach of contract that are not otherwise authorized by law or by agreement of the parties. (See *Thompson v. Jespersen* (1990) 222 Cal.App.3d 964, 272 Cal.Rptr. 132 ****1020** *****607** [AAA rules do not authorize an arbitrator to award attorney fees in the absence of either an agreement of the parties or a rule of law authorizing attorney fees].) In *Thompson v. Jespersen,* the arbitrator awarded attorney fees to the prevailing party. In proceedings to confirm the arbitration award, the prevailing party contended that the arbitrator was authorized to award attorney fees by AAA Construction Industry Arbitration rule 43 (the equivalent of AAA Commercial Arbitration former section 42 that the parties adopted in this case). The *Thompson* court rejected that contention, holding that, by agreeing to the ***403** AAA rule in question, the parties did not "subject[ ] themselves, sub silentio, to expenses that, in the absence of a contract so providing, are impermissible even in traditional trial proceedings." (*Thompson v. Jespersen, supra,* 222 Cal.App.3d at p. 968, 272 Cal.Rptr. 132.)

The AAA's instructions to arbitrators describe only three categories of remedies for a breach of contract: money damages, specific performance, or an injunction enjoining breach. (A Guide for Commercial Arbitrators, *supra,* at pp. 23–24.) The AAA has provided a helpful example showing that arbitrators are not authorized to award equitable relief going beyond these categories: "For instance, ruling on a claim by a building owner against a contractor who failed to do certain work according to specifications, you might award monetary damages or direct the contractor to do the work over again. You might

also dismiss the claim. An award directing the contractor to reimburse the owner by landscaping the property would be improper, however, where landscaping was not contemplated in the contract." (*Id.* at p. 23.) Section 42 therefore does not authorize any additional remedies not otherwise authorized by the parties' agreement or by the substantive law underlying the claim.

In this case, the relief awarded in paragraphs 5 and 6 is unauthorized by section 42 because it is not within the scope of the remedies otherwise authorized by contract law or by the parties' agreement and because it is a benefit "not contemplated in the contract." To use the AAA example just mentioned, it is the equivalent of awarding landscaping as a remedy for faulty construction of a building. Thus, paragraphs 5 and 6 exceed the arbitrator's powers and should be vacated.

V

Moreover, as the Court of Appeal in this case properly determined, paragraphs 5 and 6 lack a rational relationship to the AMD–Intel contract as interpreted by the arbitrator, whether judged under the "essence" test or some other rational relationship test. [7]

[7] The majority interprets the Court of Appeal's statement that its review was "de novo" to mean that the court was reviewing de novo the connection between the arbitrator's remedy and the contract without deference to the arbitrator's interpretation of the contract or his determination that the remedy was appropriate in light of the contract. (Maj. opn., *ante,* at pp. 586, 589 of 36 Cal.Rptr.2d, pages 999, 1002 of 885 P.2d.) It appears, however, that what the Court of Appeal meant was that it was reviewing de novo (as the majority agrees it should, majority opinion, *ante,* at page 589, footnote 9 of 36 Cal.Rptr.2d, page 1002 of 885 P.2d) the superior court's order confirming the award without any deference to the *superior court's* determination that the award was within the arbitrator's powers. In reviewing the relationship of the arbitrator's award to the arbitrator's powers, the Court of Appeal expressly applied the highly deferential (to the arbitrator) "essence" test adopted by the majority. The Court of Appeal indicated that it was making this distinction between de novo review of the superior court's order and deferential review of the arbitrator's award when in the same sentence it said both "the question of the arbitrator's remedial powers remains one of law, subject to our de novo review" and, quoting the high court's decision in *Enterprise, supra,* that "the standard must be whether the remedial provision in issue 'draws its essence from the ... agreement.' " Similarly, the Court of Appeal stated that "we ... give credence to an arbitrator's rational assessment of the ... underlying agreement." Thus, in my view the majority's criticism of the Court of Appeal on this point is not well taken, for the Court of Appeal did adopt and apply a deferential standard for reviewing the connection between the arbitrator's choice of remedies and the arbitrator's view of the contract.

However one phrases the test of a rational connection between the arbitrator's interpretation of the contract and the relief awarded, paragraphs 5 ***404** and 6 are not a remedy that is rationally related to Intel's breach of the covenant of good faith, given the lack of *****608 **1021** causation that the arbitrator found between Intel's breach and the damage claimed by AMD. The arbitrator ultimately concluded that Intel's breach of the covenant of good faith had not prevented AMD from obtaining the right to manufacture Intel's 80386 under the contract because Intel had properly rejected the exchange products that AMD had attempted to develop to earn the right to the 80386, and that it was largely AMD's "inertia" and "myopia" that prevented AMD from taking steps sooner than it did to reverse engineer the 80386 to create its Am386. The arbitrator accordingly rejected AMD's claim for hundreds of millions of dollars in damages for breach of the covenant of good faith.

Instead, paragraphs 5 and 6 are plainly the arbitrator's attempt to give AMD "something" by solving a dispute (the federal court patent and copyright litigation between AMD and Intel over the Am386) outside the scope of the AMD–Intel contract and outside the scope of the arbitration agreement. The arbitrator's stated purpose for paragraphs 5 and 6 was to provide AMD with a complete defense to Intel's federal court litigation against AMD over the Am386. In place of paragraphs 5 and 6 the arbitrator initially proposed directly enjoining Intel from litigating its federal intellectual property claims, and only substituted paragraphs 5 and 6 when AMD informed him that his proposed injunction was an unconstitutional interference with the federal court litigation. Because in making paragraphs 5 and 6 of the award the arbitrator was attempting to resolve a dispute that did not arise under the AMD–Intel contract and that was not submitted to

him for decision, paragraphs 5 and 6 lack any rational relationship to the AMD–Intel contract.

The relief of paragraph 5 lacks a rational connection to the arbitrator's interpretation of the contract and findings of breach for other reasons as well. Under the contract, AMD never could have obtained the rights to manufacture the Am386 (which it claims is superior to Intel's 80386), only ***405** the 80386. Nor could AMD have obtained the right to authorize others to manufacture for it either the 80386 or the Am386. Nor could AMD have manufactured either the 80386 or an infringing Am386 without making royalty payments to Intel. Furthermore, Intel's breach did not cause or make it necessary for AMD, in creating the Am386, to do so in a manner that infringed the 80386.

Moreover, paragraphs 5 and 6 fail even under the majority's "essence" test. The gist of the arbitrator's decision in those paragraphs was that although AMD, independent of Intel's breach, had failed to comply with the conditions precedent for earning the right to the 80386, it was nevertheless equitable to give AMD the rights to the Am386. Even under the "essence" test used to review labor arbitrations, a remedy fails to draw its essence from the contract if it awards a contractual benefit subject to a condition precedent to a party that, for reasons unrelated to the breach, has failed to comply with the condition precedent. (See *Ethyl Corp. v. United Steelworkers of America, supra,* 768 F.2d at p. 185 ["[I]f the arbitrator here had said or implied that although the workers had not complied with a condition precedent to earning their paid vacations [the contractual benefit at issue in that case] fairness required that they get vacations ..., the district judge would have been right to set aside the award [under the 'essence' test]."].)

VI

Although in this case the Court of Appeal correctly determined that the arbitrator had exceeded his powers in his choice of remedies in paragraphs 5 and 6 of the award, the court erred in deciding that rather than being vacated, the award could be corrected and then confirmed by deleting paragraphs 5 and 6. Under Code of Civil Procedure section 1286.2, subdivision (d), when an arbitrator's award exceeds the arbitrator's powers, the award must be vacated unless it can be "corrected without affecting the merits of the decision upon the controversy submitted." Here, the arbitrator did find that Intel had breached the covenant of good faith; deleting the only remedies the arbitrator awarded for that breach necessarily affects the merits of the arbitrator's decision on that issue.

***609 **1022 VII

Arbitration has many attractions to businesses as a method of resolving commercial disputes. These attractions include the potential for swiftness, procedural informality and simplicity, reduced costs, and the possibility of selecting a decisionmaker with specialized experience. Underlying these procedural attractions, however, is the assumption that the range of possible ***406** outcomes is the same in arbitration as it would be if the dispute were instead resolved in court.

As a result of the majority's decision, however, an arbitrator's deck of remedies is now full of wild cards. By refusing to limit arbitrators in a commercial contract dispute to the range of remedies that a court could award for the same dispute and by applying only the minimal scrutiny of the "essence" test to arbitration awards, the majority has made the potential outcomes of an arbitration impossible for the parties to predict. This uncertainty can only make arbitration substantially less desirable to many. In making arbitration a more uncertain and less attractive alternative, the majority's decision will ultimately, if unwittingly, discourage arbitration.

In my view, the better rule and the one that ultimately encourages arbitration is to require that arbitration awards both fall within the range of remedies that a court could award for the same claim and, in cases of contract dispute arbitration, bear a rational relationship to the contract. Accordingly, I would affirm that portion of the Court of Appeal's judgment holding that the arbitrator exceeded his powers in ordering the remedy set forth in paragraphs 5 and 6 of his award, and I would reverse that portion of the judgment holding that the award should be corrected rather than vacated.

MOSK and SPENCER, * JJ., concur.

* Honorable Vaino H. Spencer, Presiding Justice, Court of Appeal, Second District, Division One, assigned by the Acting Chairperson of the Judicial Council.

All Citations

9 Cal.4th 362, 885 P.2d 994, 36 Cal.Rptr.2d 581

KeyCite Yellow Flag - Negative Treatment
Distinguished by PPG Industries, Inc. v. Local 470 International Association of Machinists & Aerospace Workers, W.D.La., August 30, 2018

480 F.3d 760
United States Court of Appeals,
Fifth Circuit.

RESOLUTION PERFORMANCE PRODUCTS, LLC, Plaintiff–Counter Defendant–Appellee,
v.
PAPER ALLIED INDUSTRIAL CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION, LOCAL 4–1201, formerly known as Norco Chemical Workers Union, Defendant–Counter Claimant–Appellant.

No. 05–30813.
|
March 6, 2007.

Synopsis

Background: Acquiring company, which as part of acquisition had adopted longstanding collective bargaining agreement (CBA) between acquired company's parent and union representing maintenance workers, sought judicial review of arbitrator's decision that company had violated CBA by subcontracting all maintenance work in period following acquisition. The United States District Court for the Eastern District of Louisiana, 2005 WL 2036205, G. Thomas Porteous, Jr., J., granted summary judgment for acquiring company, vacating arbitration award. Union appealed.

Holdings: The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that:

[1] arbitration award drew its essence from CBA, even though CBA provided that company had no obligation to maintain any specific number of maintenance workers, and

[2] arbitrator's ruling that union's grievance was arbitrable despite union's failure to comply with procedural provision of CBA also drew its essence from CBA.

Reversed and remanded.

West Headnotes (7)

[1] Alternative Dispute Resolution
Scope and Standards of Review
25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(1) In general
Courts afford great deference to arbitration awards.

6 Cases that cite this headnote

[2] Labor and Employment
Conformity to collective bargaining agreement
231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)4 Proceedings
231Hk1590 Award
231Hk1592 Conformity to collective bargaining agreement
In reviewing arbitrator's award in labor case, court affirms award as long as arbitrator's decision draws its essence from collective bargaining agreement (CBA), and as long as arbitrator is even arguably construing or applying CBA and acting within scope of his authority.

10 Cases that cite this headnote

[3] Labor and Employment
Conformity to collective bargaining agreement
231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)4 Proceedings
231Hk1590 Award

231Hk1592 Conformity to collective bargaining agreement

Arbitrator lacks authority to render decision contrary to unambiguous provision of collective bargaining agreement (CBA).

6 Cases that cite this headnote

[4] Labor and Employment

Contracting out work

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)4 Proceedings
231Hk1590 Award
231Hk1595 Particular Awards
231Hk1595(13) Contracting out work

Arbitrator's finding, that acquiring company that had adopted longstanding collective bargaining agreement (CBA) between acquired company's parent and union representing maintenance workers had violated CBA by utilizing subcontractors for all its maintenance work in period following acquisition, drew its essence from CBA, warranting affirmance, even though CBA provided that company had no obligation to maintain any specific number of maintenance workers; CBA did not unambiguously give company right to subcontract, since it was silent as to any such right, and it recognized union as representative of maintenance workers.

6 Cases that cite this headnote

[5] Alternative Dispute Resolution

Scope and Standards of Review

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(1) In general

Court reviewing arbitration award can uphold award on any reasonable ground.

3 Cases that cite this headnote

[6] Labor and Employment

Contracting out work

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(20) Contracting out work

Arbitrator's ruling that union grievance was arbitrable, despite union's failure to comply with collective bargaining agreement's (CBA) provision that party seeking arbitration apply for panel of arbitrators within 30 days of requesting arbitration, drew its essence from CBA, warranting affirmance; CBA's prescribed arbitration procedures were necessarily somewhat flexible, and arbitrator made fact finding that employer's counsel's untimely correspondence with union's counsel had led to delay.

5 Cases that cite this headnote

[7] Federal Courts

Grounds for sustaining decision not relied upon or considered

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)1 In General
170Bk3548 Theory and Grounds of Decision of Lower Court
170Bk3552 Grounds for sustaining decision not relied upon or considered
(Formerly 170Bk762)

Court of Appeals may affirm district court's grant of summary judgment on ground not relied upon, or rejected, by that court as long as movant asserted ground in district court.

1 Cases that cite this headnote

Attorneys and Law Firms

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Louis L. Robein, Jr. (argued), Karen Maria Torre, Robein, Urann & Lurye, Metairie, LA, for Defendant–Counter Claimant–Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before HIGGINBOTHAM, DENNIS and CLEMENT, Circuit Judges.

Opinion

PATRICK E. HIGGINBOTHAM, Circuit Judge:

As part of RPP's purchase of a subsidiary of Shell Oil Company, RPP signed a collective bargaining agreement with the Union, which had had a longstanding relationship with Shell. After the purchase, RPP used only subcontractors, not Union members, for maintenance work, contrary to Shell's past practice. The Union complained that RPP should hire Union members for maintenance work, as Shell had in the past. The arbitrator agreed. The federal district court vacated the award. We reverse and remand.

I

From at least 1950 to 2000, Shell Oil Company owned a subsidiary named Shell Epoxy Resins. During that time, Shell and the Norco Chemical Workers Union, later the Paper Allied Industrial Chemical and Energy Workers International Union, [1] ***762** had a collective bargaining agreement covering both production workers and maintenance workers. Over that fifty-year span, the understanding captured in the CBA was enriched by bargaining and several arbitrations.

1 PACE subsumed NCWU in 2001, succeeding it in all respects.

In 2000, Shell sold the resin subsidiary to Resolution Performance Products, now Hexion Chemical Company. In the sale agreements, RPP agreed to recognize the Union and adopt the CBA with all past letters of agreement. RPP did so, adopting a CBA identical in all relevant respects to the Shell–Union CBA. The CBA stated, in pertinent part and italicized for importance:

Preamble

.... The Company hereby recognizes the Union as the exclusive bargaining representative of the following collective bargaining unit ... [including both production and maintenance workers.]

This Agreement constitutes the entire agreement between the parties, and it is agreed that no prior understanding or agreement shall hereafter be operative unless it was reduced to writing and is not in conflict or inconsistent with the terms hereof.

Article III—Classification of Employees

1. Craftsmen [maintenance workers]

...

(D) *Nothing herein shall require the Company to adjust or maintain any given number of craftsmen in any craft.* [2]

2 There is no comparable provision under the section governing production workers.

Article XIV—Contractors Rates of Pay

Section 1—Contractor Performing Work within the Plant

Whenever a contractor or subcontractor performs work within the Plant which could be performed by employees covered by this Agreement, the Company will include a provision in the applicable contract requiring the contractor and subcontractor to pay not less than the rates of pay provided in this Agreement for the same character of work; provided, however, that the foregoing shall not apply if there is an agreement as to rates between the contractor or subcontractor and his employees reached through collective bargaining.... [3]

3 Neither party discusses whether RPP is paying the subcontractors according to these compensation

guidelines. *See infra* note 4 and accompanying text (discussing how RPP now uses only subcontractors for maintenance).

Section 2—Demotions or Layoffs

RPP's obligations under Section 1 will apply only for the period of time when,

(A) an employee is demoted or displaced from any department or craft listed in Exhibit "A" of the Agreement through no fault of his/her own, whereupon Section 1 will apply on a one-for-one basis to any contractor performing work at the Norco Plant, or

(B) an employee is laid off due to a reduction in force. However, RPP's obligations under Section 1 will continue to apply to any contracted work normally performed by Operators.

After the sale, some production workers transferred to RPP, but no maintenance workers transferred.[4] During the first ***763** year of RPP's control of the business, all maintenance workers were subcontractors, either employees of various firms, including KBR, or Shell employees subcontracted to RPP under the Interim Labor Services Agreement.[5] At the end of that year, RPP stopped using Shell's workers, who were parties to a Shell–Union CBA; and instead of hiring Union workers, it used as maintenance workers, as it still does, only subcontractors from firms other than Shell, primarily KBR.

4 According to RPP, Shell and RPP had agreed as part of the deal that Shell would identify before the sale any openings for maintenance workers in the new resin company (how Shell would know this is unclear) or maintenance workers eligible to transfer, but it identified no such openings or workers through its "posting" system. The record on appeal lacks this agreement, although the arbitrator found that, "[a]pparently, Shell wished to retain all of its [maintenance workers]" and "the [maintenance workers] wished to continue to be employed [by Shell]." RPP also alleges that Shell and the Union refused to release maintenance workers for whom RPP had offered jobs; although it cites only briefs, not record evidence, for this allegation, it is consistent with the arbitrator's findings.

5 Shell was a subcontractor because, under the interim services agreement, it retained the right to control its employees, including the right to control hours of work and delegation of assignments.

The Union asserted in a grievance in 2001 that RPP improperly used subcontractors instead of union workers for maintenance. RPP responded that it would not recognize the grievance because, among other things, it was not timely, the CBA did not require it to employ any maintenance workers, RPP had never employed any maintenance workers and thus could not have subcontracted out the work to the Union's detriment, and Shell maintenance employees had rejected employment with RPP, forcing the company to subcontract out the work. Arbitration followed, and in July 2004 the arbitrator concluded that the grievance was timely and that RPP violated the CBA by subcontracting out all the maintenance work.

The arbitrator began by acknowledging the unique circumstances: while RPP had never employed any Union workers for maintenance, Shell had for fifty years. She then concluded that RPP, by assuming the obligations of the CBA and all past letters of agreement, "logically ... accepted" the "rich bargaining history" and "past arbitral interpretations of its obligations under the CBA." Hence, she concluded, "the issue should be resolved in the same manner as any other contracting out grievance"—analyzing the text of the CBA and prior arbitral interpretations of that text.

First, she noted that the CBA addressed subcontracting only in Article XIV, which prescribed subcontractor pay. She then stated, "It is generally accepted that a CBA ... which is silent about subcontracting ... does not give Management the unfettered right to subcontract." She did not mention the applicability of Article III, which grants RPP the right to determine the number of maintenance workers, or discuss the "recognition clause" in the preamble, which the Union argues on appeal is a limitation on the right to subcontract, stating only that the CBA is silent as to RPP's right to subcontract.

Turning then to past arbitral interpretations to inform that silence, the arbitrator analyzed four prior matters, quoting passages showing a desire to protect the integrity of the bargaining unit:

> [Even when subcontracting,] the Company is still obligated to act reasonably and in good faith in such matters, so as not to subvert the labor agreement or to seriously damage the bargaining unit....
>
> ...
>
> Arbitrators are hesitant to permit wholesale subcontracting even where the labor contract is silent regarding such restrictions, if the subcontracting act ***764** would significantly undermine the integrity of the bargaining unit or its members rights.
>
> ...
>
> [T]he fact that the grievance may create a scheduling difficulty or cost a bit more, does not change the fact that this is bargaining unit work and, as such, cannot be assigned to [ ] contract workers.
>
> ...
>
> [Where Shell filled one position with an outside subcontractor,] Shell's decision ... had absolutely no impact on the scope or integrity of the bargaining unit.

The arbitrator distinguished the instant case from the fourth arbitration, which arose when the last Union member serving as an insulator retired and Shell hired for the waning position one subcontractor, instead of a Union member. She noted that the current case is about the entire maintenance unit, not just one position, and that there is plenty of maintenance work for the unit here, unlike the prior arbitration where there was not even one daily full-time job for an insulator. She observed that the arbitrator in the prior arbitration sensibly read the CBA not to force Shell to maintain obsolete positions.

The arbitrator here found the lesson from past arbitrations clear: though the company has some latitude to subcontract, it cannot do so if subcontracting would significantly undermine the integrity of the bargaining unit. Because RPP did not employ any bargaining unit maintenance employees but instead subcontracted out all the maintenance work, the arbitrator concluded that RPP had undermined the integrity of the bargaining unit.

Finally, as the remedy, the arbitrator ordered that

> the Company shall employ maintenance craft employees in numbers comparable to that of the Epoxy Resins Department when it was owned by Shell. Bargaining unit maintenance employees shall be responsible for routine maintenance of the plant. The Company may allocate work in the manner comparable to Shell's practices relating to employment and contracting out, before the sale.

RPP filed suit in federal district court, seeking vacatur of the award, and both parties moved for summary judgment. The district court granted RPP's motion. Although the court deferred to the arbitrator's conclusion that the grievance was timely, it concluded that the arbitrator erred by considering past practice where the CBA stated it was the entire agreement between the parties and erred under *Beaird Industries, Inc. v. Local 2297, International Union,* [6] which directs vacatur where the arbitrator acts contrary to an express provision of the CBA, because Article III of the CBA unambiguously did not require RPP to maintain a fixed number of maintenance workers. The Union appealed.

6 404 F.3d 942, 944 (5th Cir.2005).

II

[1] **[2]** **[3]** We review the district court's grant of summary judgment *de novo.* [7] Judicial review of arbitration decisions arising from the terms of a CBA is "narrowly limited," and courts should afford "great deference" to arbitration awards. [8] "As long as the arbitrator's decision 'draws its essence from the collective bargaining agreement' and the arbitrator is not fashioning 'his own brand of industrial justice,' ***765** the award cannot be set aside." [9] Additionally, "a court must affirm an arbitral award 'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority.' " [10] Even where a court would have interpreted the contract differently, a court

must still affirm the award. [11] However, under *Beaird,* an arbitrator lacks authority to render a decision contrary to an unambiguous provision of the CBA. [12]

7 *Hunt v. Rapides Healthcare Sys., LLC,* 277 F.3d 757, 762 (5th Cir.2001).

8 *Beaird,* 404 F.3d at 944.

9 *Weber Aircraft Inc. v. Gen. Warehousemen & Helpers Union Local 767,* 253 F.3d 821, 824 (quoting *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987)).

10 *Beaird,* 404 F.3d at 944 (quoting *Misco,* 484 U.S. at 38, 108 S.Ct. 364).

11 *Id.*

12 *Id.* at 946–47. *See also Houston Lighting & Power Co. v. Int'l Bhd. of Elec. Workers, Local Union No. 66,* 71 F.3d 179, 182 (5th Cir.1995) ("The 'rule in this circuit, and the emerging trend among other courts of appeals, is that arbitral action contrary to express contractual provisions will not be respected.' ") (quoting *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n,* 889 F.2d 599, 604 (5th Cir.1989)).

III

The Union argues that the award drew its essence from the CBA because the CBA does not unambiguously permit RPP to subcontract, especially in the face of the preamble's "recognition clause," which recognizes the Union as the exclusive bargaining agent for the class of maintenance workers. For this proposition it cites three cases, which it also contends are more relevant than *Beaird.*

In *Folger Coffee Co. v. Int'l Union,* [13] the arbitrator sustained the union's challenge to the company's use of subcontractors, concluding that, despite language in the CBA permitting the company to subcontract, the right to subcontract was not absolute. In so concluding, the arbitrator relied in part on the past practice of union members performing the work of subcontractors and in part on a CBA provision stating that the CBA's purpose was to strengthen the parties' relationship. This court affirmed, concluding that reliance on past practice was permissible where the agreement was silent or insufficient to enable the arbitrator to render a decision and that the arbitrator's interpretation of the "purpose" clause as a limitation on the right to subcontract was reasonable because, unless the agreement contained an explicit clause entitling the company to subcontract regardless of the effect on the bargaining unit, subcontracting should be balanced against the rights of the union.

13 905 F.2d 108 (5th Cir.1990).

In *National Gypsum Co. v. Oil, Chemical, and Atomic Workers International Union,* [14] the arbitrator concluded that, although the CBA included a management rights clause permitting the company to "schedule and reschedule employees as required by the business needs" of the company, the company had to bargain before reducing the work week from seven to six days. The arbitrator reasoned in part that the recognition clause recognized the Union as the exclusive bargaining agent. In so concluding, the arbitrator relied in part on past practice, even though the agreement explicitly stated that it constituted the "full scope" of the agreement between the parties. This court affirmed, concluding that the arbitrator, whose province it was to resolve conflict between CBA provisions, had made a reasonable interpretation; it evinced concern about the use of past practice given the "full scope" clause, but because the decision was otherwise ***766** grounded in the CBA, the inquiry into past practice was not "fatal."

14 147 F.3d 399 (5th Cir.1998).

In *NCR Corp. v. International Association of Machinists and Aerospace Workers,* [15] the arbitrator interpreted the recognition clause as a limitation on the management's right-to-subcontract clause in sustaining the union's challenge to the company's use of subcontractors. In so concluding, the arbitrator also looked to past practice. The Tenth Circuit reversed the district court's vacatur, emphasizing the deferential standard of review and affirming the use of past practice.

15 906 F.2d 1499 (10th Cir.1990).

In *Beaird,* the arbitrator sustained the union's grievance challenging company subcontracting. The district court vacated the award. This court affirmed, determining that the CBA provision defining the company's right to subcontract was unambiguous: " '[T]he Company has and retains and the Union recognizes the sole and exclusive right of the Company to exercise all the

rights or functions of management ... [including] the decision to subcontract out work....' " We concluded that, because no other provision of the CBA limited this right, the arbitrator failed to draw his conclusion from the essence of the agreement by acting contrary to an express CBA provision.[16] We distinguished *Folger* on the ground that the CBA in *Beaird* was explicit in permitting subcontracting and contained no limitation on subcontracting; we also called *Folger*'s holding the "outer limits" of deference to arbitral awards.

16 404 F.3d at 944–47.

[4] The Union claims that *Beaird* is not on point because the Union's CBA does not contain an unambiguous "management rights" clause reserving to RPP the right to subcontract, and because its CBA contains a recognition clause recognizing the Union as the exclusive bargaining agent for the maintenance workers.

RPP counters that Article III unambiguously allows it not to maintain maintenance workers, conflicting head-on with the arbitrator's award that RPP "shall employ maintenance [workers] in numbers comparable to that of the [ ] Department when it was owned by Shell...." It also contends that the arbitrator pointed to no CBA provision which RPP violated.

We conclude that the arbitrator's award "drew its essence" from the CBA. First, we put aside one area of contention. There is a powerful argument that RPP, by explicitly assuming the Shell–Union CBA and all prior letters of agreement, assumed the prior arbitral interpretations of the CBA. The argument is that those interpretations did more than fill interstices and provide needed gloss to unclear provisions, the results of which must be controlling now; they also framed the background against which the parties understood the terms of negotiation. RPP contends that the arbitral history is irrelevant.

The arbitrator here did consider past interpretations, but only after concluding that the CBA was ambiguous as to subcontracting. If the CBA did not unambiguously confer a right to subcontract, then the arbitrator's task was to construe an ambiguous CBA, and mere disagreement with the performance of that task is not alone a basis for vacating the award.[17] Relatedly, the role the past arbitral decisions played is not wholly clear. At one point, after finding the CBA ambiguous, the arbitrator appeared to construe the ***767** CBA *de novo,* without reference to any prior arbitration: "It is generally accepted that a CBA ... which is silent about subcontracting ... does not give Management the unfettered right to subcontract." That is, she seemingly decided how to construe this CBA as a matter of first impression.[18] Regardless, the question for us is whether the CBA unambiguously gave RPP the right to subcontract. We conclude that it did not.

17 *Beaird,* 404 F.3d at 944 (quoting *Misco,* 484 U.S. at 38, 108 S.Ct. 364).

18 Her use of the term "generally accepted" suggests reliance on prior legal interpretations of similar contracts, but that is different from reliance on precedential interpretations of the CBA at issue. After all, all judges when interpreting contracts, even in the first instance, use rules and maxims derived from other cases.

[5] That the CBA did not unambiguously give RPP the right to subcontract is apparent. At the very least, that conclusion is defensible and, therefore, we must defer to it. Most importantly, the CBA is silent as to RPP's right to subcontract,[19] and the CBA recognizes the Union as the representative of maintenance workers, suggesting that RPP cannot subcontract all maintenance work.[20] There was no recognition clause in *Beaird,* and the CBA there included a "management rights" clause expressly reserving to management the right to subcontract, absent here. Our result accords with *Folger Coffee Co. v. International Union,* where the CBA explicitly gave management the right to subcontract, absent here, but that clause was contradicted by others.[21] In sum, the CBA here did not speak in unambiguous terms about subcontracting. Because the CBA was ambiguous about RPP's right to subcontract, we must defer to the arbitrator's interpretation, which draws its essence from the CBA, that the CBA does not permit wholesale subcontracting.[22]

19 Subcontracting is mentioned once, but only in the section requiring any subcontractors to be paid at certain rates.

20 In *NCR Corp.,* 906 F.2d at 1505–06, the Tenth Circuit construed a recognition clause as a limitation on an express right-to-subcontract clause. This goes even further than we do since the CBA here contains no express right-to-subcontract clause.

At oral argument, RPP contended that we cannot rely on the recognition clause because the arbitrator did not rely on it in her analysis. This mistakes the nature of our review of arbitral awards, which we review *in toto* only to determine whether they draw their "essence" from the CBA. After all, arbitrators need not, and sometimes do not, attach any reasoning to their awards, and we do not by virtue of that fact vacate such awards. *See Sarofim v. Trust Company of the West,* 440 F.3d 213, 218 (5th Cir.2006). Moreover, we can affirm a federal district court's judgment on grounds presented by the parties but not relied on by the court, *see Brown v. Nationsbank Corp.,* 188 F.3d 579, 586 (5th Cir.1999); certainly our review of arbitral awards is no less deferential. In short, we can and should uphold an award on any reasonable ground. *See Brabham v. A.G. Edwards & Sons, Inc.,* 376 F.3d 377, 385 (5th Cir.2004).

21 905 F.2d at 109. *Beaird* distinguished *Folger* precisely because the CBA in *Beaird* had the explicit management rights clause and no contradictory clauses, again highlighting the lack of such an explicit clause here. 404 F.3d at 945–46.

22 Contrary to RPP's assertion, the arbitrator need not have pointed to a specific, explicit CBA provision that RPP violated. The CBA was ambiguous about subcontracting; the arbitrator reasonably interpreted that ambiguity to preclude wholesale subcontracting, thus RPP violated the CBA. Our holdings in *Folger* and *Beaird,* and traditional principles of contract interpretation, do not require violation of a specific, explicit provision.

RPP's best argument, that advanced by the district court, is that Article III unambiguously gives RPP a right to subcontract by stating that RPP has no obligation to maintain any specific number of maintenance workers. Article III, of course, makes no mention of subcontracting. ***768** Rather, both RPP and the district court focus on the wording in the arbitrator's award that "the Company shall employ maintenance ... employees in numbers comparable to that of the Epoxy Resins Department when it was owned by Shell." Just one or two pages before that statement, however, the arbitrator stated that "the CBA cannot mandate that a job classification remain filled if there is inadequate work" due to modernization, a changing market, or similar business reasons. That is, she acknowledged that the CBA does not mandate that RPP maintain positions it wants to eliminate, as the Union conceded at oral argument. [23] Reading the "award" as not just the final section entitled "award" but rather the entire document, [24] we see ambiguity in the award stemming from these two statements. Put another way, with this dispute, drawn as it is over the right of RPP to subcontract, we do not read the arbitrator's remedy as unambiguously imposing the obligation to engage unneeded workers. That reading is defied by the circumstance that the issue in dispute is subcontracting or not, as the arbitrator herself made clear in dispensing with the idea that RPP would have to employ a certain number of workers. The critical element in the remedy is the obligation to "employ," that is "not subcontract," not the phrase "in numbers comparable." In context, it is not unreasonable to read the award as ordering that *to the extent that* RPP chooses to use routine maintenance workers, it must meet that need as its predecessor did by employing Union workers, not by wholesale subcontracting. [25]

23 Again, we need not decide the appropriate precedential effect of prior arbitral decisions. In addressing the prior arbitrations, the arbitrator confirmed her own view that the company cannot be made to retain a certain number of positions in the face of certain circumstances: "As Arbitrator Fox correctly observed, the CBA cannot mandate...." The relevant point is that the conflict arises from her own statements, the precedential force of prior arbitrations aside.

24 *See, e.g., Cannelton Indus., Inc. v. Dist. 17, United Mine Workers of Am.,* 951 F.2d 591, 594 (4th Cir.1991) (explaining that courts sometimes look to an arbitrator's reasoning in determining whether the award draws its essence from the CBA).

25 RPP suggested at oral argument that maintenance workers might become obsolete. About that we say only that RPP is not obligated to use any workers to do maintenance.

In sum, the CBA did not clearly allow RPP to subcontract out the maintenance work. The arbitrator resolved the dispute over this uncertainty by precluding subcontracting, a resolution we cannot fault, footed as it is in the terms of the contract.

IV

[6] **[7]** RPP presses an alternative ground for affirmance, [26] that the arbitrator, whose action on this

point was affirmed by the district court, improperly found the grievance arbitrable. Namely, RPP contends that the arbitrator ignored the plain language of the CBA requiring the party requesting arbitration, the Union, to apply for a panel of arbitrators within thirty days of requesting arbitration. [27]

26 The Union incorrectly argues that RPP has forfeited this issue by failing to cross-appeal it. We may affirm a lower court's grant of summary judgment on a ground not relied upon (or rejected) by that court as long as the movant below asserted the ground, *see Black v. North Panola School District,* 461 F.3d 584, 593 (5th Cir.2006); hence before us now is the propriety of the entire order of summary judgment.

27 RPP also argued in front of the arbitrator and the district court that the underlying grievances were not timely filed, but it abandons this argument on appeal.

***769** Although the Union waited more than thirty days to apply for a panel of arbitrators, the district court explained that

> [t]he arbitrator found the matter arbitrable after reviewing correspondence between the parties' counsel regarding the original grievances and the Union's desire to proceed to arbitration.... The Arbitrator ... concluded the delay in proceeding to arbitration was a result of RPP counsel's failure to correspond with the Union in a timely fashion. [28]

28 The arbitrator also concluded that the CBA, by stating that the party seeking arbitration "may" apply for a panel of arbitrators within thirty days, did not *require* the Union to act within thirty days. We do not address this issue.

On appeal, RPP argues that the arbitrator's focus on the correspondence improperly contradicts the plain meaning of the CBA. In other words, RPP contends that the Union should have requested a panel within thirty days, regardless of any dilatory tactics or obstruction, intentional or not, on RPP's part.

We are unwilling to say that the arbitrator's conclusion did not "draw[ ] its essence from the collective bargaining agreement" and that the arbitrator was not "even arguably construing or applying the contract and acting within the scope of h[er] authority." [29] The CBA's prescribed arbitration procedures are necessarily somewhat flexible, and the CBA sustains the interpretation that a party cannot obstruct the procedures and then benefit from that obstruction. And we do not second-guess the arbitrator's factual finding that RPP's counsel's correspondence led to the delay.

29 *Misco,* 484 U.S. at 38, 108 S.Ct. 364.

We REVERSE the district court's judgment and REMAND for proceedings consistent with this opinion.

All Citations

480 F.3d 760, 181 L.R.R.M. (BNA) 2545, 154 Lab.Cas. P 10,819

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130 S.Ct. 1758
Supreme Court of the United States

STOLT–NIELSEN S.A. et al., Petitioners,
v.
ANIMALFEEDS INTERNATIONAL CORP.

No. 08–1198.
|
Argued Dec. 9, 2009.
|
Decided April 27, 2010.

Synopsis

Background: In consolidated actions, owners of parcel tankers moved to vacate arbitration award imposing class arbitration on charterers' class antitrust claims. The United States District Court for the Southern District of New York, Jed S. Rakoff, J., 435 F.Supp.2d 382, vacated the arbitration award, and charterer appealed. The United States Court of Appeals for the Second Circuit, Sack, Circuit Judge, 548 F.3d 85,reversed and remanded with instructions to deny the petition to vacate. Certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:

[1] challenge to arbitration award was ripe for judicial review;

[2] arbitration panel exceeded its powers under the Federal Arbitration Act (FAA) by imposing its policy choice;

[3] vessel owners did not waive challenge to arbitration panel's award; and

[4] the parties could not be compelled to submit antitrust claims to class arbitration.

Reversed and remanded.

Justice Ginsburg filed a dissenting opinion in which Justice Stevens and Justice Breyer joined.

Justice Sotomayor took no part in the consideration or decision of the case.

West Headnotes (24)

[1] Shipping
Arbitration of controversies
354 Shipping
354III Charters
354k39 Construction and Operation in General
354k39(7) Arbitration of controversies
Question of whether arbitration panel's award imposing class arbitration on charterers and vessel owners, whose arbitration clauses were "silent" on that issue, was consistent with the Federal Arbitration Act (FAA) was ripe for judicial review; the panel's award meant that owners had to submit to class determination proceedings before arbitrators who, if owners were correct, had no authority to require class arbitration absent the parties' agreement to resolve their disputes on that basis, and should owners refuse to proceed with what they maintained was essentially an ultra vires proceeding, they would almost certainly be subject to a petition to compel arbitration under the FAA. 9 U.S.C.A. § 1 et seq.

40 Cases that cite this headnote

[2] Federal Courts
Presentation of Questions Below or on Review;Record;Waiver
170B Federal Courts
170BXVI Supreme Court
170BXVI(D) Presentation of Questions Below or on Review;Record;Waiver
170Bk3181 In general
(Formerly 170Bk461)
Argument that the question on which certiorari was granted, namely whether arbitration panel's award imposing class arbitration on charterers and vessel owners, whose arbitration clauses were "silent" on that issue, was consistent with the Federal Arbitration Act (FAA), was prudentially

unripe was waived before the Supreme Court, where argument was not pressed in, or considered by, the courts below. 9 U.S.C.A. § 1 et seq.

25 Cases that cite this headnote

[3] Federal Courts
Ripeness;Prematurity

Federal Courts
Prudential concerns

170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2118 Ripeness;Prematurity
170Bk2119 In general
(Formerly 170Bk12.1)
170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2118 Ripeness;Prematurity
170Bk2122 Prudential concerns
(Formerly 170Bk12.1)

"Ripeness" reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction.

28 Cases that cite this headnote

[4] Administrative Law and Procedure
Finality;ripeness

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(B) Decisions and Acts Reviewable
15Ak704 Finality;ripeness

In evaluating a claim to determine whether it is ripe for judicial review, Supreme Court considers both the fitness of the issues for judicial decision and the hardship of withholding court consideration.

34 Cases that cite this headnote

[5] Alternative Dispute Resolution
Mistake or Error

Alternative Dispute Resolution
Grounds for Impeachment or Vacation

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk327 Mistake or Error
25Tk328 In general
25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk360 Impeachment or Vacation
25Tk362 Grounds for Impeachment or Vacation
25Tk362(1) In general

In order to obtain relief vacating decision of arbitration panel, a party must clear a high hurdle, and it is not enough for the party to show that the panel committed an error, or even a serious error. 9 U.S.C.A. § 1 et seq.

170 Cases that cite this headnote

[6] Alternative Dispute Resolution
Consistency and reasonableness;lack of evidence

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk324 Consistency and reasonableness;lack of evidence

It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable under the Federal Arbitration Act (FAA). 9 U.S.C.A. § 10(a)(4).

129 Cases that cite this headnote

[7] Alternative Dispute Resolution
Nature and Extent of Authority

25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk228 Nature and Extent of Authority
25Tk229 In general

The task of an arbitrator is to interpret and enforce a contract, not to make public policy. 9 U.S.C.A. § 1 et seq.

28 Cases that cite this headnote

[8] Shipping
Arbitration of controversies

354 Shipping
354III Charters
354k39 Construction and Operation in General
354k39(7) Arbitration of controversies

Arbitration panel exceeded its powers under the Federal Arbitration Act (FAA) by imposing its own policy choice in concluding that arbitration clauses in charter party agreements between charterers and vessel owners allowed for class arbitration of charterers' antitrust claims, despite the fact that the clauses were silent as to class arbitration; rather than inquiring whether the FAA, maritime law, or New York law contained a default rule under which an arbitration clause would be construed as allowing class arbitration in the absence of express consent, the panel perceived an emerging consensus among arbitrators that class arbitration was beneficial in a wide variety of settings, and the panel then considered only whether there was any good reason not to follow that consensus in this dispute. 9 U.S.C.A. § 10(a)(4).

91 Cases that cite this headnote

[9] Customs and Usages
Explanation of Contract

113 Customs and Usages
113k9 Application and Operation
113k15 Explanation of Contract
113k15(1) In general

Under both New York law and general maritime law, evidence of custom and usage is relevant to determining the parties' intent when an express agreement is ambiguous.

7 Cases that cite this headnote

[10] Shipping
Arbitration of controversies

354 Shipping
354III Charters
354k39 Construction and Operation in General
354k39(7) Arbitration of controversies

Vessel owners, who sought to overturn arbitration panel's award imposing class arbitration on antitrust claims brought against them by charterers, did not waive, in the parties' supplemental agreement, any claim that the arbitrators could not construe the arbitration agreement to permit class arbitration, where the supplemental agreement expressly provided that it did not alter the scope of the parties' arbitration agreements in any charter party agreement, and it provided that neither the supplemental agreement itself, nor any of its terms, could be used to support or oppose any argument in favor of a class action arbitration, and nothing in the supplemental agreement conferred authority on the arbitrators to exceed the terms of the charter party agreements. 9 U.S.C.A. § 1 et seq.

194 Cases that cite this headnote

[11] Alternative Dispute Resolution
Construction

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 In general

Courts are obliged to enforce the parties' agreement to arbitrate according to its terms. 9 U.S.C.A. § 1 et seq.

68 Cases that cite this headnote

[12] Federal Courts
Alternative dispute resolution

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision;Erie Doctrine
170BXV(B) Application to Particular Matters
170Bk3022 Procedural Matters
170Bk3053 Alternative dispute resolution
(Formerly 170Bk403)

While the interpretation of an arbitration agreement is generally a matter of state law, the Federal Arbitration Act (FAA) imposes

certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion. 9 U.S.C.A. § 1 et seq.

86 Cases that cite this headnote

[13] Alternative Dispute Resolution
Constitutional and statutory provisions and rules of court

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 Constitutional and statutory provisions and rules of court

The central or primary purpose of the Federal Arbitration Act (FAA) is to ensure that private agreements to arbitrate are enforced according to their terms. 9 U.S.C.A. § 1 et seq.

102 Cases that cite this headnote

[14] Alternative Dispute Resolution
Construction

Contracts
Intention of Parties

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 In general
95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) In general

Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties, and in this endeavor, as with any other contract, the parties' intentions control. 9 U.S.C.A. § 1 et seq.

95 Cases that cite this headnote

[15] Alternative Dispute Resolution
Agreement or submission as determinative

25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk228 Nature and Extent of Authority
25Tk230 Agreement or submission as determinative

An arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution. 9 U.S.C.A. § 1 et seq.

11 Cases that cite this headnote

[16] Alternative Dispute Resolution
Contractual or consensual basis

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 Contractual or consensual basis

Parties may specify with whom they choose to arbitrate their disputes. 9 U.S.C.A. § 1 et seq.

29 Cases that cite this headnote

[17] Alternative Dispute Resolution
Construction

Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 In general
25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 In general

It falls to courts and arbitrators to give effect to the parties' contractual limitations on arbitration, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties. 9 U.S.C.A. § 1 et seq.

54 Cases that cite this headnote

[18] Shipping

Arbitration of controversies

354 Shipping
354III Charters
354k39 Construction and Operation in General
354k39(7) Arbitration of controversies

Charterer and vessel owners could not be compelled to submit charterer's class action antitrust claims to class arbitration, where the charterers and owners had not reached an agreement on class arbitration, and the arbitration clauses in their charter party agreements were silent on the question of class arbitration. 9 U.S.C.A. § 1 et seq.

289 Cases that cite this headnote

[19] Alternative Dispute Resolution

Contractual or consensual basis

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 Contractual or consensual basis

A party may not be compelled under the Federal Arbitration Act (FAA) to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. 9 U.S.C.A. § 1 et seq.

240 Cases that cite this headnote

[20] Alternative Dispute Resolution

Contractual or consensual basis

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 Contractual or consensual basis

The foundational Federal Arbitration Act (FAA) principle is that arbitration is a matter of consent. 9 U.S.C.A. § 1 et seq.

99 Cases that cite this headnote

[21] Alternative Dispute Resolution

Construction

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 In general

In certain contexts, it is appropriate under the Federal Arbitration Act (FAA) to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement; this recognition is grounded in the background principle that when the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court. 9 U.S.C.A. § 1 et seq.; Restatement (Second) of Contracts § 204.

20 Cases that cite this headnote

[22] Alternative Dispute Resolution

Construction

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 In general

Under the Federal Arbitration Act (FAA), an implicit agreement to authorize class-action arbitration is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate, because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator, and the relative benefits of class-action arbitration are much less assured than the benefits of bilateral arbitration, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration. 9 U.S.C.A. § 1 et seq.

444 Cases that cite this headnote

[23] Alternative Dispute Resolution

Nature, purpose, and right to arbitration in general

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk111 Nature, purpose, and right to arbitration in general

In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. 9 U.S.C.A. § 1 et seq.

24 Cases that cite this headnote

[24] Alternative Dispute Resolution
Construction

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 In general

The differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the Federal Arbitration Act (FAA), that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings. 9 U.S.C.A. § 1 et seq.

93 Cases that cite this headnote

****1761 *662** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Petitioner shipping companies serve much of the world market for parcel tankers—seagoing vessels with compartments that are separately chartered to customers, such as respondent (AnimalFeeds), who wish to ship liquids in small quantities. AnimalFeeds ships its goods pursuant to a standard contract known in the maritime trade as a charter party. The charter party that AnimalFeeds uses contains an arbitration clause. AnimalFeeds brought a class action antitrust suit against petitioners for price fixing, and that suit was consolidated with similar suits brought by other charterers, including one in which the Second Circuit subsequently reversed a lower court ruling that the charterers' claims were not subject to arbitration. As a consequence, the parties in this case agree that they must arbitrate their antitrust dispute. AnimalFeeds sought arbitration on behalf of a class of purchasers of parcel tanker transportation services. The parties agreed to submit the question whether their arbitration agreement allowed for class arbitration to a panel of arbitrators, who would be bound by rules (Class Rules) developed by the American Arbitration Association following *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414. One Class Rule requires an arbitrator to determine whether an arbitration clause permits class arbitration. The parties selected an arbitration panel, designated New York City as the arbitration site, and stipulated that their arbitration clause was "silent" on the class arbitration issue. The panel determined that the arbitration clause allowed for class arbitration, but the District Court vacated the award. It concluded that the arbitrators' award was made in "manifest disregard" of the law, for had the arbitrators conducted a choice-of-law analysis, they would have applied the rule of federal maritime law requiring contracts to be interpreted in light of custom and usage. The Second Circuit reversed, holding that because petitioners had cited no authority applying a maritime rule of custom and usage *against* class arbitration, the arbitrators' decision was not in manifest disregard of maritime law; and that the arbitrators had not manifestly ****1762** disregarded New York law, which had not established a rule against class arbitration.

***663** *Held:* Imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* Pp. ——– ——.

(a) The arbitration panel exceeded its powers by imposing its own policy choice instead of identifying and applying a rule of decision derived from the FAA or from maritime or New York law. Pp. ——– ——.

(1) An arbitration decision may be vacated under FAA § 10(a)(4) on the ground that the arbitrator exceeded his powers, "only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice,' " *Major League Baseball Players Assn. v. Garvey,* 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 *(per*

curiam), for an arbitrator's task is to interpret and enforce a contract, not to make public policy. P. ——.

(2) The arbitration panel appears to have rested its decision on AnimalFeeds' public policy argument for permitting class arbitration under the charter party's arbitration clause. However, because the parties agreed that their agreement was "silent" on the class arbitration issue, the arbitrators' proper task was to identify the rule of law governing in that situation. Instead, the panel based its decision on post-*Bazzle* arbitral decisions without mentioning whether they were based on a rule derived from the FAA or on maritime or New York law. Rather than inquiring whether those bodies of law contained a "default rule" permitting an arbitration clause to allow class arbitration absent express consent, the panel proceeded as if it had a common-law court's authority to develop what it viewed as the best rule for such a situation. Finding no reason to depart from its perception of a post-*Bazzle* consensus among arbitrators that class arbitration was beneficial in numerous settings, the panel simply imposed its own conception of sound policy and permitted class arbitration. The panel's few references to intent do not show that the panel did anything other than impose its own policy preference. Thus, under FAA § 10(b), this Court must either "direct a rehearing by the arbitrators" or decide the question originally referred to the panel. Because there can be only one possible outcome on the facts here, there is no need to direct a rehearing by the arbitrators. Pp. —— – ——.

(b) *Bazzle* did not control resolution of the question whether the instant charter party permits arbitration to proceed on behalf of this class. Pp. —— – ——.

(1) No single rationale commanded a majority in *Bazzle,* which concerned contracts between a commercial lender and its customers that had an arbitration clause that did not expressly mention class arbitration. The plurality decided only the question whether the court or arbitrator should decide whether the contracts were "silent" on the class arbitration issue, concluding that it was the arbitrator. Justice STEVENS' ***664** opinion bypassed that question, resting instead on his resolution of the questions of what standard the appropriate decisionmaker should apply in determining whether a contract allows class arbitration, and whether, under whatever standard is appropriate, class arbitration had been properly ordered in the case at hand. Pp. —— – ——.

(2) The *Bazzle* opinions appear to have baffled these parties at their arbitration proceeding. For one thing, the parties appear to have believed that *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration, ****1763** a question addressed only by the plurality. That question need not be revisited here because the parties expressly assigned that issue to the arbitration panel, and no party argues that this assignment was impermissible. Both the parties and the arbitration panel also seem to have misunderstood *Bazzle* as establishing the standard to be applied in deciding whether class arbitration is permitted. However, *Bazzle* left that question open. Pp. —— – ——.

(c) Imposing class arbitration here is inconsistent with the FAA. Pp. —— – ——.

(1) The FAA imposes rules of fundamental importance, including the basic precept that arbitration "is a matter of consent, not coercion." *Volt v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488. The FAA requires that a "written provision in any maritime transaction" calling for the arbitration of a controversy arising out of such transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and permits a party to an arbitration agreement to petition a federal district court for an order directing that arbitration proceed "in the manner provided for in such agreement," § 4. Thus, this Court has said that the FAA's central purpose is to ensure that "private agreements to arbitrate are enforced according to their terms." *Volt,* 489 U.S., at 479, 109 S.Ct. 1248. Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must "give effect to the [parties'] contractual rights and expectations." *Ibid.* The parties' "intentions control," *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444, and the parties are "generally free to structure their arbitration agreements as they see fit," *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57, 115 S.Ct. 1212, 131 L.Ed.2d 76. They may agree to limit the issues arbitrated and may agree on rules under which an arbitration will proceed. They may also specify *with whom* they choose to arbitrate their disputes. See *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 289, 122 S.Ct. 754, 151 L.Ed.2d 755. Pp. —— – ——.

(2) It follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. Here, the arbitration panel imposed class arbitration despite the parties' stipulation that they had reached ***665** "no agreement" on that issue. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent. It may be appropriate to presume that parties to an arbitration agreement implicitly authorize the arbitrator to adopt those procedures necessary to give effect to the parties' agreement. See *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491. But an implicit agreement to authorize class action arbitration is not a term that the arbitrator may infer solely from the fact of an agreement to arbitrate. The differences between simple bilateral and complex class action arbitration are too great for such a presumption. Pp. ——– – ——.

548 F.3d 85, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS and BREYER, JJ., joined. SOTOMAYOR, J., took no part in the consideration or decision of the case.

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Opinion

Justice ALITO delivered the opinion of the Court.

***666** We granted certiorari in this case to decide whether imposing class arbitration on parties whose arbitration clauses are "silent" on that issue is consistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*

I

A

Petitioners are shipping companies that serve a large share of the world market for parcel tankers—seagoing vessels with compartments that are separately chartered to customers wishing to ship liquids in small quantities. One of those customers is AnimalFeeds International Corp. (hereinafter AnimalFeeds), which supplies raw ingredients, such as fish oil, to animal-feed producers around the world. AnimalFeeds ships its goods pursuant to a standard contract known in the maritime trade as a charter party.[1] Numerous charter parties are in regular use, and the charter party that AnimalFeeds uses is known as the "Vegoilvoy" charter party. Petitioners assert, without contradiction, that charterers ***667** like AnimalFeeds, or their agents—not the shipowners—typically select the particular ****1765** charter party that governs their shipments. Accord, Trowbridge, Admiralty

Law Institute: Symposium on Charter Parties: The History, Development, and Characteristics of the Charter Concept, 49 Tulane L.Rev. 743, 753 (1975) ("Voyage charter parties are highly standardized, with many commodities and charterers having their own specialized forms").

1 "[C]harter parties are commonly drafted using highly standardized forms specific to the particular trades and business needs of the parties." Comment, A Comparative Analysis of Charter Party Agreements "*Subject to*" Respective American and British Laws and Decisions ... It's All in the Details, 26 Tulane Mar. L.J. 291, 294 (2001–2002); see also 2 T. Schoenbaum, Admiralty and Maritime Law § 11–1, p. 200 (3d ed.2001).

Adopted in 1950, the Vegoilvoy charter party contains the following arbitration clause:

> "Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [*i.e.,* the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator." App. to Pet. for Cert. 69a.

In 2003, a Department of Justice criminal investigation revealed that petitioners were engaging in an illegal price-fixing conspiracy. When AnimalFeeds learned of this, it brought a putative class action against petitioners in the District Court for the Eastern District of Pennsylvania, asserting antitrust claims for supracompetitive prices that petitioners allegedly charged their customers over a period of several years.

Other charterers brought similar suits. In one of these, the District Court for the District of Connecticut held that the charterers' claims were not subject to arbitration under the applicable arbitration clause, but the Second Circuit reversed. See ***668** *JLM Industries, Inc. v. Stolt–Nielsen S.A.,* 387 F.3d 163, 183 (2004). While that appeal was pending, the Judicial Panel on Multidistrict Litigation ordered the consolidation of then-pending actions against petitioners, including AnimalFeeds' action, in the District of Connecticut. See *In re Parcel Tanker Shipping Services Antitrust Litigation,* 296 F.Supp.2d 1370, 1371, and n. 1 (JPML 2003). The parties agree that as a consequence of these judgments and orders, AnimalFeeds and petitioners must arbitrate their antitrust dispute.

B

In 2005, AnimalFeeds served petitioners with a demand for class arbitration, designating New York City as the place of arbitration and seeking to represent a class of "[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [petitioners] at any time during the period from August 1, 1998, to November 30, 2002." 548 F.3d 85, 87 (C.A.2 2008) (internal quotation marks omitted). The parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators who were to "follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as effective Oct. 8, 2003)." App. to Pet. for Cert. 59a. These rules (hereinafter Class Rules) were developed by the American Arbitration Association (AAA) after our decision in *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), and Class Rule 3, in accordance with the plurality opinion in that case, requires an arbitrator, as a threshold matter, to determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." App. 56a.

****1766** The parties selected a panel of arbitrators and stipulated that the arbitration clause was "silent" with respect to class arbitration. Counsel for AnimalFeeds explained to the arbitration panel that the term "silent" did not simply mean that ***669** the clause made no express reference to class arbitration. Rather, he said, "[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue." *Id.,* at 77a.

After hearing argument and evidence, including testimony from petitioners' experts regarding arbitration customs and usage in the maritime trade, the arbitrators concluded that the arbitration clause allowed for class arbitration. They found persuasive the fact that other arbitrators

ruling after *Bazzle* had construed "a wide variety of clauses in a wide variety of settings as allowing for class arbitration," but the panel acknowledged that none of these decisions was "exactly comparable" to the present dispute. See App. to Pet. for Cert. 49a–50a. Petitioners' expert evidence did not show an "inten[t] to preclude class arbitration," the arbitrators reasoned, and petitioners' argument would leave "no basis for a class action absent express agreement among all parties and the putative class members." *Id.,* at 51a.

The arbitrators stayed the proceeding to allow the parties to seek judicial review, and petitioners filed an application to vacate the arbitrators' award in the District Court for the Southern District of New York. See 9 U.S.C. § 10(a)(4) (authorizing a district court to "make an order vacating the award upon the application of any party to the arbitration ... where the arbitrators exceeded their powers"); Petition to Vacate Arbitration Award, No. 1:06–CV–00420–JSR (SDNY) in App. in No. 06–3474–cv (CA2), p. A–17, ¶ 16 (citing § 10(a)(4) as a ground for vacatur of the award); see also *id.,* at A–15 to A–16, ¶ 9 (invoking the District Court's jurisdiction under 9 U.S.C. § 203 and 28 U.S.C. §§ 1331 and 1333). The District Court vacated the award, concluding that the arbitrators' decision was made in "manifest disregard" of the law insofar as the arbitrators failed to conduct a choice-of-law analysis. 435 F.Supp.2d 382, 384–385 (S.D.N.Y.2006). See *Wilko v. Swan,* 346 U.S. 427, 436–437, 74 S.Ct. 182, 98 L.Ed. 168 (1953) ("[T]he interpretations of the law by the arbitrators ***670** in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation"); see also Petition to Vacate Arbitration Award, *supra,* at A–17, ¶ 17 (alleging that the arbitration panel "manifestly disregarded the law"). Had such an analysis been conducted, the District Court held, the arbitrators would have applied the rule of federal maritime law requiring that contracts be interpreted in light of custom and usage. 435 F.Supp.2d, at 385–386.

AnimalFeeds appealed to the Court of Appeals, which reversed. See 9 U.S.C. § 16(a)(1)(E) ("An appeal may be taken from ... an order ... vacating an award"). As an initial matter, the Court of Appeals held that the "manifest disregard" standard survived our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), as a "judicial gloss" on the enumerated grounds for vacatur of arbitration awards under 9 U.S.C. § 10. 548 F.3d, at 94. Nonetheless, the Court of Appeals concluded that, because petitioners had cited no authority applying a federal maritime rule of custom and usage *against* class arbitration, the arbitrators' decision was not in manifest disregard of federal maritime law. *Id.,* at 97–98. Nor had the arbitrators manifestly disregarded New York law, the Court of Appeals continued, since nothing in New York case law ****1767** established a rule against class arbitration. *Id.,* at 98–99.

[1] **[2]** **[3]** **[4]** We granted certiorari. 557 U.S. 903, 129 S.Ct. 2793, 174 L.Ed.2d 289 (2009). [2]

2 Invoking an argument not pressed in or considered by the courts below, the dissent concludes that the question presented is not ripe for our review. See *post,* at ——, —— – —— (opinion of GINSBURG, J.). In so doing, the dissent offers no clear justification for now embracing an argument "we necessarily considered and rejected" in granting certiorari. *United States v. Williams,* 504 U.S. 36, 40, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992). Ripeness reflects constitutional considerations that implicate "Article III limitations on judicial power," as well as "prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.,* 509 U.S. 43, 57, n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). In evaluating a claim to determine whether it is ripe for judicial review, we consider both "the fitness of the issues for judicial decision" and "the hardship of withholding court consideration." *National Park Hospitality Assn. v. Department of Interior,* 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003). To the extent the dissent believes that the question on which we granted certiorari is constitutionally unripe for review, we disagree. The arbitration panel's award means that petitioners must now submit to class determination proceedings before arbitrators who, if petitioners are correct, have no authority to require class arbitration absent the parties' agreement to resolve their disputes on that basis. See Class Rule 4(a) (cited in App. 57a); Brief for American Arbitration Association as *Amicus Curiae* 17. Should petitioners refuse to proceed with what they maintain is essentially an ultra vires proceeding, they would almost certainly be subject to a petition to compel arbitration under 9 U.S.C. § 4. Cf. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed

provisions will come into effect"). We think it is clear on these facts that petitioners have demonstrated sufficient hardship, and that their question is fit for our review at this time. To the extent the dissent believes that the question is prudentially unripe, we reject that argument as waived, *Sprietsma v. Mercury Marine,* 537 U.S. 51, 56, n. 4, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002), and we see no reason to disregard the waiver. We express no view as to whether, in a similar case, a federal court may consider a question of prudential ripeness on its own motion. See *National Park Hospitality Assn., supra,* at 808, 123 S.Ct. 2026 ("[E]ven in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion").

***671** II

A

[5] **[6]** **[7]** Petitioners contend that the decision of the arbitration panel must be vacated, but in order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error —or even a serious error. See *Eastern Associated Coal Corp. v. Mine Workers,* 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000); *Paperworkers v. Misco, Inc.,* 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." *Major League Baseball Players Assn. v. Garvey,* 532 U.S. 504, 509, 1015, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) *(per curiam)* (quoting *Steelworkers v. Enterprise Wheel & Car* ***672** *Corp.,* 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator "exceeded [his] powers," for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must conclude that what the arbitration panel did was simply to impose its own view of sound ****1768** policy regarding class arbitration. [3]

[3] We do not decide whether " 'manifest disregard' " survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 585, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10. AnimalFeeds characterizes that standard as requiring a showing that the arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." Brief for Respondent 25 (internal quotation marks omitted). Assuming, *arguendo,* that such a standard applies, we find it satisfied for the reasons that follow.

B

1

[8] In its memorandum of law filed in the arbitration proceedings, AnimalFeeds made three arguments in support of construing the arbitration clause to permit class arbitration:

> "The parties' arbitration clause should be construed to allow class arbitration because (a) the clause is silent on the issue of class treatment and, without express prohibition, class arbitration is permitted under *Bazzle*; *(b) the clause should be construed to permit class arbitration as a matter of public policy*; and (c) the clause would be unconscionable and unenforceable if it forbade class arbitration." App. in No. 06–3474–cv (CA2), at A–308 to A–309 (emphasis added).

The arbitrators expressly rejected AnimalFeeds' first argument, see App. to Pet. for Cert. 49a, and said nothing about the third. Instead, the panel appears to have rested ***673** its decision on AnimalFeeds' public policy argument. Because the parties agreed their agreement was "silent" in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation. Had they engaged in that undertaking, they presumably would have looked either to the FAA itself or to one of the two bodies of law that the parties claimed were governing, *i.e.,* either federal maritime law or New York law. But the panel did not consider whether the FAA provides the rule of decision in such a situation; nor did the panel attempt to determine what rule would govern under either maritime or New York law in the case of a "silent" contract. Instead, the panel based its decision on post-*Bazzle* arbitral decisions that "construed a wide variety of clauses in a wide variety of settings as allowing

for class arbitration." App. to Pet. for Cert. 49a–50a. The panel did not mention whether any of these decisions were based on a rule derived from the FAA or on maritime or New York law. [4]

4 The panel's reliance on these arbitral awards confirms that the panel's decision was not based on a determination regarding the parties' intent. All of the arbitral awards were made under the AAA's Class Rules, which were adopted in 2003, and thus none was available when the parties here entered into the Vegoilvoy charter party during the class period ranging from 1998 to 2002. See 548 F.3d 85, 87 (C.A.2 2008) (defining the class period). Indeed, at the hearing before the panel, counsel for AnimalFeeds conceded that "[w]hen you talk about expectations, virtually every one of the arbitration clauses that were the subject of the 25 AAA decisions were drafted before *[Bazzle]*. So therefore, if you are going to talk about the parties' intentions, pre-*[Bazzle]* class arbitrations were not common, post *[Bazzle]* they are common." App. 87a. Moreover, in its award, the panel appeared to acknowledge that none of the cited arbitration awards involved a contract between sophisticated business entities. See App. to Pet. for Cert. 50a.

[9] Rather than inquiring whether the FAA, maritime law, or New York law contains ****1769** a "default rule" under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it ***674** had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation. Perceiving a post-*Bazzle* consensus among arbitrators that class arbitration is beneficial in "a wide variety of settings," the panel considered only whether there was any good reason not to follow that consensus in this case. App. to Pet. for Cert. 49a–50a. The panel was not persuaded by "court cases denying consolidation of arbitrations," [5] by undisputed evidence that the Vegoilvoy charter party had "never been the basis of a class action," or by expert opinion that "sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration." [6] ***675** *Id.,* at 50a–51a. Accordingly, finding no convincing ground for departing from the post-*Bazzle* arbitral consensus, the panel held that class arbitration was permitted in this case. App. to Pet. for Cert. 52a. The conclusion is inescapable that the panel simply imposed its own conception of sound policy. [7]

5 See *Government of United Kingdom v. Boeing Co.,* 998 F.2d 68, 71, 74 (C.A.2 1993); see also *Glencore, Ltd. v. Schnitzer Steel Prods. Co.,* 189 F.3d 264, 268 (C.A.2 1999); *Champ v. Siegel Trading Co.,* 55 F.3d 269, 275 (C.A.7 1995). Unlike the subsequent arbitration awards that the arbitrators cited, these decisions were available to the parties when they entered into their contracts.

6 Petitioners produced expert evidence from experienced maritime arbitrators demonstrating that it is customary in the shipping business for parties to resolve their disputes through bilateral arbitration. See, *e.g.,* App. 126a (expert declaration of John Kimball) ("In the 30 years I have been practicing as a maritime lawyer, I have never encountered an arbitration clause in a charter party that could be construed as allowing class action arbitration"); *id.,* at 139a (expert declaration of Bruce Harris) ("I have been working as a maritime arbitrator for thirty years and this matter is the first I have ever encountered where the issue of a class action arbitration has even been raised"). These experts amplified their written statements in their live testimony, as well. See, *e.g.,* App. 112a, 113a (Mr. Kimball) (opining that the prospect of a class action in a maritime arbitration would be "quite foreign" to overseas shipping executives and charterers); *id.,* at 111a–112a (Mr. Harris) (opining that in the view of the London Corps of International Arbitration, class arbitration is "inconceivable").
Under both New York law and general maritime law, evidence of "custom and usage" is relevant to determining the parties' intent when an express agreement is ambiguous. See *Excess Ins. Co. v. Factory Mut. Ins. Co.,* 3 N.Y.3d 577, 590–591, 789 N.Y.S.2d 461, 822 N.E.2d 768, 777 (2004) ("Our precedent establishes that where there is ambiguity in a reinsurance certificate, the surrounding circumstances, including industry custom and practice, should be taken into consideration"); *Lopez v. Consolidated Edison Co. of N. Y.,* 40 N.Y.2d 605, 609, 389 N.Y.S.2d 295, 357 N.E.2d 951, 954–955 (1976) (where contract terms were ambiguous, parol evidence of custom and practice was properly admitted to show parties' intent); *407 East 61st Garage, Inc. v. Savoy Fifth Avenue Corp.,* 23 N.Y.2d 275, 281, 296 N.Y.S.2d 338, 244 N.E.2d 37, 41 (1968) (contract was "not so free from ambiguity to preclude extrinsic evidence" of

industry "custom and usage" that would "establish the correct interpretation or understanding of the agreement as to its term"). See also *Great Circle Lines, Ltd. v. Matheson & Co.,* 681 F.2d 121, 125 (C.A.2 1982) ("Certain long-standing customs of the shipping industry are crucial factors to be considered when deciding whether there has been a meeting of the minds on a maritime contract"); *Samsun Corp. v. Khozestan Mashine Kar Co.,* 926 F.Supp. 436, 439 (S.D.N.Y.1996) ("[W]here as here the contract is one of charter party, established practices and customs of the shipping industry inform the court's analysis of what the parties agreed to"); Hough, Admiralty Jurisdiction—Of Late Years, 37 Harv. L.Rev. 529, 536 (1924) (noting that "maritime law is a body of sea customs" and the "custom of the sea ... includes a customary interpretation of contract language").

7 The dissent calls this conclusion "hardly fair," noting that the word " 'policy' is not so much as mentioned in the arbitrators' award." *Post,* at 1780. But just as merely saying something is so does not make it so, cf. *United States v. Morrison,* 529 U.S. 598, 614, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), the arbitrators need not have said they were relying on policy to make it so. At the hearing before the arbitration panel, one of the arbitrators recognized that the body of post-*Bazzle* arbitration awards on which AnimalFeeds relied involved "essentially consumer non-value cases." App. 82a. In response, counsel for AnimalFeeds defended the applicability of those awards by asserting that the "vast majority" of the claimants against petitioners "have negative value claims ... meaning it costs more to litigate than you would get if you won." *Id.,* at 82a–83a. The panel credited this body of awards in concluding that petitioners had not demonstrated the parties' intent to preclude class arbitration, and further observed that if petitioners' anticonsolidation precedents controlled, then "there would appear to be no basis for a class action absent express agreement among all parties and the putative class members." App. to Pet. for Cert. 50a, 51a.

***676 **1770** 2

It is true that the panel opinion makes a few references to intent, but none of these shows that the panel did anything other than impose its own policy preference. The opinion states that, under *Bazzle,* "arbitrators must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action," and the panel added that "[t]his is also consistent with New York law." App. to Pet. for Cert. 49a. But the panel had no occasion to "ascertain the parties' intention" in the present case because the parties were in complete agreement regarding their intent. In the very next sentence after the one quoted above, the panel acknowledged that the parties in this case agreed that the Vegoilvoy charter party was "silent on whether [it] permit[ted] or preclude[d] class arbitration," but that the charter party was "not ambiguous so as to call for parol evidence." *Ibid.* This stipulation left no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task.

The panel also commented on the breadth of the language in the Vegoilvoy charter party, see *id.,* at 50a, but since the only task that was left for the panel, in light of the parties' stipulation, was to identify the governing rule applicable in a case in which neither the language of the contract nor any other evidence established that the parties had reached any agreement on the question of class arbitration, the particular wording of the charter party was quite beside the point.

In sum, instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York ***677** law, the arbitration panel imposed its own policy choice and thus exceeded its powers. As a result, under § 10(b) of the FAA, we must either "direct a rehearing by the arbitrators" or decide the question that was originally referred to the panel. Because we conclude that there can be only one possible outcome on the facts before us, we see no need to direct a rehearing by the arbitrators.

III

A

The arbitration panel thought that *Bazzle* "controlled" the "resolution" of the question whether the Vegoilvoy charter party "permit[s] this arbitration to proceed on behalf of a class," App. to Pet. for Cert. 48a–49a, but that understanding was incorrect.

****1771** *Bazzle* concerned contracts between a commercial lender (Green Tree) and its customers. These

contracts contained an arbitration clause but did not expressly mention class arbitration. Nevertheless, an arbitrator conducted class arbitration proceedings and entered awards for the customers.

The South Carolina Supreme Court affirmed the awards. *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 569 S.E.2d 349 (2002). After discussing both Seventh Circuit precedent holding that a court lacks authority to order classwide arbitration under § 4 of the FAA, see *Champ v. Siegel Trading Co.*, 55 F.3d 269 (1995), and conflicting California precedent, see *Keating v. Superior Court of Alameda Cty.*, 31 Cal.3d 584, 183 Cal.Rptr. 360, 645 P.2d 1192 (1982), the State Supreme Court elected to follow the California approach, which it characterized as permitting a trial court to "order class-wide arbitration under adhesive but enforceable franchise contracts," 351 S.C., at 259, 266, 569 S.E.2d, at 357, 360. Under this approach, the South Carolina court observed, a trial judge must "[b]alanc[e] the potential inequities and inefficiencies" ***678** of requiring each aggrieved party to proceed on an individual basis against "resulting prejudice to the drafting party" and should take into account factors such as "efficiency" and "equity." *Id.*, at 260, and n. 15, 569 S.E.2d, at 357, and n. 15.

Applying these standards to the case before it, the South Carolina Supreme Court found that the arbitration clause in the Green Tree contracts was "silent regarding class-wide arbitration." *Id.*, at 263, 569 S.E.2d, at 359 (emphasis deleted). The Court described its holding as follows:

> "[W]e ... hold that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice. If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement." *Id.*, at 266, 569 S.E.2d, at 360 (footnote omitted).

When *Bazzle* reached this Court, no single rationale commanded a majority. The opinions of the Justices who joined the judgment—that is, the plurality opinion and Justice STEVENS' opinion—collectively addressed three separate questions. The first was which decision maker (court or arbitrator) should decide whether the contracts in question were "silent" on the issue of class arbitration. The second was what standard the appropriate decision maker should apply in determining whether a contract allows class arbitration. (For example, does the FAA entirely preclude class arbitration? Does the FAA permit class arbitration only under limited circumstances, such as when the contract expressly so provides? Or is this question left entirely to state law?) The final question was whether, under whatever standard is appropriate, class arbitration had been properly ordered in the case at hand.

***679** The plurality opinion decided only the first question, concluding that the arbitrator and not a court should decide whether the contracts were indeed "silent" on the issue of class arbitration. The plurality noted that, "[i]n certain limited circumstances," involving "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," it is assumed "that the parties intended courts, not arbitrators," to make the decision. 539 U.S., at 452, 123 S.Ct. 2402. But the plurality opined that the question whether ****1772** a contract with an arbitration clause forbids class arbitration "does not fall into this narrow exception." *Ibid.* The plurality therefore concluded that the decision of the State Supreme Court should be vacated and that the case should be remanded for a decision by the arbitrator on the question whether the contracts were indeed "silent." The plurality did not decide either the second or the third question noted above.

Justice STEVENS concurred in the judgment vacating and remanding because otherwise there would have been "no controlling judgment of the Court," but he did not endorse the plurality's rationale. *Id.*, at 455, 123 S.Ct. 2402 (opinion concurring in judgment and dissenting in part). He did not take a definitive position on the first question, stating only that *"[a]rguably* the interpretation of the parties' agreement should have been made in the first instance by the arbitrator." *Ibid.* (emphasis added). But because he did not believe that Green Tree had raised the question of the appropriate decision maker, he preferred not to reach that question and, instead, would have affirmed the decision of the State Supreme Court on the ground that "the decision to conduct a class-action arbitration was correct as a matter of law." *Ibid.* Accordingly, his analysis bypassed the first question noted above and rested instead on his resolution of the second and third questions. Thus, *Bazzle* did not yield a majority decision on any of the three questions.

***680** B

Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case at the time of the arbitration proceeding. For one thing, the parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration. See App. 89a (transcript of argument before arbitration panel) (counsel for Stolt–Nielsen states: "What *[Bazzle]* says is that the contract interpretation issue is left up to the arbitrator, that's the rule in *[Bazzle]* "). In fact, however, only the plurality decided that question. But we need not revisit that question here because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible.

[10] **[11]** Unfortunately, however, both the parties and the arbitration panel seem to have misunderstood *Bazzle* in another respect, namely, that it established the standard to be applied by a decisionmaker in determining whether a contract may permissibly be interpreted to allow class arbitration. The arbitration panel began its discussion by stating that the parties "differ regarding *the rule of interpretation* to be gleaned from [the *Bazzle*] decision." App. to Pet. for Cert. 49a (emphasis added). The panel continued:

> "Claimants argue that *Bazzle* requires clear language that forbids class arbitration in order to bar a class action. The Panel, however, agrees with Respondents that the test is a more general one—arbitrators must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action." *Ibid.*

As we have explained, however, *Bazzle* did not establish the rule to be applied in deciding whether class arbitration is ***681** permitted.[8] The decision in *Bazzle* left that question open, and we turn to it now.

[8] AnimalFeeds invokes the parties' supplemental agreement as evidence that petitioners "waived" any claim that the arbitrators could not construe the arbitration agreement to permit class arbitration. Brief for Respondent 15. The dissent concludes, likewise, that the existence of the parties' supplemental agreement renders petitioners' argument under § 10(a)(4) "scarcely debatable." *Post,* at 1780. These arguments are easily answered by the clear terms of the supplemental agreement itself. The parties expressly provided that their supplemental agreement "*does not alter* the scope of the Parties' arbitration agreements in any Charter Party Agreement," and that "[n]either the fact of this Agreement nor any of its terms may be used to support or oppose *any argument in favor of a class action arbitration* ... and may not be relied upon by the Parties, any arbitration panel, *any court,* or any other tribunal for such purposes." App. to Pet. for Cert. 62a–63a (emphasis added). As with any agreement to arbitrate, we are obliged to enforce the parties' supplemental agreement "according to its terms." *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 58, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995). The question that the arbitration panel was charged with deciding was whether the arbitration clause in the Vegoilvoy charter party allowed for class arbitration, and nothing in the supplemental agreement conferred authority on the arbitrators to exceed the terms of the charter party itself. Thus, contrary to AnimalFeeds' argument, these statements show that petitioners did *not* waive their argument that *Bazzle* did not establish the standard for the decisionmaker to apply when construing an arbitration clause.

****1773** IV

[12] While the interpretation of an arbitration agreement is generally a matter of state law, see *Arthur Andersen LLP v. Carlisle,* 556 U.S. 624, ——, 129 S.Ct. 1896, 1901–02, 173 L.Ed.2d 832 (2009); *Perry v. Thomas,* 482 U.S. 483, 493, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration "is a matter of consent, not coercion," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

A

[13] In 1925, Congress enacted the United States Arbitration Act, as the FAA was formerly known, for the express purpose ***682** of making "valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations." 43 Stat. 883. Reenacted and codified in 1947, see

61 Stat. 669,[9] the FAA provides, in pertinent part, that a "written provision in any maritime transaction" calling for the arbitration of a controversy arising out of such transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. Under the FAA, a party to an arbitration agreement may petition a United States district court for an order directing that "arbitration proceed in the manner provided for in such agreement." § 4. Consistent with these provisions, we have said on numerous occasions that the central or "primary" purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms." *Volt, supra,* at 479, 109 S.Ct. 1248; *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57, 58, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); see also *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 688, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996). See generally 9 U.S.C. § 4.

9 See generally Sturges & Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act, 17 Law & Contemp. Prob. 580, 580–581, n. 1 (1952) (recounting the history of the United States Arbitration Act and its 1947 reenactment and codification).

[14] **[15]** Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must ****1774** "give effect to the contractual rights and expectations of the parties." *Volt, supra,* at 479, 109 S.Ct. 1248. In this endeavor, "as with any other contract, the parties' intentions control." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution. See *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 648–649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) ("[A]rbitrators derive ***683** their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Mitsubishi Motors, supra,* at 628, 105 S.Ct. 3346 ("By agreeing to arbitrate ..., [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"); see also *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 581, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) (an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties" (internal quotation marks omitted)).

Underscoring the consensual nature of private dispute resolution, we have held that parties are " 'generally free to structure their arbitration agreements as they see fit.' " *Mastrobuono, supra,* at 57, 115 S.Ct. 1212; see also *AT & T Technologies, supra,* at 648–649, 106 S.Ct. 1415. For example, we have held that parties may agree to limit the issues they choose to arbitrate, see *Mitsubishi Motors, supra,* at 628, 105 S.Ct. 3346, and may agree on rules under which any arbitration will proceed, *Volt, supra,* at 479, 109 S.Ct. 1248. They may choose who will resolve specific disputes. *E.g.,* App. 30a; *Alexander v. Gardner–Denver Co.,* 415 U.S. 36, 57, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *Burchell v. Marsh,* 58 U.S. 344, 17 How. 344, 349, 15 L.Ed. 96 (1855); see also *International Produce, Inc. v. A/S Rosshavet,* 638 F.2d 548, 552(CA2) ("The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose"), cert. denied, 451 U.S. 1017, 101 S.Ct. 3006, 69 L.Ed.2d 389 (1981).

[16] **[17]** We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes. See *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 289, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties,* that are not already covered in the agreement" (emphasis added)); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.,* 460 U.S. 1, 20, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("[A]n arbitration agreement must be enforced notwithstanding ***684** the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement"); *Steelworkers, supra,* at 581, 80 S.Ct. 1358 (an arbitrator "has no general charter to administer justice for a community which transcends the parties" (internal quotation marks omitted)); accord, *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (" [A]rbitration is simply a matter of contract *between the parties*; it is a way to resolve those disputes—but only those disputes—that the *parties* have agreed to submit to arbitration" (emphasis added)). It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the ****1775** exercise:

to give effect to the intent of the parties. *Volt,* 489 U.S., at 479, 109 S.Ct. 1248.

B

[18] **[19]** **[20]** From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached "no agreement" on that issue, see App. 77a. The critical point, in the view of the arbitration panel, was that petitioners did not "establish that the parties to the charter agreements intended to *preclude* class arbitration." App. to Pet. for Cert. 51a. Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment, the panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

[21] In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize ***685** the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement. Thus, we have said that " ' "procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (quoting *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 557, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964)). This recognition is grounded in the background principle that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." Restatement (Second) of Contracts § 204 (1979).

[22] **[23]** An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. See *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); *Mitsubishi Motors,* 473 U.S., at 628, 105 S.Ct. 3346; see also *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, ——, 129 S.Ct. 1456, 1463–65, 173 L.Ed.2d 398 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution") (citing *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 123, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001)); *Gardner–Denver, supra,* at 57, 94 S.Ct. 1011 ("Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations"). But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve ***686** disputes through class- ****1776** wide arbitration. Cf. *First Options, supra,* at 945, 115 S.Ct. 1920 (noting that "one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate" contrary to their expectations).

[24] Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure, see, *e.g., supra,* at ——, no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. See App. 86a ("[W]e believe domestic class members could be in the hundreds" and that "[t]here could be class members that ship to and from the U.S. who are not domestic who we think would be covered"); see also, *e.g., Bazzle,* 351 S.C., at 251, 569 S.E.2d, at 352–353 (involving a class of 1,899 individuals that was awarded damages, fees, and costs of more than $14 million by a single arbitrator). Under the Class Rules, "the presumption of privacy and confidentiality" that applies in many bilateral arbitrations "shall not apply in class arbitrations," see Addendum to Brief for American Arbitration Association

as *Amicus Curiae* 10a (Class Rule 9(a)), thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. Cf. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) (noting that "the burden of justification rests on the exception" to the general rule that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process" (internal quotation marks omitted)). And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, cf. App. in No. 06–3474–cv (CA2), at A–77, A–79, ¶¶ 30, 31, 40, even ***687** though the scope of judicial review is much more limited, see *Hall Street,* 552 U.S., at 588, 128 S.Ct. 1396. We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings. [10]

10 We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was "no agreement" on the issue of class-action arbitration. App. 77a.

The dissent minimizes these crucial differences by characterizing the question before the arbitrators as being merely what "procedural mode" was available to present AnimalFeeds' claims. *Post,* at 1781. If the question were that simple, there would be no need to consider the parties' intent with respect to class arbitration. See *Howsam, supra,* at 84, 123 S.Ct. 588 (committing "procedural questions" presumptively to the arbitrator's discretion (internal quotation marks omitted)). But the FAA requires more. Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration. Here, where the parties stipulated that there was "no agreement" on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.

****1777** V

For these reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

***688** Justice GINSBURG, with whom Justice STEVENS and Justice BREYER join, dissenting.

When an arbitration clause is silent on the question, may arbitration proceed on behalf of a class? The Court prematurely takes up that important question and, indulging in *de novo* review, overturns the ruling of experienced arbitrators. [1]

1 All three panelists are leaders in the international-dispute-resolution bar. See Brief for Respondent 8–9.

The Court errs in addressing an issue not ripe for judicial review. Compounding that error, the Court substitutes its judgment for that of the decisionmakers chosen by the parties. I would dismiss the petition as improvidently granted. [2] Were I to reach the merits, I would adhere to the strict limitations the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.,* places on judicial review of arbitral awards. § 10. Accordingly, I would affirm the judgment of the Second Circuit, which rejected petitioners' plea for vacation of the arbitrators' decision.

2 Alternatively, I would vacate with instructions to dismiss for lack of present jurisdiction. See Reply to Brief in Opposition 12, n. 6.

I

As the Court recounts, *ante,* at —— – ——, this case was launched as a class action in federal court charging named ocean carriers (collectively, Stolt–Nielsen) with a conspiracy to extract supracompetitive prices from their customers (buyers of ocean-transportation services). That court action terminated when the Second Circuit held, first, that the parties' transactions were governed by contracts (charter parties) with enforceable arbitration clauses, and second, that the antitrust claims were arbitrable. *JLM Industries, Inc. v. Stolt–Nielsen S.A.,* 387 F.3d 163, 175, 181 (2004).

Cargo-shipper AnimalFeeds International Corp. (AnimalFeeds) thereupon filed a demand for class arbitration of the ***689** antitrust-conspiracy claims.[3] STOLT–NIELSen contested animalfeeds' righT to pRoceed on behalf of a class, but agreed to submission of that threshold dispute to a panel of arbitrators. Thus, the parties entered into a supplemental agreement to choose arbitrators and instruct them to "follow ... Rul[e] 3 ... of the American Arbitration Association's Supplementary Rules for Class Arbitrations." App. to Pet. for Cert. 59a. Rule 3, in turn, directed the panel to "determine ... whether the applicable arbitration clause permits the arbitration to proceed on behalf of ... a class." App. 56a.

3 Counsel for AnimalFeeds submitted in arbitration that "[i]t would cost ... the vast majority of absent class members, and indeed the current claimants, ... more to litigate the matter on an individual basis than they could recover. An antitrust case, particularly involving an international cartel[,] ... is extraordinarily difficult and expensive to litigate." App. 82a (paragraph break omitted).

After receiving written submissions and hearing arguments, the arbitration panel rendered a clause-construction award. It decided unanimously—and only—that the "arbitration claus[e] [used in the parties' standard-form shipping contracts] permit[s] this ... arbitration to proceed as a class arbitration." App. to Pet. for Cert. 52a. Stolt–Nielsen petitioned for court review urging vacatur of the clause-construction ****1778** award on the ground that "the arbitrators [had] exceeded their powers." § 10(a)(4). The Court of Appeals upheld the award: "Because the parties specifically agreed that the arbitration panel would decide whether the arbitration claus[e] permitted class arbitration," the Second Circuit reasoned, "the arbitration panel did not exceed its authority in deciding that issue—irrespective of whether it decided the issue correctly." 548 F.3d 85, 101 (2008).

II

I consider, first, the fitness of the arbitrators' clause-construction award for judicial review. The arbitrators decided the issue, in accord with the parties' supplemental ***690** agreement, "as a threshold matter." App. 56a. Their decision that the charter-party arbitration clause permitted class arbitration was abstract and highly interlocutory. The panel did not decide whether the particular claims AnimalFeeds advanced were suitable for class resolution, see App. to Pet. for Cert. 48a–49a; much less did it delineate any class or consider whether, "if a class is certified, ... members of the putative class should be required to 'opt in' to th[e] proceeding," *id.,* at 52a.

The Court, *ante,* at ——, n. 2, does not persuasively justify judicial intervention so early in the game or convincingly reconcile its adjudication with the firm final-judgment rule prevailing in the federal court system. See, *e.g.,* 28 U.S.C. § 1257 (providing for petitions for certiorari from "[f]inal judgments or decrees" of state courts); § 1291 (providing for Court of Appeals review of district court "final decisions"); *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945) (describing "final decision" generally as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment").

We have equated to "final decisions" a slim set of "collateral orders" that share these characteristics: They "are conclusive, [they] resolve important questions separate from the merits, and [they] are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Industries, Inc. v. Carpenter,* 558 U.S. 100, ——, 130 S.Ct. 599, 601, 175L.Ed.2d 458 (2009) (quoting *Swint v. Chambers County Comm'n,* 514 U.S. 35, 42, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995)). "[O]rders relating to class certification" in federal court, it is settled, do not fit that bill. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 470, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).[4]

4 Federal Rule of Civil Procedure 23(f), adopted in response to *Coopers & Lybrand,* gives Courts of Appeals discretion to permit an appeal from an order granting or denying class-action certification. But the rule would not permit review of a preliminary order of the kind at issue here, *i.e.,* one that defers decision whether to grant or deny certification.

***691** Congress, of course, can provide exceptions to the "final-decision" rule. Prescriptions in point include § 1292 (immediately appealable " [i]nterlocutory decisions"); § 2072(c) (authorizing promulgation of rules defining when a district court ruling is final for purposes of appeal under § 1291); Fed. Rule Civ. Proc. 23(f) (pursuant to § 1292(e), accords Courts of Appeals discretion to permit appeals from district court orders granting or denying class-action certification); Fed. Rule Civ. Proc. 54(b) (providing for "entry of a final judgment as to one or more, but fewer

than all, of the claims or parties"). Did Congress provide for immediate review of the preliminary ruling in question here?

**1779 Section 16 of the FAA, governing appellate review of district court arbitration orders, lists as an appealable disposition a district court decision "confirming or denying confirmation of an award or partial award." 9 U.S.C. § 16(a)(1)(D). Notably, the arbitrators in the matter at hand labeled their decision "Partial Final Clause Construction Award." App. to Pet. for Cert. 45a. It cannot be true, however, that parties or arbitrators can gain instant review by slicing off a preliminary decision or a procedural order and declaring its resolution a "partial award." Cf. *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 588, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008) (FAA §§ 9–11, which provide for expedited review to confirm, vacate, or modify arbitration awards, "substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.").

Lacking this Court's definitive guidance, some Courts of Appeals have reviewed arbitration awards "finally and definitely dispos[ing] of a separate independent claim." *E.g., Metallgesellschaft A.G. v. M/V Capitan Constante,* 790 F.2d 280, 283 (C.A.2 1986).[5] Others have considered "partial *692 award [s]" that finally "determin[e] liability, but ... not ... damages." *E.g., Hart Surgical, Inc. v. Ultracision, Inc.,* 244 F.3d 231, 234 (C.A.1 2001).[6] Another confirmed an interim ruling on a " separate, discrete, independent, severable issue." *Island Creek Coal Sales Co. v. Gainesville,* 729 F.2d 1046, 1049 (C.A.6 1984) (internal quotation marks omitted), abrogated on other grounds by *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.,* 529 U.S. 193, 120 S.Ct. 1331, 146 L.Ed.2d 171 (2000).

5 See *Metallgesellschaft A.G.,* 790 F.2d, at 283, 284 (Feinberg, C.J., dissenting) (describing exception for separate and independent claims as "creat[ing], in effect, an arbitration analogue to [Fed. Rule Civ. Proc.] 54(b)").

6 But see *Liberty Mut. Ins. Co. v. Wetzel,* 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976) (district court order determining liability but reserving decision on damages held not immediately appealable).

Receptivity to review of preliminary rulings rendered by arbitrators, however, is hardly universal. See *Dealer Computer Servs., Inc. v. Dub Herring Ford,* 547 F.3d 558 (C.A.6 2008) (arbitration panel's preliminary ruling that contract did not bar class proceedings held not ripe for review; arbitrators had not yet determined that arbitration *should* proceed on behalf of a class); *Metallgesellschaft A.G.,* 790 F.2d, at 283, 285 (Feinberg, C.J., dissenting) ("[Piecemeal review] will make arbitration more like litigation, a result not to be desired. It would be better to minimize the number of occasions the parties to arbitration can come to court; on the whole, this benefits the parties, the arbitration process and the courts.").

While lower court opinions are thus divided, this much is plain: No decision of this Court, until today, has ever approved immediate judicial review of an arbitrator's decision as preliminary as the "partial award" made in this case.[7]

7 The parties agreed that the arbitrators would issue a "partial final award," and then "stay all proceedings ... to permit any party to move a court of competent jurisdiction to confirm or to vacate" the award. App. 56a. But an arbitration agreement, we have held, cannot "expand judicial review" available under the FAA. *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 587, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).

*693 III

Even if Stolt–Nielsen had a plea ripe for judicial review, the Court should reject it on the merits. Recall that the parties **1780 jointly asked the arbitrators to decide, initially, whether the arbitration clause in their shipping contracts permitted class proceedings. See *supra,* at ——. The panel did just what it was commissioned to do. It construed the broad arbitration clause (covering "[a]ny dispute arising from the making, performance or termination of this Charter Party," App. to Pet. for Cert. 47a) and ruled, expressly and only, that the clause permitted class arbitration. The Court acts without warrant in allowing Stolt–Nielsen essentially to repudiate its submission of the contract-construction issue to the arbitration panel, and to gain, in place of the arbitrators' judgment, this Court's *de novo* determination.

A

The controlling FAA prescription, § 10(a),[8] authorizes a court to vacate an arbitration panel's decision "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). The four grounds for vacatur ***694** codified in § 10(a) restate the longstanding rule that, "[i]f [an arbitration] award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court ... will not set [the award] aside for error, either in law or fact." *Burchell v. Marsh,* 58 U.S. 344, 349, 17 How. 344, 349, 15 L.Ed. 96 (1855).

8 Title 9 U.S.C. § 10(a) provides:
"In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
"(1) where the award was procured by corruption, fraud, or undue means;
"(2) where there was evident partiality or corruption in the arbitrators, or either of them;
"(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
"(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

The sole § 10 ground Stolt–Nielsen invokes for vacating the arbitrators' decision is § 10(a)(4). The question under that provision is "whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *DiRussa v. Dean Witter Reynolds Inc.,* 121 F.3d 818, 824 (C.A.2 1997); *Comprehensive Accounting Corp. v. Rudell,* 760 F.2d 138, 140 (C.A.7 1985). The parties' supplemental agreement, referring the class-arbitration issue to an arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision. That scarcely debatable point should resolve this case.

B

The Court's characterization of the arbitration panel's decision as resting on "policy," not law, is hardly fair comment, for "policy" is not so much as mentioned in the arbitrators' award. Instead, the panel tied its conclusion that the arbitration clause permitted class arbitration, App. to Pet. for Cert. 52a, to New York law, federal maritime law, and decisions made by other panels pursuant to Rule 3 of the American Arbitration Association's Supplementary Rules for Class Arbitrations. *Id.,* at 49a–50a.

At the outset of its explanation, the panel rejected the argument, proffered by AnimalFeeds, that this Court's decision in ****1781** *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), settled the matter by "requir[ing] clear language that *forbids* class arbitration in order to bar a class action." App. to Pet. for Cert. 49a (emphasis added). Agreeing with Stolt–Nielsen in this regard, the panel said that the test it ***695** employed looked to the language of the particular agreement to gauge whether the parties "intended to permit or to preclude class action[s]." *Ibid.* Concentrating on the wording of the arbitration clause, the panel observed, is "consistent with New York law as articulated by the [New York] Court of Appeals ... and with federal maritime law." *Ibid.*[9]

9 On New York law, the panel referred to *Evans v. Famous Music Corp.,* 1 N.Y.3d 452, 775 N.Y.S.2d 757, 807 N.E.2d 869 (2004).

Emphasizing the breadth of the clause in question —" 'any dispute arising from the making, performance or termination of this Charter Party' shall be put to arbitration," *id.,* at 50a—the panel noted that numerous other partial awards had relied on language similarly comprehensive to permit class proceedings "in a wide variety of settings." *Id.,* at 49a–50a. The panel further noted "that many of the other panels [had] rejected arguments similar to those advanced by [Stolt–Nielsen]." *Id.,* at 50a.

The Court features a statement counsel for AnimalFeeds made at the hearing before the arbitration panel, and maintains that it belies any argument that the clause in question permits class arbitration: "All the parties agree

that when a contract is silent on an issue there's been no agreement that has been reached on that issue." *Ante,* at 1766 (quoting App. 77a); see *ante,* at ——, —— – ——, ——, ——, and n. 10. The sentence quoted from the hearing transcript concluded: "therefore there has been *no agreement to bar class arbitrations*." App. 77a (emphasis added). Counsel quickly clarified his position: "It's also undisputed that the arbitration clause here contains broad language and this language should be interpreted to permit class arbitrations." *Id.,* at 79a. See also *id.,* at 80a (noting consistent recognition by arbitration panels that "a silent broadly worded arbitration clause, just like the one at issue here, should be construed to permit class arbitration"); *id.,* at 88a ("[B]road ... language ... silent as to class proceedings should be interpreted to permit a class proceeding.").

***696** Stolt–Nielsen, the panel acknowledged, had vigorously argued, with the support of expert testimony, that "the bulk of international shippers would never intend to have their disputes decided in a class arbitration." App. to Pet. for Cert. 52a. That concern, the panel suggested, might be met at a later stage; "if a class is certified," the panel noted, class membership could be confined to those who affirmatively " 'opt in' " to the proceeding. *Ibid.*

The question properly before the Court is not whether the arbitrators' ruling was erroneous, but whether the arbitrators "exceeded their powers." § 10(a)(4). The arbitrators decided a threshold issue, explicitly committed to them, see *supra,* at ——, about the procedural mode available for presentation of AnimalFeeds' antitrust claims. Cf. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.,* 559 U.S. 393, ——, 130 S.Ct. 1431, 1443, 176 L.Ed.2d 311 (2010) (plurality opinion) ("[R]ules allowing multiple claims (and claims by or against multiple parties) to be litigated together ... neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter ****1782** only how the claims are processed."). That the arbitrators endeavored to perform their assigned task honestly is not contested. "Courts ... do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Paperworkers v. Misco, Inc.,* 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). The arbitrators here not merely "arguably," but certainly, "constru[ed] ... the contract" with fidelity to their commission. *Ibid.* This Court, therefore, may not disturb the arbitrators' judgment, even if convinced that "serious error" infected the panel's award. *Ibid.*

C

The Court not only intrudes on a decision the parties referred to arbitrators. It compounds the intrusion by according the arbitrators no opportunity to clarify their decision and thereby to cure the error the Court perceives. ***697** Section 10(b), the Court asserts, invests in this tribunal authority to "decide the question that was originally referred to the panel." *Ante,* at 1770. The controlling provision, however, says nothing of the kind. Section 10(b) reads, in full: "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, *direct a rehearing by the arbitrators*." (Emphasis added.) Just as § 10(a)(4) provides no justification for the Court's disposition, see *supra,* at —— – —— and this page, so, too, § 10(b) provides no grounding for the Court's peremptory action.

IV

A

For arbitrators to consider whether a claim should proceed on a class basis, the Court apparently demands contractual language one can read as affirmatively authorizing class arbitration. See *ante,* at —— ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."); *ante,* at ——. The breadth of the arbitration clause, and the absence of any provision waiving or banning class proceedings, [10] will not do. *Ante,* at —— – ——.

10 Several courts have invalidated contractual bans on, or waivers of, class arbitration because proceeding on an individual basis was not feasible in view of the high costs entailed and the slim benefits achievable. See, *e.g., In re American Express Merchants' Litigation,* 554 F.3d 300, 315–316, 320 (C.A.2 2009); *Kristian v. Comcast Corp.,* 446 F.3d 25, 55, 59 (C.A.1 2006); *Discover Bank v. Superior Court,* 36 Cal.4th 148, 162–163, 30 Cal.Rptr.3d 76, 113 P.3d 1100, 1110 (2005); *Leonard v. Terminix Int'l Co., LP,* 854 So.2d 529,

539 (Ala.2002). Were there no right to proceed on behalf of a class in the first place, however, a provision banning or waiving recourse to this aggregation device would be superfluous.

The Court ties the requirement of affirmative authorization to "the basic precept that arbitration 'is a matter of consent, ***698** not coercion.' " *Ante,* at —— (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). Parties may "specify *with whom* they choose to arbitrate," the Court observes, just as they may "limit the issues they choose to arbitrate." *Ante,* at 1774. But arbitrators, in delineating an appropriate class, need not, and should not, disregard such contractual constraints. In this case, for example, AnimalFeeds proposes to pursue, on behalf of a class, only "claims ... arising out of any [charter party agreement] ... *that provides for arbitration*." App. to Pet. for Cert. 56a (emphasis added). Should the arbitrators certify the proposed class, they would adjudicate only the rights of persons "with whom" ****1783** Stolt–Nielsen agreed to arbitrate, and only "issues" subject to arbitration. *Ante,* at —— (emphasis omitted).

The Court also links its affirmative-authorization requirement to the parties' right to stipulate rules under which arbitration may proceed. See *ibid.* The question, however, is the proper default rule when there is no stipulation. Arbitration provisions, this Court has noted, are a species of forum-selection clauses. See *Scherk v. Alberto–Culver Co.,* 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). Suppose the parties had chosen a New York *judicial forum* for resolution of "any dispute" involving a contract for ocean carriage of goods. There is little question that the designated court, state or federal, would have authority to conduct claims like AnimalFeeds' on a class basis. Why should the class-action prospect vanish when the "any dispute" clause is contained in an arbitration agreement? Cf. *Connecticut General Life Ins. Co. v. Sun Life Assurance Co. of Canada,* 210 F.3d 771, 774–776 (C.A.7 2000) (reading contract's authorization to arbitrate "[a]ny dispute" to permit consolidation of arbitrations). If the Court is right that arbitrators ordinarily are not equipped to manage class proceedings, see *ante,* at —— – ——, then the claimant should retain its right to proceed in that format in court.

***699** B

When adjudication is costly and individual claims are no more than modest in size, class proceedings may be "the thing," *i.e.,* without them, potential claimants will have little, if any, incentive to seek vindication of their rights. *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (C.A.7 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."). Mindful that disallowance of class proceedings severely shrinks the dimensions of the case or controversy a claimant can mount, I note some stopping points in the Court's decision.

First, the Court does not insist on express consent to class arbitration. Class arbitration may be ordered if "there is a contractual basis for concluding that the part[ies] *agreed*" "to submit to class arbitration". *Ante,* at ——; see *ante,* at ——, n. 10 ("We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."). Second, by observing that "the parties [here] are sophisticated business entities," and "that it is customary for the shipper to choose the charter party that is used for a particular shipment," the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis. *Ante,* at ——. While these qualifications limit the scope of the Court's decision, I remain persuaded that the arbitrators' judgment should not have been disturbed.

* * *

For the foregoing reasons, I would dismiss the petition for want of a controversy ripe for judicial review. Were I to reach the merits, I would affirm the Second Circuit's judgment confirming the arbitrators' clause-construction decision.

All Citations

559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605, 2010 A.M.C. 913, 93 Empl. Prac. Dec. P 43,878, 78 USLW 4328, 2010-1 Trade Cases P 76,982, 10 Cal. Daily Op. Serv.

5144, 2010 Daily Journal D.A.R. 6107, 22 Fla. L. Weekly Fed. S 269

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949 F.2d 1175
United States Court of Appeals,
District of Columbia Circuit.

Robert C. KANUTH, Jr., Appellee,
v.
PRESCOTT, BALL & TURBEN, INC., Appellant.

No. 90–7182.
|
Argued Nov. 22, 1991.
|
Decided Dec. 13, 1991.

Synopsis

Employer appealed from an order of the United States District Court for the District of Columbia, Thomas A. Flannery, J., granting employee's motion to confirm arbitrators' decision awarding him damages for breach of employment agreement. The Court of Appeals, Wald, Circuit Judge, held that arbitrators did not exceed scope of their authority or manifestly disregard the law.

Affirmed.

West Headnotes (3)

[1] Alternative Dispute Resolution
Actions exceeding arbitrator's authority

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk316 Actions exceeding arbitrator's authority
(Formerly 33k76(5) Arbitration)

Arbitrators' decision awarding damages to employee for breach of employment agreement would not be vacated, despite employer's contention that arbitration panel ignored plain meaning of agreement, and, thus, exceeded its authority; even assuming that employee's expert failed to deduct certain expenses from estimates as required by agreement, such fact did not detract from arbitration panel's implicit determination that its award for lost incentive compensation, which mirrored expert's figure, was just and reasonable, and there was nothing on face of panel's lump-sum award which suggested that panel failed to construe agreement.

30 Cases that cite this headnote

[2] Alternative Dispute Resolution
Findings, conclusions, and reasons for decision

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk302 Making and Formal Requisites
25Tk307 Findings, conclusions, and reasons for decision
(Formerly 33k52.5 Arbitration)

Arbitration panel deciding appropriate amount of damages for breach of employment agreement was not required to explain how it derived particular numbers associated with each element of total damage award.

12 Cases that cite this headnote

[3] Alternative Dispute Resolution
Error of judgment or mistake of law

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk327 Mistake or Error
25Tk329 Error of judgment or mistake of law
(Formerly 33k76(3) Arbitration)

Arbitration panel presiding over employment dispute did not manifestly disregard Ohio law in making incentive compensation award to employee, as would warrant vacation of award.

31 Cases that cite this headnote

***1175** ****319** Appeal from the United States District Court for the District of Columbia.

Attorneys and Law Firms

Joan M. Hall, with whom J. Kevin McCall, Sidney I. Schenkier and ***1176** ****320** Jeffrey T. Shaw, Chicago, Ill., were on the brief, for appellant.

Thomas A. Gottschalk, with whom John G. Froemming, Washington, D.C., was on the brief, for appellee.

Before BRENNAN, Associate Justice (Retired), [*] WALD and HENDERSON, Circuit Judges.

[*] The Honorable William J. Brennan, Jr., Associate Justice of the United States Supreme Court, retired, sitting by designation pursuant to 28 U.S.C. § 294(a).

Opinion

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

Appellant Prescott, Ball & Turben, Inc. ("PBT") appeals from a decision of the district court granting the motion of appellee Robert C. Kanuth, Jr. ("Kanuth") to confirm an arbitral award of $38,233,079 and denying PBT's motion to vacate or modify that award. Appellant has made two arguments on appeal: First, that the district court erred in confirming the award because the arbitral panel ("panel") ignored an unambiguous provision of the employment agreement which had the result of improperly increasing the total damage award by over $12 million; and, second, that the district court erred in confirming the award, because the panel manifestly disregarded applicable law in failing to take into account the actual performance of Kanuth's company when accepting the expert's projection of future revenues.

Because we believe that the district court was correct in holding that the panel did not ignore the plain and unambiguous meaning of the governing contract and that it did not manifestly disregard applicable law when reaching its decision on the proper award, we affirm.

I. BACKGROUND

Kanuth was the founder, chief executive officer, and principal shareholder of Cranston Corporation ("Cranston"). Cranston owned all outstanding shares of Cranston Securities, Inc., a firm engaged principally in the business of underwriting tax-exempt municipal bonds. Cranston Securities, Inc. was extremely successful, earning almost $8 million in 1986 alone. In September 1987, Kanuth agreed to sell Cranston to PBT, a division of Kemper Securities Group, Inc., and the parties entered into a Stock Purchase Agreement and an Employment Agreement. PBT purchased Cranston's shares in Cranston Securities, Inc. for approximately $11.3 million, and it retained Kanuth as head of Cranston/Prescott, the newly-organized finance division of PBT.

The Employment Agreement was executed on September 4, 1987. Kanuth describes the contract as an "earnout" agreement according to which Kanuth would be paid during an initial five-year period from future earnings of Cranston/Prescott in order to compensate Kanuth for the remainder of the purchase price of Cranston Securities, Inc. Although PBT does not describe the agreement in these terms, there is no dispute that the Employment Agreement provided that Kanuth would receive not only a salary and bonus, but that he would also retain complete control over the distribution of an "incentive compensation pool." [1] This pool was to be funded from any net pretax earnings generated by Cranston/Prescott. During the initial five-year period, the first $2 million of net pretax ***1177** ****321** earnings in each year would go to PBT, and eighty percent of any remaining revenues would flow into Kanuth's incentive compensation pool. [2]

[1] According to paragraph 7 of the Employment Agreement,

> (a) During the Initial Period, Net Pretax Earnings of the Business shall be utilized to create an annual Incentive Compensation Pool in accordance with the following rules:
>
> (i) The first $2,000,000 (the "Exclusion Amount") of such Net Pretax Earnings shall, each year, be retained by PBT.
>
> (ii) If Net Pretax Earnings for any year exceed the Exclusion Amount, 80% of such excess shall be allocated to that year's Incentive Compensation Pool. If Net Pretax Earnings for any year fail to exceed the Exclusion Amount (the "Shortfall"), the succeeding year's Net Pretax Earnings (or those for successive subsequent years, if necessary) shall first be reduced by the Shortfall, and only thereafter shall 80% of the remainder be allocated to the Incentive Compensation Pool

> for that succeeding (or successive subsequent) year.
>
> Employment Agreement ¶ 7.

2 The Employment Agreement provided further that after the initial five-year period, PBT would no longer receive the first $2 million off the top and the total net pretax earnings would be split 50–50 between Kanuth and PBT. *See* Employment Agreement ¶ 8(a).

The "net pretax earnings" for any given year were to be determined in accordance with the requirements found in Exhibit A to the Employment Agreement.[3] After first listing what should be included in net pretax earnings, Exhibit A then provided that certain expenses should be deducted. Of particular relevance for this appeal is the following: With respect to the Initial Period only, deductible expenses were to include "all bonuses or other incentive compensation paid to or for the benefit of Business employees." Employment Agreement, Exhibit A, ¶ 2(d) ("¶ 2(d)"). The district court concluded that "[p]aragraph 2(d) of the employment contract clearly requires that bonus and incentive compensation payments be included in Deductible Expenses." *Kanuth v. Prescott, Ball & Turben, Inc.*, No. 88–01416, Memorandum Opinion at 11, 1990 WL 179601 (D.D.C. Nov. 2, 1990) ("Mem.Op.").

3 *See* Employment Agreement ¶ 7(a)(iv).

Several months after the acquisition of Cranston by PBT, disputes arose between the parties. According to Kanuth, PBT's parent company had fired PBT's chairman and installed new managers for PBT that were unhappy with the agreement between Kanuth and the previous PBT management. According to PBT, Cranston/Prescott had been unprofitable, and PBT was concerned about Kanuth's managerial autonomy. Kanuth filed suit in federal district court on May 24, 1988, alleging breach of the Employment Agreement, breach of the implied covenant of good faith and fair dealing, and fraud.

On June 13, 1988, PBT filed an arbitration claim with the National Association of Securities Dealers, Inc., alleging that Kanuth had engaged in various forms of misconduct, both before and after the acquisition. PBT fired Kanuth one week later, on June 21, 1988. Finally, PBT moved to compel arbitration pursuant to a standard arbitration clause, and the district court granted the motion on August 8, 1988. *See Kanuth v. Prescott, Ball & Turben, Inc.*, No. 88–01416, Order, 1988 WL 90392 (D.D.C. Aug. 8, 1988).

Between May 23, 1989 and April 20, 1990, a panel of three arbitrators heard testimony from 40 witnesses, taken over 22 days. The transcript of the proceedings comprises nearly 7,000 pages, and the panel examined approximately 1,200 exhibits. The panel heard closing arguments and considered post-trial briefs submitted by both parties. On May 2, 1990, the panel issued its decision awarding Kanuth $38,233,079 in damages.[4] The award consisted of the following:

4 The panel's actual award—$38,232,979—contained an arithmetic error of $100. The error was corrected by the district court. *See* Mem. Op. at 2 n. 4.

Salary for initial five years:	$ 1,775,870.00
Incentive compensation:	$31,457,209.00
Defamation:	$ 1,000,000.00
Emotional distress:	$ 3,000,000.00
Punitive damages:	+ $ 1,000,000.00
TOTAL:	$38,233,079.00

Award (May 2, 1990) ("Award") at 6–8; *see also* Mem. Op. at 2.

Kanuth filed a motion to confirm the arbitration award and to enter judgment on May 25, 1990. PBT opposed this motion and filed a motion to vacate or modify the arbitral award on July 9, 1990. PBT argued that the panel exceeded its authority and disregarded applicable law in reaching its decision. After oral argument on these motions, the district court confirmed the arbitral award of $38,233,079 and entered judgment for that amount. PBT has appealed the judgment of the district court on the following two grounds: First, the district court erred in not modifying the amount of the award attributable to lost incentive compensation, because the panel ignored the plain meaning of ¶ 2(d) in failing to deduct from the projected net pretax ***1178 **322** earnings the amount of incentive compensation that would have been payable for the previous year; and, second, the district court erred in not vacating the entire incentive compensation award because the panel did not

consider the actual performance history of Cranston/Prescott when estimating future revenues as required for lost profit projections under the governing law of the contract, which in this case is the law of Ohio. [5]

5 The Employment Agreement expressly provided that "[t]he validity, interpretation, construction and performance of this Agreement shall be governed by the laws of the State of Ohio." Employment Agreement ¶ 12.

II. DISCUSSION

The United States Arbitration Act provides for the vacation of arbitral awards only under limited circumstances:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (1988).

Courts have recognized that judicial review of arbitral awards is extremely limited. "Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L.Ed.2d 286 (1987). As the Supreme Court made clear almost forty years ago, "[t]he United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation." *Wilko v. Swan,* 346 U.S. 427, 431, 74 S.Ct. 182, 185, 98 L.Ed. 168 (1953). In the famous *Steelworkers' Trilogy,* the Court emphasized that "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599, 80 S.Ct. 1358, 1362, 4 L.Ed.2d 1424 (1960); *see id.* at 597, 80 S.Ct. at 1361 (in interpreting and applying a contract, an arbitrator "may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the [contract]"). [6]

6 *See also United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 585, 80 S.Ct. 1347, 1354, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 568, 80 S.Ct. 1343, 1346, 4 L.Ed.2d 1403 (1960).

Courts have suggested that, in addition to the statutory grounds for vacating an arbitral award, an award may be vacated if the arbitrators made the award in "manifest disregard of the law." *Advest, Inc. v. McCarthy,* 914 F.2d 6, 9 & n. 5 (1st Cir.1990); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,* 808 F.2d 930, 933 (2d Cir.1986). This formulation comes from dicta in *Wilko v. Swan,* 346 U.S. at 436–37, 74 S.Ct. at 187–88, 98 L.Ed. 168, and it is clear that it means more than error or misunderstanding with respect to the law. *Sargent v. Paine Webber Jackson & Curtis, Inc.,* 882 F.2d 529, 532 (D.C.Cir.1989), *cert. denied,* 494 U.S. 1028, 110 S.Ct. 1474, 108 L.Ed.2d 612 (1990); *Bobker,* 808 F.2d at 933 ("The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator."); *Siegel v. Titan Indus. Corp.,* 779 F.2d 891, 893 (2d Cir.1985) (manifest disregard ***1179 **323** of the law may be found if arbitrator understood and correctly stated the law but proceeded to ignore it).

A. *Plain Language of the Employment Agreement*

[1] In order to prove damages at the arbitration hearing, Kanuth retained William O'Connell ("O'Connell"), a partner with the accounting firm of Deloitte & Touche, to give expert testimony on quantifying lost earnings after a business interruption. O'Connell testified to having personally spent over 600 hours reviewing relevant financial and operational information, including deal

files and financial statements, from the predecessor companies (PBT and Cranston Securities, Inc.) as well as from the successor company (Cranston/Prescott). Based on this extensive review of the available records, O'Connell concluded that net pretax earnings would have amounted to $49,321,511 for the initial five-year period. Pursuant to the Employment Agreement, PBT would have been entitled each year to the first $2 million of net pretax earnings, and Kanuth would have received eighty percent of the remainder in incentive compensation. According to O'Connell's calculations, Kanuth would have been entitled to a total of $31,457,209 in incentive compensation during the initial period. *See* Kanuth Exhibit 600, Exhibit A—Damages.

[2] In typical fashion, the panel did not explain how it derived the particular numbers associated with each element of the total damage award. Of course, the panel is not required to give an explanation, *see Sargent,* 882 F.2d at 532 ("an explanation requirement would unjustifiably undermine the speed and thrift sought to be obtained by" arbitration), and courts will not generally inquire into the basis of a lump-sum award "unless they believe that the arbitrators rendered it in 'manifest disregard' of the law or unless the facts of the case fail to support it." *Koch Oil, S.A. v. Transocean Gulf Oil Co.,* 751 F.2d 551, 554 (2d Cir.1985). In this case, however, the "lump sum" is not particularly mysterious —the panel determined that Kanuth was entitled to lost incentive compensation totalling $31,457,209, the exact figure proposed by Kanuth's expert witness as the amount of incentive compensation to which Kanuth would be entitled after the five-year initial period. The panel ordered that a portion of this sum be paid immediately, with the remainder to be paid in quarterly installments over a ten-year period. [7]

7 Specifically, of the total $31,457,209 awarded for incentive compensation, the panel ordered that 20%, or $6,291,442, be paid immediately. The balance, $25,165,767, would be paid in forty quarterly installments of $629,144.17 each, and the balance would not bear interest. *See* Award at 8.

Kanuth suggests that "[i]n using the same amount of damages over an extended time frame, it cannot be assumed that the Panel necessarily adopted O'Connell's methodology. Perhaps, it did; perhaps, it did not." Brief for Plaintiff–Appellee Robert C. Kanuth, Jr. (filed Oct. 11, 1991) at 31. PBT calls this assertion "frivolous," and it insists that the "only conceivable basis for the panel's award is the reasoning underlying O'Connell's incentive compensation projection, which the panel necessarily adopted in awarding the exact figure which O'Connell advanced." Reply Brief for Defendant–Appellant Prescott, Ball & Turben, Inc. (filed Oct. 22, 1991) at 6.

There appears to be no dispute that when arriving at the figure of $31,457,209, O'Connell did not deduct from projected net pretax earnings the amount that would have been paid to Kanuth as incentive compensation for the previous year. It is also undisputed that O'Connell was never cross-examined on this point during the arbitration hearing and that PBT never made any argument to the panel in its post-hearing brief that such a deduction was required under the Employment Agreement. [8] PBT ***1180** ****324** retained new counsel when it moved to vacate the award in district court, and it seems likely that the argument it now makes as to the relationship between the previous year's incentive payments under ¶ 2(d) and the subsequent year's earnings first occurred to PBT after the arbitration was completed. Assuming, however, for argument's sake, that PBT is free to raise this issue for the first time in court and assuming, also, that the plain meaning of ¶ 2(d) is, as PBT asserts, that incentive compensation paid for one year should have been deducted from net pretax earnings for the subsequent year, [9] it is still clear to us that the panel's award must be confirmed.

8 PBT has suggested that its counsel referred to O'Connell's failure to make the proper deductions during closing argument before the panel. But PBT's counsel said only that the Employment Agreement contemplated the deduction of expenses from revenue; counsel did not even mention ¶ 2(d) or single out its proper construction as a critical issue. *See* Transcript of Hearing before Arbitration Panel (Apr. 20, 1990) ("Transcript") at 6879, attached as Exhibit 54 to Reply Memorandum of Points and Authorities in Support of Defendant's Motion to Vacate or Modify and in Opposition to Plaintiff's Motion [to] Confirm the Arbitral Award (D.D.C. filed July 24, 1990).

9 That this argument apparently never occurred to PBT during the arbitration suggests that the meaning of ¶ 2(d) may not be so plain and unambiguous as PBT would have us believe.

PBT's counsel admitted at oral argument that § 10(d) of the United States Arbitration Act provides the only statutory authority for vacating this award. According to that subsection, an award may be vacated "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(d) (1988). This court has determined that "[i]t is particularly necessary to accord the 'narrowest of readings' to the excess-of-authority provision of section 10(d). That provision does not, it must be stressed, confer on courts a general equitable power to substitute a judicial resolution of a dispute for an arbitral one." *Davis v. Chevy Chase Fin. Ltd.,* 667 F.2d 160, 165 (D.C.Cir.1981) (citation omitted) (quoting *Andros Compania Maritima, S.A. v. Marc Rich & Co.,* 579 F.2d 691, 703 (2d Cir.1978)). PBT suggests nonetheless that in accepting O'Connell's damage estimates, the panel failed to apply the plain meaning of ¶ 2(d) and, therefore, exceeded its authority.

The Supreme Court recently considered the issue of when an arbitrator's misreading of the plain language of a contract would justify vacating the arbitral award:

> The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.... [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L.Ed.2d 286 (1987).

The cases on which PBT relies for the proposition that arbitrators exceed their powers when they ignore the plain language of a contract have, in the main, involved situations in which the arbitrators did not have the authority under the contract itself to construct the kind of remedy that they have proposed. [10]

10 *See, e.g., AP Parts Co. v. UAW,* 923 F.2d 488, 490–91 (6th Cir.1991) (arbitrator concluded that he had insufficient information to formulate opinion and remanded matter to parties for further negotiation; this exceeded his authority under arbitration clause which allowed him to interpret or apply agreement but not to add to, detract from, ignore, or change terms of agreement); *Leed Architectural Prods., Inc. v. United Steelworkers,* 916 F.2d 63, 65–66 (2d Cir.1990) (arbitrator determined that company's decision to pay higher wage to one worker violated collective bargaining agreement; however, he exceeded his authority when he required that company pay higher wage to all workers, for contract explicitly required that wage rate be determined through collective bargaining); *Bruno's, Inc. v. United Food & Commercial Workers Int'l Union,* 858 F.2d 1529, 1532 (11th Cir.1988) (agreement specified that employer alone had right to establish and maintain reasonable regulations concerning employee operations; arbitrator exceeded his authority when, after striking down old rule as unfair, he crafted new rule in its place); *S.D. Warren Co. v. United Paperworkers' Int'l Union,* 845 F.2d 3, 6–7 (1st Cir.) (contract contemplated that arbitrator would determine whether or not company rule was violated; arbitrator exceeded his authority when, once he found a violation, he purported to fashion remedy), *cert. denied,* 488 U.S. 992, 109 S.Ct. 555, 102 L.Ed.2d 582 (1988); *Industrial Mut. Ass'n v. Amalgamated Workers,* 725 F.2d 406, 411 (6th Cir.1984) (as part of remedy for improper discharge, arbitrator awarded to all storekeepers cancellation of their outstanding debts; arbitrator exceeded his authority because agreement unequivocally placed financial responsibility for those debts on storekeepers, and arbitrator only had authority to award money damages); *Coast Trading Co. v. Pacific Molasses Co.,* 681 F.2d 1195, 1198 (9th Cir.1982) (arbitration panel exceeded its authority when it crafted remedy not contemplated by trade association rules which had been incorporated into purchase agreement); *Davis v. Chevy Chase Fin. Ltd.,* 667 F.2d 160, 165–66 (D.C.Cir.1981) (under arbitration agreement, arbitrator only had authority to determine fair market value of tendered shares; in also ruling that party was obligated to sell the shares, arbitrator exceeded his authority); *J.P. Greathouse Steel Erectors, Inc. v. Blount Bros. Constr. Co.,* 374

F.2d 324, 325 (D.C.Cir.) (arbitration clause explicitly limited arbitrators' authority to resolving questions of fact; because they implicitly decided questions of law, they exceeded their authority), *cert. denied,* 389 U.S. 847, 88 S.Ct. 64, 19 L.Ed.2d 116 (1967).

***1181** ****325** That is not the case here. Over Kanuth's strong objection, PBT insisted on having an arbitral panel determine the damages occasioned by the breach of the Employment Agreement. PBT agreed "to abide by and perform" any award rendered by the panel, *see* Uniform Submission Agreement—NASD Arbitration, ¶ 4. In contrast to the cases relied on by PBT, there is no question here of the panel having exceeded its authority by crafting a remedy that was not contemplated by the governing contract. The parties explicitly requested the panel to award monetary damages to the injured party, and that is precisely what it did.

The damages in this case were based on accountant projections of future earnings for a company that had existed for less than ten months. By their very nature, these damages were speculative. The panel was not engaged in an exact science; it examined 1,200 exhibits and 7,000 pages of testimony and then came up with a lump-sum figure of $31,457,209 for lost incentive compensation. This number clearly came from O'Connell's estimates; but the panel was well within its authority to borrow from Kanuth's expert what it believed to be a reasonable estimate of the incentive compensation Kanuth would have received had PBT not breached the contract. Even assuming that O'Connell failed to deduct certain expenses from the estimates as required by the contract, this fact does not detract from the panel's implicit determination that an award of $31,457,209 for lost incentive compensation was just and reasonable.

PBT cites *Inter–City Gas Corp. v. Boise Cascade Corp.,* 845 F.2d 184 (8th Cir.1988), for the proposition that an award may be vacated whenever the arbitrator ignores the "plain language" of a contract. But *Boise Cascade* does not stand for such a broad proposition. The arbitrator in *Boise Cascade* concluded that Inter–City had overcharged Boise Cascade for natural gas because it had based its retail rate on a higher wholesale rate instead of the lower rate that was later adopted by the regulatory agency. The court vacated the arbitral award because the arbitrator had ignored a provision in the gas contract that specifically required the rates which Inter–City could charge Boise Cascade to track the wholesale rates set by the valid regulatory authority. *Id.* at 187. For the time period in question, the lower wholesale rates had not yet been adopted; the only wholesale rates that had been set by the valid regulatory authority during the time period at issue were the higher rates, and it was these rates which Inter–City had used to calculate the rates charged Boise Cascade. Anyone applying the plain language of the contract to these facts would have concluded that Inter–City had in fact charged Boise Cascade at the proper rate. *Id.* at 188.

Boise Cascade is easily distinguished. It was clear simply by looking at the arbitrator's award that he had completely ignored the contract. The court in *Boise Cascade* simply could not conclude that "the arbitrator [was] even arguably construing or applying the contract," *Misco,* 484 U.S. at 38, 108 S.Ct. at 3, and that is why the award had to be vacated.

In our case, the panel first had to determine which party was liable for the breach of the employment contract and then, based on inherently imprecise projections ***1182** ****326** of future earnings and future expenses, it had to estimate the amount of damages to which the injured party was entitled. Even if O'Connell's estimates were based on a misreading of the Employment Agreement, the panel adopted the expert's projections because it believed them to be a reasonable estimate of damages. In contrast to the arbitrator's award in *Boise Cascade,* there is nothing on the face of the panel's lump-sum award which suggests that the panel failed to construe the contract. To hold otherwise would require us to inquire into precisely how and why the panel derived the lump-sum award, an inquiry clearly outside of our limited scope of review.

B. *Application of Governing Law*

[3] PBT's second argument is that the entire incentive compensation award should be vacated because, when estimating what the future revenues of Cranston/Prescott would have been in the absence of a breach, O'Connell did not take into consideration the ten months of actual revenue experience as the basis for his lost profit projections. Brief for Defendant–Appellant Prescott, Ball & Turben, Inc. (filed Sept. 11, 1991) at 29–32. PBT claims that the panel's adoption of O'Connell's projections reflected a "manifest disregard" of Ohio law.

As explained above, "manifest disregard" means much more than failure to apply the correct law. "Manifest

disregard" may be found, for example, if the panel understood and correctly stated the law but then proceeded to ignore it. *See Siegel v. Titan Indus. Corp.,* 779 F.2d 891, 893 (2d Cir.1985). The award stated that "[w]here questions of substantive law have arisen, the panel has looked to the law of the State of Ohio in reaching its determination." Award at 7. The panel never even mentioned the Ohio law on calculating lost profit projections, and it certainly did not proceed either explicitly or implicitly to ignore that law.

Furthermore, there is ample evidence in O'Connell's testimony that he did *not* ignore the actual performance of Cranston/Prescott in projecting future revenues. *See, e.g.,* Transcript at 4874 (testifying that he had reviewed financial information "of the Cranston/Prescott operation after the merger as well as ... deal files from the merged firms of Cranston/Prescott"); *id.* at 4876 ("the post-merger deal files were one of the sources of information that we used in making the damage calculations"); *id.* at 4933 (describing his methodology as one that "takes a look at historical results prior to the merger. It takes a look at historical results after the merger, and it also takes a look at industry data available for this specific industry."). So even if it were relevant what methodology O'Connell used—and we believe that, for the purposes of evaluating the panel's award, it is not relevant—it appears from the undisputed testimony that his methodology did in fact incorporate actual historical experience.

Under Ohio law, lost profits may be recovered in a breach of contract action if "profits were within the contemplation of the parties at the time the contract was made, the loss of profits is the probable result of the breach of contract, and the profits are not remote and speculative and may be shown with reasonable certainty." *Charles R. Combs Trucking, Inc. v. International Harvester Co.,* 466 N.E.2d 883, 887 (Ohio 1984). As to the third prong, lost profits may be established "with reasonable certainty through the use of such evidence as expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and any other relevant facts." *AGF, Inc. v. Great Lakes Heat Treating Co.,* 51 Ohio St.3d 177, 555 N.E.2d 634, 640 (1990). These are precisely the tools Kanuth used to prove his lost profits; it was up to the panel to decide whether he proved them with "reasonable certainty." The panel did not manifestly disregard the law, and we shall not disturb its award.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is affirmed.

It is so ordered.

All Citations

949 F.2d 1175, 292 U.S.App.D.C. 319, Fed. Sec. L. Rep. P 86,411, Fed. Sec. L. Rep. P 96,411

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Abram Landau Real Estate v. Bevona, 2nd Cir. (N.Y.), August 15, 1997

115 S.Ct. 1920
Supreme Court of the United States

FIRST OPTIONS OF CHICAGO, INC., Petitioner,
v.
Manuel KAPLAN, et ux. and MK Investments, Inc.

No. 94-560.
|
Argued March 22, 1995.
|
Decided May 22, 1995.

Synopsis
Options market maker, its principal, and his wife filed petitions to vacate arbitration award in favor of clearing firm, and clearing firm filed cross-petitions for confirmation. The United States District Court for the Eastern District of Pennsylvania, Jay C. Waldman, J., confirmed award and petitioners appealed. The Court of Appeals for the Third Circuit, 19 F.3d 1503, affirmed in part, and reversed and remanded with instructions in part. Certiorari was granted. The Supreme Court, Justice Breyer, held that: (1) question whether arbitrators or courts have primary power to decide if parties agreed to arbitrate merits of dispute depends on whether parties agreed to submit question to arbitration; (2) there was no evidence that aggrieved parties had agreed to arbitrate; and (3) Court of Appeals should accept district court's findings of fact regarding agreement to submit issue to arbitration if not "clearly erroneous" but decide questions of law de novo, regardless of whether district court has confirmed or denied confirmation of arbitration award.

Affirmed.

West Headnotes (8)

[1] Alternative Dispute Resolution
Scope and Standards of Review
25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(1) In general
(Formerly 33k77(4) Arbitration)
If parties to arbitration have agreed to submit arbitrability question itself to arbitration, court's standard for reviewing arbitrator's decision as to arbitrability is same as reviewing any other matter that parties have agreed to arbitrate, giving considerable leeway to arbitrator and setting aside his or her decision only in certain narrow circumstances. 9 U.S.C.A. § 10.

1727 Cases that cite this headnote

[2] Alternative Dispute Resolution
Scope of inquiry in general
25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk360 Impeachment or Vacation
25Tk363 Motion to Set Aside or Vacate
25Tk363(6) Scope of inquiry in general
(Formerly 33k77(4) Arbitration)
If parties to arbitration agreement did not agree to submit arbitrability question itself to arbitration, then reviewing court should decide arbitrability as it would decide any other question parties had not submitted to arbitration, namely independently. 9 U.S.C.A. § 10.

1110 Cases that cite this headnote

[3] Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement
25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 In general
(Formerly 33k23.14, 33k7.5 Arbitration)

When deciding whether parties agreed to arbitrate a certain matter (including arbitrability), courts generally should apply ordinary state-law principles governing formation of contracts. 9 U.S.C.A. § 10.

375 Cases that cite this headnote

[4] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute
(Formerly 33k23.14 Arbitration)

Under Illinois law, determination of who was to decide question of arbitrability would require court to see whether parties objectively revealed an intent to submit arbitrability issue to arbitration. 9 U.S.C.A. § 10.

505 Cases that cite this headnote

[5] Alternative Dispute Resolution
Evidence

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 Evidence
(Formerly 33k23.14 Arbitration)

In determining whether parties have agreed to submit issue of arbitrability of matter to arbitration, courts are not to assume that parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. 9 U.S.C.A. § 10.

2174 Cases that cite this headnote

[6] Alternative Dispute Resolution
Performance, breach, enforcement, and contest of agreement

25T Alternative Dispute Resolution
25TII Arbitration
25TII(I) Exchanges and Dealer Associations
25Tk411 Relations Between Customer-Investors and Broker-Dealers
25Tk414 Performance, breach, enforcement, and contest of agreement
(Formerly 33k91 Arbitration, 160k11(11.1))

Shareholders did not manifest intent to have question of their personal liability for debts of their corporation submitted to arbitration, pursuant to an arbitration provision contained in workout agreement, even though shareholders appeared before arbitration panel to assert claim that issue was not arbitrable; shareholders were appearing in support of corporation arbitrating other matters, and there was precedent that they could argue arbitrability without losing their right to independent court review. 9 U.S.C.A. § 10.

115 Cases that cite this headnote

[7] Alternative Dispute Resolution
Agreements to arbitrate

25T Alternative Dispute Resolution
25TII Arbitration
25TII(I) Exchanges and Dealer Associations
25Tk411 Relations Between Customer-Investors and Broker-Dealers
25Tk413 Agreements to arbitrate
(Formerly 33k91 Arbitration, 160k11(11.1))

Arbitrators' determination, that question of whether shareholders of investment company were personally liable for company's obligations under workout agreement was arbitrable pursuant to arbitration clause of agreement, could be independently reviewed by court; there was no indication that shareholders had agreed to arbitrate question of arbitrability. 9 U.S.C.A. § 10.

462 Cases that cite this headnote

[8] Alternative Dispute Resolution
Discretion

Alternative Dispute Resolution
Questions of law or fact

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(6) Discretion
(Formerly 33k77(4) Arbitration)
25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(7) Questions of law or fact
(Formerly 33k77(4) Arbitration)

Courts of Appeal reviewing district courts decisions as to whether parties have agreed to submit dispute to arbitration are to accept findings of fact that are not "clearly erroneous" but decide questions of law de novo, whether district court confirms or declines to confirm arbitration award; use of "abuse of discretion" standard, even as to questions of law, when reviewing district court decisions confirming arbitration awards is inappropriate. 9 U.S.C.A. § 10.

542 Cases that cite this headnote

****1921** Syllabus [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***938** This case arose out of disputes centered on a "workout" agreement, embodied in four documents, which governs the "working out" of debts owed by respondents-Manuel Kaplan, his wife, and his wholly owned investment company, MK Investments, Inc. (MKI)-to petitioner First Options of Chicago, Inc., a firm that clears stock trades on the Philadelphia Stock Exchange. When First Options' demands for payment went unsatisfied, it sought arbitration by a stock exchange panel. MKI, which had signed the only workout document containing an arbitration agreement, submitted to arbitration, but the Kaplans, who had not signed that document, filed objections with the panel, denying that their disagreement with First Options was arbitrable. The arbitrators decided that they had the power to rule on the dispute's merits and ruled in First Options' favor. The District Court confirmed the award, but the Court of Appeals reversed. In finding that the dispute was not arbitrable, the Court of Appeals said that courts should independently decide whether an arbitration panel has jurisdiction over a dispute, and that it would apply ordinary standards of review when considering the District Court's denial of respondents' motion to vacate the arbitration award.

Held:

1. The arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts. Pp. 1923-1926.

(a) The answer to the narrow question whether the arbitrators or the courts have the primary power to decide whether the parties agreed to arbitrate a dispute's merits is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, see, *e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76, so the question "who has the primary power to decide arbitrability" turns upon whether the parties agreed to submit that question to arbitration. If so, then the court should defer to the arbitrator's arbitrability decision. If not, then the court should decide the question independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties. Pp. 1923-1924.

***939** b) The Kaplans did not agree to arbitrate arbitrability. Courts generally should apply ordinary state-law principles governing contract formation in deciding whether such an agreement exists. However, courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. See, *e.g., AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648. First Options cannot show a clear agreement on the part of the Kaplans. The Kaplans' objections to the arbitrators'

jurisdiction indicate that they did not want the arbitrators to have binding authority over them. This conclusion is supported by (1) an obvious explanation for their presence before the arbitrators (*i.e.,* Mr. Kaplan's wholly owned firm was arbitrating workout agreement matters); and (2) Third Circuit law, which suggested that they might argue arbitrability to the arbitrators without losing their right to independent court review. First Options' counterarguments are unpersuasive. Pp. 1924-1926.

****1922** 2. Courts of appeals should apply ordinary standards when reviewing district court decisions upholding arbitration awards, *i.e.,* accepting findings of fact that are not "clearly erroneous" but deciding questions of law *de novo;* they should not, in those circumstances, apply a special "abuse of discretion" standard. It is undesirable to make the law more complicated by proliferating special review standards without good reason. More importantly, a court of appeals' reviewing attitude toward a district court decision should depend upon the respective institutional advantages of trial and appellate courts, not upon what standard of review will more likely produce a particular substantive result. Nothing in the Arbitration Act supports First Options' claim that a court of appeals should use a different standard when conducting review of certain district court decisions. P. 1926.

3. The factbound question whether the Court of Appeals erred in its ultimate conclusion that the dispute was not arbitrable is beyond the scope of the questions this Court agreed to review. P. 1926.

19 F.3d 1503 (CA3 1994), affirmed.

BREYER, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

James D. Holzhauer, Chicago, IL, for petitioner.

John G. Roberts, Jr., Washington, DC, for respondents.

Opinion

***940** Justice BREYER delivered the opinion of the Court.

In this case we consider two questions about how courts should review certain matters under the federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1988 Ed. and Supp. V): (1) how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute, and (2) how a court of appeals should review a district court's decision confirming, or refusing to vacate, an arbitration award.

I

The case concerns several related disputes between, on one side, First Options of Chicago, Inc., a firm that clears stock trades on the Philadelphia Stock Exchange, and, on the other side, three parties: Manuel Kaplan; his wife, Carol Kaplan; and his wholly owned investment company, MK Investments, Inc. (MKI), whose trading account First Options cleared. The disputes center on a "workout" agreement, embodied in four separate documents, which governs the "working out" of debts to First Options that MKI and the Kaplans incurred as a result of the October 1987 stock market crash. In 1989, after entering into the agreement, MKI lost an additional $1.5 million. First Options then took control of, and liquidated, certain MKI assets; demanded immediate payment of the entire MKI debt; and insisted that the Kaplans personally pay any deficiency. When its demands went unsatisfied, First Options sought arbitration by a panel of the Philadelphia Stock Exchange.

***941** MKI, having signed the only workout document (out of four) that contained an arbitration clause, accepted arbitration. The Kaplans, however, who had not personally signed that document, denied that their disagreement with First Options was arbitrable and filed written objections to that effect with the arbitration panel. The arbitrators decided that they had the power to rule on the merits of the parties' dispute, and did so in favor of First Options. The Kaplans then asked the Federal District Court to vacate the arbitration award, see 9 U.S.C. § 10 (1988 Ed., Supp. V), and First Options requested its confirmation, see § 9. The court confirmed the award. Nonetheless, on appeal the Court of Appeals for the Third Circuit agreed with the Kaplans that their dispute was not arbitrable; and it reversed the District Court's confirmation of the award against them. 19 F.3d 1503 (1994).

We granted certiorari to consider two questions regarding the standards that the Court of Appeals used to review the determination that the Kaplans' dispute with First **1923 Options was arbitrable. 513 U.S. 1040, 115 S.Ct. 634, 130 L.Ed.2d 539 (1994). First, the Court of Appeals said that courts "should *independently* decide whether an arbitration panel has jurisdiction over the merits of any particular dispute." 19 F.3d, at 1509 (emphasis added). First Options asked us to decide whether this is so (*i.e.,* whether courts, in "reviewing the arbitrators' decision on arbitrability," should "apply a *de novo* standard of review or the more deferential standard applied to arbitrators' decisions on the merits") when the objecting party "submitted the issue to the arbitrators for decision." Pet. for Cert. i. Second, the Court of Appeals stated that it would review a district court's denial of a motion to vacate a commercial arbitration award (and the correlative grant of a motion to confirm it) "*de novo.*" 19 F.3d, at 1509. First Options argues that the Court of Appeals instead should have applied an "abuse of discretion" standard. See *Robbins v. Day,* 954 F.2d 679, 681-682 (CA11 1992).

*942 II

The first question-the standard of review applied to an arbitrator's decision about arbitrability-is a narrow one. To understand just how narrow, consider three types of disagreement present in this case. First, the Kaplans and First Options disagree about whether the Kaplans are personally liable for MKI's debt to First Options. That disagreement makes up the *merits* of the dispute. Second, they disagree about whether they agreed to arbitrate the merits. That disagreement is about the *arbitrability* of the dispute. Third, they disagree about *who should have the primary power to decide the second matter.* Does that power belong primarily to the arbitrators (because the court reviews their arbitrability decision deferentially) or to the court (because the court makes up its mind about arbitrability independently)? We consider here only this third question.

Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, *e.g.,* 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan,* 346 U.S. 427, 436-437, 74 S.Ct. 182, 187-188, 98 L.Ed. 168 (1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). Hence, who-court or arbitrator-has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.

[1] **[2]** ***943** We believe the answer to the "who" question (*i.e.,* the standard-of-review question) is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, see, *e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57, 115 S.Ct. 1212, 1216, 131 L.Ed.2d 76 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985), so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. See *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986) (parties may agree to arbitrate arbitrability); *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 583, n. 7, 80 S.Ct. 1347, 1353, n. 7, 4 L.Ed.2d 1409 (1960) (same). That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. See, *e.g.,* **1924 9 U.S.C. § 10. If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes-but only those disputes-that the parties have agreed to submit to arbitration. See, *e.g., AT & T Technologies, supra,* at 649, 106 S.Ct., at 1418; *Mastrobuono, supra,* at 57-58, and n. 9, 115 S.Ct., at

1216-1217, and n. 9; *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 271, 115 S.Ct. 834, 837-838, 130 L.Ed.2d 753 (1995); *Mitsubishi Motors Corp., supra,* at 625-626, 105 S.Ct., at 3353.

We agree with First Options, therefore, that a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration. Nevertheless, ***944** that conclusion does not help First Options win this case. That is because a fair and complete answer to the standard-of-review question requires a word about how a court should decide whether the parties have agreed to submit the arbitrability issue to arbitration. And, that word makes clear that the Kaplans did not agree to arbitrate arbitrability here.

[3] **[4]** When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. See, *e.g., Mastrobuono, supra,* at 62-63, and n. 9, 115 S.Ct., at 1218-1219, and n. 9; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 475-476, 109 S.Ct. 1248, 1253-1254, 103 L.Ed.2d 488 (1989); *Perry v. Thomas,* 482 U.S. 483, 492-493, n. 9, 107 S.Ct. 2520, 2526-2527, n. 9, 96 L.Ed.2d 426 (1987); G. Wilner, 1 Domke on Commercial Arbitration § 4:04, p. 15 (rev. ed. Supp.1993) (hereinafter Domke). The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration. See, *e.g., Estate of Jesmer v. Rohlev,* 241 Ill.App.3d 798, 803, 182 Ill.Dec. 282, 286, 609 N.E.2d 816, 820 (1993) (law of the State whose law governs the workout agreement); *Burkett v. Allstate Ins. Co.,* 368 Pa.Super. 600, 608, 534 A.2d 819, 823-824 (1987) (law of the State where the Kaplans objected to arbitrability). See generally *Mitsubishi Motors, supra,* at 626, 105 S.Ct., at 3353.

[5] This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. *AT & T Technologies, supra,* at 649, 106 S.Ct., at 1418-1419; see *Warrior & Gulf, supra,* at 583, n. 7, 80 S.Ct., at 1353, n. 7. In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because ***945** it is within the scope of a valid arbitration agreement"-for in respect to this latter question the law reverses the presumption. See *Mitsubishi Motors, supra,* at 626, 105 S.Ct., at 3353 (" '[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration' ") (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983)); *Warrior & Gulf, supra,* at 582-583, 80 S.Ct., at 1352-1353.

But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, see, *e.g., Mitsubishi Motors, supra,* at 626, 105 S.Ct., at 3353, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. See Domke § 12.02, p. 156 (issues will be deemed arbitrable unless "it is clear that the arbitration ****1925** clause has not included" them). On the other hand, the former question-the "who (primarily) should decide arbitrability" question-is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv.L.Rev. 1482, 1508-1509 (1959), cited in *Warrior & Gulf,* 363 U.S., at 583, n. 7, 80 S.Ct., at 1353, n. 7. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide. *Ibid.* See generally *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 219-220, 105 S.Ct. 1238, 1241-1242, 84 L.Ed.2d 158 (1985) (Arbitration Act's basic purpose is to "ensure judicial enforcement of privately made agreements to arbitrate").

[6] ***946** On the record before us, First Options cannot show that the Kaplans clearly agreed to have

the arbitrators decide (*i.e.,* to arbitrate) the question of arbitrability. First Options relies on the Kaplans' filing with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction. But merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i.e.,* a willingness to be effectively bound by the arbitrator's decision on that point. To the contrary, insofar as the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options, one naturally would think that they did *not* want the arbitrators to have binding authority over them. This conclusion draws added support from (1) an obvious explanation for the Kaplans' presence before the arbitrators (*i.e.,* that MKI, Mr. Kaplan's wholly owned firm, was arbitrating workout agreement matters); and (2) Third Circuit law that suggested that the Kaplans might argue arbitrability to the arbitrators without losing their right to independent court review, *Teamsters v. Western Pennsylvania Motor Carriers Assn.,* 574 F.2d 783, 786-788 (1978); see 19 F.3d, at 1512, n. 13.

First Options makes several counterarguments: (1) that the Kaplans had other ways to get an independent court decision on the question of arbitrability without arguing the issue to the arbitrators (*e.g.,* by trying to enjoin the arbitration, or by refusing to participate in the arbitration and then defending against a court petition First Options would have brought to compel arbitration, see 9 U.S.C. § 4); (2) that permitting parties to argue arbitrability to an arbitrator without being bound by the result would cause delay and waste in the resolution of disputes; and (3) that the Arbitration Act therefore requires a presumption that the Kaplans agreed to be bound by the arbitrators' decision, not the contrary. The first of these points, however, while true, simply does not say anything about whether the Kaplans intended to be bound by the arbitrators' decision. The second point, too, is inconclusive, ***947** for factual circumstances vary too greatly to permit a confident conclusion about whether allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination would, in general, slow down the dispute resolution process. And, the third point is legally erroneous, for there is no strong arbitration-related policy favoring First Options in respect to its particular argument here. After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, *Dean Witter Reynolds, supra,* at 219-220, 105 S.Ct., at 1241-1242, but to ensure that commercial arbitration agreements, like other contracts, " 'are enforced according to their terms,' " *Mastrobuono,* 514 U.S., at 54, 115 S.Ct., at 1214 (quoting *Volt Information Sciences,* 489 U.S., at 479, 109 S.Ct., at 1256), and according to the intentions of the parties, *Mitsubishi Motors,* 473 U.S., at 626, 105 S.Ct., at 3353. See *Allied-Bruce,* 513 U.S., at 271, 115 S.Ct., at 838. That policy favors the Kaplans, not First Options.

[7] We conclude that, because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that ****1926** the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts.

III

[8] We turn next to the standard a court of appeals should apply when reviewing a district court decision that refuses to vacate, see 9 U.S.C. § 10 (1988 Ed., Supp. V), or confirms, see § 9, an arbitration award. Although the Third Circuit sometimes used the words "*de novo* " to describe this standard, its opinion makes clear that it simply believes (as do all Circuits but one) that there is no *special* standard governing its review of a district court's decision in these circumstances. Rather, review of, for example, a district court decision confirming an arbitration award on the ground that the parties agreed to submit their dispute to arbitration, should proceed like review of any other district court decision finding ***948** an agreement between parties, *e.g.,* accepting findings of fact that are not "clearly erroneous" but deciding questions of law *de novo.* See 19 F.3d, at 1509.

One Court of Appeals, the Eleventh Circuit, has said something different. Because of federal policy favoring arbitration, that court says that it applies a specially lenient "abuse of discretion" standard (even as to questions of law) when reviewing district court decisions that confirm (but not those that set aside) arbitration awards. See, *e.g., Robbins v. Day,* 954 F.2d, at 681-682. First Options asks us to hold that the Eleventh Circuit's view is correct.

We believe, however, that the majority of Circuits is right in saying that courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards. For one

thing, it is undesirable to make the law more complicated by proliferating review standards without good reasons. More importantly, the reviewing attitude that a court of appeals takes toward a district court decision should depend upon "the respective institutional advantages of trial and appellate courts," not upon what standard of review will more likely produce a particular substantive result. *Salve Regina College v. Russell,* 499 U.S. 225, 231-233, 111 S.Ct. 1217, 1221-1222, 113 L.Ed.2d 190 (1991). The law, for example, tells all courts (trial and appellate) to give administrative agencies a degree of legal leeway when they review certain interpretations of the law that those agencies have made. See, *e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843-844, 104 S.Ct. 2778, 2781-2782, 81 L.Ed.2d 694 (1984). But no one, to our knowledge, has suggested that this policy of giving leeway to agencies means that a court of appeals should give *extra* leeway to a district court decision that upholds an agency. Similarly, courts grant arbitrators considerable leeway when reviewing most arbitration decisions; but that fact does not mean that appellate courts should give *extra* leeway to district courts that uphold arbitrators. First Options argues that the Arbitration Act is special because the Act, in one ***949** section, allows courts of appeals to conduct interlocutory review of certain antiarbitration district court rulings (*e.g.,* orders enjoining arbitrations), but not those upholding arbitration (*e.g.,* orders refusing to enjoin arbitrations). 9 U.S.C. § 16 (1988 Ed., Supp. V). But that portion of the Act governs the timing of review; it is therefore too weak a support for the distinct claim that the court of appeals should use a different *standard* when reviewing certain district court decisions. The Act says nothing about standards of review.

We conclude that the Court of Appeals used the proper standards for reviewing the District Court's arbitrability determinations.

IV

Finally, First Options argues that, even if we rule against it on the standard-of-review questions, we nonetheless should hold that the Court of Appeals erred in its ultimate conclusion that the merits of the Kaplan/First Options dispute were not arbitrable. This factbound issue is beyond the scope of the questions we agreed to review.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

All Citations

514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985, 63 USLW 4459, Fed. Sec. L. Rep. P 98,728

186 So.3d 210
Court of Appeal of Louisiana,
Second Circuit.

FLUID DISPOSAL SPECIALTIES, INC., et al., Plaintiff–Appellees.
v.
UNIFIRST CORPORATION, Defendant–Appellant.

No. 50,356–CA.
|
Jan. 13, 2016.

Synopsis

Background: Uniform supplier initiated arbitration proceedings based on arbitration clause on back of a purported customer service agreement with oil field services provider. Provider filed suit against supplier for a preliminary and permanent injunction barring arbitration. The Second Judicial District Court, Parish of Claiborne, No. 40393, Jimmy C. Teat, J., held an evidentiary hearing and granted preliminary injunction, and denied supplier's dilatory exception of prematurity. Supplier appealed.

Holdings: The Court of Appeal, Garrett, J., held that:

[1] issue as to whether provider's shop foreman had authority to sign agreement was to be determined by court, not arbitrator, and

[2] shop foreman did not have actual or apparent authority to execute agreement.

Affirmed.

West Headnotes (13)

[1] Injunction
Presumptions and burden of proof
Injunction
Preponderance of evidence
212 Injunction
212V Actions and Proceedings
212V(E) Evidence
212k1563 Presumptions and burden of proof
212 Injunction
212V Actions and Proceedings
212V(E) Evidence
212k1567 Weight and Sufficiency
212k1571 Preponderance of evidence

Generally, a party seeking issuance of a preliminary injunction bears the burden of establishing by a preponderance of the evidence a prima facie showing that he will prevail on the merits and that irreparable injury or loss will result without the preliminary injunction. LSA–C.C.P. art. 3601.

Cases that cite this headnote

[2] Appeal and Error
Preliminary injunction;temporary restraining order
Injunction
Discretionary Nature of Remedy
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)19 Injunctive Relief
30k3664 Preliminary injunction;temporary restraining order
(Formerly 30k954(1))
212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1077 Discretionary Nature of Remedy
212k1078 In general

The trial court enjoys considerable discretion in determining whether a preliminary injunction is warranted; thus, the trial court's ruling will not be disturbed on appeal absent a clear abuse of discretion. LSA–C.C.P. art. 3601.

Cases that cite this headnote

[3] Alternative Dispute Resolution
Evidence
25T Alternative Dispute Resolution
25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 Evidence
When the issue of a party's failure to arbitrate is raised through a dilatory exception of prematurity, the exceptor has the burden of showing a valid contract to arbitrate. LSA–R.S. 9:4201.

Cases that cite this headnote

[4] **Alternative Dispute Resolution**
Persons affected or bound
25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk141 Persons affected or bound
In determining whether a party is bound by an arbitration agreement, the appellate court applies ordinary contract principles.

Cases that cite this headnote

[5] **Alternative Dispute Resolution**
Contractual or consensual basis
25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 Contractual or consensual basis
A party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.

Cases that cite this headnote

[6] **Alternative Dispute Resolution**
Existence and validity of agreement
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 Existence and validity of agreement
Issue of the existence of an agreement to arbitrate is to be decided by the courts.

Cases that cite this headnote

[7] **Alternative Dispute Resolution**
Existence and validity of agreement
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 Existence and validity of agreement
Issue as to whether shop foreman who signed a uniform supply agreement containing arbitration provision was authorized to execute the document on behalf of his company, as would render arbitration provision enforceable, was to be determined by court, not arbitrator; court was proper forum to decide whether an agreement to arbitrate existed when the question of authority to bind the company was being urged.

Cases that cite this headnote

[8] **Principal and Agent**
Implied and Apparent Authority
308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 In general
"Apparent authority" is a doctrine by which an agent is empowered to bind his principal in a transaction with a third person when the principal has made a manifestation to the third person, or to the community of which the third person is a member, that the agent is authorized to engage in the particular transaction, although the principal has not actually delegated this authority to the agent.

1 Cases that cite this headnote

[9] **Principal and Agent**
Implied and Apparent Authority
308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority

308k99 In general

Apparent authority operates only when it is reasonable for the third person to believe the agent is authorized and the third person actually believes this.

1 Cases that cite this headnote

[10] Principal and Agent

Presumptions and burden of proof

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k18 Evidence of Agency
308k19 Presumptions and burden of proof

An agency relationship is never presumed; it must be clearly established.

Cases that cite this headnote

[11] Principal and Agent

Presumptions and Burden of Proof

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k118 Evidence as to Authority
308k119 Presumptions and Burden of Proof
308k119(1) In general

The burden of proving apparent authority is on the party seeking to bind the principal; a third party may not blindly rely on the assertions of an agent, but has a duty to determine, at his peril, whether the agency purportedly granted by the principal permits the proposed act by the agent.

1 Cases that cite this headnote

[12] Appeal and Error

Substantive Matters

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)22 Substantive Matters
30k3721 In general
(Formerly 30k1008.1(8.1))

An appellate court's review of a trial court's factual findings as to the existence of an agency relationship is governed by the manifest error standard of review, under which the appellate court may reverse only if it finds that no reasonable factual bases exist for the trial court's findings which are clearly wrong or manifestly erroneous.

Cases that cite this headnote

[13] Alternative Dispute Resolution

Persons affected or bound

Principal and Agent

Duty to ascertain authority in general

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk141 Persons affected or bound
308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(C) Unauthorized and Wrongful Acts
308k147 Duty to Disclose or Ascertain Authority
308k147(2) Duty to ascertain authority in general

Shop foreman did not have actual or apparent authority to execute a uniform supply agreement containing arbitration provision on behalf of his company, an oil field services provider, as would bind provider to arbitrate; supplier's sales representative blindly relied upon her beliefs that foreman had authority to execute the contract, which listed the corporate status of company on its upper portion, and she and her supervisors failed to fulfill their duty to determine whether the agency purportedly granted by principal permitted the act by foreman, who merely signed his name on signature line without any statement that he was signing as a representative of his company. LSA–C.C. art. 3021.

Cases that cite this headnote

Attorneys and Law Firms

***212** Office of David Turansky, LLC By David C. Turansky, Richard E. Griffith, Shreveport, LA, Appellant.

Colvin, Smith & McKay By James H. Colvin, Jr., Shreveport, LA, Daniel N. Bays, Jr., for Appellees.

Before DREW, MOORE, and GARRETT, JJ.

Opinion

GARRETT, J.

****1** The defendant, UniFirst Corporation ("UniFirst"), appeals from a trial court judgment granting a preliminary injunction against arbitration in favor of the plaintiff, Fluid Disposal Specialties, Inc. ("Fluid"), and denying UniFirst's exception of prematurity. For the following reasons, we affirm the trial court judgment.

INTRODUCTION

The narrow issues presented by this appeal are: (1) was the trial court correct in considering the issue of whether the person who signed an agreement was authorized to execute the document on behalf of Fluid instead of referring this issue to arbitration; and (2) assuming the trial court was correct in considering the issue, was the ruling made below on the authority issue supported by the law and the evidence. Under the circumstances presented in this case, we answer both questions in the affirmative.

FACTUAL AND PROCEDURAL BACKGROUND

Fluid is a Louisiana corporation. It has locations in Homer and Minden, Louisiana, and in Marshall and Buffalo, Texas. Prior to this controversy, it had an agreement with Aramark to supply uniforms for its employees. The cost was approximately $750 per week, per location. UniFirst supplies uniforms and other items to businesses. A UniFirst sales representative, Charlsa Henderson, contacted Kenny Bryce, the shop foreman at Fluid's location in Homer, on numerous occasions about supplying uniforms. Bryce told her the uniforms had to be flame resistant and the price had to be close to the amount the company was spending with ****2** Aramark. Henderson eventually gave Bryce a quote of $751.70 per week for uniforms which were represented to be better quality than those supplied by Aramark. On April 3, 2014, Bryce signed his name on a form customer service agreement presented by Henderson. The printed form agreement contained an arbitration clause on the reverse side along with numerous other provisions in fine print. Bryce and Henderson initialed some changes on the back side of the form agreement, shortening the preprinted term from 60 to 36 months. UniFirst eventually began supplying uniforms and other items to Fluid.

Rather than costing approximately $3,000 per week for uniforms for all four locations, the charges were approximately $4,888 per week. At some point, Fluid objected to the cost and officials of Fluid entered into unproductive discussions with representatives of UniFirst. Fluid maintained that Bryce did not have the authority to execute the agreement on behalf of the company and that Fluid was not obligated under the agreement. At some ***213** point, Fluid began using another uniform supplier.

On November 25, 2014, counsel for UniFirst wrote a demand letter to Fluid claiming more than $809,000 in damages due to Fluid's alleged breach of the agreement. [1] Fluid obviously did not pay the amount demanded. UniFirst then initiated arbitration proceedings, based upon the arbitration clause on the back of the customer service agreement, which provided in pertinent part:

> ****3** All disputes of whatever kind between Customer and UniFirst based upon past, present, or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation or performance of this Agreement shall be resolved exclusively by final and binding arbitration. The arbitration shall be conducted in the capital city of the state where Customer has its principal place of business (or some other location mutually agreed to by Customer and UniFirst) pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American

1 UniFirst claimed it was owed $488,374.49 in garment costs; $254,203.56 for unexpired weeks in the agreement; $66,702.68 in accounts receivable for a total of $809,280.73. Some of the items claimed were based upon a liquidated damages provision contained on the reverse side of the printed document.

Arbitration Association and shall be governed by the Federal Arbitration Act.

On January 26, 2015, Fluid and Bryce filed the instant suit in state district court against UniFirst for a declaratory judgment, as well as preliminary and permanent injunctive relief barring arbitration.[2] Fluid claimed that Bryce did not have authority to sign the agreement on behalf of the company, therefore, the contract was not valid under Louisiana law and the arbitration clause was not enforceable.

[2] In addition to arguing that Bryce did not have authority to enter into any contracts on behalf of the company, Fluid also contended the document signed by Bryce was merely a price list which did not have a total of the uniforms to be rented. Therefore, the parties did not have a meeting of the minds on the price, and there was no contract.

UniFirst countered with an exception of prematurity and a demand for arbitration. On March 11, 2015, the trial court held an evidentiary hearing on both the plaintiffs' request for a preliminary injunction and the defendant's exception. Without any objection by either side, the trial court heard testimony from numerous witnesses, and numerous exhibits were introduced.

Mike Hays, the president of Fluid, testified that Bryce is the dispatcher and shop foreman at the Homer location. Hays was aware that Bryce had been talking to other uniform suppliers, but Bryce did not have authority to sign contracts for the company. The persons authorized to ****4** execute documents on behalf of the company were Hays and the Chief Financial Officer ("CFO"), Timothy Brown. Hays said he was not aware that Bryce had signed the agreement sought to be enforced until well after April 2014, when the dispute arose.

Bryce testified that Fluid's old uniforms were getting faded and he talked to Hays about getting new ones. Hays said Bryce could "look into it" if the price was the same or cheaper. Bryce said he showed Henderson the Aramark bill and she said she could get uniforms for around the same price. She quoted $751.70 per week for the Homer location and said the company could get out of any agreement after 30 days if Fluid was not satisfied. He stated that he did not talk to anyone else at Fluid before he signed the document ***214** presented by UniFirst. Bryce put the document in a drawer. Bryce stated that he did not realize it was a long-term contract and he did not have authority to sign such an agreement on behalf of Fluid. Henderson returned the next day with another agreement which added the Buffalo location and Bryce also initialed it. Henderson gave Bryce a credit application and he passed it on to Brown.

Brown testified that he had been the CFO at Fluid for 15 years. He knew Bryce was talking to companies about uniforms, but did not know until well after the fact that Bryce signed an agreement. Brown testified that the company purchased many things without contracts on an "occurrence by occurrence basis." According to Brown, Bryce did not have authority to execute a contract on behalf of Fluid. Brown was questioned about the ****5** credit application from UniFirst. He said he did not recall who gave him the application to fill out.

The testimony of Charlsa Henderson, the UniFirst sales representative, differed in many respects from that given by Hays and Bryce. She testified that, for four to five months, she discussed with Bryce the possibility of Fluid leasing uniforms from her company. Bryce gave her a business card, stating his job title as "transportation logistics." According to Henderson, Bryce told her he was the decision maker. She first claimed that she never saw Fluid's invoices from Aramark, but later said she did see the Aramark paperwork and told Bryce her company could provide uniforms for approximately the same price. She assumed that Fluid's contract with Aramark was signed by Bryce's predecessor.

Henderson gave Bryce a quote of $751.70 per week for uniforms for the Homer location. On April 3, 2014, she and Bryce signed the customer service agreement and initialed changes to the standard agreement to provide for a term of 36 rather than 60 months. Henderson acknowledged that the customer service agreement did not contain the number of uniforms to be rented. She stated that Bryce told her they needed to add the location in Buffalo, Texas, so she took another copy of the customer service agreement to him on April 4, and they both signed that agreement.

Henderson admitted she told Bryce that Fluid could get out of the contract with 30 days' notice. Henderson claimed that Bryce said he had to go to the next room to get approval from Hays before he signed the agreement. She claimed Bryce walked out of the room and then returned in ****6** a few minutes. Henderson testified that

she saw Hays at the Homer location on that day. However, in his testimony, Hays said that he was working from his home in Simsboro on the day the disputed agreement was signed by Bryce and Henderson. He denied being in Homer. As proof of this point, he offered into evidence his cell phone records showing he made calls from Simsboro when Henderson claimed she saw him in Homer. Bryce also corroborated the testimony that Hays was not at the Homer location at the time claimed by Henderson.

Tommy White, the Bossier branch manager for UniFirst, testified that in order to supply uniforms to Fluid, the company purchased 2,034 shirts at a cost of $97.37 per shirt and 2,042 pairs of pants at $87.98 per pair. The average weekly rental rate for Fluid's four locations was $4,888.53. White acknowledged that the number of uniforms to be leased was not included in the agreement signed by Bryce.

The first issue presented to the trial court was whether the court or the arbitrator should decide whether there was a valid written contract between the parties ***215** requiring arbitration. The trial court determined that it should decide this issue. After hearing the testimony and evidence recounted above, the court concluded that Bryce did not have the authority to commit Fluid to the written contract sought to be enforced by UniFirst, and thus there was no binding arbitration agreement. The narrowly tailored judgment signed by the trial court provided as follows:

> IT IS HEREBY ORDERED that the plaintiffs' petition for preliminary injunction to enjoin arbitration is hereby GRANTED for the reasons stated orally in open court and that ****7** any further arbitration proceedings are hereby enjoined pending further orders of this court to the contrary.
>
> IT IS HEREBY FURTHER ORDERED that defendant's Dilatory Exception of Prematurity is DENIED for the reasons orally stated in open court.

UniFirst appealed. It did not make assignments of error in this case. The arguments we address are extrapolated from its brief.

ARBITRATOR OR DISTRICT COURT

UniFirst claims that, under the broadly written arbitration clause in the agreement, the arbitrator and not the trial court must decide whether the agreement is valid. UniFirst notes that the arbitration clause specifies:

> All disputes of whatever kind between Customer and UniFirst based upon past, present, or future acts, whether known or unknown, and arising out of or relating to the negotiation, *formation* or performance of this Agreement shall be resolved exclusively by final and binding arbitration. [Emphasis supplied.]

UniFirst maintains that this clause is inclusive of disputes concerning the formation of the agreement, which makes this matter distinguishable from other cases decided by this court in which the arbitration clause was more narrowly written. Based upon our review of the jurisprudence pertaining to similar cases, this argument is without merit.

Discussion

[1] **[2]** Fluid sought a preliminary injunction enjoining arbitration. La. C.C.P. art. 3601 provides in pertinent part:

> An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant[.]

Generally, a party seeking issuance of a preliminary injunction bears the burden of establishing by a preponderance of the evidence a *prima facie* ****8** showing that he will prevail on the merits and that irreparable injury or loss will result without the preliminary injunction. The trial court enjoys considerable discretion in determining whether a preliminary injunction is warranted; thus, the trial court's ruling will not be

disturbed on appeal absent a clear abuse of discretion. *Tobin v. Jindal,* 2011–0838 (La.App. 1st Cir.2/10/12), 91 So.3d 317. [3]

[3] We note that La. C.C.P. art. 3612(B) specifies:

> An appeal may be taken as a matter of right from an order or judgment relating to a preliminary or final injunction, but such an order or judgment shall not be suspended during the pendency of an appeal unless the court in its discretion so orders.

[3] **[4]** **[5]** In the present case, Unifirst filed an exception of prematurity, contending that the matter should go to arbitration. When the issue of a party's failure to arbitrate is raised through a dilatory exception of prematurity, the exceptor has the burden of showing a valid contract to arbitrate. ***216** *Johnson's, Inc. v. GERS, Inc.,* 34,268 (La.App.2d Cir.1/24/01), 778 So.2d 740; *Broussard v. Compulink Bus. Sys., Inc.,* 41,276 (La.App.2d Cir.8/23/06), 939 So.2d 506. In determining whether a party is bound by an arbitration agreement, we apply ordinary contract principles. A party cannot be required to submit to arbitration any dispute which he has not agreed to so submit. *Horseshoe Entm't v. Lepinski,* 40,753 (La.App.2d Cir.3/08/06), 923 So.2d 929, *writ denied,* 2006–0792 (La.6/02/06), 929 So.2d 1259; *Broussard v. Compulink Bus. Sys., Inc., supra.*

Louisiana has adopted a policy favoring arbitration. *Aguillard v. Auction Mgmt. Corp.,* 2004–2804 (La.6/29/05), 908 So.2d 1; ****9** *Broussard v. Compulink Bus. Sys., Inc., supra.* The Louisiana Arbitration Act ("LAA") is found in La. R.S. 9:4201–4217. La. R.S. 9:4201 provides:

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

La. R.S. 9:4203 specifies in pertinent part:

> A. The party aggrieved by the alleged failure or refusal of another to perform under a written agreement for arbitration, may petition any court of record having jurisdiction of the parties, or of the property, for an order directing that the arbitration proceed in the manner provided for in the agreement. Five days' written notice of the application shall be served upon the party in default. Service shall be made in the manner provided by law for the service of a summons.
>
> B. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the court shall issue an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure or refusal to perform is an issue, the court shall proceed summarily to the trial thereof.

[6] The Federal Arbitration Act ("FAA") is contained in 9 U.S.C. §§ 1–16. Louisiana courts look to federal law in interpreting the LAA because it is very similar to the FAA. *Marsh Farms v. Olvey,* 42,889 (La.App.2d Cir.1/9/08), 974 So.2d 194. In construing the FAA, the Supreme Court has held that the federal court may consider only issues relating to the making and performance of the agreement to arbitrate. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Both federal and Louisiana jurisprudence provides that the issue of ****10** the existence of an agreement to arbitrate is to be decided by the courts. In *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), the parties signed a contract containing an arbitration clause, but the respondents claimed the agreement was not valid because it was usurious. Buckeye moved to compel arbitration. The Supreme Court considered whether the validity of a contract containing an arbitration clause should be decided by the court or by an arbitrator. The Supreme Court held that a challenge to the validity of a contract, as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court. However, the Supreme Court expressly noted

in a footnote that the issue of a contract's validity is different from the ***217** issue of whether any agreement at all existed between the alleged obligor and the obligee. The Court stated it was not considering cases including those holding that courts should decide whether the signor lacked authority to commit the alleged principal. This statement by the Supreme Court, as well as other federal and state jurisprudence, indicates that in such a situation, there would be no agreement at all between the parties, including an agreement to arbitrate and the issue of the existence of the agreement would be decided by the court.

In *Will–Drill Res., Inc. v. Samson Res. Co.,* 352 F.3d 211 (5th Cir.2003), the Fifth Circuit held that the issue of whether any agreement to arbitrate existed is to be decided by the courts, based upon state law contract formation principles. The Third Circuit, in *Sandvik AB v. Advent Int'l Corp.,* 220 F.3d 99 (3d Cir.2000), addressed the issue of whether the court ****11** or the arbitrator should decide the issue of the very existence of a contract containing an arbitration clause when one of the parties claimed the person who signed the agreement lacked authority to do so. The Third Circuit concluded that the court was the proper forum to determine this issue, finding that there may be no arbitration if the agreement to arbitrate is nonexistent. Also, in *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.,* 256 F.3d 587 (7th Cir.2001), the Seventh Circuit concluded that, where a party argues that the signature on a contract was made by a faithless agent who lacked authority to make the commitment, there is an issue as to whether there is any contract at all. The Seventh Circuit noted that many federal appellate courts have held that the judiciary, rather than the arbitrator, decides whether a contract came into being. See also *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.,* 925 F.2d 1136 (9th Cir.1991).

In *Sinners & Saints, L.L.C. v. Noire Blanc Films, L.L.C.,* 937 F.Supp.2d 835 (E.D.La.2013), the court considered a claim by one of the parties to the suit that it was not bound by an agreement containing an arbitration clause because its agent acted outside the scope of his authority in signing it. The court held that, in order to determine whether parties should be compelled to arbitrate a dispute, courts perform a two-step inquiry. First, the court must determine whether the parties agreed to arbitrate the dispute. In making this inquiry, the court must determine: (1) whether there is a valid agreement to arbitrate between the parties, and (2) whether the dispute in question falls within the scope of that arbitration agreement. *Sinners & Saints, L.L.C. v. Noire Blanc Films, L.L.C., supra*; *BMA Fin. Servs., Inc. v.* ****12** *Guin,* 164 F.Supp.2d 813 (W.D.La.2001); *Marsh Farms v. Olvey, supra; Saavedra v. Dealmaker Devs., LLC,* 2008–1239 (La.App. 4th Cir.3/18/09), 8 So.3d 758, *writ denied,* 2009–0875 (La.6/5/09), 9 So.3d 871; *Lakeland Anesthesia, Inc. v. United Healthcare of La., Inc.,* 2003–1662 (La.App. 4th Cir.3/17/04), 871 So.2d 380, *writs denied,* 2004–0969, 2004–0972 (La.6/25/04), 876 So.2d 834.

[7] Here, Fluid contends that UniFirst does not have a valid and enforceable written contract with it because the agreement was signed by an employee without any legal authority to bind the company. Essentially, Fluid argues that it was never a party to the agreement UniFirst seeks to enforce. The trial court properly found that it had the power to decide whether there was an agreement to arbitrate, rather than requiring that this issue be determined by an arbitrator. This decision was in accord with the jurisprudence discussed above, holding that the court is the proper forum to decide this issue when the question ***218** of authority to bind the corporation is being urged.

We also observe that UniFirst did not lodge any objection below to the trial court's actions in conducting a lengthy evidentiary hearing on this issue. Notably, both sides called witnesses and introduced exhibits. At this juncture, we have a fully developed record on the authority issue. It would be completely counterproductive to vacate the decision by the trial court and refer this issue to an arbitrator.

****13** APPARENT AUTHORITY

Unifirst next contends that the trial court erred in failing to find that Bryce had apparent authority to enter into the agreement and that Fluid is bound by all terms of the written agreement. This argument is without merit.

Discussion

[8] In the past, Louisiana courts jurisprudentially recognized the doctrine of apparent authority. See *Walton Const. Co. v. G.M. Horne & Co.,* 2007–0145 (La.App. 1st Cir.2/20/08), 984 So.2d 827. Apparent authority is a

doctrine by which an agent is empowered to bind his principal in a transaction with a third person when the principal has made a manifestation to the third person, or to the community of which the third person is a member, that the agent is authorized to engage in the particular transaction, although the principal has not actually delegated this authority to the agent. *Tedesco v. Gentry Dev., Inc.,* 540 So.2d 960 (La.1989); *Walton Const. Co. v. G.M. Horne & Co., supra.* See also *American Zurich Ins. Co. v. Johnson,* 37,567 (La.App.2d Cir.7/30/03), 850 So.2d 1112; *Kobuszewski v. Scriber,* 518 So.2d 524 (La.App. 2d Cir.1987). In 1997, the legislature enacted La. C.C. art. 3021 to specifically address the liability of a principal that arises out of his agent's purporting to act on the principal's behalf. Acts 1997, No. 261, § 1, effective Jan. 1, 1998; *Walton Const. Co. v. G.M. Horne & Co., supra.* That article provides:

> One who causes a third person to believe that another person is his mandatary is bound to the third person who in good faith contracts with the putative mandatary.

[9] ****14** The courts have continued to apply the pre-La. C.C. art. 3021 jurisprudence on the doctrine of apparent authority. See *Walton Const. Co. v. G.M. Horne & Co., supra.* Apparent authority operates only when it is reasonable for the third person to believe the agent is authorized and the third person actually believes this. *Tedesco v. Gentry Dev., Inc., supra.* Louisiana courts have utilized the doctrine of apparent authority to protect third persons by treating a principal who has manifested an agent's authority to third persons as if the principal had actually granted the authority to the agent. *Tedesco v. Gentry Dev., Inc., supra.* In the absence of contact between the putative principal and the third party, there is no manifestation and, *a fortiori,* no apparent authority. *American Zurich Ins. Co. v. Johnson, supra.*

[10] **[11]** An agency relationship is never presumed; it must be clearly established. *Broussard v. Compulink Bus. Sys., Inc., supra.* The burden of proving apparent authority is on the party seeking to bind the principal. A third party may not blindly rely on the assertions of an agent, but has a duty to determine, at his peril, whether the agency purportedly granted by the principal permits the proposed act by the agent. One must look from the viewpoint of the third party to determine whether an apparent agency has been created. *Bamburg Steel Bldgs., Inc. v. Lawrence Gen. Corp.,* 36,005 (La.App.2d Cir.5/8/02), 817 So.2d 427. See ***219** also *Marinebanc Leasing Co. v. Allied Cos. of La., Inc.,* 535 So.2d 796 (La.App. 2d Cir.1988).

[12] A trial court's determination of an agency relationship is essentially a factual matter. Therefore, our review of the trial court's factual findings is ****15** governed by the manifest error standard of review. Under this standard, the reviewing court may reverse only if it finds that no reasonable factual bases exist for the findings of the trial court which are clearly wrong or manifestly erroneous. *Bamburg Steel Bldgs., Inc. v. Lawrence Gen. Corp., supra.*

[13] We note at the outset that Fluid is a corporation and was listed as such on the upper portion of the document filled out by Henderson. She was fully aware that Hays was the president of Fluid. The document does not show that Bryce signed as a representative of the corporation; he merely signed his name on a signature line.

Henderson stated that she talked with Bryce for several months about securing an agreement to supply uniforms. Bryce had a business card which stated his job title as "transportation logistics." He testified that, in addition to being the shop foreman for the Homer location, he was also a dispatcher for Fluid. There is nothing inherent in either of thesepositions that would lead a third party to believe that Bryce had authority to enter into an expensive and long-term agreement on behalf of Fluid. It was Bryce alone who had contact with Henderson. Her testimony that he led her to believe that he had authority to make an agreement to rent uniforms is belied by her later testimony that he got approval from Hays before he signed. The corporate officers of Fluid who had authority to bind the company never had any contact with Henderson and never made any manifestations to her that Bryce had authority to sign an agreement on behalf of the company. Henderson blindly relied upon her beliefs and she and her supervisors failed to fulfill their duty to determine whether the agency purportedly granted by ****16** the principal permitted the act by Bryce. We cannot help but note that Henderson herself had to get the written approval of her branch manager, Tommy White, who approved the agreement. We agree with the conclusion by the trial court

that Bryce did not have either actual or apparent authority to execute the agreement on behalf of Fluid. Since there is no valid written agreement compelling arbitration, the trial court's rulings on the narrow issues before it are correct.

We note that the provisions of the narrowly tailored judgment signed by the trial court, quoted above, do not in any way preclude UniFirst from instituting appropriate legal action against Fluid or Bryce for any obligations or damages that may have arisen from Fluid's utilization of uniforms and other items supplied by UniFirst. Indeed, the trial court very astutely stated on the record at the hearing on the injunction and exception:

> I think the relevant issue for this Court ... maybe later on down the road about how much money somebody may or may not owe based on other trials, that some of this may be relevant as to whether or not somebody owes $809,000 or they owe $15. But, right now the issue is whether or not Mr. Bryce had authority to bind Fluid Disposal to any contract, but more importantly this one.

CONCLUSION

For the reasons stated above, we affirm the trial court judgment granting a preliminary injunction in favor of Fluid and denying the exception of prematurity by UniFirst. ***220** Costs in this court are assessed to UniFirst.

AFFIRMED.

All Citations

186 So.3d 210, 50,356 (La.App. 2 Cir. 1/13/16)

130 S.Ct. 2847
Supreme Court of the United States

GRANITE ROCK COMPANY, Petitioner,
v.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS et al.

No. 08–1214.
|
Argued Jan. 19, 2010.
|
Decided June 24, 2010.

Synopsis

Background: Employer sued international union and local union, alleging that local's conducting strike constituted breach of no-strike clause in collective bargaining agreement (CBA), and that international had engaged in tortious interference with contract by promoting strike, and asserting claims against both entities under the Labor Management Relations Act (LMRA). The United States District Court for the Northern District of California, James Ware, J., granted international's motion to dismiss, and denied local's motion to compel arbitration on issue of whether CBA had been ratified. Employer and local cross-appealed. The Court of Appeals for the Ninth Circuit, 546 F.3d 1169, affirmed in part, reversed in part, and remanded. Certiorari was granted.

Holdings: The United States Supreme Court, Justice Thomas, held that:

[1] dispute over ratification date of CBA was matter to be resolved by District Court, rather than by arbitrator;

[2] employer did not implicitly consent to arbitration of dispute over ratification date of CBA; and

[3] tortious interference claim was outside scope of LMRA.

Affirmed in part, reversed in part, and remanded.

Justice Sotomayor, filed opinion, concurring in part and dissenting in part, with which Justice Stevens joined.

West Headnotes (14)

[1] Alternative Dispute Resolution
Arbitrability of dispute

Labor and Employment
Arbitrability

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute
231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(4) Arbitrability

In both commercial and labor law cases, whether parties have agreed to submit a particular dispute to arbitration is typically an issue for judicial determination.

193 Cases that cite this headnote

[2] Contracts
Questions for jury

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k29 Questions for jury

Where the dispute at issue concerns contract formation, the dispute is generally for courts to decide.

85 Cases that cite this headnote

[3] Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement

25T Alternative Dispute Resolution

25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 In general

A court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute..

408 Cases that cite this headnote

[4] **Alternative Dispute Resolution**
Existence and validity of agreement

Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 Existence and validity of agreement
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

To satisfy itself that an agreement to arbitrate exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce.

129 Cases that cite this headnote

[5] **Labor and Employment**
Arbitrability

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(4) Arbitrability

The rule that arbitration is strictly a matter of consent, and thus that courts must typically decide any questions concerning the formation or scope of an arbitration agreement before ordering parties to comply with it, is the cornerstone for deciding arbitrability disputes in LMRA cases. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

42 Cases that cite this headnote

[6] **Alternative Dispute Resolution**
Construction in favor of arbitration

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 Construction in favor of arbitration

Where parties concede that they have agreed to arbitrate some matters pursuant to an arbitration clause, the law's permissive policies in respect to arbitration counsel that any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration.

126 Cases that cite this headnote

[7] **Alternative Dispute Resolution**
Severability

Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk140 Severability
25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 In general

In cases governed by the Federal Arbitration Act (FAA), courts must treat the arbitration clause as severable from the contract in which it appears, and thus apply the clause to all disputes within its scope, unless the validity challenge is to the arbitration clause itself, or the party disputes the formation of the contract. 9 U.S.C.A. § 1 et seq.

71 Cases that cite this headnote

[8] **Alternative Dispute Resolution**
Contractual or consensual basis

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 Contractual or consensual basis

Arbitration is strictly a matter of consent, and thus, is a way to resolve those disputes, but only those disputes, that the parties have agreed to submit to arbitration.

105 Cases that cite this headnote

[9] **Alternative Dispute Resolution**
Validity

Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(1) In general
25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 In general

Courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement nor its enforceability or applicability to the dispute is in issue.

324 Cases that cite this headnote

[10] **Alternative Dispute Resolution**
Existence and validity of agreement

Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 Existence and validity of agreement
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

Where a party contests either the formation of the arbitration agreement or its enforceability or applicability to the dispute at issue, the court must resolve the disagreement.

127 Cases that cite this headnote

[11] **Labor and Employment**
Matters Subject to Arbitration Under Agreement

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(1) In general

Dispute over ratification date of collective bargaining agreement (CBA), which contained arbitration clause, was matter to be resolved by District Court, rather than by arbitrator, in employer's LMRA lawsuit against labor union alleging that strike constituted breach of no-strike clause in CBA; dispute concerned the formation or existence of CBA at the time of labor union's strike, which was necessary to resolve in order to decide whether arbitration clause applied to employer's LMRA breach of contract claim, and formation or existence date dispute fell outside scope of arbitration clause, which was limited to claims "arising under" the CBA. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

18 Cases that cite this headnote

[12] **Labor and Employment**
Matters Subject to Arbitration Under Agreement

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements

231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(1) In general

Employer did not implicitly consent to arbitration of dispute with labor union over date that the parties' collective bargaining agreement (CBA) was ratified by filing LMRA suit to enforce CBA's no-strike and arbitrable grievance provisions; although when employer filed suit, it viewed the CBA and all of its provisions as enforceable, the ratification date issue had not yet been raised. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

5 Cases that cite this headnote

[13] Labor and Employment
Actions in General

231H Labor and Employment
231HIX Interference with the Employment Relationship
231Hk915 Actions in General
231Hk916 In general

Employer's claim against international union, alleging tortious interference with contract based on international union's allegedly promoting strike by local union that violated no-strike clause in new collective bargaining agreement (CBA) between employer and local, was outside scope of LMRA provision, conferring federal jurisdiction over suits concerning violation of contracts between an employer and a labor organization; recognition of new federal tort claim under LMRA was not justified. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

8 Cases that cite this headnote

[14] Federal Courts
Presentation of Questions Below or on Review;Record;Waiver

170B Federal Courts
170BXVI Supreme Court
170BXVI(D) Presentation of Questions Below or on Review;Record;Waiver
170Bk3181 In general
(Formerly 170Bk461)

Employer did not abandon its claim against international union, alleging tortious interference with contract based on international union's allegedly promoting strike by local union that violated no-strike clause in new collective bargaining agreement (CBA) between employer and local, when employer declared its intention to seek only contractual, as opposed to punitive damages, on the claim.

2 Cases that cite this headnote

****2849** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

In June 2004, respondent local union (Local), supported by its parent international (IBT), initiated a strike against petitioner Granite Rock, the employer of some of Local's members, following the expiration of the parties' collective-bargaining agreement (CBA) and an impasse in their negotiations. On July 2, the parties agreed to a new CBA containing no-strike and arbitration clauses, but could not reach a separate back-to-work agreement holding local and international union members harmless for any strike-related damages Granite Rock incurred. IBT instructed Local to continue striking until Granite Rock approved such a hold-harmless agreement, but the company refused to do so, informing Local that continued strike activity would violate the new CBA's no-strike clause. IBT and Local responded by announcing a companywide strike involving numerous facilities and workers, including members of other IBT locals.

Granite Rock sued IBT and Local, invoking federal jurisdiction under § 301(a) of the Labor Management Relations Act, 1947 (LMRA), seeking strike-related damages for the unions' alleged breach of contract, and asking for an injunction against the ongoing strike because the hold-harmless dispute was an arbitrable grievance

under the new CBA. The unions conceded § 301(a) jurisdiction, but asserted that the new CBA was never validly ratified by a vote of Local's members, and, thus, the CBA's no-strike clause did not provide a basis for Granite Rock to **2850 challenge the strike. After Granite Rock amended its complaint to add claims that IBT tortiously interfered with the new CBA, the unions moved to dismiss. The District Court granted IBT's motion to dismiss the tortious interference claims on the ground that § 301(a) supports a federal cause of action only for breach of contract. But the court denied Local's separate motion to send the parties' dispute over the CBA's ratification date to arbitration, ruling that a jury should decide whether ratification occurred on July 2, as Granite Rock contended, or on August 22, as Local alleged. After the jury concluded that the CBA was ratified on July 2, the court ordered arbitration to proceed on Granite Rock's breach-of-contract claims. The Ninth Circuit affirmed the dismissal of the tortious interference claims, but reversed the arbitration order, holding that the parties' ratification-date dispute was a matter for an arbitrator to resolve under the CBA's arbitration clause. The Court of Appeals reasoned that the clause covered the ratification-date dispute because the clause clearly covered the related strike claims; national policy favoring arbitration required ambiguity about the arbitration clause's scope to be resolved in favor of arbitrability; and, in any event, Granite Rock had implicitly consented to arbitrate the ratification-date dispute by suing under the contract.

Held :

1. The parties' dispute over the CBA's ratification date was a matter for the District Court, not an arbitrator, to resolve. Pp. 2855 – 2864.

(a) Whether parties have agreed to arbitrate a particular dispute is typically an " 'issue for judicial determination,' " *e.g., Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491, as is a dispute over an arbitration contract's formation, see, *e.g., First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985. These principles would neatly dispose of this case if the formation dispute here were typical. But it is not. It is based on when (not whether) the new CBA containing the parties' arbitration clause was ratified and thereby formed. To determine whether the parties' dispute over the CBA's ratification date is arbitrable, it is necessary to apply the rule that a court may order arbitration of a particular dispute only when satisfied that the parties agreed to arbitrate *that dispute.* See, *e.g., id.,* at 943, 115 S.Ct. 1920. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the specific arbitration clause that a party seeks to have the court enforce. See, *e.g., Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. 63, 68 – 70, 130 S.Ct. 2772, 177 L.Ed.2d 403. Absent an agreement committing them to an arbitrator, such issues typically concern the scope and enforceability of the parties' arbitration clause. In addition, such issues always include whether the clause was agreed to, and may include when that agreement was formed. Pp. 2855 – 2856.

(b) In cases invoking the "federal policy favoring arbitration of labor disputes," *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 377, 94 S.Ct. 629, 38 L.Ed.2d 583, courts adhere to the same framework, see, *e.g., AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648, and discharge their duty to satisfy themselves that the parties agreed to arbitrate a particular dispute by (1) applying the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand and (2) ordering arbitration only where the presumption is not rebutted, see, *e.g., id.,* at 651–652, 106 S.Ct. 1415. Local is thus wrong to suggest that the **2851 presumption takes courts outside the settled framework for determining arbitrability. This Court has never held that the presumption overrides the principle that a court may submit to arbitration "only those disputes ... the parties have agreed to submit," *First Options, supra,* at 943, 115 S.Ct. 1920, nor that courts may use policy considerations as a substitute for party agreement, see, *e.g., AT & T Technologies, supra,* at 648, 651–652, 106 S.Ct. 1415. The presumption should be applied only where it reflects, and derives its legitimacy from, a judicial conclusion (absent a provision validly committing the issue to an arbitrator) that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed, is legally enforceable, and is best construed to encompass the dispute. See, *e.g., First Options, supra,* at 944–945, 115 S.Ct. 1920. This simple framework compels reversal of the Ninth Circuit's judgment because it requires judicial resolution of two related questions central to Local's arbitration demand: when the CBA was formed, and

whether its arbitration clause covers the matters Local wishes to arbitrate. Pp. 2856 – 2860.

(c) The parties characterize their ratification-date dispute as a formation dispute because a union vote ratifying the CBA's terms was necessary to form the contract. For purposes of determining arbitrability, *when* a contract is formed can be as critical as *whether* it was formed. That is so where, as here, an agreement's ratification date determines its formation date, and thus determines whether its provisions were enforceable during the period relevant to the parties' dispute. This formation-date question requires judicial resolution here because it relates to Local's arbitration demand in a way that required the District Court to determine the CBA's ratification date in order to decide whether the parties consented to arbitrate the matters the demand covered. The CBA requires arbitration only of disputes that "arise under" the agreement. The parties' ratification-date dispute does not clearly fit that description. But the Ninth Circuit credited Local's argument that the ratification-date dispute should be presumed arbitrable because it relates to a dispute (the no-strike dispute) that *does* clearly "arise under" the CBA. The Ninth Circuit overlooked the fact that this theory of the ratification-date dispute's arbitrability fails if, as Local asserts, the new CBA was not formed until August 22, because in that case there was no CBA for the July no-strike dispute to "arise under." Local attempts to address this flaw in the Circuit's reasoning by arguing that a December 2004 document the parties executed rendered the new CBA effective as of May 1, 2004, the date the prior CBA expired. The Court of Appeals did not rule on this claim, and this Court need not do so either because it was not raised in Local's brief in opposition to the certiorari petition. Pp. 2860 – 2862.

(d) Another reason to reverse the Court of Appeals' judgment is that the ratification-date dispute, whether labeled a formation dispute or not, falls outside the arbitration clause's scope on grounds the presumption favoring arbitration cannot cure. CBA § 20 provides, *inter alia,* that "[a]ll disputes arising under this agreement shall be resolved in accordance with the [Grievance] procedure," which includes arbitration. The parties' ratification-date dispute cannot properly be said to fall within this provision's scope for at least two reasons. First, the question whether the CBA was validly ratified on July 2, 2004—a question concerning the CBA's very existence—cannot fairly be said to "arise under" the CBA. Second, even if the "arising under" language could in isolation ****2852** be construed to cover this dispute, § 20's remaining provisions all but foreclose such a reading by describing that section's arbitration requirement as applicable to labor disagreements that are addressed in the CBA and are subject to its requirement of mandatory mediation. The Ninth Circuit's contrary conclusion finds no support in § 20's text. That court's only effort to grapple with that text misses the point by focusing on whether Granite Rock's claim to enforce the CBA's *no-strike* provisions could be characterized as "arising under" the agreement, which is not the dispositive issue here. P. 2862.

(e) Local's remaining argument in support of the Court of Appeals' judgment—that Granite Rock "implicitly" consented to arbitration when it sued to enforce the CBA's no-strike and arbitrable grievance provisions—is similarly unavailing. Although it sought an injunction against the strike so the parties could arbitrate the labor grievance giving rise to it, Granite Rock's decision to sue does not establish an agreement, "implicit" or otherwise, to arbitrate an issue (the CBA's formation date) that the company did not raise and has always rightly characterized as beyond the arbitration clause's scope. Pp. 2863 – 2864.

2. The Ninth Circuit did not err in declining to recognize a new federal common-law cause of action under LMRA § 301(a) for IBT's alleged tortious interference with the CBA. Though virtually all other Circuits have rejected such claims, Granite Rock argues that doing so in this case is inconsistent with federal labor law's goal of promoting industrial peace and economic stability through judicial enforcement of CBAs, and with this Court's precedents holding that a federal common law of labor contracts is necessary to further this goal, see, *e.g., Textile Workers v. Lincoln Mills of Ala.,* 353 U.S. 448, 451, 77 S.Ct. 912, 1 L.Ed.2d 972. The company says the remedy it seeks is necessary because other potential avenues for deterrence and redress, such as state-law tort claims, unfair labor practices claims before the National Labor Relations Board (NLRB), and federal common-law breach-of-contract claims, are either unavailable or insufficient. But Granite Rock has not yet exhausted all of these avenues for relief, so this case does not provide an opportunity to judge their efficacy. Accordingly, it would be premature to recognize the cause of action Granite Rock seeks, even assuming § 301(a) authorizes this Court to do so. That is

particularly true here because the complained-of course of conduct has already prompted judgments favorable to Granite Rock from the jury below and from the NLRB in separate proceedings concerning the union's attempts to delay the new CBA's ratification. Those proceedings, and others to be conducted on remand, buttress the conclusion that Granite Rock's assumptions about the adequacy of other avenues of relief are questionable, and that the Court of Appeals did not err in declining to recognize the new federal tort Granite Rock requests. Pp. 2863 – 2866.

546 F.3d 1169, reversed in part, affirmed in part, and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, BREYER, AND ALITO, JJ., joined, and in which STEVENS and SOTOMAYOR, JJ., joined as to Part III. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, pp. 2866 – 2869.

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Opinion

Justice THOMAS delivered the opinion of the Court.

***291** This case involves an employer's claims against a local union and the union's international parent for economic damages ***292** arising out of a 2004 strike. The claims turn in part on whether a collective-bargaining agreement (CBA) containing a no-strike provision was validly formed during the strike period. The employer contends that it was, while the unions contend that it was not. Because the CBA contains an arbitration clause, we first address whether the parties' dispute over the CBA's ratification date was a matter for the District Court or an arbitrator to resolve. We conclude that it was a matter for judicial resolution. Next, we address whether the Court of Appeals erred in declining the employer's request to recognize a new federal cause of action under § 301(a) of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U.S.C. § 185(a), for the international union's alleged tortious interference with the CBA. The Court of Appeals did not err in declining this request.

I

Petitioner Granite Rock Company is a concrete and building materials company that has operated in California since 1900. Granite Rock employs approximately 800 employees under different labor contracts with several unions, including respondent International Brotherhood of Teamsters, Local 287 (Local). Granite Rock and Local were parties to a 1999 CBA that expired in April 2004. The parties' attempt to negotiate a new CBA hit an impasse and, on June 9, 2004, Local members initiated a strike in support of their contract demands. [1]

[1] In deciding the arbitration question in this case we rely upon the terms of the CBA and the facts in the District Court record. In reviewing the judgment affirming dismissal of Granite Rock's tort claims against respondent International Brotherhood of Teamsters (IBT) for failure to state a claim, we rely on the facts alleged in Granite Rock's Third Amended Complaint. See, *e.g., H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 250, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

The strike continued until July 2, 2004, when the parties reached agreement on the terms of a new CBA. The CBA ***293** contained a no-strike clause but did not directly address union members' liability for any strike-related damages Granite Rock may have incurred before the

new CBA was negotiated but after the prior CBA had expired. At the end of the negotiating session on the new CBA, Local's business representative, George Netto, approached Granite Rock about executing a separate "back-to-work" agreement that **2854 would, among other things, hold union members harmless for damages incurred during the June 2004 strike. Netto did not make execution of such an agreement a condition of Local's ratification of the CBA, or of Local's decision to cease picketing. Thus, Local did not have a back-to-work or hold-harmless agreement in place when it voted to ratify the CBA on July 2, 2004.

Respondent IBT, which had advised Local throughout the CBA negotiations and whose leadership and members supported the June strike, opposed Local's decision to return to work without a back-to-work agreement shielding both Local and IBT members from liability for strike-related damages. In an effort to secure such an agreement, IBT instructed Local's members not to honor their agreement to return to work on July 5, and instructed Local's leaders to continue the work stoppage until Granite Rock agreed to hold Local and IBT members free from liability for the June strike. Netto demanded such an agreement on July 6, but Granite Rock refused the request and informed Local that the company would view any continued strike activity as a violation of the new CBA's no-strike clause. IBT and Local responded by announcing a companywide strike that involved numerous facilities and hundreds of workers, including members of IBT locals besides Local 287.

According to Granite Rock, IBT not only instigated this strike; it supported and directed it. IBT provided pay and benefits to union members who refused to return to work, directed Local's negotiations with Granite Rock, supported Local financially during the strike period with a $1.2 million *294 loan, and represented to Granite Rock that IBT had unilateral authority to end the work stoppage in exchange for a hold-harmless agreement covering IBT members within and outside Local's bargaining unit.

On July 9, 2004, Granite Rock sued IBT and Local in the District Court, seeking an injunction against the ongoing strike and strike-related damages. Granite Rock's complaint, originally and as amended, invoked federal jurisdiction under LMRA § 301(a), alleged that the July 6 strike violated Local's obligations under the CBA's no-strike provision, and asked the District Court to enjoin the strike because the hold-harmless dispute giving rise to the strike was an arbitrable grievance. See *Boys Markets, Inc. v. Retail Clerks,* 398 U.S. 235, 237–238, 253–254, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970) (holding that federal courts may enjoin a strike where a CBA contemplates arbitration of the dispute that occasions the strike). The unions conceded that LMRA § 301(a) gave the District Court jurisdiction over the suit but opposed Granite Rock's complaint, asserting that the CBA was not validly ratified on July 2 (or at any other time relevant to the July 2004 strike) and, thus, its no-strike clause did not provide a basis for Granite Rock's claims challenging the strike.

The District Court initially denied Granite Rock's request to enforce the CBA's no-strike provision because Granite Rock was unable to produce evidence that the CBA was ratified on July 2.App. 203–213. Shortly after the District Court ruled, however, a Local member testified that Netto had put the new CBA to a ratification vote on July 2, and that the voting Local members unanimously approved the agreement. Based on this statement and supporting testimony from 12 other employees, Granite Rock moved for a new trial on its injunction and damages claims.

On August 22, while that motion was pending, Local conducted a second successful "ratification" vote on the CBA, and **2855 on September 13, the day the District Court was scheduled to hear Granite Rock's motion, the unions called off *295 their strike. Although their return to work mooted Granite Rock's request for an injunction, the District Court proceeded with the hearing and granted Granite Rock a new trial on its damages claims. The parties proceeded with discovery, and Granite Rock amended its complaint, which already alleged federal[2] claims for breach of the CBA against both Local and IBT, to add federal inducement of breach and interference with contract (hereinafter tortious interference) claims against IBT.

2 This Court has recognized a federal common-law claim for breach of a CBA under LMRA § 301(a). See, *e.g., Textile Workers v. Lincoln Mills of Ala.,* 353 U.S. 448, 456, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957).

IBT and Local both moved to dismiss. Among other things, IBT argued that Granite Rock could not plead a federal tort claim under § 301(a) because that provision supports a federal cause of action only for breach of contract. The District Court agreed and dismissed Granite

Rock's tortious interference claims. The District Court did not, however, grant Local's separate motion to send the parties' dispute over the CBA's ratification date to arbitration.[3] The District Court held that whether the CBA was ratified on July 2 or August 22 was an issue for the court to decide, and submitted the question to a jury. The jury reached a unanimous verdict that Local ratified the CBA on July 2, 2004. The District Court entered the verdict and ordered the parties to proceed with arbitration on Granite Rock's breach-of-contract claims for strike-related damages.

3 The CBA's ratification date is important to Granite Rock's underlying suit for strike damages. If the District Court correctly concluded that the CBA was ratified on July 2, Granite Rock could argue on remand that the July work stoppage violated the CBA's no-strike clause.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. See 546 F.3d 1169 (2008). The Court of Appeals affirmed the District Court's dismissal of Granite Rock's tortious interference claims against IBT. See *id.*, at 1170–1175. But it disagreed with the District ***296** Court's determination that the date of the CBA's ratification was a matter for judicial resolution. See *id.*, at 1176–1178. The Court of Appeals reasoned that the parties' dispute over this issue was governed by the CBA's arbitration clause because the clause clearly covered the related strike claims, the "national policy favoring arbitration" required that any ambiguity about the scope of the parties' arbitration clause be resolved in favor of arbitrability, and, in any event, Granite Rock had "implicitly" consented to arbitrate the ratification-date dispute "by suing under the contract." *Id.*, at 1178 (internal quotation marks omitted). We granted certiorari. 557 U.S. 933, 129 S.Ct. 2865, 174 L.Ed.2d 575 (2009).

II

[1] **[2]** It is well settled in both commercial and labor cases that whether parties have agreed to "submi[t] a particular dispute to arbitration" is typically an " 'issue for judicial determination.' " *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (quoting *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)); see *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546–547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is ****2856** generally for courts to decide. See, *e.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter ... courts generally ... should apply ordinary ... principles that govern the formation of contracts"); *AT & T Technologies, supra*, at 648–649, 106 S.Ct. 1415 (explaining the settled rule in labor cases that " 'arbitration is a matter of contract' " and "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, n. 1, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (distinguishing treatment of the generally nonarbitral question whether an arbitration agreement was "ever concluded" from the question whether a ***297** contract containing an arbitration clause was illegal when formed, which question we held to be arbitrable in certain circumstances).

These principles would neatly dispose of this case if the formation dispute here were typical. But it is not. It is based on when (not whether) the CBA that contains the parties' arbitration clause was ratified and thereby formed.[4] And at the time the District Court considered Local's demand to send this issue to an arbitrator, Granite Rock, the party resisting arbitration, conceded both the formation and the validity of the CBA's arbitration clause.

4 Although a union ratification vote is not always required for the provisions in a CBA to be considered validly formed, the parties agree that ratification was such a predicate here. See App. 349–351.

[3] **[4]** These unusual facts require us to reemphasize the proper framework for deciding when disputes are arbitrable under our precedents. Under that framework, a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*. See *First Options, supra*, at 943, 115 S.Ct. 1920; *AT & T Technologies, supra*, at 648–649, 106 S.Ct. 1415. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. See, *e.g.*, *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 68–70, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). Where there

is no provision validly committing them to an arbitrator, see *ante,* at 2776 – 2778, these issues typically concern the scope of the arbitration clause and its enforceability. In addition, these issues always include whether the clause was agreed to, and may include when that agreement was formed.

A

[5] **[6]** **[7]** The parties agree that it was proper for the District Court to decide whether their ratification dispute was arbitrable. [5] ***298** They disagree about whether the District Court answered the question correctly. Local contends that the District Court erred in holding that the CBA's ratification date was an issue for the court to decide. The Court of Appeals agreed, holding that the District Court's refusal to send that dispute to arbitration violated two principles of arbitrability set forth in our precedents. See ****2857** 546 F.3d, at 1177–1178. The first principle is that where, as here, parties concede that they have agreed to arbitrate *some* matters pursuant to an arbitration clause, the "law's permissive policies in respect to arbitration" counsel that " 'any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration.' " *First Options, supra,* at 945, 115 S.Ct. 1920 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)); see 546 F.3d, at 1177, n. 4, 1178 (citing this principle and the "national policy favoring arbitration" in concluding that arbitration clauses "are to be construed very broadly" (internal quotation marks omitted)). The second principle the Court of Appeals invoked is that this presumption of arbitrability applies even to disputes about the enforceability of the entire contract containing the arbitration clause, because at least in cases governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, [6] courts must ***299** treat the arbitration clause as severable from the contract in which it appears, and thus apply the clause to all disputes within its scope " '[u]nless the [validity] challenge is to the arbitration clause itself' " or the party "disputes the formation of [the] contract," 546 F.3d, at 1176 (quoting *Buckeye, supra,* at 445–446, 126 S.Ct. 1204); 546 F.3d, at 1177, and n. 4 (explaining that it would treat the parties' arbitration clause as enforceable with respect to the ratification-date dispute because no party argued that the "clause is invalid in any way").

5 Because neither party argues that the arbitrator should decide this question, there is no need to apply the rule requiring " 'clear and unmistakable' " evidence of an agreement to arbitrate arbitrability. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (quoting *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986); alterations omitted).

6 We, like the Court of Appeals, discuss precedents applying the FAA because they employ the same rules of arbitrability that govern labor cases. See, *e.g., id.*, at 650, 106 S.Ct. 1415. Indeed, the rule that arbitration is strictly a matter of consent—and thus that courts must typically decide any questions concerning the formation or scope of an arbitration agreement before ordering parties to comply with it—is the cornerstone of the framework the Court announced in the *Steelworkers Trilogy* for deciding arbitrability disputes in LMRA cases. See *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 567–568, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

[8] **[9]** **[10]** Local contends that our precedents, particularly those applying the " 'federal policy favoring arbitration of labor disputes,' " permit no other result. Brief for Respondent Local, p. 15 (quoting *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 377, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974)); see Brief for Respondent Local, at 10–13; 16–25. Local, like the Court of Appeals, overreads our precedents. The language and holdings on which Local and the Court of Appeals rely cannot be divorced from the first principle that underscores all of our arbitration decisions: Arbitration is strictly "a matter of consent," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), and thus "is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration," *First Options,* 514 U.S., at 943, 115 S.Ct. 1920 (emphasis added). [7] Applying this principle, our precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the ****2858** parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. *Ibid.* Where a party contests ***300** either or

both matters, "the court" must resolve the disagreement. *Ibid.*

7 See also *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 219–220, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985); *Scherk v. Alberto–Culver Co.,* 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *AT & T Technologies,supra,* at 648, 106 S.Ct. 1415; *Warrior & Gulf, supra,* at 582, 80 S.Ct. 1347; *United States v. Moorman,* 338 U.S. 457, 462, 70 S.Ct. 288, 94 L.Ed. 256 (1950).

Local nonetheless interprets some of our opinions to depart from this framework and to require arbitration of certain disputes, particularly labor disputes, based on policy grounds even where evidence of the parties' agreement to arbitrate the dispute in question is lacking. See Brief for Respondent Local, at 16 (citing cases emphasizing the policy favoring arbitration generally and the "impressive policy considerations favoring arbitration" in LMRA cases (internal quotation marks omitted)). That is not a fair reading of the opinions, all of which compelled arbitration of a dispute only after the Court was persuaded that the parties' arbitration agreement was validly formed and that it covered the dispute in question and was legally enforceable. See, *e.g., First Options, supra,* at 944–945, 115 S.Ct. 1920. That *Buckeye* and some of our cases applying a presumption of arbitrability to certain disputes do not discuss each of these requirements merely reflects the fact that in those cases some of the requirements were so obviously satisfied that no discussion was needed.

In *Buckeye,* the formation of the parties' arbitration agreement was not at issue because the parties agreed that they had "concluded" an agreement to arbitrate and memorialized it as an arbitration clause in their loan contract. 546 U.S., at 444, n. 1, 126 S.Ct. 1204. The arbitration clause's scope was also not at issue, because the provision expressly applied to " '[a]ny claim, dispute, or controversy ... arising from or relating to ... the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement.' " *Id.*, at 442, 126 S.Ct. 1204. The parties resisting arbitration (customers who agreed to the broad arbitration clause as a condition of using Buckeye's loan service) claimed only that a usurious interest provision in the loan agreement invalidated the entire contract, including the arbitration clause, and thus precluded the Court from relying on the clause as evidence of the parties' consent to arbitrate ***301** matters within its scope. See *id.*, at 443, 126 S.Ct. 1204. In rejecting this argument, we simply applied the requirement in § 2 of the FAA that courts treat an arbitration clause as severable from the contract in which it appears and enforce it according to its terms unless the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself, see *id.*, at 443–445, 126 S.Ct. 1204 (citing 9 U.S.C. § 2; *Southland Corp. v. Keating,* 465 U.S. 1, 4–5, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 402–404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)), or claims that the agreement to arbitrate was "[n]ever concluded," 546 U.S., at 444, n. 1, 126 S.Ct. 1204; see also *Rent–A–Center,* 561 U.S., at 70 – 71, and n. 2, 130 S.Ct. 2772.

Our cases invoking the federal "policy favoring arbitration" of commercial and labor disputes apply the same framework. They recognize that, except where "the parties clearly and unmistakably provide otherwise," *AT & T Technologies,* 475 U.S., at 649, 106 S.Ct. 1415, it is "the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning" a particular matter, *id.*, at 651, 106 S.Ct. 1415. They then discharge this duty by: (1) applying the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and (2) adhering to the presumption ****2859** and ordering arbitration only where the presumption is not rebutted. See *id.,* at 651–652, 106 S.Ct. 1415; *Prima Paint Corp., supra,* at 396–398, 87 S.Ct. 1801; *Gateway Coal*, *supra*, at 374–377, 94 S.Ct. 629, 38 L.Ed.2d 583; *Drake Bakeries Inc. v. Bakery Workers,* 370 U.S. 254, 256–257, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962); *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 241–242, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962); *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 576, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). [8]

8 That our labor arbitration precedents apply this rule is hardly surprising. As noted above, see n. 6, *supra,* the rule is the foundation for the arbitrability framework this Court announced in the *Steelworkers Trilogy*. Local's assertion that *Warrior & Gulf* suggests otherwise is misplaced. Although *Warrior & Gulf* contains language that might in isolation be misconstrued as establishing a presumption that labor disputes are arbitrable whenever they are not

expressly excluded from an arbitration clause, 363 U.S., at 578–582, 80 S.Ct. 1347, the opinion elsewhere emphasizes that even in LMRA cases, "courts" must construe arbitration clauses because "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," *id.*, at 582, 80 S.Ct. 1347 (applying this rule and finding the dispute at issue arbitrable only after determining that the parties' arbitration clause could be construed under standard principles of contract interpretation to cover it).

Our use of the same rules in FAA cases is also unsurprising. The rules are suggested by the statute itself. Section 2 of the FAA requires courts to enforce valid and enforceable arbitration agreements according to their terms. And § 4 provides in pertinent part that where a party invokes the jurisdiction of a federal court over a matter that the court could adjudicate but for the presence of an arbitration clause, "[t]he court shall hear the parties" and "direc[t] the parties to proceed to arbitration in accordance with the terms of the agreement" except "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue," in which case "the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4.

***302** Local is thus wrong to suggest that the presumption of arbitrability we sometimes apply takes courts outside our settled framework for deciding arbitrability. The presumption simply assists in resolving arbitrability disputes within that framework. Confining the presumption to this role reflects its foundation in "the federal policy favoring arbitration." As we have explained, this "policy" is merely an acknowledgment of the FAA's commitment to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Volt,* 489 U.S., at 478, 109 S.Ct. 1248 (internal quotation marks and citation omitted). Accordingly, we have never held that this policy overrides the principle that a court may submit to arbitration "only those disputes ... that the parties have agreed to submit." *First Options,* 514 U.S., at 943, 115 S.Ct. 1920; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) ("[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties"); ***303** *AT & T Technologies,* 475 U.S., at 650–651, 106 S.Ct. 1415 (applying the same rule to the "presumption of arbitrability for labor disputes"). Nor have we held that courts may use policy considerations as a substitute for party agreement. See, *e.g., id.*, at 648–651, 106 S.Ct. 1415; *Volt, supra,* at 478, 109 S.Ct. 1248. We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and ****2860** best construed to encompass the dispute. See *First Options, supra,* at 944–945, 115 S.Ct. 1920 (citing *Mitsubishi,* 473 U.S., at 626, 105 S.Ct. 3346); *Howsam,* 537 U.S., at 83–84, 123 S.Ct. 588; *AT & T Technologies, supra,* at 650, 106 S.Ct. 1415 (citing *Warrior & Gulf, supra,* at 582–583, 80 S.Ct. 1347); *Drake Bakeries, supra,* at 259–260, 82 S.Ct. 1346. This simple framework compels reversal of the Court of Appeals' judgment because it requires judicial resolution of two questions central to Local's arbitration demand: when the CBA was formed, and whether its arbitration clause covers the matters Local wishes to arbitrate.

B

[11] We begin by addressing the grounds on which the Court of Appeals reversed the District Court's decision to decide the parties' ratification-date dispute, which the parties characterize as a formation dispute because a union vote ratifying the CBA's terms was necessary to form the contract. See App. 351. [9] For purposes of determining arbitrability, ***304** *when* a contract is formed can be as critical as *whether* it was formed. That is the case where, as here, the date on which an agreement was ratified determines the date the agreement was formed, and thus determines whether the agreement's provisions were enforceable during the period relevant to the parties' dispute. [10]

9 The parties' dispute about the CBA's ratification date presents a formation question in the sense above, and is therefore not on all fours with, for example, the formation disputes we referenced in *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444, n. 1, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), which concerned whether, not when, an agreement to arbitrate was "concluded." That said, the manner in which the CBA's ratification date relates to Local's arbitration demand makes the ratification-date dispute in this

case one that requires judicial resolution. See *infra,* at 2860 – 2863.

10 Our conclusions about the significance of the CBA's ratification date to the specific arbitrability question before us do not disturb the general rule that parties may agree to arbitrate past disputes or future disputes based on past events.

This formation-date question requires judicial resolution here because it relates to Local's arbitration demand in such a way that the District Court was required to decide the CBA's ratification date in order to determine whether the parties consented to arbitrate the matters covered by the demand.[11] The parties agree that the CBA's arbitration clause pertains only to disputes that "arise under" the agreement. Accordingly, to hold the parties' ratification-date dispute arbitrable, the Court of Appeals had to decide whether that dispute could be characterized as "arising under" the CBA. In answering this question in the affirmative, both Local and the Court of Appeals tied the arbitrability of the ratification-date issue—which Local raised as a defense to Granite Rock's strike claims—to the arbitrability of the strike claims themselves. See *id.*, at 347. They did so because the CBA's arbitration clause, which pertains only to disputes "arising under" the CBA and thus presupposes the ***305** CBA's existence, would seem plainly to cover a dispute that "arises ****2861** under" a specific substantive provision of the CBA, but does not so obviously cover disputes about the CBA's own formation. Accordingly, the Court of Appeals relied upon the ratification dispute's relationship to Granite Rock's claim that Local breached the CBA's no-strike clause (a claim the Court of Appeals viewed as clearly "arising under" the CBA) to conclude that "the arbitration clause is certainly 'susceptible of an interpretation' that covers" Local's formation-date defense. 546 F.3d, at 1177, n. 4.

11 In reaching this conclusion we need not, and do not, decide whether every dispute over a CBA's ratification date would require judicial resolution. We recognize that ratification disputes in labor cases may often qualify as "formation disputes" for contract law purposes because contract law defines formation as acceptance of an offer on specified terms, and in many labor cases ratification of a CBA is necessary to satisfy this formation requirement. See App. 349–351. But it is not the mere labeling of a dispute for contract law purposes that determines whether an issue is arbitrable. The test for arbitrability remains whether the parties consented to arbitrate the dispute in question.

The Court of Appeals overlooked the fact that this theory of the ratification dispute's arbitrability fails if the CBA was not formed at the time the unions engaged in the acts that gave rise to Granite Rock's strike claims. The unions began their strike on July 6, 2004, and Granite Rock filed its suit on July 9. If, as Local asserts, the CBA containing the parties' arbitration clause was not ratified, and thus not formed, until August 22, there was no CBA for the July no-strike dispute to "arise under," and thus no valid basis for the Court of Appeals' conclusion that Granite Rock's July 9 claims arose under the CBA and were thus arbitrable along with, by extension, Local's formation-date defense to those claims.[12] See *ibid.* For the foregoing reasons, resolution of the parties' dispute about whether the CBA was ratified in July or August was central to deciding Local's arbitration demand. Accordingly, the Court of Appeals erred in holding that it was not necessary for the District Court to determine the CBA's ratification date in order to decide whether the parties agreed to arbitrate Granite Rock's no-strike claim or the ratification-date dispute Local raised as a defense to that claim.

12 This analysis pertains only to the Court of Appeals' decision, which did not engage the 11th-hour retroactivity argument Local raised in its merits brief in this Court, and that we address below.

Local seeks to address this flaw in the Court of Appeals' decision by arguing that in December 2004 the parties executed ***306** a document that rendered the CBA effective as of May 1, 2004 (the date the prior CBA expired), and that this effective-date language rendered the CBA's arbitration clause (but not its no-strike clause) applicable to the July strike period notwithstanding Local's view that the agreement was ratified in August (which ratification date Local continues to argue controls the period during which the no-strike clause applies). See Brief for Respondent Local, at 26–27; Tr. of Oral Arg. 32, 37–39. The Court of Appeals did not rule on the merits of this claim (*i.e.,* it did not decide whether the CBA's effective-date language indeed renders some or all of the agreement's provisions retroactively applicable to May 2004), and we need not do so either. Even accepting Local's assertion that it raised this retroactivity argument in the District Court, see Brief for Respondent Local, at 26,[13] Local did not raise this argument in the Court

of Appeals. Nor, more importantly, did Local's brief in opposition to Granite Rock's petition for certiorari raise the argument as an alternative ground on which this Court could or should affirm the Court of Appeals' judgment finding the ratification-date dispute arbitrable for the reasons discussed above. Accordingly, the argument is properly "deemed waived." This Court's Rule 15.2; *Carcieri v. Salazar,* 555 U.S. 379, 396, 129 S.Ct. 1058, 1068, 172 L.Ed.2d 791 (2009). [14]

13 This claim is questionable because Local's February 2005 references to the agreement "now in effect" are not obviously equivalent to the express retroactivity argument Local asserts in its merits brief in this Court. See Brief for Respondent Local, at 26–27.

14 Justice SOTOMAYOR's conclusion that we should nonetheless excuse Local's waiver and consider the retroactivity argument, see *post,* at 2868 – 2869 (opinion concurring in part and dissenting in part), is flawed. This Court's Rule 15.2 reflects the fact that our adversarial system assigns both sides responsibility for framing the issues in a case. The importance of enforcing the Rule is evident in cases where, as here, excusing a party's noncompliance with it would require this Court to decide, in the first instance, a question whose resolution could affect this and other cases in a manner that the district court and court of appeals did not have an opportunity to consider, and that the parties' arguments before this Court may not fully address.

****2862** ***307** C

Although the foregoing is sufficient to reverse the Court of Appeals' judgment, there is an additional reason to do so: The dispute here, whether labeled a formation dispute or not, falls outside the scope of the parties' arbitration clause on grounds the presumption favoring arbitration cannot cure. Section 20 of the CBA provides in relevant part that "[a]ll disputes *arising under this agreement* shall be resolved in accordance with the [Grievance] procedure," which includes arbitration. App. 434 (emphasis added); see also *id.,* at 434–437. The parties' ratification-date dispute cannot properly be characterized as falling within the (relatively narrow, cf., *e.g., Drake Bakeries Inc.,* 370 U.S., at 256–257, 82 S.Ct. 1346) scope of this provision for at least two reasons. First, we do not think the question whether the CBA was validly ratified on July 2, 2004 —a question that concerns the CBA's very existence— can fairly be said to "arise under" the CBA. Second, even if the "arising under" language could in isolation be construed to cover this dispute, § 20's remaining provisions all but foreclose such a reading by describing that section's arbitration requirement as applicable to labor disagreements that are addressed in the CBA and are subject to its requirement of mandatory mediation. See App. 434–437 (requiring arbitration of disputes "arising under" the CBA, but only after the union and employer have exhausted mandatory mediation, and limiting any arbitration decision under this provision to those "within the scope and terms of this agreement and ... specifically limited to the matter submitted").

The Court of Appeals' contrary conclusion does not find support in the text of § 20. The Court of Appeals' only effort to grapple with that text misses the point because it focuses on whether Granite Rock's claim to enforce the ***308** CBA's *no-strike* provisions could be characterized as "arising under" the agreement. See 546 F.3d, at 1177, n. 4. Even assuming *that* claim can be characterized as "arising under" the CBA, it is not the issue here. The issue is whether the formation-date defense that Local raised in response to Granite Rock's no-strike suit can be characterized as "arising under" the CBA. It cannot for the reasons we have explained, namely, the CBA provision requiring arbitration of disputes "arising under" the CBA is not fairly read to include a dispute about when the CBA came into existence. The Court of Appeals erred in failing to address this question and holding instead that the arbitration clause is "susceptible of an interpretation" that covers Local's formation-date defense to Granite Rock's suit "[b]ecause Granite Rock is suing 'under' the alleged new CBA" and "[a]rbitration clauses are to be construed very broadly." *Ibid.;* see also *id.,* at 1178.

D

[12] Local's remaining argument in support of the Court of Appeals' judgment ****2863** is similarly unavailing. Local reiterates the Court of Appeals' conclusion that Granite Rock "implicitly" consented to arbitration when it sued to enforce the CBA's no-strike and arbitrable grievance provisions. See Brief for Respondent Local, at 17–18. We do not agree that by seeking an injunction against the strike so the parties could arbitrate the labor grievance that gave rise to it, Granite Rock also consented to arbitrate the ratification- (formation-) date dispute we

address above. See 564 F.3d, at 1178. It is of course true that when Granite Rock sought that injunction it viewed the CBA (and all of its provisions) as enforceable. But Granite Rock's decision to sue for compliance with the CBA's grievance procedures on strike-related matters does not establish an agreement, "implicit" or otherwise, to arbitrate an issue (the CBA's formation date) that Granite Rock did not raise, and that Granite Rock has always (and rightly, see Part II–C, *supra*) characterized as beyond the scope of ***309** the CBA's arbitration clause. The mere fact that Local raised the formation-date dispute as a defense to Granite Rock's suit does not make that dispute attributable to Granite Rock in the waiver or estoppel sense the Court of Appeals suggested, see 546 F.3d, at 1178, much less establish that Granite Rock agreed to arbitrate it by suing to enforce the CBA as to other matters. Accordingly, we hold that the parties' dispute over the CBA's formation date was for the District Court, not an arbitrator, to resolve, and remand for proceedings consistent with that conclusion.

III

[13] **[14]** We turn now to the claims available on remand. The parties agree that Granite Rock can bring a breach-of-contract claim under LMRA § 301(a) against Local as a CBA signatory, and against IBT as Local's agent or alter ego. See Brief for Respondent IBT 10–13; Reply Brief for Petitioner 12–13, and n. 11.[15] The question is whether Granite Rock may also bring a federal tort claim under § 301(a) for IBT's alleged interference with the CBA.[16] Brief for Petitioner ***310** 32. The Court of Appeals joined virtually all other Circuits in holding that it would not recognize such a claim under § 301(a).

15 Although the parties concede the general availability of such a claim against IBT, they dispute whether Granite Rock abandoned its agency or alter ego allegations in the course of this litigation. Compare Brief for Respondent IBT 10 with Reply Brief for Petitioner 12–13, n. 11. Granite Rock concedes that it has abandoned its claim that IBT acted as Local's undisclosed principal in orchestrating the ratification response to the July 2, 2004, CBA. See Plaintiff Granite Rock's Memorandum of Points and Authorities in Opposition to Defendant IBT's Motion to Dismiss in No. 5:04–cv–02767–JW (ND Cal., Aug. 7, 2006), Doc. 178, pp. 6, 8 (hereinafter Points and Authorities). But Granite Rock insists that it preserved its argument that Local served as IBT's agent or alter ego when Local denied ratification and engaged in unauthorized strike activity in July 2004. Nothing in the record before us unequivocally refutes this assertion. See App. 306, 311–315, 318; Points and Authorities 6, n. 3. Accordingly, nothing in this opinion forecloses the parties from litigating these claims on remand.

16 IBT argues that we should dismiss this question as improvidently granted because Granite Rock abandoned its tortious interference claim when it declared its intention to seek only contractual (as opposed to punitive) damages on the claim. See Brief for Respondent IBT 16. We reject this argument, which confuses Granite Rock's decision to forgo the pursuit of punitive damages on its claim with a decision to abandon the claim itself. The two are not synonymous, and IBT cites no authority for the proposition that Granite Rock must allege more than economic damages to state a claim on which relief could be granted.

Granite Rock asks us to reject this position as inconsistent with federal labor law's ****2864** goal of promoting industrial peace and economic stability through judicial enforcement of CBAs, as well as with our precedents holding that a federal common law of labor contracts is necessary to further this goal. See *id.*, at 31; see also, *e.g., Textile Workers v. Lincoln Mills of Ala.,* 353 U.S. 448, 451, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). Explaining that IBT's conduct in this case undermines the very core of the bargaining relationship federal labor laws exist to protect, Granite Rock argues that a federal common-law tort remedy for IBT's conduct is necessary because other potential avenues for deterring and redressing such conduct are either unavailable or insufficient. See Brief for Petitioner 32–33; Reply Brief for Petitioner 19–20. On the unavailable side of the ledger Granite Rock lists state-law tort claims, some of which this Court has held § 301(a) pre-empts, as well as administrative (unfair labor practices) claims, which Granite Rock says the National Labor Relations Board (NLRB) cannot entertain against international unions that (like IBT) are not part of the certified local bargaining unit they allegedly control. On the insufficient side of the ledger Granite Rock lists federal common-law breach-of-contract claims, which Granite Rock says are difficult to prove against non-CBA signatories like IBT because international unions structure their relationships with local unions in a way that makes agency or alter ego difficult to establish. Based on

these assessments, Granite Rock suggests that this case presents us with the ***311** choice of either recognizing the federal common-law tort claim Granite Rock seeks or sanctioning conduct inconsistent with federal labor statutes and our own precedents. See Brief for Petitioner 13–14.

We do not believe the choice is as stark as Granite Rock implies. It is of course true that we have construed "[s]ection 301 [to] authoriz[e] federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements." *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960) (citing *Lincoln Mills, supra*). But we have also emphasized that in developing this common law we "did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule." *Howard Johnson Co. v. Hotel Employees,* 417 U.S. 249, 255, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974). The balance federal statutes strike between employer and union relations in the collective-bargaining arena is carefully calibrated, see, *e.g., NLRB v. Drivers,* 362 U.S. 274, 289–290, 80 S.Ct. 706, 4 L.Ed.2d 710 (1960), and as the parties' briefs illustrate, creating a federal common-law tort cause of action would require a host of policy choices that could easily upset this balance, see Brief for Respondent IBT 42–44; Reply Brief for Petitioner 22–25. It is thus no surprise that virtually all Courts of Appeals have held that federal courts' authority to "create a federal common law *of collective bargaining agreements* under section 301" should be confined to "a common law of contracts, not a source of independent rights, let alone tort rights; for section 301 is ... a grant of jurisdiction only to enforce contracts." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1180 (C.A.7 1993). We see no reason for a different result here because it would be premature to recognize the federal common-law tort Granite Rock requests in this case even assuming that § 301(a) authorizes us to do so.

In reaching this conclusion, we emphasize that the question before us is a narrow one. It is not whether the conduct Granite Rock challenges is remediable, but whether we should augment the claims already available to Granite Rock ***312** by creating a new federal common-law cause of action ****2865** under § 301(a). That we decline to do so does not mean that we approve of IBT's alleged actions. Granite Rock describes a course of conduct that does indeed seem to strike at the heart of the collective-bargaining process federal labor laws were designed to protect. As the record in this case demonstrates, however, a new federal tort claim is not the only possible remedy for this conduct. Granite Rock's allegations have prompted favorable judgments not only from a federal jury, but also from the NLRB. In proceedings that predated those in which the District Court entered judgment for Granite Rock on the CBA's formation date, [17] the NLRB concluded that a "complete agreement" was reached on July 2, and that Local and IBT violated federal labor laws by attempting to delay the CBA's ratification pending execution of a separate agreement favorable to IBT. See *In re Teamsters Local 287,* 347 N.L.R.B. 339, 340–341, and n. 1 (2006) (applying the remedial order on the 2004 conduct to both Local and IBT on the grounds that IBT did not disaffiliate from the AFL–CIO until July 25, 2005).

17 Although the NLRB and federal jury reached different conclusions with respect to the CBA's ratification date, the discrepancy has little practical significance because the NLRB's remedial order against Local and IBT gives "retroactive effect to the terms of the [CBA of] July 2, 2004, as if ratified on that date." *In re Teamsters Local 287,*347 N.L.R.B. 339, 340 (2006).

These proceedings, and the proceedings that remain to be conducted on remand, buttress our conclusion that Granite Rock's case for a new federal common-law cause of action is based on assumptions about the adequacy of other avenues of relief that are at least questionable because they have not been fully tested in this case and thus their efficacy is simply not before us to evaluate. Notably, Granite Rock (like IBT and the Court of Appeals) assumes that federal common law provides the only possible basis for the type of tort claim it wishes to pursue. See Brief for Respondent IBT 33–34; ***313** Reply Brief for Petitioner 16. But Granite Rock did not litigate below, and thus does not present us with occasion to address, whether state law might provide a remedy. See, *e.g., Steelworkers v. Rawson,* 495 U.S. 362, 369–371, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990); *Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. Automobile Workers,* 523 U.S. 653, 656, 658, 118 S.Ct. 1626, 140 L.Ed.2d 863 (1998). Nor did Granite Rock fully explore the breach-of-contract and administrative causes of action it suggests are insufficient to remedy IBT's conduct. For example, far from establishing that an agency or alter ego claim against IBT would be unsuccessful, the record in this case suggests it might be

easier to prove than usual if, as the NLRB's decision observes, IBT and Local were affiliated in 2004 in a way relevant to Granite Rock's claims. See *In re Teamsters Local 287, supra,* at 340, n. 6. Similarly, neither party has established that the NLRB itself could not issue additional relief against IBT. IBT's *amicus* argues that the "overlap between Granite Rock's § 301 claim against the IBT and the NLRB General Counsel's unfair labor practice complaint against Local 287 brings into play the [National Labor Relations Act] rule that an international union commits an unfair labor practice by causing its affiliated local unions to 'impose extraneous non-bargaining unit considerations into the collective bargaining process.' " Brief for American Federation of Labor and Congress of Industrial Organizations 30–31 (quoting *Paperworkers Local 620,* 309 N.L.R.B. 44, 44 (1992)). The fact that at least one Court of Appeals has recognized the viability of such a claim, see ****2866** *Kobell v. United Paperworkers Int'l Union,* 965 F.2d 1401, 1407–1409 (C.A.6 1992), further persuades us that Granite Rock's arguments do not justify recognition of a new federal tort claim under § 301(a).

* * *

We reverse the Court of Appeals' judgment on the arbitrability of the parties' formation-date dispute, affirm its judgment dismissing Granite Rock's claims against IBT to the ***314** extent those claims depend on the creation of a new federal common-law tort cause of action under § 301(a), and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, with whom Justice STEVENS joins, concurring in part and dissenting in part.

I join Part III of the Court's opinion, which holds that petitioner Granite Rock's tortious interference claim against respondent International Brotherhood of Teamsters (IBT) is not cognizable under § 301(a) of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185(a). I respectfully dissent, however, from the Court's conclusion that the arbitration provision in the collective-bargaining agreement (CBA) between Granite Rock and IBT Local 287 does not cover the parties' dispute over whether Local 287 breached the CBA's no-strike clause. In my judgment, the parties clearly agreed in the CBA to have this dispute resolved by an arbitrator, not a court.

The legal principles that govern this case are simpler than the Court's exposition suggests. Arbitration, all agree, "is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit." *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). Before ordering parties to arbitrate, a court must therefore confirm (1) that the parties have an agreement to arbitrate and (2) that the agreement covers their dispute. See *ante,* at 2857 – 2858. In determining the scope of an arbitration agreement, "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' " *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quoting *Warrior,* 363 U.S., at 582–583, 80 S.Ct. 1347); ***315** see also *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 550, n. 4, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) ("[W]hen a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, national labor policy requires, within reason, that an interpretation that covers the asserted dispute ... be favored" (emphasis deleted; internal quotation marks omitted)). [1]

1 When the question is " '*who* (primarily) should decide arbitrability' " (as opposed to " '*whether* a particular merits-related dispute is arbitrable' "), "the law reverses the presumption." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944–945, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). In other words, "[u]nless the parties clearly and unmistakably provide otherwise," it is presumed that courts, not arbitrators, are responsible for resolving antecedent questions concerning the scope of an arbitration agreement. *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). As the majority correctly observes, *ante,* at 2856, n. 5, this case does not implicate the reversed presumption because both parties accept that a court, not an arbitrator, should resolve their current disagreement about whether their underlying dispute is arbitrable.

**2867 The application of these established precepts to the facts of this case strikes me as equally straightforward: It is undisputed that Granite Rock and Local 287 executed a CBA in December 2004. The parties made the CBA retroactively "effect[ive] from May 1, 2004," the day after the expiration of their prior collective-bargaining agreement. App. to Pet. for Cert. A–190. Among other things, the CBA prohibited strikes and lockouts. *Id.*, at A–181. The CBA authorized either party, in accordance with certain grievance procedures, to "refe[r] to arbitration" "[a]ll disputes arising under this agreement," except for three specified "classes of disputes" not implicated here. *Id.*, at A–176 to A–179.

Granite Rock claims that Local 287 breached the CBA's no-strike clause by engaging in a work stoppage in July 2004. Local 287 contests this claim. Specifically, it contends that it had no duty to abide by the no-strike clause in July because it did not vote to ratify the CBA until August. As I see it, the parties' disagreement as to whether the no-strike *316 clause proscribed the July work stoppage is plainly a "disput[e] arising under" the CBA and is therefore subject to arbitration as Local 287 demands. Indeed, the parties' no-strike dispute is indistinguishable from myriad other disputes that an employer and union might have concerning the interpretation and application of the substantive provisions of a collective-bargaining agreement. These are precisely the sorts of controversies that labor arbitrators are called upon to resolve every day.

The majority seems to agree that the CBA's arbitration provision generally encompasses disputes between Granite Rock and Local 287 regarding the parties' compliance with the terms of the CBA, including the no-strike clause. The majority contends, however, that Local 287's "formation-date defense" raises a preliminary question of contract formation that must be resolved by a court rather than an arbitrator. *Ante,* at 2860 – 2861. The majority's reasoning appears to be the following: If Local 287 did not ratify the CBA until August, then there is "no valid basis" for applying the CBA's arbitration provision to events that occurred in July. *Ibid.*

The majority's position is flatly inconsistent with the language of the CBA. The parties expressly chose to make the agreement effective from May 1, 2004. As a result, "the date on which [the] agreement was ratified" does not, as the majority contends, determine whether the parties' dispute about the permissibility of the July work stoppage falls within the scope of the CBA's arbitration provision. *Ante,* at 2860. When it comes to answering the arbitrability question, it is entirely irrelevant whether Local 287 ratified the CBA in August (as it contends) or in July (as Granite Rock contends). In either case, the parties' dispute—which postdates May 1—clearly "aris[es] under" the CBA, which is all the arbitration provision requires to make a dispute referable to an arbitrator. Cf. *Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB,* 501 U.S. 190, 201, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991) (recognizing that "a collective-bargaining agreement *317 might be drafted so as to eliminate any hiatus between expiration of the old and execution of the new agreement"). [2]

[2] Notably, at the time they executed the CBA in December 2004, the parties were well aware that they disagreed about the legitimacy of the July work stoppage. Yet they made the CBA retroactive to May and declined to carve out their no-strike dispute from the arbitration provision, despite expressly excluding three other classes of disputes from arbitration. Cf. *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 584–585, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) ("In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail").

**2868 Given the CBA's express retroactivity, the majority errs in treating Local 287's ratification-date defense as a "formation dispute" subject to judicial resolution. *Ante,* at 2860. The defense simply goes to the merits of Granite Rock's claim: Local 287 maintains that the no-strike clause should not be construed to apply to the July work stoppage because it had not ratified the CBA at the time of that action. Cf. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (distinguishing a disagreement that "makes up the *merits* of the dispute" from a disagreement "about the *arbitrability* of the dispute"). Accordingly, the defense is necessarily a matter for the arbitrator, not the court. See *AT & T,* 475 U.S., at 651, 106 S.Ct. 1415 ("[I]t is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement"). Indeed, this Court has been emphatic that "courts ... have no business weighing the merits of the grievance." *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 568, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960). "When the judiciary undertakes to determine the merits of a grievance under

the guise of interpreting the [arbitration provisions] of collective bargaining agreements, it usurps a function ... entrusted to the arbitration tribunal." *Id.*, at 569, 80 S.Ct. 1343; see also *AT & T,* 475 U.S., at 649, 106 S.Ct. 1415 ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims"); *Warrior,* 363 U.S., at 582, 585, 80 S.Ct. 1347 ("[T]he judicial inquiry under [LMRA] § 301 ***318** must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance"; "the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement").

Attempting to sidestep this analysis, the majority declares that Local 287 waived its retroactivity argument by failing in the courts below to challenge Granite Rock's consistent characterization of the parties' dispute as one of contract formation. See *ante,* at 2861 – 2862. As a result of Local 287's omission, the District Court and Court of Appeals proceeded under the understanding that this case presented a formation question. It was not until its merits brief in this Court that Local 287 attempted to correct this mistaken premise by pointing to the parties' execution of the December 2004 CBA with its May 2004 effective date. This Court's Rules "admonis[h] [counsel] that they have an obligation to the Court to point out in the brief in opposition [to certiorari], and not later, any perceived misstatement made in the petition [for certiorari]"; nonjurisdictional arguments not raised at that time "may be deemed waived." This Court's Rule 15.2. Although it is regrettable and inexcusable that Local 287 did not present its argument earlier, I do not see it as one we can ignore. The question presented in this case presupposes that "it is disputed whether any binding contract exists." Brief for Petitioner i. Because it is instead undisputed that the parties executed a binding contract in December 2004 that was effective as of May 2004, we can scarcely pretend that the parties have a formation dispute. Consideration of this fact is "a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.' " *Ohio v. Robinette,* 519 U.S. 33, 38, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (quoting ****2869** *Vance v. Terrazas,* 444 U.S. 252, 258, n. 5, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980); this Court's Rule 14.1(a)). Indeed, by declining to consider the plain terms of the parties' agreement, the majority offers little more than "an opinion advising what the law would be upon ***319** a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 241, 57 S.Ct. 461, 81 L.Ed. 617 (1937). In view of the CBA's effective date, I would hold that the parties agreed to arbitrate the no-strike dispute, including Local 287's ratification-date defense, and I would affirm the judgment below on this alternative ground. Cf. *Dandridge v. Williams,* 397 U.S. 471, 475, n. 6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of [the] judgment, whether or not that ground was relied upon or even considered by the trial court").

All Citations

561 U.S. 287, 130 S.Ct. 2847, 177 L.Ed.2d 567, 188 L.R.R.M. (BNA) 2897, 78 USLW 4712, 159 Lab.Cas. P 10,261, 10 Cal. Daily Op. Serv. 7929, 2010 Daily Journal D.A.R. 9651, 22 Fla. L. Weekly Fed. S 593

2016 WL 6123820
Supreme Court of Louisiana.

James DUHON
v.
ACTIVELAF, LLC, d/b/a Skyzone Lafayette and Underwriters at Lloyds, London

No. 2016-CC-0818
|
10/19/2016

Synopsis

Background: Injured indoor trampoline park patron sued park for negligence. The park filed several exceptions, including an exception of prematurity based on mandatory arbitration clause in electronic Participant Agreement, Release and Assumption of Risk document. The 19th Judicial District Court, Parish of E. Baton Rouge, No. 641,482, refused to enforce arbitration agreement and overruled park's exception of prematurity. Park appealed. The Court of Appeal reversed. Patron appealed. Certiorari was granted.

[Holding:] The Supreme Court, Johnson, C.J., held that arbitration clause was adhesionary and not enforceable.

Reversed and remanded.

Weimer, J., dissented and filed opinion.

Guidry, J., dissented and assigned reasons.

Clark, J., concurred and filed statement.

Hughes, concurred in result and filed statement.

Chichton, J., concurred and assigned reasons.

West Headnotes (7)

[1] Alternative Dispute Resolution
Arbitration favored;public policy

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk113 Arbitration favored;public policy

Louisiana and federal law explicitly favor the enforcement of arbitration clauses in written contracts. (Per Johnson, C.J., with one justice joining and three justices concurring.) La. Rev. Stat. Ann. § 9:4201.

Cases that cite this headnote

[2] Alternative Dispute Resolution
Preemption

Commerce
Arbitration

States
Particular cases, preemption or supersession

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk117 Preemption
83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 Arbitration
360 States
360I Political Status and Relations
360I(B) Federal Supremacy;Preemption
360k18.15 Particular cases, preemption or supersession

To the extent that federal and state arbitration law differ, the Federal Arbitration Act (FAA) preempts state law as to any written arbitration agreement in a contract involving interstate commerce. (Per Johnson, C.J., with one justice joining and three justices concurring.) 9 U.S.C. § 1, et seq.

2 Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Construction

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 In general

Ordinary state-law principles that govern the formation of contracts are applied when deciding whether the parties agreed to arbitration. (Per Johnson, C.J., with one justice joining and three justices concurring.)

Cases that cite this headnote

[4] **Alternative Dispute Resolution**
Constitutional and statutory provisions and rules of court

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 Constitutional and statutory provisions and rules of court

The savings clause in the Federal Arbitration Act (FAA), which makes arbitration agreements valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contact, does not permit courts to invalidate an arbitration agreement under a state law applicable only to arbitration provisions. 9 U.S.C.A. § 2.

7 Cases that cite this headnote

[5] **Public Amusement and Entertainment**
Pre-Injury Releases

315T Public Amusement and Entertainment
315TIV Personal Injuries
315TIV(B) Defenses, Mitigating Circumstances and Statutory Limitations of Liability
315Tk129 Pre-Injury Releases
315Tk130 In general

Supreme Court would interpret and analyze terms of indoor trampoline park's electronic Participant Agreement, Release and Assumption of Risk document using the same rules that it would apply to oral and written contracts. (Per Johnson, C.J., with one justice joining and three justices concurring.)

Cases that cite this headnote

[6] **Alternative Dispute Resolution**
Unconscionability

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) Unconscionability

Arbitration clause in indoor trampoline park's electronic Participant Agreement, Release and Assumption of Risk document was adhesionary and not enforceable; lack of distinguishing features and specific placement of the arbitration clause in the agreement served to conceal the arbitration language from park patrons, thereby nullifying a patron's consent, provision lacked mutuality as it only required patrons to submit their claims to arbitration, and punitive provision compelled patrons to pay park liquidated damages of $5,000 within sixty days should a patron file suit, with legal interest added at 12% per year. (Per Johnson, C.J., with one justice joining and three justices concurring.) 9 U.S.C.A. § 2; La. Rev. Stat. Ann. § 9:4201.

5 Cases that cite this headnote

[7] **Alternative Dispute Resolution**
Evidence

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 Evidence

The party seeking to enforce an arbitration provision has the burden of showing the existence of a valid contract to arbitrate. (Per Johnson, C.J., with one justice joining and three justices concurring.)

Cases that cite this headnote

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

Opinion

JOHNSON, CHIEF JUSTICE

***1** ****1** Patrons of Sky Zone Lafayette, an indoor trampoline park, are required to complete a "Participant Agreement, Release and Assumption of Risk" document ("Agreement") prior to entering the facility. The Agreement contains a clause waiving the participant's right to trial and compelling arbitration. Plaintiff, James Duhon, was a patron at Sky Zone and was injured in the course of participating in the park's activities. After Mr. Duhon filed suit seeking damages, Sky Zone filed an exception of prematurity seeking to compel arbitration pursuant to the Agreement. The district court overruled Sky Zone's exception, but the court of appeal reversed, finding the arbitration provision should be enforced.

For the following reasons, we reverse the ruling of the court of appeal, holding the arbitration clause in the Sky Zone agreement is adhesionary and therefore unenforceable.

FACTS AND PROCEDURAL HISTORY

On April 19, 2015, James Duhon, accompanied by three minors, went to Sky Zone in Lafayette. Upon entering the facility, Mr. Duhon was directed by Sky Zone staff to a computer screen to check himself and the minors into the facility. Check-in ****2** required all participants to complete a Participation Agreement which requested names and dates of birth for all participants, required participants to check three boxes next to certain terms of the Agreement, and required participants to digitally sign the Agreement.

The Agreement provided that in consideration for gaining access to Sky Zone Lafayette and engaging in the services, patrons agreed:

> ☐ I acknowledge that my participation in [Sky Zone] trampoline games or activities entails known and unanticipated risks that could result in physical or emotional injury including, but not limited to broken bones, sprained or torn ligaments, paralysis, death, or other bodily injury or property damage to myself my children, or to third parties. I understand that such risks simply cannot be eliminated without jeopardizing the essential qualities of the activity. I expressly agree and promise to accept and assume all of the risks existing in this activity. My and/or my children's participation in this activity is purely voluntary and I elect to participate, or allow my children to participate in spite of the risks. If I and/or my children are injured, I acknowledge that I or my children may require medical assistance, which I acknowledge will be at my own expense or the expense of my personal insurers. I hereby represent and affirm that I have adequate and appropriate insurance to provide coverage for such medical expense.
>
> ☐ In consideration for allowing me and the minor child(ren) identified herein to participate in the [Sky Zone] activities and use the [Sky Zone] facility, I expressly and voluntarily agree to forever release, acquit, indemnify and discharge [Sky Zone] and agree to hold [Sky Zone] harmless on behalf of myself, my spouse, my children, my parents, my guardians, and my heirs, assigns, personal representative and estate, and any and all other persons and entities who could in any way represent me, or the minor children identified herein or act on our respective halves, from any and all actions or omissions, cause and causes of action, suits, debts, damages, judgments, costs, including, but not limited to attorney's fees, and claims and demands whatsoever, in law or in equity, for any personal injury, death, or property damages that I and/or the minor children's use of [Sky Zone] activities, [Sky Zone] premises or at offsite and camp activities related to [Sky Zone]. This waiver is intended to be a complete release of any and all responsibility or duties owed by [Sky Zone] as indemnitees for personal injuries, death and/or property loss/damage sustained by myself or any minor children identified herein while on the [Sky Zone] premises, or with respect to [Sky Zone] activities, whether using [Sky Zone] equipment or not, even if such injury or damage results from [Sky Zone] negligence, [Sky Zone] employee ****3** negligence, improper supervision, improper maintenance of [Sky Zone] equipment or premises or negligence by other [Sky Zone] guests.

***2**

☐ I certify that I and/or my child(ren) are physically able to participate in all activities at the Location without aid or assistance. I further certify that I am willing to assume the risk of any medical or physical condition that I and/or my child(ren) may have. I acknowledge that I have read the rules, (the "Sky Zone Rules") governing my and/or my child(ren)'s participation in any activities at the Location. I certify that I have explained the [Sky Zone] Rules to the child(ren) identified herein. I understand that the [Sky Zone] Rules have been implemented for the safety of all guests at the Location. I agree that if any portion of this Agreement is found to be void and unenforceable, the remaining portions shall remain in full force and effect. If there are any disputes regarding this agreement, I on behalf of myself and/or my child(ren) hereby waive any right I and/or my child(ren) may have to a trial and agree that such dispute shall be brought within one year of the date of this Agreement and will be determined by binding arbitration before one arbitrator to be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. I further agree that the arbitration will take place solely in the state of Louisiana and that the substantive law of Louisiana shall apply. If, despite the representations made in this agreement, I or anyone on behalf of myself and/or my child(ren) file or otherwise initiate a lawsuit against [Sky Zone], in addition to my agreement to defend and indemnify [Sky Zone], I agree to pay within 60 days liquidated damages in the amount of $5,000 to [Sky Zone]. Should I fail to pay this liquidated damages amount within the 60 day time period provided by this Agreement, I further agree to pay interest on the $5,000 amount calculated at 12% per annum.

I further grant [Sky Zone] the right, without reservation or limitation, to videotape, and/or record me and/or my children on closed circuit television.

I further grant [Sky Zone] the right, without reservation or limitation, to photograph, videotape, and/or record me and/or my children and to use my or my children's name, face, likeness, voice and appearance in connection with exhibitions, publicity, advertising and promotional materials.

I would like to receive free email promotions and discounts to the email address provided below. I may unsubscribe from emails from Sky Zone at any time.

By signing this document, I acknowledge that if anyone is hurt or property is damaged during my participation in this activity, I may be found by a court of law to have waived my right to maintain a lawsuit ****4** against [Sky Zone] on the basis of any claim from which I have released them herein. I have had sufficient opportunity to read this entire document. I understand this Agreement and I voluntarily agree to be bound by its terms.

I further certify that I am the parent or legal guardian of the children listed above on this Agreement or that I have been granted power of attorney to sign this Agreement on behalf of the parent or legal guardian of the children listed above.

Mr. Duhon electronically completed the Agreement on behalf of himself and the minors by checking the three boxes provided in the agreement, furnishing the relevant personal identifying information, and clicking on an "accept" button. Mr. Duhon and the minors then entered the facility.

Mr. Duhon asserts he was injured at the facility due to Sky Zone's negligence. On August 12, 2015, Mr. Duhon filed suit against Activelaf, L.L.C., d/b/a Sky Zone Lafayette and its insurer ("Sky Zone"). In response, Sky Zone filed several exceptions, including an exception of prematurity. Sky Zone alleged that the Agreement contained a mandatory arbitration clause, thereby rendering Mr. Duhon's suit premature. Mr. Duhon asserted he did not knowingly consent to arbitration, and argued the Agreement was adhesionary and ambiguous.

Following a hearing, the district court determined there was a lack of mutuality in the Agreement relative to the arbitration clause because only Mr. Duhon was bound to arbitrate claims. Thus, relying on this court's decision in *Aguillard Auction Management Corp.*, 04–2804 (La. 6/29/05), 908 So.2d 1 and the Third Circuit's opinion in *Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 07–146 (La.App. 3 Cir. 12/12/07), 971 So.2d 1257, the district court refused to enforce the arbitration agreement and overruled Sky Zone's exception of prematurity.

The court of appeal granted Sky Zone's writ and reversed the district court's ruling:

> There is a strong presumption favoring the enforceability of arbitration **5 clauses. The weight of this presumption is heavy and arbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue. *Aguillard v. Auction Management Corp.*, 2004-2804 (La. 6/29/05), 908 So.2d 1. We find that plaintiff failed to establish that this arbitration provision is adhesionary, and accordingly, the arbitration provision should be enforced.

*3 Judge Theriot dissented without reasons, stating he would deny the writ application. *Duhon v. ActiveLaf, LLC*, 16–0167 (La. App. 1 Cir. 4/5/16) (unpublished).

On Mr. Duhon's application, we granted certiorari to review the correctness of the court of appeal's ruling. *Duhon v. ActiveLaf, LLC*, 16–0818 (La. 6/17/16), 192 So.3d 762.

DISCUSSION

This case involves the legal questions of whether the court of appeal erred in its "contract of adhesion" analysis of the arbitration clause in the Agreement, and whether the arbitration clause is unenforceable on general contract principles of consent or adhesion. Thus, we review the matter *de novo*. *See Aguillard*, 908 So.2d at 3; *Prasad v. Bullard*, 10–291 (La.App. 5 Cir. 10/12/10), 51 So.3d 35, 39; *Horseshoe Entertainment v. Lepinski*, 40,753 (La.App. 2 Cir. 3/8/06), 923 So.2d 929, 934, *writ denied*, 06–792 (La. 6/2/06), 929 So.2d 1259.

[1] [2] Louisiana and federal law explicitly favor the enforcement of arbitration clauses in written contracts. *Aguillard*, 908 So.2d at 7. Louisiana Binding Arbitration Law ("LBAL") is set forth in La. R.S. 9:4201 *et seq.* and expresses a strong legislative policy favoring arbitration. La. R.S. 9:4201 provides:

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

As this court recognized in *Aguillard*, "[s]uch favorable treatment echos the Federal **6 Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*" 908 So.2d at 7. We noted the LBAL is virtually identical to the FAA, and determinations regarding the viability and scope of arbitration clauses are the same under either law, thus federal jurisprudence interpreting the FAA may be considered in construing the LBAL. *Id.* at 18. Further, to the extent that federal and state law differ, the FAA preempts state law as to any written arbitration agreement in a contract involving interstate commerce. *Hodges v. Reasonover*, 12–0043 (La. 7/2/12), 103 So.3d 1069, 1072; *FIA Card Services, N.A. v. Weaver*, 10–1372 (La. 3/15/11), 62 So.3d 709, 712; *Collins v. Prudential Ins. Co. of America*, 99–1423 (La. 1/19/00), 752 So.2d 825, 827.

[3] [4] The FAA makes arbitration agreements "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contact*." 9 U.S.C. § 2 (emphasis added). The United States Supreme Court has explained that this provision reflects both a "liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 1745, 179 L.Ed.2d 742 (2011) (citing *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) and *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 67, 130 S.Ct. 2772, 2776, 177 L.Ed.2d

403 (2010)). The Supreme Court has instructed that in line with these principles, courts must place arbitration agreements on an equal footing with other contracts. *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)). Despite this policy favoring enforcement of arbitration agreements, the Supreme Court has also recognized that, under the savings clause in § 2, general state contract principles still apply to assess whether those agreements to arbitrate are valid and enforceable, just as they would to any other contract dispute arising under state law. ****7** *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686–87, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902 (1996). Accordingly, ordinary state-law principles that govern the formation of contracts are applied when deciding whether the parties agreed to arbitration. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924, 131 L.Ed. 2d 985 (1995). Importantly, the savings clause in § 2 does not permit courts to invalidate an arbitration agreement under a state law applicable *only* to arbitration provisions. *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740; *Aguillard*, 908 So. 2d at 8.

***4** **[5]** With these principles in mind, we consider whether the arbitration clause in the Sky Zone Agreement should be invalided under Louisiana law. As an initial matter, we note the electronic nature of the Agreement in this case is of no legal consequence and does not fundamentally change the principles of contract. Louisiana law gives legal effect to both electronic contracts and signatures. *See* La. R.S. 9:2607. We interpret and analyze the terms of the Agreement using the same rules that we would apply to oral and written contracts.

Aguillard is the seminal case from this court addressing the validity of an arbitration agreement in a standard form contract. In *Aguillard*, the winning bidder at a real estate auction brought suit to enforce the auction sales agreement. This court, pursuant to its authority under La. R.S. 9:4201 and 9 U.S.C. § 2, applied a "contract of adhesion" analysis to determine the enforceability and validity of an arbitration agreement in the auction contract. In discussing the "contract of adhesion" doctrine, we explained: "Broadly defined, a contract of adhesion is a standard contract, usually in printed form, prepared by a party of superior bargaining power for adherence or rejection of the weaker party. Often in small print, these contracts sometimes raise a question as to whether or not the weaker party actually consented to the terms." 908 So. 2d at 10. This court further stated that "although a contract of adhesion is a contract executed in a standard form in the vast majority of instances, not every ****8** contract in standard form may be regarded as a contract of adhesion. Therefore, we are not willing to declare all standard form contracts adhesionary; rather, we find standard form serves merely as a possible indicator of adhesion." *Id.* (Internal citations removed). We made clear that the "real issue in a contract of adhesion analysis is not the standard form of the contract, but rather whether a party truly consented to all the printed terms. Thus, the issue is one of consent." *Id.* (Internal citations removed). The court explained:

> Consent is called into question by the standard form, small print, and most especially the disadvantageous position of the accepting party, which is further emphasized by the potentially unequal bargaining positions of the parties. An unequal bargaining position is evident when the contract unduly burdens one party in comparison to the burdens imposed upon the drafting party and the advantages allowed to that party. Once consent is called into question, the party seeking to invalidate the contract as adhesionary must then demonstrate the non-drafting party either did not consent to the terms in dispute or his consent was vitiated by error, which in turn, renders the contract or provision unenforceable.
>
> In summation, a contract is one of adhesion when either its form, print, or unequal terms call into question the consent of the non-drafting party and it is demonstrated that the contract is unenforceable, due to lack of consent or error, which vitiates consent. Accordingly, even if a contract is standard in form and printed in small font, if it does not call into question the non-drafting party's consent and if it is not demonstrated that the non-drafting party did not consent or his consent is vitiated by error, the contract is not a contract of adhesion.

Id. at 10–11. Thus, the question we consider is whether Mr. Duhon truly consented to the arbitration provision in the Agreement.

[6] In concluding the arbitration provision in *Aguillard* was *not* adhesionary, we noted (1) the arbitration provision was contained in a short, two-page document

and was contained in a single sentence paragraph; (2) the arbitration provision was not concealed; (3) the contract did not lack mutuality because defendants did not reserve their right to litigate issues arising from the contract; and (4) the parties did not have a significant difference in bargaining power because a real estate auction is not a ****9** necessary transaction that plaintiff was compelled to enter. *Id.* Thus, while not declaring a definitive test, this court effectively established a framework for examining the validity of an arbitration clause within a standard form contract by generally describing the characteristics of an unenforceable adhesionary agreement. Finding our analysis in *Aguillard* instructive, we consider the following factors to determine the enforceability of the arbitration clause in the Sky Zone Agreement: (1) the physical characteristics of the arbitration clause, (2) the distinguishing features of the arbitration clause, (3) the mutuality of the arbitration clause, and (4) the relative bargaining strength of the parties. After our review of the Agreement in light of the above factors, we hold the arbitration clause is adhesionary and not enforceable because of its placement in the Agreement and its lack of mutuality.

***5** Examining the physical characteristics of the arbitration clause, we observe the arbitration language is consistent in size and font with the other provisions in the Agreement. However, the lack of distinguishing features and the specific placement of the arbitration clause serve to conceal the arbitration language from Sky Zone patrons. The Agreement is structured with check boxes next to the first three paragraphs, followed by five additional paragraphs without corresponding check boxes. The first check box is placed next to a single, six-sentence paragraph generally discussing participants' risks of injuries and assumption of those risks. The second check box is placed next to a single paragraph containing two long sentences purporting to release Sky Zone from any liability. The third check box is placed next to one long paragraph discussing multiple topics. Specifically, the arbitration language is located starting in the eleventh line of this third paragraph, following provisions regarding patrons' physical ability to participate in the activities, assumption of the risks, certification that Sky Zone's rules have been explained to any children, and expressing agreement to follow those rules.

****10** In *Aguillard*, we noted "the arbitration provision, although not distinguished, was not concealed in any way, but rather was contained in a single sentence paragraph separated from the preceding and following paragraphs by double spacing." 908 So. 2d at 16. Sky Zone argues the paragraph containing the arbitration clause was sufficiently distinguished and brought to patrons' attention through the use of the check box feature. We disagree. Although patrons are required to check a box adjacent to the top of the third paragraph, significantly no check box was placed next to the arbitration language. In contrast, the other two check boxes in the Agreement were placed next to paragraphs limited to one subject matter. The Agreement also contains five additional paragraphs following the third paragraph that do not include corresponding check boxes. Each of these are short one-topic paragraphs addressing such items as Sky Zone's right to videotape and record patrons and to use recordings for promotional materials. Thus, looking at the Agreement as a whole, the arbitration language appears to be the only specific provision not relegated to a separate paragraph or set apart in some explicit way. Here, the two-sentence provision mandating arbitration is camouflaged within the confines of an eleven sentence paragraph, nine of which do not discuss arbitration. The effect of the placement of the arbitration language is to cloak it within a blanket of boilerplate language regarding rules and risks of participating in the Sky Zone activities. Thus, although it is undisputed that Mr. Duhon electronically signed the Agreement, purportedly demonstrating an acceptance of its terms, under Louisiana contract law, we find Mr. Duhon did not truly consent to the arbitration provision.

Additionally, the lack of mutuality in the arbitration clause fortifies our finding that it is adhesionary. The arbitration provision requires only Sky Zone patrons to submit their claims to arbitration. The entire contract, including the arbitration clause, repeatedly includes "I acknowledge" and "I agree" language, with the "I" referencing ****11** the "applicant"—here, Mr. Duhon. Specifically, the Agreement provides if there are any disputes regarding this agreement "I ... hereby waive any right ... to a trial and agree that such dispute shall be ... determined by binding arbitration ...." Although Sky Zone does not expressly reserve itself the right to pursue litigation, nowhere in the Agreement are "the parties" or Sky Zone particularly bound to arbitration. This is in stark contrast to the arbitration clause in *Aguillard* which clearly applied to both parties by providing: "Any controversy or claim arising from or relating to this agreement or any breach of such agreement shall be settled

by arbitration administered by the American Arbitration Association under is [sic] rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof." 908 So. 2d at 4. Thus, in *Aguillard*, we found the arbitration clause did not lack sufficient mutuality to invalidate the clause as adhesionary because the arbitration clause severely limited both the defendants' and the plaintiff's right to litigate, and the defendants did not reserve their right to litigate in the document. *Id.* at 16. Even more troublesome in this case is the punitive provision compelling patrons to pay Sky Zone liquidated damages of $5,000 within sixty days should the patron file suit, with legal interest added at 12% per year. Sky Zone has no mutual obligation in the Agreement.

***6** **[7]** The party seeking to enforce an arbitration provision has the burden of showing the existence of a valid contract to arbitrate. *FIA Card Services*, 62 So. 3d at 719. Sky Zone has failed to meet this burden. Considering the lack of mutuality together with the obscure placement of the arbitration language in the Agreement, and in comparison to the contract in *Aguillard*, we are compelled to find the arbitration clause in the Sky Zone Agreement is adhesionary and unenforceable.

In finding this arbitration clause invalid, we have carefully considered the Supreme Court's admonition that, under the doctrine of preemption, state courts ****12** cannot adopt defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *See*, *e.g.*, *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740; *Casarotto*, 517 U.S. at 687, 116 S.Ct. 1652. Nor can we apply state law rules that stand as an obstacle to the accomplishment of the FAA's objectives. *Concepcion*, 563 U.S. at 343, 131 S.Ct. 1740. We are mindful that setting forth a legal requirement relative to a particular form or method of distinguishing or highlighting arbitration clauses, or requiring term-for-term mutuality in an arbitration clause could risk running afoul of the FAA. However, the Supreme Court has made it clear that state courts may apply standard state law contract defenses to arbitration agreements. *Id.* at 339, 131 S.Ct. 1740. Our application of Louisiana contract law to invalidate the arbitration provision in the instant case is consistent with § 2 of the FAA, and we find no conflict between our holding today and Supreme Court decisions discussing preemption.

As explained earlier, consideration of enforceability of contracts of adhesion is an issue of consent, and determining whether a party truly consented to the contract terms. Consideration of consent is not limited to arbitration clauses; we consider the issue of consent in any contract. Lack of consent is a generally applicable contract defense. *See* La. C.C. art. 1927. The factors discussed in *Aguillard* simply provided a template for considering consent to an arbitration clause contained in a standard contract. *Aguillard* did not create a *per se* rule that any degree of non-mutuality in an arbitration agreement renders it unenforceable, nor did *Aguillard* prescribe a definitive rule that arbitration agreements must be delineated a particular way to be enforceable. Considering the *Aguillard* analysis in its entirety, it is clear we viewed the arbitration provision in the context of the overall contract and the surrounding circumstances, and our determination was based on weighing several factors. Were we not to consider factors relative to consent when examining the validity of an arbitration agreement, we would be operating in contravention to the mandate of the Supreme Court by ****13** treating arbitration agreements differently from other contracts. Thus, we find our application of Louisiana contract law to invalidate the arbitration provision in this case is consistent with the savings clauses in § 2 of the FAA and La. R.S. 9:4201.

CONCLUSION

The determination of whether an arbitration clause in a standard form contract is adhesionary is necessarily made on a case by case basis. Based on the facts of this case, the concealment of the arbitration clause and the lack of mutuality compels us to find the arbitration clause in the Sky Zone Agreement is adhesionary and unenforceable. Accordingly, we find the court of appeal erred in reversing the district court's ruling on Sky Zone's exception of prematurity. [1] Therefore, the ruling of the court of appeal is reversed, and the ruling of the district court is reinstated.

1 Because we hold the arbitration clause is adhesionary and unenforceable based on consideration of the factors set forth in *Aguillard*, we pretermit discussion of Mr. Duhon's additional arguments relative to ambiguity of the Agreement or whether the scope of the arbitration clause covers personal injury.

DECREE

***7 REVERSED AND REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.**

WEIMER, J., dissenting.

****1** I agree with the majority's assessment that the factors outlined in **Aguillard v. Auction Management Corp.**, 04–2804 (La. 6/29/05), 908 So.2d 1, are an appropriate starting point for analyzing the issue presented in this matter.[1] See **Duhon v. ActiveLaf, LLC**, 16–0818, slip op. at 7 (La. 10/——/16). However, I respectfully disagree with the majority's conclusion that analysis of the Sky Zone Agreement using **Aguillard**'s four-factor "framework" supports a finding that the arbitration clause is adhesionary and not enforceable. To the contrary, I find the arbitration clause to be valid and enforceable. I also find that analysis of the clause using **Aguillard**'s factors, viewed in light of the strong and, as **Aguillard** describes it, "heavy" presumption in favor of arbitration, dictates that finding of enforceability. **Aguillard**, 04–2804 at 25, 908 So.2d at 18.

1 While I dissented in **Aguillard**, I did so solely on grounds that there was a threshold legal question that I believed needed to be resolved before reaching the issue of the enforceability of the arbitration clause: whether the arbitration clause at issue even applied in light of the fact that the Auction Agreement for the Purchase and Sale of Real Estate had been completed. **Aguillard**, 04–2804 at 1, 908 So.2d at 20–21 (Weimer, J., dissenting.).

As the majority recognizes, a contract of adhesion is broadly defined as "a standard contract, usually in printed form, [often in small print,] prepared by a party ****2** *of superior bargaining power* for adherence or rejection of the weaker party." **Duhon**, 16-0818, slip op. at 7-8 (quoting **Aguillard**, 04–2804 at 9, 908 So.2d at 8–9.) (Emphasis added.) Pursuant to this definition, a predicate factor to consider in determining whether a contract is adhesionary is the existence of unequal bargaining power. Indeed, this is one of the four factors delineated in the **Aguillard** analysis. Yet, the majority opinion does not mention, much less weigh, this factor in conducting its analysis—this, despite the fact that there must be unequal bargaining power for the contract to meet the definitional hurdle of a contract of adhesion in the first instance.

In this case, it is clear that, as in **Aguillard**, there was not "such a difference in bargaining positions between the parties so as to justify the application of the principle of contract of adhesion to the arbitration clause." **Aguillard**, 04–2804 at 22, 908 So.2d at 16–17. As **Aguillard** explained in defining a contract of adhesion, "[o]wing to the necessities of modern life a particular kind of contract has been developed where one of the parties is not free to bargain." ***Id.***, 04–2804 at 10, 908 So.2d at 9 (quoting Saul Litvinoff, *Consent Revisited: Offer, Acceptance, Option, Right of First Refusal, and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 74 La.L.Rev. 699, 757–59 (1986–1987)). Such a lack of bargaining power exists where "[t]he party in the weaker position is left *with no other choice* than to adhere to the terms proposed by the other." ***Id.*** (Emphasis added.) Typical examples of such contracts include those entered into with "airlines, public utilities, railroad or insurance companies." ***Id.***

8** In **Aguillard**, this court recognized that the relative bargaining positions of the real estate auctioneer and the individual auction participant involved in that case were not so unequal as to justify invalidating the arbitration clause on grounds of adhesion, ****3** reasoning that, although the participant was required to sign the agreement containing the arbitration clause in order to participate in the auction, "the underlying transaction, the real estate auction, [was] not ... such a necessary transaction" that the participant "was compelled to enter it." ***Id., 04–2804 at 22–23, 908 So.2d at 16-17. Indeed, the participant could have avoided arbitration by not signing the agreement, not participating in the auction, and simply walking away. See ***id.*** 04–2804 at 22, 908 So.2d at 17. Under such circumstances, the court found "nothing sufficient to establish the [auctioneers] were in such a superior bargaining position as to render the [auction participant] a far weaker party or the contract adhesionary." ***Id.*** 04–2804 at 23, 908 So.2d at 17.

The rationale of the court in **Aguillard** applies with equal force to the Sky Zone Agreement at issue in this case. Here, the Agreement concerns not a "necessity of modern life," but a purely voluntary recreational activity. The plaintiff was not compelled—physically, economically or otherwise—to visit the trampoline park,

jump on its trampolines, or sign the Agreement containing the arbitration clause. Jumping on a trampoline is simply not a practical necessity of modern living like water, electricity, or even airline flight. Like the auction participant in **Aguillard**, the plaintiff, here, retained the ultimate bargaining chip in this situation: he could have refused to sign Sky Zone's Agreement, walked away, and pursued an alternative form of recreational activity. Given these circumstances, there is simply no evidence to establish that Sky Zone was in such a superior bargaining position as to render the plaintiff a far weaker party or the contract adhesionary.

Further, and also contrary to the majority, I find nothing in the Sky Zone Agreement, itself, that would call into question the validity of the plaintiff's consent to the terms of the Agreement. This determination is based on my analysis of the ****4** three factors that are addressed in the majority's **Aguillard** analysis—(1) the physical characteristics of the arbitration clause; (2) the distinguishing features of that clause; and (3) the mutuality of the clause—and my differing conclusions as to each.

In addressing the first **Aguillard** factor—the physical characteristics of the arbitration clause—the majority acknowledges that "the arbitration language is consistent in size and font with the other provisions in Agreement." **Duhon**, slip op. at 9. In fact, the clause is not in small print or otherwise unreadable, but is just as legible as every other word in the Agreement. The majority apparently concedes, therefore, and I agree, that the physical characteristics of the arbitration clause weigh in favor of finding the clause enforceable.

In addressing the second of the **Aguillard** factors—the distinguishing features of the clause—the majority, in my view, falls into error. It downplays the very feature that distinguishes the arbitration clause and calls its attention to the participant: the box located next to the paragraph in which the clause appears, *a box which must be affirmatively checked before the Agreement can be completed*. The majority chooses, instead, to focus solely on the fact that the arbitration language is not set out in a stand-alone paragraph to reach the conclusion that it is "camouflaged" and "cloak[ed] ... within a blanket of boilerplate language" to such an extent that plaintiff could not have not consented to its terms, despite affirmatively indicating by checking the electronic box that he did just that. See **Duhon**, 16-0818, slip op. at 10. While it is true that the arbitration clause appears in a paragraph not limited to the single topic of arbitration, more than one-half of that paragraph concerns the agreed-upon arbitration, its procedure, its locale, governing law, and the consequences for refusing or otherwise breaching the agreement to arbitrate.[2] The arbitration language is hardly ****5** camouflaged. Further, the majority's suggestion, that failure to set the arbitration language out in a stand-alone paragraph fails to sufficiently distinguish the arbitration clause, ignores the check box. See **Duhon**, 16-0818, slip op. at 10. The presence of that box is akin to, and has the same legal force and effect as, requiring the plaintiff to initial next to the paragraph, a requirement that affirmatively alerts the participant to the contents and significance of the paragraph.[3] Like the arbitration provision in **Aguillard**, and contrary to the majority, I find the arbitration language in the Sky Zone Agreement was not concealed in any way and that the use of the electronic check boxes reasonably distinguished the clause.

2 See **Duhon**, 16-0818, slip op'n at 3.

3 Modern technology has introduced what is referred to as a "clickwrap" agreement as a mechanism for having a "user manifest his or her assent to the terms of the ... agreement by clicking on an icon." See **Register.com, Inc. v. Verio, Inc.**, 356 F.3d 393, 429 (2nd Cir. 2004).

***9** Finally, as to the third **Aguillard** factor, the mutuality of the obligation to arbitrate, the majority acknowledges that "**Aguillard** did not create a *per se* rule that any degree of non-mutuality in an arbitration agreement renders it unenforceable,"[4] and that "requiring term-for-term mutuality in an arbitration clause could risk running afoul of the [Federal Arbitration Act],"[5] but then inexplicably invalidates the arbitration clause in the Sky Zone Agreement precisely because it lacks the term-for-term mutuality that it acknowledges the law does not require, and may even prohibit.[6] In truth, the only difference between the arbitration clause in **Aguillard** and the one in the Sky Zone Agreement is the use of the "I" in the Sky Zone Agreement. However, the mere use of the word "I" does not render the clause non-mutual, ****6** particularly in light of the fact, acknowledged by the majority, that the Agreement does not reserve to Sky Zone the right to pursue litigation.[7]

4 See **Duhon**, 16-0818, slip op. at 13.

5 See **Duhon**, 16-0818, slip op. at 12.

6 See **Duhon**, 16–0818, slip op. at 11-13.

7 See **Duhon**, 16-0818, slip op. at 11.

Consequently, unlike the majority, I find an analysis of all four of the factors outlined in **Aguillard** leads to the conclusion that the Sky Zone Agreement is not adhesionary and is valid and enforceable. This conclusion is strengthened, not only by the strong legislative policy that favors arbitration,[8] but also by the long-standing principle that signatures to documents are not mere ornaments.[9] As **Aguillard** notes: "It is well[-]settled that a party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, that he did not understand it, or that the other party failed to explain it to him." ***Id.***, 04–2804 at 22, 908 So.2d at 17. In this case, as in **Aguillard**, the plaintiff signed the Agreement acknowledging that he "had sufficient opportunity to read this entire document ... understand this Agreement and ... voluntarily agree to be bound by its terms."[10] As in **Aguillard**, there was no evidence that the plaintiff was not in an equal bargaining position with Sky Zone because the plaintiff could have avoided arbitration and the contractual provisions as a whole by simply not signing the Sky Zone Agreement and pursuing an alternative recreational activity. Also as in **Aguillard**, there is nothing in the Sky Zone Agreement itself—its physical or distinguishing characteristics—that would call into question the validity of the plaintiff's consent to the terms of the Sky Zone Agreement as indicated by his signature. I would affirm the decision of the court of appeal.

8 See **Duhon**, 16-0818, slip op. at 5 (citing La. R.S. 9:4201, *et seq.*).

9 See **Tweedel v. Brasseaux**, 433 So. 2d 133, 137 (La. 1983) (quoting **Boullt v. Sarpy**, 30 La.Ann. 494, 495 (La. 1878)).

10 See **Duhon**, 16-0818, slip op. at 4.

GUIDRY, J., dissents and assigns reasons.

I respectfully dissent from the majority's reversal of the ruling of the court of appeal. In my view, the arbitration clause in the Sky Zone Agreement is not part of a contract of adhesion which would render it unenforceable.

As the majority correctly states, a contract of adhesion is a "standard contract, usually in printed form, prepared by a party of superior bargaining power for adherence or rejection of the weaker party." Aguillard v. Auction Management Corp., 2004–2804, 2004–2857, p.9 (La. 6/29/05), 908 So.2d 1, 8–9. It is undisputed that the real issue in a contract of adhesion analysis is consent, whether the non-drafting party, considered to be the weaker party, truly consented to all the printed terms. Id. In addressing the issue of consent, a court must look to the form, print, or unequal terms of the contract by considering the factors set forth in Aguillard, namely, the physical characteristics and distinguishing features of the arbitration clause, the relative bargaining position of the parties, and the mutuality or lack thereof in the arbitration clause. Id., 2004–2804, 2004–2857, p. 9, 908 So.2d at 17.

***10** As an initial matter, I disagree with the majority's finding that the arbitration clause was hidden and camouflaged within the Sky Zone Agreement in such a way that would indicate the plaintiff's consent to the agreement could be called into question. Neither the print nor the font size of the arbitration clause differed from that of the remainder of the contract executed by the plaintiff. The standard form agreement was relatively short and straightforward, consisting of a total of nine paragraphs, three of which were set off with boxes to be checked to signify the patron's consent. The arbitration clause, while not set off alone, consisted of one-half of a paragraph that was required to be checked off. The clause commenced midway through the paragraph and ran until the end of the paragraph. The plaintiff does not dispute that he checked off the box reflecting his consent to the terms of the arbitration clause.

Furthermore, the record is absent any evidence that the plaintiff was not in an equal bargaining position with the defendants. At the heart of the transaction, the plaintiff was seeking admittance to a recreational facility. Indisputably, this was not a contract to which the plaintiff was compelled to enter into the terms. He could have simply elected to not sign the agreement and bypass the recreational activity. Instead, the plaintiff signed the arbitration agreement acknowledging that he had sufficient opportunity to read the entire document and understood its terms. Having signed the agreement,

the plaintiff cannot seek to avoid his obligations by contending that he did not read or understand it. Basic contract law dictates that a party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, that he did not understand it, or that the other party failed to explain it to him. Coleman v. Jim Walter Homes, Inc., 2008–1221, p. 7 (La. 3/17/09), 6 So.3d 179, 183 (citing Tweedel v. Brasseaux, 433 So.2d 133, 137 (La.1983)). To overcome the presumption, the party has the burden of proving with reasonable certainty that he was deceived. Id. The plaintiff is unable to satisfy this burden, because there is no evidence in the record that the plaintiff made any effort to contact the defendant for an explanation or to discuss the terms of the contract in any respect.

Next, the arbitration clause at issue substantially mirrors the Aguillard arbitration clause, which this court found to be mutual. The plaintiff has not shown anything in the clause that reserves Sky Zone's right to litigate disputes related to the agreement that is not equally afforded to the plaintiff. As such, the majority errs in finding the lack of mutuality as to the parties.

Finally, in Aguillard, this court addressed the presumption of arbitrability:

> [E]ven when the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration. The weight of this presumption is heavy and arbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue. Therefore, even if some legitimate doubt could be hypothesized, this Court, in conjunction with the Supreme Court, requires resolution of the doubt in favor of arbitration.
>
> Id., 04–2804 at 18, 908 So.2d at 25.

In light of the controlling law indicating the favorable consideration afforded arbitration agreements, coupled with the plaintiff's failure to satisfy his burden of proving the contract was adhesionary, the majority erred in invalidating the contract. Accordingly, I respectfully dissent and would affirm the ruling of the court of appeal.

CLARK, J., concurring.

I find that the contract at issue lacks mutuality to such an extent that the contract is adhesionary. Not only does the contract bind only patrons to arbitration, the contract stipulates that if a patron files a lawsuit against Sky Zone, the patron is liable for $5,000 in liquidated damages. At the same time, Sky Zone is free to file a lawsuit against the patron without any penalty.

HUGHES, J., concurring.

***11** Although I do not agree that the arbitration language was hidden, I concur that it lacked mutuality, and thus with the result.

CRICHTON, J., additionally concurs and assigns reasons.

I agree with the majority decision, and write separately to emphasize that I do not view this decision as a rejection of arbitration agreements. To the contrary, Louisiana law favors the enforcement of arbitration agreements. *See* La. R.S. 9:4201 (Validity of arbitration agreements). Consistent with the Federal Arbitration Act ("FAA"), arbitration agreements must be placed "upon the same footing" as other types of contracts." *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *see also* 9 U.S.C. § 2. But just as Louisiana law should not create obstacles to the enforceability of arbitration agreements, *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (applying the FAA to preempt a state law condition to the enforceability of an arbitration agreement), neither should Louisiana law create exceptions for arbitration agreements that do not exist for other types of contracts.

Without question, arbitration can be a waiver of the traditional access to our judicial system. And so, applying *Aguillard v. Auction Management Corp.*, 04–2804 (La. 6/29/05), 908 So. 2d 1, this waiver must be in accord with Louisiana contract law, otherwise a party's consent may be called into question. Thus, a business entity or individual seeking to draft a contract that includes an arbitration agreement must meet all of the elements of an enforceable contract.

By concealing the existence of the arbitration agreement, this agreement deprives a party of redress in the justice

system. To make a bad situation worse, this agreement does not bind Sky Zone to arbitration, yet it penalizes a Sky Zone patron—*but not Sky Zone*—for seeking to initiate a lawsuit. These blatant asymmetries exhibit a stunning lack of draftsmanship and fail to adhere to the principles set forth in *Aguillard*. Accordingly, in my view, this Court is bound to deem this agreement unenforceable.

All Citations

--- So.3d ----, 2016 WL 6123820, 2016-0818 (La. 10/19/16)

KeyCite Red Flag - Severe Negative Treatment
Abrogated by Henry Schein, Inc. v. Archer and White Sales, Inc., U.S., January 8, 2019

757 F.3d 460
United States Court of Appeals,
Fifth Circuit.

Shirley DOUGLAS, Successor in Interest of Schwartz & Associates, P.A. and Interstate Fire & Casualty Company, Plaintiff–Appellee,
v.
REGIONS BANK, Defendant–Appellant.

No. 12–60877.
|
July 7, 2014.

Synopsis

Background: Plaintiff, whose former attorney allegedly embezzled plaintiff's settlement from personal injury action, brought action against bank where account was held, alleging negligence and conversion on the ground that they had notice of the embezzlement and negligently failed to report that activity, make reasonable inquiries, or prevent further diversions. Bank moved to compel arbitration. The United States District Court for the Southern District of Mississippi, Louis Guirola, Jr., J., 2012 WL 5400040, denied motion.

[Holding:] The Court of Appeals, Jerry E. Smith, Circuit Judge, held that delegation provision in arbitration agreement signed by plaintiff when she opened checking account did not bind her to arbitrate gateway questions of arbitrability in unrelated negligence and conversion action.

Affirmed.

James L. Dennis, Circuit Judge, filed dissenting opinion.

West Headnotes (3)

[1] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

A delegation provision is an agreement to arbitrate gateway questions of arbitrability, such as whether the parties' agreement covers a particular controversy.

57 Cases that cite this headnote

[2] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

Parties may agree to arbitrate whether a particular claim is subject to arbitration so long as they clearly and unmistakably do so in their agreement.

46 Cases that cite this headnote

[3] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

Existence of a delegation provision in arbitration agreement signed by plaintiff when she opened checking account did not bind her to arbitrate gateway questions of arbitrability in unrelated dispute with bank alleging negligence and conversion on the ground that they had notice her of former attorney's embezzlement of plaintiff's settlement funds from personal injury action and negligently failed to report that activity.

35 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of Mississippi.

Before SMITH, DENNIS, and HIGGINSON, Circuit Judges.

Opinion

JERRY E. SMITH, Circuit Judge:

In August 2002, Shirley Douglas opened a checking account with Union Planters Bank and signed a signature card binding her to arbitration. The arbitration provision included a clause (the "delegation provision") delegating the question of a dispute's arbitrability to an arbitrator. Douglas's account was closed less than a year later. Union Planters Bank ("Union Planters") merged with Regions Bank ("Regions") in June 2005.

In 2007, Douglas was injured in an automobile accident caused by the negligence of the driver of another vehicle. She retained a lawyer, settled the claim for $500,000, and hired a separate attorney, Vann Leonard, to get the settlement approved in bankruptcy court, where she had filed under Chapter 13. Leonard allegedly embezzled Douglas's portion of the settlement. Douglas sued Regions and Trustmark National Bank ("Trustmark"), where Leonard had maintained accounts, for negligence and conversion on the ground that they had notice of the embezzlement and negligently failed to report that activity, make reasonable inquiries, or prevent further diversions.

Regions moved to compel arbitration based on the delegation provision in the arbitration agreement Douglas had entered into with Union Planters, Regions' predecessor-in-interest. The district court denied the motion, and Regions appealed.[1] Although the district court applied the incorrect law, we affirm because the claim that this dispute is within the scope of the arbitration provision is groundless.

1 The district court stayed proceedings with Trustmark pending conclusion of any arbitration proceedings between Douglas and Regions.

I.

The district court denied Regions' motion to compel arbitration on the ground that no arbitration agreement existed between Douglas and Regions because under Mississippi law, Union Planters' successor-in-interest (Regions) was not a party to the arbitration agreement. Significantly, Douglas does not defend the district court's reasoning on appeal. She admits that Regions was a party to the original ***462** arbitration agreement under Mississippi law, and indeed it appears that she never argued in response to the motion to compel that Regions' status as a successor did not bind it to the agreement. The district court apparently did not consider the applicable state law.[2]

2 "(a) When a merger becomes effective: ... (3) All property owned by, and every con tract right possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor without reversion or impairment[.]" MISS. CODE ANN. § 79–4–11.07(a)(3); *see also id.* § 81–5–2 ("All the provisions of law relating to private corporations operating in this state which are not inconsistent with this chapter or Chapters 1 and 3 of Title 81, Mississippi Code of 1972, or with the proper business of depository institutions, shall be applicable to all state banks.").

An agreement did, in other words, exist. Douglas signed a signature card with an arbitration agreement when she opened a checking account some number of years before the subject chain of events. The question is whether the arbitration agreement and its delegation provision have anything to do with the claim at issue here—that is, whether there is an arbitration agreement *relevant* to the dispute at hand.

[1] **[2]** A delegation provision is an "agree[ment] to arbitrate 'gateway' questions of 'arbitrability,' such as ... whether [the parties'] agreement covers a particular controversy." *Rent–A–Center, W., Inc. v. Jackson,* 561 U.S. 63, 130 S.Ct. 2772, 2777, 177 L.Ed.2d 403 (2010). Parties may agree to arbitrate whether a particular claim is subject to arbitration so long as they clearly and

unmistakably do so in their agreement. *First Options of Chi., Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Delegation provisions thus normally require an arbitrator to decide in the first instance whether a dispute falls within the scope of the arbitration provision. There is doubt that Douglas unmistakably intended to arbitrate gateway questions of arbitrability. [3]

[3] The agreement states that

> by using or maintaining your account, you agree that, in the event of any dispute, disagreement, claim or controversy ... between you and us or any of our agents or employees, or our parent, subsidiary or sister corporations or their employees or agents, any such dispute will, at the election of you or us, be resolved through the process of binding arbitration ... regardless of when the dispute arose.

It then defines "disputes" as follows (emphasis added):

> "Disputes" shall have the broadest possible meaning and shall include ... any claim, controversy or dispute arising from or relating in any way to (i) this Agreement, (ii) any related agreement (iii) any agreement that this Agreement supercedes, [and] (iv) the relationships, accounts or balances on the accounts resulting from this Agreement or such other agreements, *including the validity, enforceability, or scope of this Arbitration provision or any amendments or supplements to this Agreement* [ ].... Disputes include[ ] ... any Disputes based on ... tort ... (including any claims of any injury or damage to person or property), claims for breach of fiduciary duty or wrongful acts.

[3] The mere existence of a delegation provision in the checking account's arbitration agreement, however, cannot possibly bind Douglas to arbitrate gateway questions of arbitrability in *all* future disputes with the other party, no matter their origin. Suppose the driver who injured Douglas was an employee of Regions who was conducting bank business. Douglas would not have to arbitrate the underlying tort, which is unrelated to her checking account and its accompanying contract, just because she happens to have a contract with Regions on a completely different matter. It follows that she does not have to send such a claim for "gateway arbitration" merely because there is a delegation provision in the completely unrelated contract.

***463** If it were otherwise, then every case involving an arbitration agreement with a delegation provision must, with no exceptions, be submitted for such gateway arbitration; no matter how untenable the argument that there is some connection between the dispute and the agreement, an arbitrator must decide first. Douglas would have to go to the arbitrator, who would flatly tell her that this claim is not within the scope of the completely unrelated arbitration agreement she signed many years earlier when opening a checking account and that she must actually go to federal court after all.

The law of this circuit does not require all claims to be sent to gateway arbitration merely because there is a delegation provision. In *Agere Systems, Inc. v. Samsung Electronics Co.,* 560 F.3d 337 (5th Cir.2009), we sent a dispute to arbitration so the arbitrator could decide the gateway question of arbitrability because the agreement had a delegation provision. But we did so only because there were *plausible* arguments that the dispute was covered by the agreement as well as plausible arguments that it was not: "We adopt no new standards of Fifth Circuit analysis of arbitration provisions today." *Id.* "We simply conclude that there is a legitimate argument that this arbitration clause covers the present dispute, and, on the other hand, that it does not. The resolution of these plausible arguments is left for the arbitrator." *Id.*

The *Agere* court cited the test established by another circuit to decide whether a particular dispute must go to gateway arbitration because of the presence of a delegation provision:

> The Federal Circuit recently articulated an approach for handling such disputes, an approach the parties have addressed in this appeal. That court set out a two step process: (1) did the parties "unmistakably intend to delegate the power to decide arbitrability to an arbitrator," and if so, (2) is the assertion of arbitrability "wholly groundless."

Id. (citing *Qualcomm Inc. v. Nokia Corp.,* 466 F.3d 1366, 1371 (Fed.Cir.2006)). The Federal Circuit elaborated on this test in a more recent opinion:

> In *Qualcomm,* we explained that the "wholly groundless" inquiry allows a court to stay an action

based on an agreement among the parties to submit their disputes to arbitration, "while also preventing a party from asserting any claim at all, no matter how divorced from the parties' agreement, to force an arbitration." Accordingly, "even if the court finds that the parties' intent was clear and unmistakable that they delegated arbitrability decisions to an arbitrator, the court may make a second more limited inquiry to determine whether a claim of arbitrability is 'wholly groundless.' " Because the "wholly groundless" inquiry is supposed to be limited, a court performing the inquiry may simply "conclude that there is a legitimate argument that [the] arbitration clause covers the present dispute, and, on the other hand, that it does not" and, on that basis, leave "[t]he resolution of [those] plausible arguments ... for the arbitrator." Nevertheless, the "wholly groundless" inquiry "necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement." [4]

4 *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n,* 718 F.3d 1336, 1346–47 (Fed.Cir.2013) (internal citations omitted) (brackets and ellipses in original), *vacated on other grounds,* —— U.S. ——, 134 S.Ct. 1876, 188 L.Ed.2d. 905 (2014) (vacating on mootness grounds).

***464** Although the *Agere* court did not explicitly adopt this two-part *Qualcomm* test, its holding implicitly relied on it.

The *Qualcomm* test is an attractive one and most accurately reflects the law—that what must be arbitrated is a matter of the parties' intent. *See Rent–A–Ctr.,* 561 U.S. at 80, 130 S.Ct. 2772. When Douglas signed the arbitration agreement containing a delegation provision, did she intend to go through the rigmaroles of arbitration just so the arbitrator can tell her in the first instance that her claim has nothing whatsoever to do with her arbitration agreement, and she should now feel free to file in federal court? Obviously not.

If the argument that the claim at hand is within the scope of the arbitration agreement is "wholly groundless," surely Douglas never intended that such arguments would see the light of day at an unnecessary and needlessly expensive gateway arbitration. We conclude that when she agreed to arbitrate "the validity, enforceability, or scope of this Arbitration provision," Douglas did not intend to bind herself for life to gateway arbitration for any and all claims that ever might exist between her and Regions. She meant only to bind herself to arbitrate gateway questions of arbitrability if the argument that the dispute falls within the scope of the agreement is not wholly groundless.

Because the events leading to Douglas's claim—a car accident, a settlement, and embezzlement of the funds through an account that a third party held with the bank—have nothing to do with her checking account opened years earlier for only a brief time, the notion that her claim falls within the scope of the arbitration agreement is "wholly groundless." Regions' only theory that its claim of arbitrability is not wholly groundless is that there is a delegation provision. That is circular: The two-part *Qualcomm*/*Agere* test demands that even *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). Merely restating that there is a delegation provision brings us back to step one.

Because this matter should not be sent to gateway arbitration, the judgment denying the motion to compel arbitration is AFFIRMED.

JAMES L. DENNIS, Circuit Judge, dissenting:

The majority adopts the "wholly groundless" test put forth by the Federal Circuit, which has not been adopted by this circuit and appears to be contrary to Supreme Court authority. Although I am sympathetic to the plight of ordinary persons caught in the throes of commercial arbitration, I do not think the Supreme Court's decisions allow us this innovation. Accordingly, I respectfully dissent.

I agree with the majority's decision that an agreement to arbitrate existed between the parties and that this agreement contained a delegation provision. Douglas previously signed a "signature card" for a checking account with Union Planters, which was later acquired by Regions. By signing the card, Douglas indicated her consent to the Deposit Account Agreement and Disclosure ("the Agreement") and that she had been provided at least one copy of this document. As the majority acknowledges, the Agreement provides that disputes "including the validity, enforceability, or *scope*

of this Arbitration provision" are to be decided through arbitration. Specifically, the Agreement states that

> by using or maintaining your account, you agree that, in the event of any dispute, disagreement, claim or controversy ... between you and us or any of our agents or employees, or our parent, subsidiary or sister corporations or their ***465** employees or agents, any such dispute will, at the election of you or us, be resolved through the process of binding arbitration ... regardless of when the dispute arose.

The Agreement defines "disputes" as follows:

> "Disputes" shall have the broadest possible meaning and shall include ... any claim, controversy or dispute arising from or relating in any way to (i) this Agreement, (ii) any related agreement (iii) any agreement that this Agreement supercedes, [and] (iv) the relationships, accounts or balances on the accounts resulting from this Agreement or such other agreements, including the validity, enforceability, or scope of this Arbitration provision or any amendments or supplements to this Agreement[ ].... Disputes include[ ] ... any Disputes based on ... tort ... (including any claims of any injury or damage to person or property), claims for breach of fiduciary duty or wrongful acts.

The Agreement includes a separability provision; provides that "[t]his Agreement shall be governed by and construed in accordance with all applicable federal laws and all applicable substantive laws of the State of Mississippi"; provides that "[t]his Arbitration Provision ... shall be governed by the Federal Arbitration Act" ("FAA"); and states that it "will remain in effect if you close your account or accounts with us and is irrevocable." Finally, the Agreement provides that arbitration "will be administered according to this agreement and the rules of the American Arbitration Association ('AAA') in effect at the time of filing."

Douglas asserts, and the majority agrees, that her negligence and conversion claims against Regions are not within the scope of the arbitration clause because they do not relate to the Agreement's arbitration provision. Regardless of the merit of her argument, however, the issue is not for us to decide. The Agreement contains a delegation clause, or, stated differently, an "agree[ment] to arbitrate 'gateway' questions of 'arbitrability,' such as ... whether [the parties'] agreement covers a particular controversy." *Rent–A–Center, W., Inc. v. Jackson,* 561 U.S. 63, 130 S.Ct. 2772, 2777, 177 L.Ed.2d 403 (2010). Consequently, Douglas's argument that her claims do not relate to the Agreement's arbitration provision—in essence, a scope-of-coverage dispute—must be decided in the first instance by the arbitrator, not a court.

I.

Ordinarily, whether a claim is subject to arbitration must be decided in the first instance by a court, not an arbitrator. *AT & T Techs., Inc. v. Commc'ns Workers of Am.,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). Parties may agree, however, to arbitrate whether a particular claim is subject to arbitration so long as they clearly and unmistakably do so in their agreement. *First Options of Chi., Inc. v. Kaplan,* 514 U.S. 938, 943–44, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). In this case, that standard is satisfied.

First, the Agreement, by defining the claims subject to arbitration to include "the validity, enforceability, or scope of th[e] Arbitration provision," includes what the Supreme Court has described as a delegation clause. *See Rent–A–Center,* 130 S.Ct. at 2777. The Court explained that a delegation clause "is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Id.* The Court "ha[s] recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether

their agreement covers a particular controversy." *Id.* The Supreme Court has also held that the ***466** existence of such a delegation clause, by defining the claims subject to arbitration to include any challenge to the validity, enforceability, or scope of the parties' agreement to arbitrate, is sufficiently clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *See id.* Second, the Agreement incorporates the AAA Rules—including the rule empowering the arbitrator "to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement"—which this court has deemed sufficient to satisfy *First Option's* test. See *Petrofac, Inc. v. DynMcDermott Petrol. Operations Co.,* 687 F.3d 671, 675 (5th Cir.2012). I therefore would conclude that there is clear and unmistakable evidence that the parties to the Agreement agreed to arbitrate arbitrability.

Accordingly, Douglas's argument that her negligence and conversion claims against Regions are outside the scope of the Agreement raises "the question 'who has the primary power to decide arbitrability' [which] turns upon what the parties agreed about *that* matter." *See First Options,* 514 U.S. at 943, 115 S.Ct. 1920. Douglas admits that she entered into an agreement to arbitrate with Union Planters. She does not challenge that Regions is Union Planter's successor-in-interest, admitting that she cannot defend the district court's ruling on this point. Nor does she dispute that the Agreement contains a delegation clause and incorporates the AAA Rules. Nor does she specifically challenge the delegation provision.[1] As such, whether particular claims—namely, her negligence and conversion claims against Regions—are subject to arbitration is a question of the arbitration clause's *scope* and, under both the delegation clause and the AAA rules, one for the arbitrator, not a court, to decide in the first instance. Although she could ultimately persuade the arbitrator to conclude that her claim against Regions falls outside the scope of the arbitration agreement, that dispute must be submitted in the first instance to the arbitrator.

1 If she had specifically challenged the validity of the Agreement's delegation provision, her challenge would have been for the court, and not the arbitrator, to decide. *See Rent–A–Center,* 130 S.Ct. at 2779.

II.

Douglas's arguments to the contrary are unavailing. First, she argues that the text of the FAA requires a connection between her dispute with Regions and the Agreement's arbitration provision. FAA § 2 provides:

> A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter *arising out of such contract or transaction,* or the refusal to perform the whole or any part thereof[ ] ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). By comparison, Douglas asserts that New York's arbitration statute, on which the FAA was modeled, *Hall St. Assocs., L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 589 n. 7, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), authorizes arbitration of any subsequent dispute between the parties regardless of whether it is connected to the contract containing the parties' agreement to arbitrate, *see* N.Y. C.P.L.R. § 7501. On this basis, Douglas asserts that whereas the New York law applies to any subsequent dispute between the parties, the FAA requires that for a dispute to be arbitrable it must arise out of the contract containing the parties' agreement to arbitrate.

***467** Beyond citing the texts of the FAA and New York's arbitration statute, however, Douglas cites no authority for her interpretation and, moreover, wholly ignores the Supreme Court's interpretation of the FAA in cases such as *Rent–A–Center* and *First Options.* More fundamentally, Douglas's argument is that, *based on the language of the Agreement's arbitration clause,* her dispute with Regions is not subject to arbitration. However, we are not authorized to decide whether her dispute with Regions is arbitrable; rather, such a question must be decided in the first instance by the arbitrator because she did not specifically challenge the validity of the Agreement's delegation provision. *See Rent–A–Center,*

130 S.Ct. at 2779; *First Options,* 514 U.S. at 943–44, 115 S.Ct. 1920.

Douglas's objection to the conclusion that she must direct her scope-of-coverage argument to the arbitrator in the first instance misapprehends the relevant analysis. She complains that Regions' argument is, essentially, that if two parties ever agree to arbitration, then they are bound to arbitrate any later dispute regardless of whether the dispute is related to the parties' agreement to arbitrate. That is not the case. The foregoing analysis does not require that parties arbitrate disputes unrelated to their agreement to arbitrate. After all, such a dispute may well fall outside the scope of the parties' agreement. Rather, when the parties clearly and unmistakably agree to arbitrate arbitrability, questions regarding the scope of the parties' agreement to arbitrate must be addressed in the first instance by the arbitrator, not a court. *See Rent–A–Center,* 130 S.Ct. at 2779; *First Options,* 514 U.S. at 943–4, 115 S.Ct. 1920.

III.

Despite the Agreement's uncontested provision that questions of the Agreement's *scope* are to be decided by an arbitrator, the majority holds that "the notion that [Douglas's] claim falls within the scope of the arbitration agreement is 'wholly groundless.' " Although the majority refers to the "wholly groundless" test as the "*Qualcomm/Agere* test," it has not hitherto been the law of this circuit, *see Agere Sys., Inc. v. Samsung Elecs. Co. Ltd.,* 560 F.3d 337, 340 (5th Cir.2009) ("We adopt no new standards of Fifth Circuit analysis of arbitration provisions today.").

In *Agere Systems,* Agere sued Samsung, alleging a breach of a patent licensing agreement, and Samsung moved to compel arbitration. *Id.* at 338. The district court denied Samsung's motion, reasoning that although the parties had agreed to arbitrate in a 2000 contract, that agreement was no longer in effect because it had been superseded by a 2006 contract that did not contain an arbitration clause. *Id.* at 339. Based on the terms of the parties' 2000 agreement, the court determined that the parties had agreed to "confer upon an arbitrator the power of determining what [disputes] 'arise[ ] out of or relate [ ] to' the [relevant agreement to arbitrate]." *Id.* at 340. That is, the court concluded that the parties had agreed to arbitrate arbitrability. *See id.* Because the court concluded that there was both a legitimate argument that the arbitration clause does and does not cover the dispute, it remanded the case with instructions to allow an arbitrator to determine the arbitrability issue. *Id.* at 340–41. The *Agere* court recited the Federal Circuit's "wholly groundless" test, but it did so merely to acknowledge that the parties had addressed the approach in their appeals and to note that the district court had not applied the test. *See id.* at 340. Thus, the "wholly groundless" test has never before been adopted by this court and, as in *Agere,* it was not considered by the district court in this case.

***468** Moreover, the "wholly groundless" test appears to be contrary to Supreme Court precedent. In *AT & T*, a labor arbitration case, the Court reaffirmed the rule that, absent clear and unmistakable evidence to the contrary, arbitrability is for the court to decide. 475 U.S. at 649, 106 S.Ct. 1415. The Court admonished, however, that

> in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.

Id. at 649–50, 106 S.Ct. 1415 (internal quotation marks omitted). In *First Options,* the Court relied on *AT & T* by analogy in stating that district courts must defer to an arbitrator's arbitrability decision upon finding clear and

unmistakable evidence that the parties so intended. 514 U.S. at 943–44, 115 S.Ct. 1920.

In *AT & T*, arbitrability was for the court to decide, but the merits were for the arbitrator, so the Supreme Court explained that a court deciding arbitrability should leave the merits of the underlying dispute for the arbitrator. 475 U.S. at 649–50, 106 S.Ct. 1415. In other words, if a court decides that a dispute is arbitrable but believes it to be completely frivolous, the court must still order the parties to arbitrate the claim. *See id.* Similarly, if there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability, the court must direct the parties to submit arbitrability questions to the arbitrator and may not pass on "the merits" of the dispute, which, in this posture, is whether Douglas's dispute with Regions is subject to arbitration. The "wholly groundless" test, however, requires a court to delve into the merits of the dispute, which the *AT & T* Court said a district court may not do. Under the reasoning of *AT & T* and *First Options,* if a court determines that there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability but nevertheless believes that an underlying claim is almost certainly not subject to arbitration, the court must still order the parties to arbitrate arbitrability. *See AT & T,* 475 U.S. at 649–50, 106 S.Ct. 1415; *First Options,* 514 U.S. at 943–44, 115 S.Ct. 1920. Similarly, *First Options* and *Rent–A–Center* provide that an arbitration agreement's delegation provision requires sending questions of arbitrability to the arbitrator absent a specific challenge to the validity of that provision (which Douglas has not here asserted). *See Rent–A–Center,* 130 S.Ct. at 2779; *First Options,* 514 U.S. at 943–44, 115 S.Ct. 1920. These decisions further support the conclusion that the Supreme Court would likely reject the majority's approach as being contrary to its previous decisions.

For these reasons, I respectfully dissent.

All Citations

757 F.3d 460

KeyCite Red Flag - Severe Negative Treatment
Vacated and Remanded by Henry Schein, Inc. v. Archer and White Sales, Inc., U.S., January 8, 2019

878 F.3d 488
United States Court of Appeals, Fifth Circuit.

ARCHER AND WHITE SALES, INC., Plaintiff-Appellee
v.
HENRY SCHEIN, INC., Danaher Corporation, Instrumentarium Dental Inc., Dental Equipment LLC, Kavo Dental Technologies LLC, and Dental Imaging Technologies Corporation, Defendants-Appellants

No. 16-41674
|
FILED December 21, 2017

Synopsis

Background: Plaintiff, a distributor, seller, and servicer for multiple dental equipment manufacturers, brought suit against competitors that distributed and manufactured dental equipment, and certain wholly-owned subsidiaries, alleging antitrust violations under the Sherman Act and the Texas Free Enterprise and Antitrust Act. The United States District Court for the Eastern District of Texas, Rodney Gilstrap, J., 2016 WL 7157421, on objections to the opinion of Roy S. Payne, United States Magistrate Judge, 2013 WL 12155243, denied defendants' motion to compel arbitration. Defendants appealed.

[Holding:] The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that it was for the court, and not the arbitrator, to decide the question of arbitrability, even if arbitration agreement delegated this question to arbitrator.

Affirmed.

West Headnotes (15)

[1] Alternative Dispute Resolution
Scope and standards of review
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) Scope and standards of review
Court of Appeals reviews a ruling on a motion to compel arbitration de novo.

Cases that cite this headnote

[2] Alternative Dispute Resolution
Existence and validity of agreement
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 Existence and validity of agreement
Enforcement of an arbitration agreement involves two analytical steps, under which a court first must decide whether the parties entered into any arbitration agreement at all; this inquiry is one of pure contract formation, and it looks only at whether the parties formed a valid agreement to arbitrate some set of claims.

3 Cases that cite this headnote

[3] Alternative Dispute Resolution
Arbitrability of dispute
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute
In determining whether to enforce an arbitration agreement, the court determines whether the dispute at issue is covered by the arbitration agreement, but before this step, the court must answer the question of who should have the primary power to decide whether the claim is arbitrable, and this question turns on whether the agreement contains a valid delegation clause, that is, if it evinces an intent

to have the arbitrator decide whether a given claim must be arbitrated.

6 Cases that cite this headnote

[4] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

If the parties clearly and unmistakably intended to delegate the question of arbitrability to an arbitrator, then a motion to compel arbitration should be granted in almost all cases, but not if the argument that the claim at hand is within the scope of the arbitration agreement is wholly groundless.

2 Cases that cite this headnote

[5] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

Where there is no plausible argument for the arbitrability of the dispute, the district court may decide the gateway issue of arbitrability despite a valid delegation clause that delegates the question of arbitrability to an arbitrator.

Cases that cite this headnote

[6] Alternative Dispute Resolution
Evidence

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 Evidence

Courts should not assume that the parties agreed to arbitrate the arbitrability of their dispute unless there is clear and unmistakable evidence that they did so.

1 Cases that cite this headnote

[7] Alternative Dispute Resolution
Existence and validity of agreement

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 Existence and validity of agreement

Absent a delegation of the issue of arbitrability to an arbitrator, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

11 Cases that cite this headnote

[8] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question who has the primary power to decide arbitrability turns upon what the parties agreed about that matter.

Cases that cite this headnote

[9] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

A contract need not contain an express delegation clause in order to delegate the issue of arbitrability to an arbitrator.

Cases that cite this headnote

[10] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

An arbitration agreement that expressly incorporates the rules of the American Arbitration Association (AAA) presents clear and unmistakable evidence that the parties agreed to arbitrate the arbitrability of their dispute.

7 Cases that cite this headnote

[11] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

Even if agreement between plaintiff, a distributor, seller, and servicer for multiple dental equipment manufacturers, and one of the defendant competitor's predecessor-in-interest clearly and unmistakably delegated the question of arbitrability to an arbitrator, the defendant competitors' arguments for arbitrability of plaintiff's antitrust claims under the Sherman Act and Texas Free Enterprise and Antitrust Act were wholly groundless, and thus, it was for the court, and not the arbitrator, to decide the question of arbitrability; plaintiff's suit sought both damages and injunctive relief, arbitration clause expressly excluded actions seeking injunctive relief, it did not limit the exclusion to actions seeking only injunctive relief, and mere fact that the clause allowed plaintiff to avoid arbitration by adding claim for injunctive relief did not change the clause's plain meaning. Sherman Act, § 1, 15 U.S.C.A. § 1; Tex. Bus. & C. Code § 15.01 et seq.

1 Cases that cite this headnote

[12] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

An assertion that the parties' dispute is within the scope of the arbitration agreement is not "wholly groundless," and thus does not fall within narrow exception allowing court to decide the issue or arbitrability despite the parties' delegation of the question of arbitrability to an arbitrator, if there is a legitimate argument that the arbitration clause covers the present dispute, and, on the other hand, that it does not.

6 Cases that cite this headnote

[13] Alternative Dispute Resolution
Arbitrability of dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of dispute

If a court can find a plausible argument that the arbitration agreement requires the merits of the claim to be arbitrated, the "wholly groundless" exception, which allows the court to decide the issue or arbitrability despite the parties' delegation of the question of arbitrability to an arbitrator, will not apply.

4 Cases that cite this headnote

[14] Contracts
Application to Contracts in General

Contracts

Rewriting, remaking, or revising contract

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(1) In general
95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(3) Rewriting, remaking, or revising contract

When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of construction, cannot reject what the parties inserted or insert what the parties elected to omit.

Cases that cite this headnote

[15] Alternative Dispute Resolution

Construction in favor of arbitration

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 Construction in favor of arbitration

While ambiguities in the language of the agreement should be resolved in favor of arbitration, the court does not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated.

Cases that cite this headnote

***490** Appeals from the United States District Court for the Eastern District of Texas

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Before HIGGINBOTHAM, GRAVES, and HIGGINSON, Circuit Judges.

Opinion

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Sued by a competitor for antitrust violations, Defendants-Appellants sought to enforce an arbitration agreement. The magistrate judge granted the motion to compel arbitration, holding that the gateway question of the arbitrability of the claims belonged to an arbitrator. The district court reversed, holding it had the authority to rule on the question of arbitrability and ***491** the claims at issue were not arbitrable. We now affirm.

I.

Five years ago, Plaintiff-Appellee Archer and White Sales, Inc. ("Archer"), a distributor, seller, and servicer for multiple dental equipment manufacturers, brought this suit against Defendant-Appellants Henry Schein, Inc. and Danaher Corporation, allegedly the largest distributor and manufacturer of dental equipment in the United States, and certain wholly-owned subsidiaries of Danaher.

The suit alleges violations of Section 1 of the Sherman Antitrust Act and the Texas Free Enterprise and Antitrust Act, contending that the Defendants' activities occurred over the preceding four years and are "continuing" violations, and seeking both damages ("estimated to be in the tens of millions of dollars") and injunctive relief. [1] The district court referred the case to a United States Magistrate Judge.

[1] Archer alleges that Defendants conspired "to fix prices and refuse to compete with each other" and to "force their common supplier Danaher and its various subsidiaries to terminate and/or reduce the distribution territory of their price-cutting distributor Archer Dental." It also alleges that the Defendants "carried out their conspiracy through a series of unlawful activities, including, but not limited to agreements not to compete, agreements to fix prices, and boycotts."

Defendants moved to compel arbitration pursuant to a clause in a contract between Archer and Pelton & Crane, allegedly a Defendant's predecessor-in-interest (the "Dealer Agreement"). The arbitration clause reads as follows:

> Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.

Following a hearing, the magistrate judge issued a Memorandum Order holding that: (1) the incorporation of the AAA Rules in the arbitration clause clearly evinced an intent to have the arbitrator decide questions of arbitrability; (2) there is a reasonable construction of the arbitration clause that would call for arbitration in this dispute; and (3) the *Grigson* equitable estoppel test, which both sides agree is controlling in their dispute, required arbitration against both signatories and non-signatories to the Dealer Agreement. [2]

[2] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-cv-572-JRG-RSP, 2013 WL 12155243 (E.D. Tex. May 28, 2013), *vacated*, 2016 WL 7157421 (E.D. Tex. Dec. 7, 2016).

The district court vacated the magistrate judge's order and held that the court could decide the question of arbitrability, and that the dispute was not arbitrable because the plain language of the arbitration clause expressly excluded suits that involved requests for injunctive relief. The court declined to reach the question of equitable estoppel. [3]

[3] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-cv-572-JRG, 2016 WL 7157421, at *9 (E.D. Tex. Dec. 7, 2016).

Defendants appealed. [4]

[4] Defendants filed an interlocutory appeal pursuant to 9 U.S.C. § 16(a)(1)(C). *See Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 757 F.3d 416, 419 (5th Cir. 2014) ("Title 9 U.S.C. section 16(a)(1)(C) provides that a party may seek interlocutory review of an order ... denying an application ... to compel arbitration.") (internal quotation marks omitted).

*492 II.

[1] [2] [3] We review a ruling on a motion to compel arbitration *de novo*. [5] "Enforcement of an arbitration agreement involves two analytical steps." [6] First, a court must decide "whether the parties entered into *any arbitration agreement at all*." [7] This inquiry is one of pure contract formation, and it looks only at whether the parties "form[ed] a valid agreement to arbitrate some set of claims." [8] The next step is to determine "whether [the dispute at issue] is covered by the arbitration agreement." [9] Before this step, however, the court must answer a third question: "[*w*]*ho should have the primary power to decide*' whether the claim is arbitrable." [10] This question turns on "whether the agreement contains a valid delegation clause—'that is, if it evinces an intent to have the arbitrator decide whether a given claim must be arbitrated.' " [11]

[5] *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016) (citing *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012)).

6 *Kubala*, 830 F.3d at 201 (5th Cir. 2016).

7 *Id.*

8 *IQ Prods. Co. v. WD-40 Co.*, 871 F.3d 344, 348 (5th Cir. 2017).

9 *Kubala*, 830 F.3d at 201.

10 *Id.* at 202 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)).

11 *IQ Prods.*, 871 F.3d at 348 (quoting *Kubala*, 830 F.3d at 202).

[4] **[5]** **[6]** This determination begins the two-step inquiry adopted in *Douglas v. Regions Bank*.[12] First, whether the parties "clearly and unmistakably" intended to delegate the question of arbitrability to an arbitrator.[13] If so, "the motion to compel arbitration should be granted in almost all cases."[14] But not "[i]f the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless.' "[15] So *Douglas* 's second step asks whether there is a plausible argument for the arbitrability of the dispute. Where there is no such plausible argument, "the district court may decide the 'gateway' issue of arbitrability despite a valid delegation clause.' "[16]

12 757 F.3d 460, 464 (5th Cir. 2014).

13 "[C]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944, 115 S.Ct. 1920 (citing *AT&T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)).

14 *Kubala*, 830 F.3d at 202.

15 *Douglas*, 757 F.3d at 464.

16 *IQ Prods.*, 871 F.3d at 349.

The parties agree that the Dealer Agreement contained an arbitration provision, though not whether the arbitration provision applies here.[17] Specifically, they disagree on whether the court or an arbitrator should decide the gateway question ***493** of arbitrability—and relatedly, whether the underlying dispute is arbitrable at all. We turn to the two-step *Douglas* test.

17 Archer states that, because the Dealer Agreement "unambiguously divides disputes into two categories"—those within the carve-out and all other disputes—there is no valid agreement to arbitrate. This argument misconstrues the very first analytical step in enforcement of an arbitration agreement, which asks "whether the parties entered into *any arbitration agreement at all*." Archer does not appear to argue that there was no arbitration agreement regarding claims outside the scope of the carve-out. Instead, Archer contends that the Dealer Agreement is "best construed to express the parties' intent not to arbitrate this action seeking injunctive relief." Thus, we treat Archer's arguments to this effect as going to whether the parties agreed to arbitrate this particular dispute.

A.

[7] **[8]** We first ask if the parties "clearly and unmistakably" delegated the issue of arbitrability.[18] Absent a delegation, "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[19] "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter.' "[20]

18 *AT&T*, 475 U.S. at 649, 106 S.Ct. 1415.

19 *Id.*

20 *First Options*, 514 U.S. at 943, 115 S.Ct. 1920 (internal citations omitted). *See also Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010) (holding that parties may delegate arbitrability through an express delegation clause).

[9] **[10]** A contract need not contain an express delegation clause to meet this standard. An arbitration agreement that expressly incorporates the AAA Rules "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."[21] Under AAA Rule 7(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."[22]

21 *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012).

22 This version of Rule 7(a) was in effect when the parties signed their agreement. AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2007), https://www.adr.org/sites/default/files/Commercial% 20Arbitration% 20Rules % 20and% 20Mediation% 20Procedures% 20Sept.% 201% 2C% 202007.pdf.

By the Dealer Agreement, "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [the predecessor]), shall be resolved by binding arbitration *in accordance with the arbitration rules of the American Arbitration Association*." The parties dispute the relationship between the carve-out clause—"except for actions seeking injunctive relief and [intellectual property] disputes"—and the incorporation of the AAA Rules.

The magistrate judge saw three separate parts to the arbitration provision: (1) a general rule compelling arbitration for any dispute related to the agreement, (2) an exemption from arbitration for actions seeking injunctive relief, and (3) a clause incorporating the AAA Rules. [23] On this reading, the AAA Rules would apply to all disputes arising under the contract, including those eventually found to fall within the Dealer Agreement's carve-out. The district court disagreed, holding that the carve-out clause removed the disputes from the ambit of both arbitration and the AAA Rules. The district court distinguished *Petrofac*, where the agreement at issue "did not contain any exclusions[;] [r]ather, it was a standard broad arbitration clause." [24]

23 *Archer*, 2013 WL 12155243 at *1.

24 *Archer*, 2016 WL 7157421, at *7.

Defendants argue that *Petrofac* controls; that, by holding otherwise, the district court conflated the issue of whether the dispute is arbitrable with the issue of who ***494** decides arbitrability; and that, under the plain language of the clause, disputes about arbitrability do not fall within the carve-out and thus belong to the arbitrator. This court has previously applied *Petrofac* to arbitration provisions containing carve-out provisions. In *Crawford*, we examined an agreement that incorporated the AAA Rules and preserved the parties' ability to seek injunctive relief in the courts. [25] We held—without directly addressing the relevance of its carve-out provision—that the *Crawford* agreement's incorporation of the AAA Rules constituted "clear and unmistakable evidence that the parties to the [ ] Agreement agreed to arbitrate arbitrability, and so ... whether the Plaintiffs' claims are subject to arbitration must be decided in the first instance by the arbitrator, not a court." [26]

25 *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 256 (5th Cir. 2014). In that case, the Provider Agreement read, in relevant part:

> Any and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association. The arbitrator must follow the rule of Law, and may only award remedies provided for in the Provider Agreement.... Arbitration shall be the exclusive and final remedy for any dispute between the parties in connection with or arising out of the Provider Agreement; provided, however, that nothing in this provision shall prevent either party from seeking injunctive relief for breach of this Provider Agreement in any state or federal court of law ....

Id.

26 *Id.* at 263. Defendants also point to *Oracle*, where the Ninth Circuit addressed an arbitration clause that adopted the UNCITRAL Rules (which also delegate arbitrability issues to the arbitrator) and a carve-out for certain types of claims. The court rejected the argument that the carve-out provision bore on the question of arbitrability, stating that such an argument "conflates the *scope* of the arbitration clause ... with the question of *who* decides arbitrability." *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1072–76 (9th Cir. 2013).

Archer responds that the agreement in *Petrofac* did not include a carve-out provision, and the *Crawford* agreement is distinguishable because it contained separate clauses incorporating the AAA Rules and creating a carve-out excluding claims for injunctive relief—specifically, the agreement stated that the AAA Rules would apply to "[a]ny and all disputes in connection with or arising out of the Provider Agreement," and contained a carve-out in a subsequent sentence stating that nothing

in the agreement would prevent a suit seeking injunctive relief in a court of law. [27]

27 *Crawford*, 748 F.3d at 256.

Archer argues that, in contrast, the structure of the specific carve-out at issue here leads to the natural reading that the AAA Rules only apply to the category of cases that are subject to binding arbitration under the Dealer Agreement —namely, those outside of the contract's express carve-out. Archer further notes that Defendants' predecessor-in-interest drafted the Dealer Agreement, and that North Carolina law requires that "[p]ursuant to well[ ]settled contract law principles, the language of [an] arbitration clause should be strictly construed against the drafter of the clause." [28]

28 *T.M.C.S., Inc. v. Marco Contractors, Inc.*, —— N.C.App. ——, 780 S.E.2d 588, 597 (2015).

There is a strong argument that the Dealer Agreement's invocation of the AAA Rules does not apply to cases that fall within the carve-out. It is not the case that any mention in the parties' contract of the AAA Rules trumps all other contract language. Here, the interaction between the AAA Rules and the carve-out is at best ***495** ambiguous. On one reading, the Rules apply to "[a]ny dispute arising under or related to [the] Agreement." On another, the provision expressly exempts certain disputes and the Rules apply only to the remaining disputes. We need not decide which reading to adopt here because *Douglas* provides us with another avenue to resolve this issue: the "wholly groundless" inquiry.

B.

[11] Regardless of whether an agreement clearly and unmistakably delegates the question of arbitrability, the second step in *Douglas* provides a narrow escape valve. If an "assertion of arbitrability [is] wholly groundless," the court need not submit the issue of arbitrability to the arbitrator. [29]

29 *Douglas*, 757 F.3d at 463 (quoting *Agere Systems, Inc. v. Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009)).

[12] **[13]** We have cautioned that the "wholly groundless" exception is a narrow one and that it "is not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause." [30] "An assertion of arbitrability is not 'wholly groundless' if 'there is a legitimate argument that th[e] arbitration clause covers the present dispute, and, on the other hand, that it does not.' " [31] If a court can find "a 'plausible' argument that the arbitration agreement requires the merits of the claim to be arbitrated," the wholly groundless exception will not apply. [32]

30 *Kubala*, 830 F.3d at 202 n.1.

31 *IQ Prods.*, 871 F.3d at 350 (quoting *Douglas*, 757 F.3d at 463).

32 *Kubala*, 830 F.3d at 202 n.1.

The magistrate judge issued his order before *Douglas*, and therefore he did not address the "wholly groundless" exception directly. Instead, he found that while "[o]n the most superficial level, this lawsuit is clearly an action seeking injunctive relief since it *does* seek that relief," there was also "a plausible construction [of the Dealer Agreement] calling for arbitration." [33] Thus, he concluded that "the question of whether the exception for actions seeking injunctive relief should be limited to actions for an injunction in aid of arbitration or to enforce an arbitrator's award should properly be left for the arbitrator to decide." [34]

33 *Archer*, 2013 WL 12155243, at *1–2.

34 *Id.* at *2.

The district court, now with *Douglas* at hand, found the Defendants' arguments for arbitrability wholly groundless. The court first stated that the wholly groundless inquiry "necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement." [35] It then noted that the Dealer Agreement's carve-out language "differs from the standard arbitration clause suggested by [AAA]," [36] and found that "the phrase 'except actions seeking injunctive relief' is clear on its ***496** face—any action seeking injunctive relief is excluded from mandatory arbitration." [37] Thus, the provision's plain language includes all actions seeking injunctive relief, not a more limited category of cases. The court declined to "re-write the terms of the Parties' agreement to accommodate a party—notably

the party that drafted the agreement—that could have negotiated for more precise language," [38] and held that the arguments for arbitrability were "wholly without merit based on the plain language of the arbitration clause itself" and fell squarely within the *Douglas* exception. [39]

35 *Archer*, 2016 WL 7157421, at *8 (quoting *Douglas*, 757 F.3d at 463) (internal quotation marks omitted). This limited inquiry allows the parties to avoid jumping through hoops to begin arbitration only to be sent directly back to the courthouse. *See Douglas*, 757 F.3d at 464 ("When [plaintiff] signed the arbitration agreement containing a delegation provision, did she intend to go through the rigmaroles of arbitration just so the arbitrator can tell her in the first instance that her claim has nothing whatsoever to do with her arbitration agreement, and she should now feel free to file in federal court? Obviously not.").

36 The district court claimed that "[s]uch an intentional drafting effort" deserves notice. *Archer*, 2016 WL 7157421, at *5.

37 *Id.*

38 *Id.* at *6.

39 *Archer*, 2016 WL 7157421, at *9. The district court also rejected arguments from Defendants that Archer failed to "plead" a claim for injunctive relief based on the fact that Archer had not made any showing on the factors articulated by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). The court held first that the *eBay* factors are not pleading requirements, and that in any event, the proper vehicle to argue the plaintiff is not entitled to relief would be a motion to dismiss under Rule 12. We do not address the underlying merits of Archer's claim here because, as Defendants concede, "the issue here is not whether Archer's injunctive relief claim fails on the merits."

Defendants suggest a limited reading of the "wholly groundless" exception that would only apply when the contract containing the arbitration provision has "nothing to do with" the dispute before the court. [40] In *Douglas*, the plaintiff had signed an agreement with an arbitration provision when she opened a checking account with Regions Bank that closed less than one year later. Years later, the plaintiff was involved in an automobile accident, and she received a $500,000 settlement in subsequent litigation. She then alleged that her attorney, who banked with Regions, had embezzled that money, and she brought suit against the bank for negligence and conversion on the theory that the bank had notice of the embezzlement and failed to report it. Regions moved to compel arbitration pursuant to the agreement that the plaintiff signed when she opened the now-closed checking account. This court held that "[t]he mere existence of a delegation provision in the checking account's arbitration agreement ... cannot possibly bind [the plaintiff] to arbitrate gateway questions of arbitrability in *all* future disputes with the other party, no matter their origin." [41]

40 *Douglas*, 757 F.3d at 461.

41 *Id.* at 462, 464.

Defendants argue that applying the "wholly groundless" exception here would allow the court to construe the bounds of an arbitration clause before an arbitrator can do so—effectively obviating the entire purpose of delegating the gateway question to the arbitrator in the first place; that their arbitrability arguments are not wholly groundless, pointing to the magistrate judge's finding of plausible readings of the arbitration clause that would not exclude the suit from arbitration; and that doubts about the arbitrability of a claim should be resolved in favor of arbitration, pursuant to settled federal law.

Defendants urge that "[t]he correct reading of this arbitration clause is that the parties may come to court seeking injunctive relief at any time ... but still must arbitrate any claim for damages." Defendants further urge the court should send the damages clause to arbitration, even if it results in "piecemeal litigation." In their view, "[t]he correct reading of this arbitration clause is that the parties may come to court seeking injunctive relief at ***497** any time ... but still must arbitrate any claim for damages."

Archer counters that the plain language of the clause makes clear that the parties did not agree to arbitrate *actions* that involve a request for injunctive relief, and that any argument to the contrary is wholly groundless. Archer emphasizes that arbitration agreements are "as enforceable as other contracts, but not more so," [42] and states that under North Carolina law, "when the terms of a contract are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written

and enforced as the parties have made it." [43] Archer says the Dealer Agreement clearly contemplates two categories of disputes—those involving "actions seeking injunctive relief" and certain intellectual property disputes, and all other disputes—and that only the latter category must be subject to arbitration. Archer contends that the clause's incorporation of "action" prohibits any piecemeal litigation because "action," as distinct from "claim," pertains to all of the claims in a given case. [44]

42 *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

43 *State v. Philip Morris USA Inc.*, 363 N.C. 623, 685 S.E.2d 85, 91 (2009) (internal quotation marks omitted) (internal citations omitted).

44 An action is "[a] civil or criminal judicial proceeding," which is "nearly if not quite synonymous" with suit. BLACK'S LAW DICTIONARY 28–29 (7th ed. 1999).

[14] **[15]** While *Douglas* is a recent case, with contours of the "wholly groundless" exception not yet fully developed, if the doctrine is to have any teeth, it must apply where, as here, an arbitration clause expressly excludes certain types of disputes. The arbitration clause creates a carve-out for "actions seeking injunctive relief." It does not limit the exclusion to "actions seeking *only* injunctive relief," nor "actions for injunction in aid of an arbitrator's award." Nor does it limit itself to only *claims* for injunctive relief. Such readings find no footing within the four corners of the contract. "When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of construction, cannot reject what the parties inserted or insert what the parties elected to omit." [45] We see no plausible argument that the arbitration clause applies here to an "action seeking injunctive relief." The mere fact that the arbitration clause allows Archer to avoid arbitration by adding a claim for injunctive relief does not change the clause's plain meaning. "While ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, *or reach a result inconsistent with the plain text of the contract*, simply because the policy favoring arbitration is implicated." [46]

45 *Procar II, Inc. v. Dennis*, 218 N.C.App. 600, 721 S.E.2d 369, 371 (2012).

46 *E.E.O.C. v. Waffle House*, 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (emphasis added).

III.

Defendants argue in the alternative that, even if the district court was correct to decide the issue of arbitrability, it erred in determining that the complaint was not subject to the arbitration clause. Because we find that Defendants' arguments for arbitrability are wholly groundless, we affirm the district court's holding that the claims are not arbitrable. Having concluded that this action is not subject to mandatory arbitration, we need not reach the ***498** question of whether the third parties to the arbitration clause in this case can enforce such an arbitration clause.

We affirm the district court's order denying the motions to compel arbitration.

All Citations

878 F.3d 488, 2017-2 Trade Cases P 80,234

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Supreme Court of the United States

HENRY SCHEIN, INC., et al., Petitioners
v.
ARCHER AND WHITE SALES, INC.

No. 17–1272.
|
Argued Oct. 29, 2018.
|
Decided Jan. 8, 2019.

Synopsis

Background: Plaintiff, a distributor, seller, and servicer for multiple dental equipment manufacturers, brought suit against competitors that distributed and manufactured dental equipment, and certain wholly-owned subsidiaries, alleging antitrust violations under the Sherman Act and the Texas Free Enterprise and Antitrust Act. The United States District Court for the Eastern District of Texas, Rodney Gilstrap, J., 2016 WL 7157421, on objections to the opinion of Roy S. Payne, United States Magistrate Judge, 2013 WL 12155243, denied defendants' motion to compel arbitration. Defendants appealed. The United States Court of Appeals for the Fifth Circuit, Patrick E. Higginbotham, Circuit Judge, 878 F.3d 488, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Kavanaugh, held that when the parties' contract delegates the question of the arbitrability of a particular dispute to an arbitrator, a court may not override the contract, even if it thinks that the argument that the arbitration agreement applies to a dispute is wholly groundless, abrogating *Simply Wireless, Inc. v. T–Mobile US, Inc.*, 877 F. 3d 522, *Douglas v. Regions Bank*, 757 F.3d 460; *Turi v. Main Street Adoption Services, LLP*, 633 F.3d 496, *Qualcomm, Inc. v. Nokia Corp.*, 466 F.3d 1366.

Vacated and remanded.

West Headnotes (18)

[1] Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement

Alternative Dispute Resolution
Matters to Be Determined by Court

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 In General
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk198 In General

Under the Federal Arbitration Act (FAA), parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. 9 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[2] Alternative Dispute Resolution
Arbitrability of Dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of Dispute

Under the Federal Arbitration Act (FAA), the question of who decides arbitrability is itself a question of contract. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[3] Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement

Alternative Dispute Resolution
Arbitrability of Dispute

Alternative Dispute Resolution

Merits of Controversy

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 In General
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of Dispute
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk203 Merits of Controversy

The Federal Arbitration Act (FAA) allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. 9 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[4] **Constitutional Law**
Civil Remedies and Procedure

Constitutional Law
Particular Issues and Applications

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2503 Civil Remedies and Procedure
92k2503(1) In General
92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)3 Encroachment on Executive
92k2542 Particular Issues and Applications
92k2543 In General

The Supreme Court is not at liberty to rewrite the Federal Arbitration Act (FAA) passed by Congress and signed by the President. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[5] **Alternative Dispute Resolution**
Arbitrability of Dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of Dispute

When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract. 9 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[6] **Alternative Dispute Resolution**
Contractual or Consensual Basis

Alternative Dispute Resolution
Right to Enforcement and Defenses in General

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 Contractual or Consensual Basis
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk178 In General

Under the Federal Arbitration Act (FAA), arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. 9 U.S.C.A. § 1 et seq.

2 Cases that cite this headnote

[7] **Alternative Dispute Resolution**
Constitutional and Statutory Provisions and Rules of Court

Alternative Dispute Resolution
Construction

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 Constitutional and Statutory Provisions and Rules of Court

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 In General

The court must interpret the Federal Arbitration Act (FAA) as written, and the Act in turn requires that the court interpret the arbitration contract as written. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[8] Alternative Dispute Resolution
Arbitrability of Dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of Dispute

When the parties' contract delegates the question of the arbitrability of a particular dispute to an arbitrator, a court may not override the contract, as in those circumstances, a court possesses no power to decide the arbitrability issue, and that is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless; abrogating *Simply Wireless, Inc. v. T–Mobile US, Inc.*, 877 F.3d 522; *Douglas v. Regions Bank*, 757 F.3d 460; *Turi v. Main Street Adoption Services, LLP*, 633 F.3d 496; *Qualcomm, Inc. v. Nokia Corp.*, 466 F.3d 1366. 9 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[9] Alternative Dispute Resolution
Merits of Controversy

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk203 Merits of Controversy

A court has no business weighing the merits of the grievance that is assigned by contract to an arbitrator, because the agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[10] Alternative Dispute Resolution
Arbitrability of Dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of Dispute

Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator. 9 U.S.C.A. § 1 et seq.

2 Cases that cite this headnote

[11] Alternative Dispute Resolution
Arbitrability of Dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of Dispute

Parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by clear and unmistakable evidence. 9 U.S.C.A. § 1 et seq.

3 Cases that cite this headnote

[12] Alternative Dispute Resolution
Existence and Validity of Agreement

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 Existence and Validity of Agreement

Before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. 9 U.S.C.A. § 2.

Cases that cite this headnote

[13] **Alternative Dispute Resolution**
Arbitrability of Dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of Dispute

If a valid arbitration agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue. 9 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[14] **Constitutional Law**
Civil Remedies and Procedure

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2503 Civil Remedies and Procedure
92k2503(1) In General

Congress designed the Federal Arbitration Act (FAA) in a specific way, and it is not the proper role of the courts to redesign the statute. 9 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[15] **Alternative Dispute Resolution**
Merits of Controversy

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk203 Merits of Controversy

When the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[16] **Alternative Dispute Resolution**
Arbitrability of Dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of Dispute

The Federal Arbitration Act (FAA) contains no "wholly groundless" exception allowing courts to decide the question of arbitrability if the argument that the arbitration agreement applies to the particular dispute is wholly groundless, and the court may not engraft its own exceptions onto the statutory text. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[17] **Constitutional Law**
Civil Remedies and Procedure

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2503 Civil Remedies and Procedure
92k2503(1) In General

The court may not rewrite the Federal Arbitration Act (FAA) to incorporate a "wholly groundless" exception, which would allow courts to decide the question of arbitrability if the argument that the arbitration agreement applies to the particular dispute is wholly groundless, simply to accommodate the policy concern that such an exception is necessary to deter frivolous motions to compel arbitration. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[18] **Alternative Dispute Resolution**
Evidence

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest

25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 Evidence

Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. 9 U.S.C.A. § 1 et seq.

3 Cases that cite this headnote

Syllabus [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***1** Respondent Archer & White Sales, Inc., sued petitioner Henry Schein, Inc., alleging violations of federal and state antitrust law and seeking both money damages and injunctive relief. The relevant contract between the parties provided for arbitration of any dispute arising under or related to the agreement, except for, among other things, actions seeking injunctive relief. Invoking the Federal Arbitration Act, Schein asked the District Court to refer the matter to arbitration, but Archer & White argued that the dispute was not subject to arbitration because its complaint sought injunctive relief, at least in part. Schein contended that because the rules governing the contract provide that arbitrators have the power to resolve arbitrability questions, an arbitrator—not the court—should decide whether the arbitration agreement applied. Archer & White countered that Schein's argument for arbitration was wholly groundless, so the District Court could resolve the threshold arbitrability question. The District Court agreed with Archer & White and denied Schein's motion to compel arbitration. The Fifth Circuit affirmed.

Held : The "wholly groundless" exception to arbitrability is inconsistent with the Federal Arbitration Act and this Court's precedent. Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. 63, 67, 130 S.Ct. 2772, 177 L.Ed.2d 403. The parties to such a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also " 'gateway' questions of 'arbitrability.' " *Id.,* at 68–69, 130 S.Ct. 2772. Therefore, when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless. That conclusion follows also from this Court's precedent. See *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 649–650, 106 S.Ct. 1415, 89 L.Ed.2d 648.

Archer & White's counterarguments are unpersuasive. First, its argument that §§ 3 and 4 of the Act should be interpreted to mean that a court must always resolve questions of arbitrability has already been addressed and rejected by this Court. See, *e.g., First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985. Second, its argument that § 10 of the Act—which provides for back-end judicial review of an arbitrator's decision if an arbitrator has "exceeded" his or her "powers"—supports the conclusion that the court at the front end should also be able to say that the underlying issue is not arbitrable is inconsistent with the way Congress designed the Act. And it is not this Court's proper role to redesign the Act. Third, its argument that it would be a waste of the parties' time and money to send wholly groundless arbitrability questions to an arbitrator ignores the fact that the Act contains no "wholly groundless" exception. This Court may not engraft its own exceptions onto the statutory text. Nor is it likely that the exception would save time and money systemically even if it might do so in some individual cases. Fourth, its argument that the exception is necessary to deter frivolous motions to compel arbitration overstates the potential problem. Arbitrators are already capable of efficiently disposing of frivolous cases and deterring frivolous motions, and such motions do not appear to have caused a substantial problem in those Circuits that have not recognized a "wholly groundless" exception.

The Fifth Circuit may address the question whether the contract at issue in fact delegated the arbitrability question to an arbitrator, as well as other properly preserved arguments, on remand. Pp. —— – ——.

***2** 878 F.3d 488, vacated and remanded.

KAVANAUGH, J., delivered the opinion for a unanimous Court.

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Opinion

Justice KAVANAUGH delivered the opinion of the Court.

[1] [2] [3] Under the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute. Who decides that threshold arbitrability question? Under the Act and this Court's cases, the question of who decides arbitrability is itself a question of contract. The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. 63, 68–70, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010); *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943–944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

[4] [5] Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is "wholly groundless." The question presented in this case is whether the "wholly groundless" exception is consistent with the Federal Arbitration Act. We conclude that it is not. The Act does not contain a "wholly groundless" exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract. We vacate the contrary judgment of the Court of Appeals.

I

Archer and White is a small business that distributes dental equipment. Archer and White entered into a contract with Pelton and Crane, a dental equipment manufacturer, to distribute Pelton and Crane's equipment. The relationship eventually soured. As relevant here, Archer and White sued Pelton and Crane's successor-in-interest and Henry Schein, Inc. (collectively, Schein) in Federal District Court in Texas. Archer and White's complaint alleged violations of federal and state antitrust law, and sought both money damages and injunctive relief.

The relevant contract between the parties provided:

> "*Disputes*. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina." App. to Pet. for Cert. 3a.

After Archer and White sued, Schein invoked the Federal Arbitration Act and asked the District Court to refer the parties' antitrust dispute to arbitration. Archer and White objected, arguing that the dispute was not subject to arbitration because Archer and White's complaint sought injunctive relief, at least in part. According to Archer and

White, the parties' contract barred arbitration of disputes when the plaintiff sought injunctive relief, even if only in part.

***3** The question then became: Who decides whether the antitrust dispute is subject to arbitration? The rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions. Schein contended that the contract's express incorporation of the American Arbitration Association's rules meant that an arbitrator—not the court—had to decide whether the arbitration agreement applied to this particular dispute. Archer and White responded that in cases where the defendant's argument for arbitration is wholly groundless—as Archer and White argued was the case here—the District Court itself may resolve the threshold question of arbitrability.

Relying on Fifth Circuit precedent, the District Court agreed with Archer and White about the existence of a "wholly groundless" exception, and ruled that Schein's argument for arbitration was wholly groundless. The District Court therefore denied Schein's motion to compel arbitration. The Fifth Circuit affirmed.

In light of disagreement in the Courts of Appeals over whether the "wholly groundless" exception is consistent with the Federal Arbitration Act, we granted certiorari, 585 U.S. ——, 138 S.Ct. 2678, 201 L.Ed.2d 1071 (2018). Compare 878 F.3d 488 (C.A.5 2017) (case below); *Simply Wireless, Inc. v. T–Mobile US, Inc.,* 877 F.3d 522 (C.A.4 2017); *Douglas v. Regions Bank,* 757 F.3d 460 (C.A.5 2014); *Turi v. Main Street Adoption Servs., LLP,* 633 F.3d 496 (C.A.6 2011); *Qualcomm, Inc. v. Nokia Corp.,* 466 F.3d 1366 (C.A.Fed.2006), with *Belnap v. Iasis Healthcare,* 844 F.3d 1272 (C.A.10 2017); *Jones v. Waffle House, Inc.,* 866 F.3d 1257 (C.A.11 2017); *Douglas,* 757 F.3d, at 464 (Dennis, J., dissenting).

II

In 1925, Congress passed and President Coolidge signed the Federal Arbitration Act. As relevant here, the Act provides:

> "A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

[6] Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. *Rent–A–Center,* 561 U.S., at 67, 130 S.Ct. 2772. Applying the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also " 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.,* at 68–69, 130 S.Ct. 2772; see also *First Options,* 514 U.S., at 943, 115 S.Ct. 1920. We have explained that an "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent–A–Center,* 561 U.S., at 70, 130 S.Ct. 2772.

Even when the parties' contract delegates the threshold arbitrability question to an arbitrator, the Fifth Circuit and some other Courts of Appeals have determined that the court rather than an arbitrator should decide the threshold arbitrability question if, under the contract, the argument for arbitration is wholly groundless. Those courts have reasoned that the "wholly groundless" exception enables courts to block frivolous attempts to transfer disputes from the court system to arbitration.

***4** We conclude that the "wholly groundless" exception is inconsistent with the text of the Act and with our precedent.

[7] **[8]** We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

[9] That conclusion follows not only from the text of the Act but also from precedent. We have held that a court may not "rule on the potential merits of the underlying" claim that is assigned by contract to an arbitrator, "even

if it appears to the court to be frivolous." *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 649–650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). A court has " 'no business weighing the merits of the grievance' " because the " 'agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.' " *Id.,* at 650, 106 S.Ct. 1415 (quoting *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 568, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960)).

[10] That *AT & T Technologies* principle applies with equal force to the threshold issue of arbitrability. Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.

In an attempt to overcome the statutory text and this Court's cases, Archer and White advances four main arguments. None is persuasive.

First, Archer and White points to §§ 3 and 4 of the Federal Arbitration Act. Section 3 provides that a court must stay litigation "upon being satisfied that the issue" is "referable to arbitration" under the "agreement." Section 4 says that a court, in response to a motion by an aggrieved party, must compel arbitration "in accordance with the terms of the agreement" when the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."

[11] **[12]** **[13]** Archer and White interprets those provisions to mean, in essence, that a court must always resolve questions of arbitrability and that an arbitrator never may do so. But that ship has sailed. This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by "clear and unmistakable" evidence. *First Options,* 514 U.S., at 944, 115 S.Ct. 1920 (alterations omitted); see also *Rent–A–Center,* 561 U.S., at 69, n. 1, 130 S.Ct. 2772. To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. See 9 U.S.C. § 2. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.

[14] **[15]** *Second,* Archer and White cites § 10 of the Act, which provides for back-end judicial review of an arbitrator's decision if an arbitrator has "exceeded" his or her "powers." § 10(a)(4). According to Archer and White, if a court at the back end can say that the underlying issue was not arbitrable, the court at the front end should also be able to say that the underlying issue is not arbitrable. The dispositive answer to Archer and White's § 10 argument is that Congress designed the Act in a specific way, and it is not our proper role to redesign the statute. Archer and White's § 10 argument would mean, moreover, that courts presumably also should decide frivolous merits questions that have been delegated to an arbitrator. Yet we have already rejected that argument: When the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous. *AT & T Technologies,* 475 U.S., at 649–650, 106 S.Ct. 1415. So, too, with arbitrability.

***5** **[16]** *Third,* Archer and White says that, as a practical and policy matter, it would be a waste of the parties' time and money to send the arbitrability question to an arbitrator if the argument for arbitration is wholly groundless. In cases like this, as Archer and White sees it, the arbitrator will inevitably conclude that the dispute is not arbitrable and then send the case back to the district court. So why waste the time and money? The short answer is that the Act contains no "wholly groundless" exception, and we may not engraft our own exceptions onto the statutory text. See *Exxon Mobil Corp. v. Allapattah Services, Inc.,* 545 U.S. 546, 556–557, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005).

In addition, contrary to Archer and White's claim, it is doubtful that the "wholly groundless" exception would save time and money systemically even if it might do so in some individual cases. Archer and White assumes that it is easy to tell when an argument for arbitration of a particular dispute is wholly groundless. We are dubious. The exception would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is *wholly* groundless, as opposed to groundless. We see no reason to create such a time-consuming sideshow.

Archer and White further assumes that an arbitrator would inevitably reject arbitration in those cases where a judge would conclude that the argument for arbitration is wholly groundless. Not always. After all, an arbitrator

might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious. It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way.

[17] *Fourth,* Archer and White asserts another policy argument: that the "wholly groundless" exception is necessary to deter frivolous motions to compel arbitration. Again, we may not rewrite the statute simply to accommodate that policy concern. In any event, Archer and White overstates the potential problem. Arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable. And under certain circumstances, arbitrators may be able to respond to frivolous arguments for arbitration by imposing fee-shifting and cost-shifting sanctions, which in turn will help deter and remedy frivolous motions to compel arbitration. We are not aware that frivolous motions to compel arbitration have caused a substantial problem in those Circuits that have not recognized a "wholly groundless" exception.

In sum, we reject the "wholly groundless" exception. The exception is inconsistent with the statutory text and with our precedent. It confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.

***6 [18]** We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options,* 514 U.S., at 944, 115 S.Ct. 1920 (alterations omitted). On remand, the Court of Appeals may address that issue in the first instance, as well as other arguments that Archer and White has properly preserved.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

All Citations

--- S.Ct. ----, 2019 WL 122164, 19 Cal. Daily Op. Serv. 328

2018 WL 5734658
Court of Appeals of Ohio, Eighth District, Cuyahoga County.

Bryan PAULOZZI, et al., Plaintiffs-Appellees
v.
PARKVIEW CUSTOM HOMES, L.L.C., et al., Defendants-Appellants

No. 106617
|
RELEASED AND JOURNALIZED: November 1, 2018

Synopsis

Background: Home owner filed a complaint against home builder and other defendants alleging breach of contract, unjust enrichment, conversion, promissory estoppel, negligent misrepresentation, fraudulent misrepresentation, breach of express warranty, breach of implied warranty, violations of Ohio's Home Construction Service Suppliers Act, and violations of Ohio's Consumer Sales Practices Act. The Court of Common Pleas, Cuyahoga County, No. CV-17-886650, denied home builder's motion to stay litigation and compel arbitration. Home builder appealed.

[Holding:] The Court of Appeals, Mary J. Boyle, P.J., held that arbitration agreement was not unenforceable due to impossibility.

Reversed and remanded.

West Headnotes (13)

[1] Alternative Dispute Resolution
Scope and standards of review

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) Scope and standards of review

When determining whether a party has waived its right to arbitration under an agreement, the Court of Appeals reviews for an abuse of discretion.

Cases that cite this headnote

[2] Alternative Dispute Resolution
Scope and standards of review

Appeal and Error
Construction, interpretation, and application in general

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) Scope and standards of review
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)22 Substantive Matters
30k3765 Contracts
30k3767 Construction, interpretation, and application in general

Questions of contract interpretation, i.e., whether a party has agreed to be subject to an arbitration provision or questions of unconscionability, are reviewed under a de novo standard of review.

Cases that cite this headnote

[3] Appeal and Error
Province of, and deference to, lower court in general

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)9 Verdict and Findings in General
30k3403 Province of, and deference to, lower court in general

The Court of Appeals gives great deference to a trial court's factual findings.

Cases that cite this headnote

[4] **Contracts**
Defense of unconscionability

Contracts
Discharge by Impossibility of Performance

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1.8 Unreasonable or Oppressive Contracts
95k1.11 Unconscionable Contracts
95k1.11(4) Defense of unconscionability
95 Contracts
95V Performance or Breach
95k309 Discharge by Impossibility of Performance
95k309(1) In general

Like unconscionability, impossibility is an affirmative defense to contract claims.

Cases that cite this headnote

[5] **Contracts**
Unconscionable Contracts

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1.8 Unreasonable or Oppressive Contracts
95k1.11 Unconscionable Contracts
95k1.11(1) In general

Unconscionability includes both an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.

Cases that cite this headnote

[6] **Contracts**
Burden of proof;presumptions

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1.8 Unreasonable or Oppressive Contracts
95k1.12 Burden of proof;presumptions

The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable.

Cases that cite this headnote

[7] **Alternative Dispute Resolution**
Arbitration favored;public policy

Alternative Dispute Resolution
Evidence

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk113 Arbitration favored;public policy
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 Evidence

Arbitration is encouraged as a method of dispute resolution and a presumption favoring arbitration arises when the claim in dispute falls within the arbitration provision.

Cases that cite this headnote

[8] **Alternative Dispute Resolution**
Construction in favor of arbitration

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 Construction in favor of arbitration

Any doubts regarding arbitration should be resolved in its favor.

Cases that cite this headnote

[9] **Contracts**
Discharge by Impossibility of Performance

95 Contracts
95V Performance or Breach
95k309 Discharge by Impossibility of Performance
95k309(1) In general

Impossibility of performance occurs where after the contract is entered into, an unforeseen event arises rendering impossible

the performance of one of the contracting parties.

Cases that cite this headnote

[10] Contracts
Discharge by Impossibility of Performance

95 Contracts
95V Performance or Breach
95k309 Discharge by Impossibility of Performance
95k309(1) In general

A contracting party will not be excused from performance merely because performance may prove difficult, dangerous or burdensome.

Cases that cite this headnote

[11] Alternative Dispute Resolution
Severability

Alternative Dispute Resolution
Designation of arbitrators

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk140 Severability
25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk149 Designation of arbitrators

Arbitration agreement in dispute between home owner and builder over construction of home was not unenforceable due to impossibility because arbitrator designated in arbitration agreement was no longer operational; arbitration agreement did not designate defunct arbitrator as the exclusive arbitrator, and designated arbitrator was severable from agreement. Ohio Rev. Code Ann. § 2711.04.

Cases that cite this headnote

[12] Alternative Dispute Resolution
Disputes and Matters Arbitrable Under Agreement

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 In general

When deciding motions to compel arbitration, the proper focus is whether the parties actually agreed to arbitrate the issue, i.e., the scope of the arbitration clause.

Cases that cite this headnote

[13] Contracts
Partial Illegality

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k135 Effect of Illegality
95k137 Partial Illegality
95k137(1) In general

Whether a part of a contract may be severed from the remainder depends generally upon the intention of the parties, and this must be ascertained by the ordinary rules of construction.

Cases that cite this headnote

Civil Appeal from the Cuyahoga County Court of Common Pleas, Case No. CV-17-886650.

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Unknown Concrete-Pouring Company, Address Unknown, pro se.

BEFORE: Boyle, P.J., S. Gallagher, J., and Keough, J.

JOURNAL ENTRY AND OPINION

MARY J. BOYLE, P.J.:

***1** {¶ 1} Defendant-appellant, Parkview Custom Homes, L.L.C. ("Parkview"), appeals the trial court's order denying its motion to stay litigation and compel arbitration. It raises one assignment of error for our review:

> The trial court erred in finding that the arbitration clause is unenforceable under the doctrine of impossibility.

{¶ 2} Finding merit to Parkview's assignment of error, we reverse and remand.

I. Procedural History and Factual Background

{¶ 3} In August 2012, plaintiffs-appellees, Bryan and Kristi Paulozzi, entered into a construction agreement ("the Agreement") with Parkview. Under the Agreement, the Paulozzis would pay Parkview $552,469 to build them a home in Strongsville, Ohio. The Agreement set forth the following remedies:

> **REMEDIES:** If Owner fails to satisfy Owner's obligations, defaults, or breaches with respect to this Agreement, at Contractor's option, Contractor may (a) terminate this Agreement and all deposits and payments by Owner shall be the property of Contractor (as liquidated damages) and Contractor and Owner shall be relieved from all obligations hereunder, or (b) sue for damages or specific performance in the Court of Common Pleas with jurisdiction or (c) arbitrate any claim or dispute as provided below.
>
> If Contractor fails to satisfy its obligations, defaults, or breaches with respect to this Agreement, as Owner's sole remedies, Owner may either (d) terminate this Agreement and shall receive all payments and deposits made by Owner in excess of actual costs incurred by Contractor (with any dispute as to said costs or any related matter to be determined solely by arbitration, as provided below) and Contractor and Owner shall be relieved from all obligations hereunder, or (e) proceed through arbitration[.]
>
> * * *
>
> In the event any remedy or limitation of remedy is invalid or unenforceable, such invalidity or unenforceability shall not adversely effect any other limitation or remedy of either Owner or Contractor.
>
> * * *

{¶ 4} The Agreement also set forth the following arbitration clause:

> **ARBITRATION:**
>
> (a) With respect to all claims, breaches, defaults, disputes and damages arising out of or related to this Agreement or the Property or the Residence (whether grounded in contract or tort), to which arbitration applies, as provided above, the arbitration shall be conducted under the auspices of the Ohio Arbitration and Mediation Center in accordance with its rules, at Cleveland, Ohio. The cost of the arbitration shall be paid one-half (1/2) by each party, and each party shall be responsible for all fees and costs which they incur in engaging counsel or other experts in representing them in the arbitration proceeding. The decision of the arbitrator shall be conclusive and may be enforced in any court with jurisdiction over the parties.
>
> (b) Ohio law contains important requirements the Owner must follow before the Owner may file lawsuit or commence arbitration proceedings for defective construction against the residential contractor (Seller) which constructed the Owner's home. At least sixty (60) days before the Owner files lawsuit or commences arbitration proceedings, the Owner must provide the contractor with written notice of the conditions the Owner alleges are defective. Under Chapter 1312, of the Ohio Revised Code, the contractor has an opportunity to offer to repair or pay for the defects. The Owner is not obligated to accept any offer the contractor makes. There are strict guidelines and procedures under State law, and failure to follow them may affect the Owner's ability to file lawsuit or commence arbitration proceedings.

***2** {¶ 5} According to the Paulozzis, Parkview finished building the home in 2013; however, within the first year of moving into the home, the Paulozzis allege that they experienced issues with the driveway and kitchen floor. The Paulozzis allege that they informed Parkview of the problems, but that Parkview never fixed the problems and did not respond to their 60-day notice of construction defect letter.

{¶ 6} In September 2017, the Paulozzis filed a complaint against Parkview, National Carpet Outlet, Inc., and an "unknown concrete-pouring company." The Paulozzis set forth claims for breach of contract, unjust enrichment, conversion, promissory estoppel, negligent misrepresentation, fraudulent misrepresentation, breach of express warranty, breach of implied warranty, violations of Ohio's Home Construction Service Suppliers Act, and violations of Ohio's Consumer Sales Practices Act against Parkview.

{¶ 7} Parkview moved to stay the litigation and compel arbitration under the Agreement's arbitration provision. The Paulozzis opposed Parkview's motion, arguing that the arbitration clause was unenforceable because

> the parties['] chosen arbitration forum, Ohio Arbitration and Mediation Center ("OAMC"): (1) is non-responsive and appears to be defunct; (2) likely was defunct when the parties entered into their Construction Agreement ("the Agreement"); and (3) has a fatal conflict of interest due to undisclosed relationships between OAMC's representatives and Parkview's principals.

The Paulozzis argued that ordering arbitration would therefore be pointless. The Paulozzis also argued that the arbitration clause was void due to fraud; specifically, the Paulozzis argued that Parkview failed to disclose the professional relationship that it had with the OAMC. [1]

[1] The Paulozzis alleged that a conflict of interest arose from the fact that two of Parkview's employees were past presidents of the Home Builders Association of Greater Cleveland ("HBA") and that the OAMC's statutory agent and incorporator was a trustee for the HBA.

{¶ 8} Parkview filed a reply brief, arguing that the "essential purpose of the arbitration provision" was "still capable of substantial accomplishment." It stated that even if or though the OAMC was no longer operational, the court only had to appoint or the parties only had to agree to a different arbitrator. Parkview also argued that "the limited relationship between * * * Parkview * * * and the OAMC" is irrelevant and does not establish bias.

{¶ 9} The trial court denied Parkview's motion in a judgment entry, stating

> The arbitration clause at issue in this case states that the arbitration "shall be conducted under the auspices of the [OAMC.]" However, the OAMC is now defunct. The arbitration agreement did not provide for an alternative arbitration forum. Therefore, the arbitration clause is unenforceable under the doctrine of impossibility.

{¶ 10} It is from this order that Parkview now appeals.

II. Law and Analysis

{¶ 11} In its sole assignment of error, Parkview argues that the trial court erred in finding that the Agreement's arbitration provision was unenforceable under the doctrine of impossibility. Parkview's arguments in support of its assignment of error are nearly identical to that argued in its reply brief filed below and discussed above, with the exception of a newly-added argument that the trial court "failed to give full effect and meaning to the severability clause of the agreement." The Paulozzis' arguments in response are the same as those they raised in their opposition below.

Standard of Review

***3** **[1]** **[2]** {¶ 12} "The appropriate standard of review on judgments pertaining to the enforceability of an arbitration agreement depends on the questions raised in challenging the applicability of the arbitration provision." *Javorsky v. Javorsky*, 8th Dist. Cuyahoga, 2017-Ohio-285, 81 N.E.3d 971, ¶ 7, citing *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, 2012 WL 1142880. For example, when determining whether a party has waived its right to

arbitration under an agreement, we review for an abuse of discretion. *Heeden v. Autos Direct Online, Inc.*, 8th Dist. Cuyahoga, 2014-Ohio-4200, 19 N.E.3d 957, ¶ 9, citing *McCaskey.* Questions of contract interpretation (i.e., whether a party has agreed to be subject to an arbitration provision or questions of unconscionability), however, are reviewed under a de novo standard of review. *Brownlee v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 97707, 2012-Ohio-2212, 2012 WL 1795273, ¶ 8; *see also N. Park Retirement Community Ctr., Inc. v. Sovran Cos.*, 8th Dist. Cuyahoga No. 96376, 2011-Ohio-5179, 2011 WL 4600700, ¶ 7 ("Arbitration is ultimately a private agreement to avoid the courts — so if the parties have agreed to arbitrate a dispute, the court's refusal to stay proceedings would in essence force the parties to submit to court proceedings to which they had agreed to avoid. It follows that appellate courts must review questions of arbitrability under the de novo standard of review applied to contracts. The abuse of discretion standard of review has no application in the context of the court deciding to stay proceedings pending the outcome of arbitration because a stay in such circumstances is mandatory, not discretionary.").

[3] {¶ 13} Further, we give "great deference" to a trial court's factual findings. *See Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 37 ("When a trial court makes factual findings * * * supporting its determination that a contract is or is not unconscionable, such as any findings regarding the circumstances surrounding the making of the contract, those factual findings should be reviewed with great deference.").

[4] **[5]** **[6]** {¶ 14} Here, the trial court found that the arbitration clause was unenforceable under the doctrine of impossibility. Like unconscionability, impossibility is an affirmative defense to contract claims.[2] *See Dennison v. Dennison*, 7th Dist. Monroe No. 08 MO 1, 2008-Ohio-6924, 2008 WL 5412391, ¶ 38, citing *Skilton v. Perry Local School Dist. Bd. of Edn.*, 11th Dist. Lake No. 2001-L-140, 2002-Ohio-6702, 2002 WL 31744700 ("Impossibility is typically an affirmative defense * * * to breach of contract * * * claims."). As a result, we review de novo whether the arbitration provision is unenforceable because it is impossible. The trial court's conclusion that the arbitration provision is impossible to enforce leads us to conclude that it found that the OAMC is no longer operational, a factual finding to which we give "great deference."

2 As the Ohio Supreme Court explained in *Taylor Bldg. Corp. of Am.,*
> Unconscionability includes both " 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' " *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383, 613 N.E.2d 183 (1993), quoting *Williams v. Walker-Thomas Furniture Co.* (D.C.Cir.1965), 350 F.2d 445, 449, 121 U.S. App. D.C. 315; *see also Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294 (2d Dist.1993). The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable. *Id.* at ¶ 33.
>
> When objecting to Parkview's motion to compel arbitration, however, the Paulozzis did not argue that the arbitration provision was unconscionable and therefore unenforceable. As a result, especially considering the trial court's lack of factual findings, we will not consider whether the arbitration provision was unconscionable for the first time on appeal. *See id.* at ¶ 57 (Boyle, J., dissenting in part and concurring in part), quoting *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161 (9th Dist.) (" 'If a contract or term in a contract is found to be unconscionable at the time that the contract was made, a court may choose to either refuse to enforce the contract, enforce the contract without the unconscionable portion, or limit the application of the unconscionable portion to avoid an unconscionable result.' ").

Ohio Arbitration Act

***4** **[7]** {¶ 15} Ohio public policy favors enforcement of arbitration provisions. Arbitration is encouraged as a method of dispute resolution and a presumption favoring arbitration arises when the claim in dispute falls within the arbitration provision. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 700 N.E.2d 859 (1998). Ohio's policy of encouraging arbitration has been declared by the legislature through the Ohio Arbitration Act, R.C. Chapter 2711. *Goodwin v. Ganley, Inc.*, 8th Dist. Cuyahoga No. 89732, 2007-Ohio-6327, 2007 WL 4201359, ¶ 8.

[8] {¶ 16} R.C. 2711.01(A) provides that an arbitration agreement in a written contract "shall be valid,

irrevocable, and enforceable, except upon grounds that exist in law or equity for the revocation of any contract." Ohio law directs trial courts to grant a stay of litigation in favor of arbitration pursuant to a written arbitration agreement on application of one of the parties in accordance with R.C. 2711.02(B), which provides:

> If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

Any doubts regarding arbitration should be resolved in its favor. *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18, ¶ 18. [3]

[3] Ohio's strong policy favoring arbitration is consistent with federal law supporting arbitration. *See* Federal Arbitration Act ("FAA"), Section 2, Title 9, U.S. Code ("A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

{¶ 17} With these principles in mind and applying a de novo standard of review, we turn to whether the Agreement's arbitration provision is impossible to perform and, therefore, unenforceable.

Impossibility

[9] **[10]** {¶ 18} "Impossibility of performance occurs where after the contract is entered into 'an unforeseen event arises rendering impossible the performance of one of the contracting parties. * * * However, a contracting party will not be excused from performance merely because performance may prove difficult, dangerous, or burdensome.' " *Leon v. State Farm Fire & Cas. Co.*, 8th Dist. Cuyahoga, 2017-Ohio-8168, 98 N.E.3d 1284, ¶ 11, citing *Truetried Serv. Co. v. Hager*, 118 Ohio App.3d 78, 691 N.E.2d 1112 (8th Dist.1997).

[11] {¶ 19} Here, the Agreement is not unenforceable due to impossibility because it is still possible to arbitrate the issues between the parties despite the OAMC's absence. *See Koon v. Hoskins*, 4th Dist. Vinton No. 95CA497, 1996 WL 30018, 7 (Jan. 24, 1996), citing *Bd. of Edn. of Bath Twp. v. Townsend*, 63 Ohio St. 514, 59 N.E. 223 (1900) ("So long as a contract is capable of performance in any mode contemplated by the parties, its performance cannot be said to have become impossible."); *see also Gar Energy & Assocs. v. Ivanhoe Energy, Inc.*, E.D.Cal. No. 1:11-CV-00907, 2011 WL 6780927, 8 (Dec. 27, 2011) ("Here, the 'nature of the thing to be done' is arbitration, and impossibility does not attach to the procedure by which the arbitration is accomplished. Consequently, plaintiffs have failed to show that impossibility excuses performance of the arbitration agreement.").

***5** **[12]** {¶ 20} " '[W]hen deciding motions to compel arbitration, the proper focus is whether the parties actually agreed to arbitrate the issue, i.e., the scope of the arbitration clause[.]' " *Arnold v. Burger King*, 8th Dist. Cuyahoga, 2015-Ohio-4485, 48 N.E.3d 69, ¶ 28, quoting *Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St.3d 411, 2011-Ohio-5262, 958 N.E.2d 1203. It is clear that the parties agreed to the arbitration provision and, therefore, arbitration should be compelled despite the OAMC's absence. To hold otherwise would defeat the parties' intentions when they entered into the contract and agreed to arbitrate the dispute.

{¶ 21} In fact, considering that the Paulozzis argue that the OAMC was a biased entity and that Parkview wants to arbitrate the issues despite the OAMC's absence, it is clear that finding and appointing a different arbitration forum would actually quell both parties' concerns. Both the Paulozzis and Parkview are still able to perform their contractual duties under the arbitration provision

— which is to arbitrate the issues between them — and, therefore, the provision is not unenforceable under the doctrine of impossibility. As a result, we find that the arbitration provision is not impossible and, therefore, is enforceable.

{¶ 22} Both Parkview and the Paulozzis discuss our decision in *Citraro v. Computertraining.com Inc.*, 8th Dist. Cuyahoga No. 99278, 2013-Ohio-3249, 2013 WL 3894969, where we analyzed whether "the arbitration agreement was unenforceable because one of the potential arbitration forums referenced in the agreement had become unavailable." *Id.* at ¶ 1. While the parties in *Citraro* did not raise and we did not analyze whether the agreement was unenforceable due to impossibility, we believe that analyzing *Citraro* is necessary.

{¶ 23} In *Citraro,* the agreement between the parties stated that any arbitration between the parties would be resolved by "the applicable rules of [either the American Arbitration Association or the National Arbitration Forum] then in effect" and that the agreement was governed by the FAA. *Id.* at ¶ 2. The agreement also contained a severability clause that stated, "If any portion of this Arbitration Agreement cannot be enforced, the rest of the Arbitration Agreement will continue to apply[.]" *Id.* at ¶ 14.

{¶ 24} We concluded that the arbitration agreement was enforceable "notwithstanding NAF's unavailability [because the] parties to the Note have manifested a clear intent to arbitrate their claims, and this intention is not contingent on the availability of a particular arbitrator." *Id.* at ¶ 11. We based our conclusion on the fact that (1) Section 5 of the FAA "plainly requires that the court appoint an arbitrator where the specified arbitration forum is no longer available," and (2) "the severability clause in the Arbitration Agreement evidences the parties' intent to arbitrate regardless of the NAF's availability." *Id.* at ¶ 12-14. Specifically, as to the severability clause, we found that while the portion of the arbitration clause concerning NAF was unenforceable, "the rest of the [agreement] continues to apply, and what remains manifests the parties' clear intention to arbitrate." *Id.* at ¶ 16. We stated, "[a]s the Citraros did not reject the [agreement], they signaled their agreement to arbitrate their claims." *Id.*

{¶ 25} While we noted the appellants' argument that "when a selected forum cannot arbitrate a claim, a court cannot enforce the arbitration agreement, regardless of the existence of a severability clause[,]" we found that we did not need to decide "whether such language would render the [agreement] unenforceable" because the agreement did not identify NAF as the "exclusive" arbitrator or specify that NAF or AAA were exclusive. *Citraro*, 8th Dist. Cuyahoga No. 99278, 2013-Ohio-3249, at ¶ 18. We based our finding on the fact that "rather than reference the rules of any particular arbitrator, the [agreement] here generally specifies that any claim 'shall be resolved by arbitration under this [agreement] and the applicable rules of the [arbitration forum] then in effect.' " *Id.*

***6** {¶ 26} There are a number of distinctions between this case and *Citraro.* First, the contract in *Citraro* was governed by the FAA, whereas the Agreement between Parkview and the Paulozzis is not. Therefore, to the extent that our holding in *Citraro* relied on the fact that the FAA requires a court to appoint a new arbitrator when the original arbitrator identified by an agreement between the parties is no longer available, *Citraro* is not helpful. Second, while the agreement in *Citraro* and the Agreement in this case both contained a severability clause, the agreement in *Citraro* identified two arbitration forums, whereas the Agreement in this case only identified one, and the Agreement in this case does reference particular rules, stating that the arbitration would be conducted "under the auspices of the [OAMC] in accordance with its rules[.]"

{¶ 27} Despite the above distinctions, we nevertheless reach a similar conclusion to that in *Citraro*. Like the agreement in that case, the Agreement between the Paulozzis and Parkview does not identify the OAMC as the "exclusive" arbitrator. The parties' positions in this appeal support that conclusion. As we noted above, the Paulozzis believe that having the OAMC serve as an arbitrator would have been unfair, and Parkview still desires arbitration even though its preferred arbitration forum is no longer viable. Therefore, it does not appear that either party is opposed to having another arbitrator handle the dispute.

[13] {¶ 28} Furthermore, like *Citraro*, 8th Dist. Cuyahoga No. 99278, 2013-Ohio-3249, we find that mention of the OAMC can be severed from the Agreement. "Whether

a part of a contract may be severed from the remainder 'depends generally upon the intention of the parties, and this must be ascertained by the ordinary rules of construction.' " *Ignazio*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18, at ¶ 11, quoting *Huntington & Finke Co. v. Lake Erie Lumber & Supply Co.*, 109 Ohio St. 488, 143 N.E. 132 (1924).

{¶ 29} Here, the severability clause, agreed to by both parties, states, "In the event any remedy or limitation of remedy is invalid or unenforceable, such invalidity or unenforceability shall not adversely effect any other limitation or remedy of either Owner or Contractor." Identifying the OAMC as the arbitrator was a limitation of the parties' remedy of arbitration. Because the OAMC is no longer available, that portion must be severed from the Agreement. Severing the identification of the OAMC from the arbitration provision leaves the provision without an identified arbitrator. However, upon application by either party to the court of common pleas, that court may appoint an arbitrator to handle the dispute between the parties. *See* R.C. 2711.04. As a result, the identification of the OAMC as the arbitrator may be severed from the arbitration provision, which is still enforceable.

Fraud

{¶ 30} The Paulozzis also argue that the arbitration provision is unenforceable because it was induced by fraud. This, however, is a matter for the trial court to decide on remand as the trial court must make findings of fact before we can review the issue. *See Citraro*, 8th Dist. Cuyahoga No. 99278, 2013-Ohio-3249, at ¶ 19 ("Although the question of whether the Arbitration Agreement was unconscionable still lingers, we conclude that this is a matter for the trial court to resolve on remand. * * * [T]he trial court has yet to make any fact findings with respect to the allegation that the Arbitration Agreement is unconscionable. * * * Accordingly, we remand this case to the trial court with instructions to make findings of fact and to render a ruling on whether the Arbitration Agreement is unconscionable as a matter of law.").

{¶ 31} Accordingly, we reverse the trial court's finding that the arbitration provision was impossible and, therefore, unenforceable and remand the matter to the trial court to make factual findings and a ruling as to whether the arbitration clause was induced by fraud.

***7** {¶ 32} Judgment reversed, and case remanded to the lower court for further proceedings consistent with this opinion.

SEAN C. GALLAGHER, J., and KATHLEEN ANN KEOUGH, J., CONCUR

All Citations

--- N.E.3d ----, 2018 WL 5734658, 2018 -Ohio- 4425

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Court of Appeals of Texas, Dallas.

SM ARCHITECTS, PLLC and Roger Stephens, Appellants
v.
AMX VETERAN SPECIALTY SERVICES, LLC, Appellee

No. 05-17-01064-CV
|
Opinion Filed November 8, 2018

Synopsis

Background: Architecture firm and architect, named as respondents in arbitration proceedings, brought interlocutory action in district court, requesting order entering arbitration panel's order so that it could be appealed, or in the alternative, vacating arbitration panel's order denying architects' motion to dismiss without a hearing. The 116th Judicial District Court, Dallas County, No. DC-17-11230, Tonya Parker, J., denied the motion to vacate, but stated that order was final and appealable. Architects appealed, and appellees moved to dismiss for lack of jurisdiction.

[Holding:] The Dallas Court of Appeals, Francis, J., held that as matter of first impression, statutory requirement that plaintiff file certificate of merit in any action or arbitration proceeding for damages arising from services provided by licensed or registered professional did not create jurisdictional right to interlocutory appeal.

Vacated and dismissed.

West Headnotes (7)

[1] Alternative Dispute Resolution
Scope and Standards of Review

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(1) In general

Because state law favors arbitration, judicial review of arbitration proceedings is extraordinarily narrow. Tex. Civ. Prac. & Rem. Code Ann. § 171.081.

Cases that cite this headnote

[2] Alternative Dispute Resolution
Decisions reviewable

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk368 Decisions reviewable

Statutory requirement that a plaintiff file certificate of merit in any action or arbitration proceeding for damages arising from services provided by licensed or registered professional did not create jurisdictional right to interlocutory appeal, and thus, trial court's order on architects' motion to vacate arbitration panel's denial of motion to dismiss, in proceedings involving alleged professional misconduct, was void for lack of jurisdiction; legislative history when considering requiring certificate of merit did not suggest intention to expand judicial review of arbitrations, and parties and panel could assess merits of allegations early in process even without benefit of interlocutory appeal. Tex. Civ. Prac. & Rem. Code Ann. §§ 150.002, 171.086.

Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Nature and essentials in general

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk301 Nature and essentials in general

In context of arbitration, the common and technical meanings of "award" contemplate finality. Tex. Civ. Prac. & Rem. Code Ann. § 171.088(a).

Cases that cite this headnote

[4] **Alternative Dispute Resolution**
Decisions reviewable

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk368 Decisions reviewable

Particularly in the context of the Texas Arbitration Act (TAA), which seeks to limit the role of the courts, the term "award" cannot be read so broadly as to encompass interlocutory orders, even those that are otherwise immediately appealable. Tex. Civ. Prac. & Rem. Code Ann. § 171.001 et seq.

Cases that cite this headnote

[5] **Alternative Dispute Resolution**
Decisions reviewable

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk368 Decisions reviewable

To allow a party to appeal an interlocutory arbitration panel order in the same manner as an arbitration award would conflict with the Texas Arbitration Act's (TAA) goal of providing an efficient, economical system for resolving disputes and limiting judicial review with its accompanying expense and delay. Tex. Civ. Prac. & Rem. Code Ann. § 171.001 et seq.

Cases that cite this headnote

[6] **Alternative Dispute Resolution**
Conditions precedent

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk180 Conditions precedent

Statute requiring a plaintiff to file certificate of merit in any action or arbitration proceedings against licensed or registered professionals is meant to increase efficiency in conflict resolution by providing a means to quickly eliminate patently unmeritorious claims against licensed or registered professionals. Tex. Civ. Prac. & Rem. Code Ann. § 150.002.

Cases that cite this headnote

[7] **Alternative Dispute Resolution**
Conditions precedent

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk180 Conditions precedent

Plaintiffs bringing claims in any action or arbitration proceedings against licensed or registered professionals must make a threshold showing of the viability of their claims through a certificate of merit or have those claims subject to dismissal. Tex. Civ. Prac. & Rem. Code Ann. § 150.002.

Cases that cite this headnote

On Appeal from the 116th Judicial District Court, Dallas County, Texas, Trial Court Cause No. DC-17-11230. Tonya Parker, Judge

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Before Justices Bridges, Francis, and Lang-Miers

OPINION

Opinion by Justice Francis

***1** This is a case of first impression regarding the ability of a party in an arbitration proceeding to appeal an interlocutory order denying a motion to dismiss for failure to file a certificate of merit as required by section 150.002 of the Texas Civil Practice and Remedies Code. Because we conclude the right to interlocutory appeal granted by section 150.002 does not apply to an order rendered by an arbitration panel, and the Texas Arbitration Act (TAA) does not provide a means for judicial review of such an order, we vacate the trial court's order as void and dismiss this appeal for lack of jurisdiction.

On August 5, 2016, AMX Veteran Specialty Services, LLC filed a demand for arbitration with the American Arbitration Association naming SM Architects, PLLC and one of its architects, Roger Stephens, as respondents. AMX stated the nature of the dispute was "professional negligence against architect and architectural firm; breach of contract; tortious interference with contract; [and] business disparagement." Section 150.002 of the civil practice and remedies code requires that, in any action or arbitration proceeding based on the provision of professional architectural services, the plaintiff must file a certificate of merit affidavit by a third-party licensed architect in support of its claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002. As an attempt to meet this requirement, AMX attached to its arbitration demand an unsigned letter by Bradford Russell of BR Architects & Engineers.

In response to the demand, appellants asserted a general denial and requested a more definite statement of the claims being made. Six weeks later, AMX filed an amended demand for arbitration, removing Stephens as a respondent and setting out the claims against SMA in more detail. SMA answered asserting multiple affirmative defenses, and both SMA and Stephens brought counterclaims for declaratory judgment, breach of contract, and copyright infringement.

On November 10, 2016, the parties mediated the case, but the dispute was not resolved. On December 28, an arbitration panel was appointed and the parties began the discovery process. Three months later, AMX amended its demand for arbitration again to reassert its claims against Stephens. Attached to the second amended demand was a signed certificate of merit affidavit by Russell. The contents of the affidavit were substantially similar to the original unsigned letter, but with added information regarding SMA's alleged negligence. Stephens was not referenced in the affidavit.

Eight months after the arbitration proceedings commenced, appellants filed a motion with the panel to dismiss AMX's claims for failure to comply with the certificate of merit requirement. Appellants contended the unsigned letter submitted with AMX's first demand for arbitration was not an affidavit as required by section 150.002. Appellants further argued the affidavit filed with AMX's second amended demand for arbitration was ineffective because the failure to file an affidavit contemporaneously with the first-filed complaint could not be cured by amendment and the affidavit did not meet the statute's specific requirements. Because section 150.002(e) states the failure to file a certificate of merit affidavit "shall result in dismissal of the complaint against the defendant," appellants contended dismissal was statutorily mandated. *See id.* The arbitration panel denied appellants' motion to dismiss without a hearing.

***2** Relying on section 150.002(f), which states that "[a]n order granting or denying a motion for dismissal" under chapter 150 is "immediately appealable," appellants filed a notice of appeal stating they wished to appeal the arbitration panel's order to this Court. *See id.* However, because chapter 150 provides no process for appealing an interlocutory arbitration order, appellants stated in their notice that, "out of an abundance of caution" and "to

the extent a district court filing, ruling, order, or other action" was required, they were filing suit in district court and requesting the court render an order "entering" the arbitration panel's order so that order could be appealed to this Court. In the alternative, appellants requested the district court vacate the arbitration panel's order. Several weeks later, appellants filed a new motion in district court requesting only that the court vacate the arbitration panel's order under either chapter 150 or section 171.088 of the TAA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a).

AMX moved to dismiss the action in district court for lack of jurisdiction, stating there was nothing in chapter 150 to indicate the legislature intended to confer jurisdiction on the district courts to review an interlocutory order issued by an arbitration panel. With respect to the motion to vacate, AMX argued the TAA authorized vacatur only of final awards and not interlocutory orders. The trial court denied the motion to vacate the arbitration panel's order but stated its order was "a final appealable order." The court additionally stayed the arbitration until further order of the court. Appellants then amended their notice of appeal in this Court to challenge the trial court's order denying the motion to vacate.

AMX has requested this appeal be dismissed on essentially the same grounds urged in the trial court. In response, appellants contend their appeal of the arbitration panel's order is authorized by both the plain language of section 150.002(f) and the TAA, which permits limited judicial review of arbitration awards. In the alternative, they ask us to treat their brief on appeal as a petition for writ of mandamus.

In deciding whether we have jurisdiction to review the merits in this matter, we examine the legislature's decision to apply the certificate of merit requirement, with its right to immediate appeal, to arbitration proceedings. This must be done in the context of the TAA, which contains the legislative grant of court jurisdiction over arbitrations. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.081. By enacting section 150.002(f), it is clear the legislature intended to provide parties in a suit before a trial court the right to immediately challenge the court's decision on whether a plaintiff has met the certificate of merit requirement. The issue before us is whether the legislature intended to significantly alter the jurisdictional limitations on courts with respect to arbitration proceedings to allow interlocutory judicial review of the same determination made by an arbitration panel. We conclude section 150.002 does not evidence such an intent.

[1] Because Texas law favors arbitration, judicial review of arbitration proceedings is extraordinarily narrow. *See E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 271 (Tex. 2010). The court's jurisdiction over an arbitration proceeding is limited to enforcing the agreement to arbitrate and rendering judgment on the panel's award. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.081. The filing of an application for an order concerning arbitration invokes the jurisdiction of the court. *Id.* § 171.082(a). But the "orders that may be rendered" include only those within the purview of section 171.086 of the TAA that assist with the arbitration process or involve limited review of a panel award. *Id.* § 171.086. Judicial review of an interlocutory order issued by an arbitration panel does not fall within the scope of section 171.086.

***3** Similarly, chapter 150 does not provide or create a process for judicial review of an interlocutory arbitration order. The absence of a review process for interlocutory arbitration orders is demonstrated by appellants' actions in this case. After the arbitration panel denied appellants' motion to dismiss, they initially appealed the panel's order directly to this Court. But, as we noted in a letter to counsel, this Court's jurisdiction is dependent on the jurisdiction of the district and county courts within our district, and we do not have direct jurisdiction over arbitration panel decisions. TEX. GOV'T CODE ANN. § 22.220(a) (Supp.).

Appellants then filed suit and obtained an order from the district court refusing to vacate the arbitration panel's order and amended their notice of appeal to challenge that order. Although a trial court may render an order granting or denying a motion to vacate an arbitration panel's decision, it may only do so with respect to an arbitration award. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.086–.088. Here, appellants have attempted to use the process for judicial review of an arbitration award to appeal the interlocutory order at issue arguing "nothing in the TAA precludes the treatment of an interlocutory Chapter 150 order as an 'award.' " We disagree.

[2] **[3]** **[4]** **[5]** Although the TAA does not define the term "award," where a term is undefined, we consider it in context and apply the meaning of its common usage. TEX. GOV'T CODE ANN. § 311.011(a). In addition, where a term has acquired a technical or particular meaning, it is construed accordingly. *Id.* § 311.011(b). Webster's Third New International Dictionary defines "award" as "a judgment, sentence, or final decision," especially "the decision of arbitrators in a case submitted to them." *Award*, WEBSTER'S THIRD NEW INT'L DICTIONARY, 152 (1993). Black's Law Dictionary defines "award" as a "final judgment or decision, esp. one by an arbitrator or by a jury assessing damages." *Award*, BLACK'S LAW DICTIONARY (10th ed. 2014). Both the common and technical meanings of "award" contemplate finality. *See Centex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677, 683 (Tex. App.—Dallas 2010, pet. denied) (arbitration awards have the same effect as judgments in a court of last resort.) Particularly in the context of the TAA, which seeks to limit the role of the courts, the term "award" cannot be read so broadly as to encompass interlocutory orders – even those that are otherwise immediately appealable. *Cf. Yaseen Educ. Soc'y v. Islamic Ass'n of Arabi, Ltd.*, 406 S.W.3d 385, 389 (Tex. App.—Dallas 2013, no pet.) (appellate court has no jurisdiction over incomplete arbitration award). To allow a party to appeal an interlocutory arbitration panel order in the same manner as an arbitration award would conflict with the TAA's goal of providing an efficient, economical system for resolving disputes and limiting judicial review with its accompanying expense and delay. *See CVN Grp., Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002); *Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 417 (Tex. App.—Fort Worth 2009, no pet).

[6] **[7]** We recognize the goal of section 150.002, like the TAA, is to increase efficiency in conflict resolution. It does so by providing a means to quickly eliminate patently unmeritorious claims against licensed or registered professionals. *See Criterium-Farrell Eng'rs v. Owens*, 248 S.W.3d 395, 399 (Tex. App.—Beaumont 2008, no pet.). Plaintiffs must make a "threshold showing" of the viability of their claims through a certificate of merit or have those claims subject to dismissal. *See M-E Eng'rs, Inc. v. City of Temple*, 365 S.W.3d 497, 504 (Tex. App.—Austin 2012, pet. denied). But the application of the certificate of merit requirement to an arbitration proceeding does not evince a concomitant intent to expand the court's jurisdiction over the proceeding. Even without the right to interlocutory appeal, a defendant in an arbitration proceeding maintains the benefits of the certificate of merit, which allows both him and the arbitration panel to assess the merits of the plaintiff's allegations early in the process. Section 150.002 is not rendered meaningless with respect to arbitrations simply because a panel's refusal to dismiss claims, like most interlocutory decisions, is not immediately reviewable.

***4** It is noteworthy that, although the certificate of merit requirement was made applicable to arbitration proceedings more than thirteen years ago, we can find no cases in which a defendant in an arbitration proceeding has sought judicial review under 150.002(f). Indeed, the legislative history of section 150.002 does not suggest the legislature intended to expand judicial review of arbitrations. Section 150.002 was amended in 2005 by House Bill 1573. The "Statement of Intent" by the bill's author-sponsor states the bill's purpose was to provide "a more accurate description of today's architecture practice" and "eliminate ambiguities in Chapter 150, Civil Practice and Remedies Code, regarding certificates of merit for design professionals." *See* House Comm. on Bus. & Commerce, Bill Analysis, Tex. H.B. 1573, 79th Leg., R.S. (2005). None of the "ambiguities" noted in the Statement of Intent pertain to arbitration proceedings or the ability of a party in such a proceeding to pursue interlocutory review. *Id.* The statement provides no support, therefore, for significant judicial intrusion into ongoing arbitration proceedings.

The scope of the court's jurisdiction over arbitration proceedings is specifically and narrowly defined by sections 171.081 and 171.086 of the TAA. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.081 & 171.086. If the legislature intended to expand judicial review of arbitration decisions beyond our limited review of arbitration awards, it could have done so by amending these sections. Absent a clear expression of intent to expand the court's jurisdiction, we cannot conclude the legislature intended anything more by its inclusion of arbitration proceedings in section 150.002 than to require plaintiffs in those proceedings to file a certificate of merit. *See id.* § 150.002(a); *see also CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011) (we strictly apply statutes granting interlocutory appeals because they are a narrow exception to general rule that interlocutory orders are not immediately appealable).

Because neither section 150.002(f) nor the TAA provides courts with the jurisdiction to review an arbitration panel's denial of a motion to dismiss, the trial court's order on appellant's motion to vacate the panel's decision is void for lack of jurisdiction. Appellants have requested that, if we determine the right to interlocutory appeal does not apply in this case, we treat their appeal as a petition for writ of mandamus and order the trial court to render judgment dismissing AMX's arbitration claims for failure to comply with section 150.002. Absent court jurisdiction to review the arbitration panel's interlocutory decision, however, there is no further relief we can grant, or action we can compel the trial court to take, with respect to the panel's decision.

Based on the foregoing, we vacate the trial court's order as void and dismiss this appeal for want of jurisdiction.

All Citations

--- S.W.3d ----, 2018 WL 5839657