The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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DELEGATE BOLDLY AND SPECIFICALLY

(DDK Hotels, LLC v. Williams-Sonoma, Inc.[2])

An exclusive 50%/50% Joint Venture Agreement ("JV")[3] between the DDK Hotels entities ("DDK") and the Williams-Sonoma entities ("W-S") contained a detailed dispute resolution agreement (calling for mediation and arbitration "in accordance with the Commercial Arbitration Rules and Mediation Procedures of the AAA then in effect") for the resolution of "Deadlock" matters defined as "Disputed Matter[s]" that required unanimous Board or Member approval except for "a Disputed Matter with respect to any Fundamental Decision."[4] When W-S started seeking independent third-parties with whom to joint venture during the term of the JV, DDK sued W-S in the U.S. District Court for the Eastern District of New York.[5] W-S then filed suit in Delaware Court of Chancery for dissolution of the JV based on "decisional deadlock."[6] The Delaware Court dismissed the dissolution lawsuit without prejudice, after which DDK filed a supplemental claim in the original district court lawsuit for reimbursement of its fees and costs incurred as the prevailing party in the Delaware Court of Chancery.[7] W-S filed a motion to compel arbitration in response to DDK's supplemental claim. The District Court denied W-S's motion to compel.[8] The Second Circuit Court of Appeals affirmed.

The issue on appeal to the Second Circuit was "whether the arbitration agreement [in the JV] delegates the question of arbitrability to the arbitrator rather than the court."[9] The arbitration

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[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of The Arbitration Newsletter is to inform generally. The application of the comments in The Arbitration Newsletter to specific questions and cases should be discussed with the reader's independent legal counsel.

[2] 2021 U.S. App. LEXIS 21862* (2nd Cir. July 23, 2021).

[3] *Id.* at *3 (A Delaware LLC with its Company Agreement labeled a "Joint Venture Agreement").

[4] 2021 U.S. App. LEXIS 21862 at *7-10 (Section 16(c) of the JV).

[5] 2020 U.S. App. LEXIS 127593 (E.D. N.Y. July 20, 2020).

[6] 2021 U.S. App. LEXIS 21862 at *4.

[7] *Id.* (Pursuant to Section 21(h) of the JV.).

[8] 2020 U.S. App. LEXIS 127593 at *32-33 (E.D. N.Y. July 20, 2020) (delegation not clear and mistakable even with the parties' adoption of the then current AAA arbitration rules).

[9] 2021 U.S. App. LEXIS 21862 at *5.

agreement adopted the then current AAA Arbitration Rules but also contained an express "exception of injunctive relief" and an express exception "as provided in Section 16(c)" that exempted injunctive relief and "a Disputed Matter with respect to any Fundamental Decision" from both mediation and arbitration.[10]

The Second Circuit applied *de novo* review to both the denial of the motion to compel and the arbitrability issue.[11] Arbitration is a matter of contract between the parties.[12] Arbitrability questions are "threshold" questions that include "whether the arbitration agreement applies to a particular dispute."[13] All these "threshold questions" are presumed to be questions to be answered by the court and not the arbitrator.[14] This presumption results from a party's right to have disputes adjudicated by courts unless parties select arbitrators to resolve their disputes.[15] Parties can overcome this presumption by delegating to arbitrators the threshold arbitrability question of who decides these questions – courts or arbitrators – but that delegation must be stated clearly and unmistakably.[16] The arbitration of a threshold question "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."[17] The parties' arbitration agreement "is determinative" of the answer of who decides arbitrability questions.[18]

There are different presumptions between who decides the *scope* of the arbitration agreement and who decides the delegation of the arbitrability questions.[19] Doubts about the arbitrability of a merits-related or claim *scope* question are resolved by a *presumption of arbitrability* in the face of silence or ambiguity in the arbitration agreement. Who decides arbitrability questions in the face of silence or ambiguity in the arbitration agreement is presumed to be the court – a *presumption of non-arbitrability*.[20]

Many arbitration agreements are silent or ambiguous regarding *who* decides arbitrability. This puts the **parties' intent** in question. And the express incorporation of arbitration rules with provisions similar to R-7 of the AAA Commercial Arbitration Rules "does not, *per se*, demonstrate clear and unmistakable evidence of the **parties' intent** to delegate threshold questions of arbitrability to the arbitrator."[21] The context for the arbitration agreement and other provisions of the parties' agreement should be reviewed when the parties' intent remains unclear or ambiguous.[22]

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[10] *Id.* at *8-9 (quoting Sections 16(b) and (c)).
[11] *Id.* at *16.
[12] *Id.* at *17-18.
[13] *Id.* at *18.
[14] *Id.*
[15] *Id.*; citing Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019).
[16] *Id.*; citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995).
[17] *Id.* at *17-18.
[18] *Id.* at *20-21.
[19] *Id.* at *19.
[20] *Id.*; citing First Options, 514 U.S. at 945.
[21] *Id.* at *22 (emphasis added).
[22] *Id.* at *21-22.

Arbitration agreements do "clearly and unmistakably" delegate arbitrability to the arbitrator when they are "broad and express[ ] the intent to arbitrate all aspects of all disputes" **and** incorporate arbitration rules with provisions similar to R-7 of the AAA Commercial Arbitration Rules.[23] Arbitration agreements do not "clearly and unmistakably" delegate arbitrability to the arbitrator that may incorporate arbitration rules with provisions similar to R-7 of the AAA Commercial Arbitration Rules but are "narrower, vague, or contain[ ] exclusionary language suggesting that the parties consented to arbitrate only a limited subset of disputes" and that also may contain "a qualifying provision."[24]

OBSERVATIONS

1. Delegation of arbitrability to the arbitrator takes more than simple incorporation of arbitration rules similar to R-7 of the AAA Commercial Arbitration Rules in the arbitration agreement.

2. Make the delegation of arbitrability express, clear, and unmistakable, and incorporate rules similar to R-7 of the AAA Commercial Arbitration Rules in the arbitration agreement.

3. Describe expressly in the arbitration agreement the parties' intent regarding delegation of arbitrability to the arbitrator.

4. Carefully and thoughtfully decide what exemptions, exceptions, or qualifying terms are included in the arbitration agreement and whether they are needed if you want the arbitrator unambiguously delegated arbitrability.

5. Incorporate R-7 of the AAA Commercial Arbitration Rules or rules similar to R-7 in the arbitration agreement even when you do not want to delegate arbitrability to the arbitrator because of other issues that need the arbitrator empowered to act during the arbitration process.

[23] *Id.* at *23; citing three Second Circuit cases (emphasis added).
[24] *Id.* at *24; citing NASDAQ OMX Grp., Inc. v. UBS Sec., LLC, 770 F.3d 1010 (2nd Cir. 2014).