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U.S. Supreme Court to Revisit Who Determines Arbitrability

Raoul Cantero (White & Case LLP) · Wednesday, February 24th, 2010 · White & Case

On January 15, 2010, the United States Supreme Court granted a writ of certiorari in Rent-A-Center West, Inc. v. Jackson, Case No. 09-497, agreeing to revisit the oft-litigated issue of whether the court or arbitrator should determine arbitrability under the Federal Arbitration Act ("FAA"). The Court's prior jurisprudence has established the general rule, as a matter of federal substantive arbitration law, that challenges to a contract's validity as a whole should be heard by the arbitrator, while those specific to the arbitration provision should be heard by the court. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006). The variation now before the high court concerns the extent to which the parties can contract around that rule. The question presented to the Court is whether a court is required in all cases to hear claims that an arbitration agreement subject to the FAA is unconscionable, even when the parties have clearly and unmistakably assigned the decision to the arbitrator.

Background and Holdings Below:

Antonio Jackson filed a lawsuit in the federal district court in Nevada against his employer, Rent-A-Center, alleging race discrimination and retaliation. Rent-A-Center moved to compel arbitration, relying on a standalone arbitration agreement Jackson signed as a condition of his employment (the "Agreement"). The Agreement provided, inter alia, that "[t]he Arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to any claim that all or any part of this Agreement is void or voidable." Rent-A-Center argued that, in light of this provision, the threshold question of whether the arbitration agreement was valid and enforceable was for an arbitrator, not the court, to decide. Jackson argued in response that the Agreement was substantively and procedurally unconscionable. The district court granted the motion to compel arbitration, reasoning that the parties "clearly and unmistakably" provided the Arbitrator exclusive authority to decide the enforceability of the arbitration agreement.

A panel of the Ninth Circuit Court of Appeals reversed the district court in part. Jackson v. Rent-A-Center, 581 F.3d 912, 920 (9th Cir. 2009). The two-judge majority held that where "an arbitration agreement delegates the question of the arbitration agreement's validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter." Id. at 919. In the majority's view, the parties' agreement to arbitrate arbitrability –like all arbitration agreements– was not enforceable per se but rather was subject to ordinary state-law principles governing contracts. Thus, the majority

concluded that the fact that the parties signed the Agreement was not dispositive in the face of Jackson's contention that he could not meaningfully assent.

The dissenting judge disagreed, stating that the question of the arbitration agreement's validity should have gone to the arbitrator. The dissenter relied on the Supreme Court's prior holding that "although the general rule gives the threshold question of arbitrability to courts, parties may provide for the arbitrator to decide the question instead if they do so 'clearly and unmistakably.'" Id. at 921 (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)). The dissenting judge pointed out that even the majority conceded that the Agreement was neither silent nor ambiguous as to who should determine arbitrability.

Application to Arbitration Agreements under the New York Convention (Chapter 2 of the FAA):

Although Rent-A-Center arises in the domestic arbitration context, the Supreme Court's forthcoming decision may impact international arbitration cases. There is a split of authority in the federal appellate courts as to whether a state-law challenge of unconscionability is a ground for non-enforcement of an arbitration agreement under the New York Convention. The Eleventh Circuit Court of Appeals has held that the defense of unequal bargaining power does not fit within the narrow scope of Article II(3) of the New York Convention, which limits the potential defenses to arbitration agreements that are "null and void, inoperative or incapable of being performed." See Bautista v. Star Cruises, 396 F.3d 1289, 1302 (11th Cir. 2005) (holding that unconscionability was not within the limited scope of the "null and void" clause of the Convention, which encompassed "only those situations –such as fraud, mistake, duress, and waiver– that can be applied neutrally on an international scale"). The First Circuit Court of Appeals, however, has entertained the defense of unconscionability against an arbitration agreement governed by the New York Convention, reasoning that unconscionability is a "standard contractual challenge" to an arbitration agreement that is consistent with the Convention's "null and void" clause. DiMercurio v. Sphere Drake Ins., Plc, 202 F.3d 71, 79-81 (1st Cir. 2000); see also Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148, 1158 (9th Cir. 2008) (assuming without deciding that unconscionability renders an agreement "null and void" under the Convention).

Moreover, the Court's opinion in Rent-A-Center may shed light as to the extent to which parties can assign other jurisdictional issues (sometimes referred to as "gateway issues") to an arbitrator by express agreement. Parties to international arbitrations commonly agree to rules that expressly empower the arbitrator to determine challenges to the existence, scope or validity of the arbitration agreement. See e.g., ICC Arbitration Rules, Art. 6(2); ICDR Arbitration Rules, Art. 15(1); LCIA Arbitration Rules, Art. 23.1. The federal courts have generally respected the incorporation of institutional rules as a method of assigning arbitrability decisions to the arbitrator. See Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005) ("when . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator"); Terminex Int'l Co., v. Palmer Ranch Ltd., 432 F.3d 1327, 1333-34 (11th Cir. 2005) (same) (AAA Arbitration Rules); Apollo Computer, Inc. v. Berg, 886 F.2d 469, 473 (1st Cir. 1989) (same) (ICC Arbitration Rules); but see Microchip Tech. Ins. v. U.S. Philips Corp., 367 F.3d 1350, 1358 (Fed. Cir. 2004) (holding that whether the parties agreed to arbitrate was to be decided by the court but failing to analyze effect of parties' incorporation of the ICC Rules in arbitration agreement). However, at least one federal circuit court has attempted to carve out an exception to this rule for cases where a party alleges the arbitral forum itself is illusory. See Awuah v. Coverall North America, Inc., 554 F.3d 7, 13 (1st Cir. 2009) (holding that party was entitled to court's

review of whether arbitration agreement was an illusory remedy, notwithstanding incorporation of AAA's rules empowering arbitrator with jurisdictional determinations). The validity and boundaries of such an exception are still uncertain. See Jackson, 581 F.3d at 921 n.4 (Hall, C.J., dissenting) (disagreeing with the majority's expansive interpretation of the holding in Awuah). Accordingly, the Supreme Court's forthcoming opinion in Rent-A-Center could provide necessary guidance to lower courts in this developing area of the law.

Oral argument in Rent-A-Center is scheduled for April 26, 2010.

Raoul G. Cantero III
Erika M. Serran
White & Case

This entry was posted on Wednesday, February 24th, 2010 at 9:54 pm and is filed under Commercial Arbitration, Domestic Courts, New York Convention, North America

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