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Examining the Delegation of the Power to Determine Arbitrability: Insights from Fujitsu Semiconductor Ltd. v. Cypress Semiconductor Corp.

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In *Fujitsu Semiconductor Ltd. v. Cypress Semiconductor Corp*., No. 22-mc-80313-VKD, 2023 U.S. Dist. LEXIS 97717 (N.D. Cal. June 5, 2023), the court ruled that arbitration was proper for the parties. The court found that the parties' arbitration clause clearly delegated power to the arbitrators to decide on the question of arbitrability, and thus, it was also appropriate for the arbitrators to determine what fell within the carve-out provisions excluding some claims from arbitration.

In its decision, the *Fujitsu* court emphasized the importance of upholding the contracting parties' intentions when assessing the validity of arbitration agreements and considered when federal courts might abstain from exercising jurisdiction. It also examined the implications of incorporating Japanese arbitration rules—with permissive, not mandatory, language stating arbitrators "may" rule on their own jurisdiction—on delegation. Notably, *Fujitsu* partially breaks with precedent in other jurisdictions on how carve-out provisions influence the delegation of arbitrability. Details of the *Fujitsu* ruling and its broader implications for the arbitration landscape follow below.

Key Facts in Fujitsu

In 2013, Fujitsu Semiconductor Limited ("Fujitsu Semiconductor") and Spansion LLC ("Spansion") entered into a Foundry Agreement that incorporated by reference an arbitration clause subjecting disputes to the Japan Commercial Arbitration Association ("JCAA") Rules and Japanese law. The clause included a carve-out provision excluding claims for "equitable relief" from arbitration. A separate dispute resolution provision, with an integration clause, was formed when Cypress Semiconductor Corporation ("Cypress") signed a Distributor Agreement with Fujitsu Electronics Inc. ("Fujitsu Electronics"), a subsidiary of Fujitsu Semiconductor, in 2015 after Cypress merged with Spansion. In 2016, Spansion assigned its rights and obligations under the earlier Foundry Agreement to Cypress. Fujitsu Electronics was later acquired by Kaga Electronics Co., Ltd. ("Kaga").

In 2019, Kaga-Fujitsu Electronics sued Cypress in California state court for breach of contract, and Cypress filed a cross-complaint against Kaga-Fujitsu Electronics and Fujitsu Semiconductor. In response, Fujitsu Semiconductor petitioned the U.S. District Court for the Northern District of

California to compel arbitration of all of Cypress' state court claims. Challenging the petition, Cypress questioned the existence of a valid arbitration agreement, the arbitrability of its claims, and the federal court's jurisdiction. Concurrent with these federal proceedings, the state court granted Fujitsu Semiconductor's motion to sever and stay Cypress' claims in state court.

Arbitration Agreement Upheld

Cypress first argued that no arbitration agreement existed, claiming that the dispute resolution section in the Distributor Agreement superseded and nullified the arbitration agreement in the earlier Foundry Agreement. Highlighting the importance of upholding the contracting parties' intentions, the *Fujitsu* court found that Fujitsu Semiconductor was not a party to the Distributor Agreement, and its signature was clearly confined to the termination of existing agreements with Spansion, not extending to other provisions such as those relating to dispute resolution. The court also emphasized that the Foundry Agreement remained in effect even after the Spansion-Cypress merger, and because Cypress explicitly assumed Spansion's obligations, a valid arbitration agreement existed.

Cypress' Concerns for Piecemeal Litigation Dismissed

Cypress also argued that to prevent redundant litigation, the federal court should abstain from exercising jurisdiction and defer instead to state court proceedings, citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). However, after applying the Ninth Circuit's eight-factor test assessing abstention, the *Fujitsu* court found no justification for deferring to state proceedings. Key considerations included the early stage of state proceedings, lack of forum shopping by Fujitsu Semiconductor, and the Federal Arbitration Act's emphasis on enforcing arbitration agreements. The *Fujitsu* court justified federal jurisdiction, noting that Fujitsu Semiconductor's successful motion to sever and stay the state court claims significantly reduced the risks of piecemeal litigation.

"May" Can Mean "Shall" in Arbitration

In addressing Cypress' argument that its claims fell within the carve-out provision and were non-arbitrable, the *Fujitsu* court prioritized resolving the question of whether the authority to determine arbitrability was clearly delegated to the arbitrators. This was fundamental for the court: if the powers were clearly delegated, the arbitrators, rather than the court, would also have the exclusive jurisdiction to determine the applicability of the carve-out provision.

Referring to *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015), *Fujitsu* affirmed that the incorporation of the American Arbitration Association (AAA) Rules, with the mandatory language that arbitrators "shall" rule on their own jurisdiction, constituted clear intent to delegate the power to decide on arbitrability. *Fujitsu* extended this logic to the language in the incorporated JCAA Rules and Japan's Arbitration Act, under which arbitrators "may" rule on their jurisdiction. Though Cypress argued that "may" is permissive and indicates non-exclusive

arbitrator authority, allowing court intervention, *Fujitsu* interpreted "may" as indistinguishable from the word "shall."

Because the court's interpretation did not explain why, questions may arise as to whether "may" really means "must" in the arbitration context. The Northern District of California has ruled similarly before, that clear intent to delegate is demonstrated when incorporated arbitration rules permissively indicate arbitrators "may" rule on their jurisdiction, or when an agreement stipulates that a party "may" bring arbitration in accordance with the AAA, but the cases generally do not explain why (*Loewen v. McDonnell*, 403 F. Supp. 3d 832 (N.D. Cal. 2019)).

However, this position appears to align with a federal pro-arbitration trend, where permissive language indicating that the parties have a choice to pursue arbitration gives rise to mandatory arbitration should one party choose to initiate it. The U.S. Supreme Court has supported this interpretation by holding that the term "may" in arbitration clauses is insufficient to overcome the presumption for arbitration in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 204 n.1 (1985). Furthermore, *Rohm Semiconductor USA, LLC v. Maxpower Semiconductor, Inc.*, 17 F.4th 1377 (Fed. Cir. 2021) lends insight applicable to the *Fujitsu* ruling, particularly in the context of the California Code of Civil Procedure. Specifically, the *Rohm* court interpreted the language of Section 1297.161—that "[t]he arbitral tribunal may rule on its own jurisdiction"—to mean that "may, *if arbitrability is disputed*," effectively interpreting "may" as "shall have the power to." The court reasoned that a contrary interpretation would render the clause redundant, as the power to decide arbitrability is an inherent authority of both courts and arbitral tribunals. This line of reasoning solidifies the pro-arbitration interpretation adopted by the *Fujitsu* court regarding the term "may."

The Power to Determine Arbitrability Includes Power Over Carve-Outs

Upon affirming that the authority to decide issues of arbitrability was with the arbitrators, the court assumed that it was also within the arbitrators' powers to interpret whether Cypress' claims fell within the carve-out provision. However, the court observed that, *even if* it were to decide on the issue, Cypress' claims did not amount to equitable relief and therefore were subject to arbitration.

The *Fujitsu* court's approach stands in contrast to the Fifth Circuit's ruling in *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019), where, after finding clear delegation through the incorporation of the AAA rules, the court nonetheless maintained that a carve-out for injunctive claims transferred the power to determine arbitrability back to the court. The U.S. Supreme Court granted *certiorari* but dismissed the review as "improvidently granted" after oral arguments, leaving the Fifth Circuit's ruling unchanged. *Henry Schein Inc. v. Archer & White Sales Inc.*, 592 U.S. 168 (2021). In contrast, *Fujitsu* affirms that a delegation of the power to determine arbitrability to arbitrators is sustained even when carve-out clauses are present.

The *Fujitsu* court's departure from the Fifth Circuit's reasoning aligns more closely with the Ninth Circuit's approach in *Oracle America, Inc. v. Myriad Group A.G.*, 724 F.3d 1069 (9th Cir. 2013). There, the court stated that deciding whether a party's claim falls under a carve-out is an arbitrability determination delegated to the arbitrator, considering the incorporation of the UNCITRAL Rules that delegate arbitrability: "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction […]". These diverging viewpoints across jurisdictions

regarding arbitrability and carve-outs pinpoint an area ripe for further review.

Conclusion

The *Fujitsu* ruling brings to light the ongoing discussions in arbitration on how carve-out provisions should impact the allocation of decision-making powers within arbitration agreements. The diverse interpretations across jurisdictions emphasize the need to draft arbitration clauses with precision to unambiguously reflect the intent of the contracting parties. In the interest of upholding the reliability and efficiency of arbitration as a dispute resolution method, there is a clear call for further judicial engagement, which could draw the attention of the U.S. Supreme Court to step in once more to harmonize the varying perspectives.

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