

Who Decides Arbitrability – Is It the Court or an Arbitrator?

Judge Abraham J. Gafni (Ret.)

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An issue that continues to present itself is who will determine if a dispute must be tried in court or arbitrated.

Recently, the U.S. Court of Appeals for the Fourth Circuit was called upon to decide if an arbitration agreement reflected a clear and unmistakable intent to delegate that role to the arbitrator in *Simply Wireless v. T-Mobile US*, No. 16-1123 (4th Cir., Dec. 13, 2017).

The parties' agreement regarding marketing and distribution provided that:

- “Any claims arising out of or relating to this agreement shall be resolved by submission to binding arbitration.”
- This JAMS arbitration was “to be administered pursuant to the JAMS comprehensive rules and procedures (JAMS rules) then in effect.”
- The Federal Arbitration Act (FAA) and “not state law shall govern the arbitrability of all disputes under this agreement.”

Subsequently, Simply Wireless sued T-Mobile in federal court alleging violations of various trademark rights.

T-Mobile moved to dismiss the complaint on several grounds, including that by expressly incorporating the JAMS rules, the parties had “clearly and unmistakably” endowed an arbitrator and not the court with the authority to resolve all arbitrability disputes.

Simply Wireless countered that as the claims asserted did not “arise out of” or “relate to” the original agreement, the claims were not subject to the agreement’s arbitration provisions.

The district court apparently took no note of T-Mobile’s argument that it would be for the arbitrator to decide arbitrability. Rather, it simply ruled that the claims fell within the scope of the agreement, and, accordingly, they were arbitrable and the complaint should be dismissed “without prejudice to allow the parties to pursue arbitration.”

Simply Wireless appealed the court’s decision.

The appellate court (by a 2-1 vote) held that the district court had erred in deciding the arbitrability issue, but, nonetheless, as will be noted, affirmed the dismissal of the complaint on alternative grounds.

The court recognized that parties do have the right by contract to agree on who should rule on arbitrability. “However, because empowering an arbitrator to determine arbitrability in the first instance ‘cuts against the normal rule’ that arbitrability disputes are for the court to resolve, a court must find by ‘clear and unmistakable evidence’ that the parties have chosen to give arbitrability questions to an arbitrator.”

T-Mobile first argued that such a clear and unmistakable intent was reflected in the general provision in the agreement under which parties were to submit “any claims or controversies relating to this agreement ... to binding arbitration.”

The court disagreed. It concluded that “broad arbitration clauses that generally commit all interpretive disputes ‘relating to’ or ‘arising out of’ the agreement do not satisfy the clear and unmistakable test” and, therefore, that language was insufficient to support T-Mobile’s position that arbitrability had been delegated to the arbitrator.

T-Mobile, however, had another, more persuasive argument. It pointed out that the agreement also incorporated JAMS Rule 11(b) which provides: “Jurisdiction and arbitrability disputes, including disputes over the formation, validity interpretation or scope of the agreement under which the arbitration is sought ... shall be submitted to and ruled on by the arbitrator. The arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.”

The question presented, therefore, was, “whether the parties’ express incorporation of JAMS rules constitutes clear and unmistakable evidence of their intent to delegate to the arbitrator questions of arbitrability.”

Although the Fourth Circuit had not previously addressed this issue, the court agreed with numerous circuits which had earlier concluded that the incorporation of JAMS rules or substantively similar rules of other organizations (AAA, UNCITRAL, ICC), did, in fact, reflect clear and unmistakable evidence of the parties' intent to arbitrate arbitrability.

The court concluded, therefore, in light of the JAMS rules, that the district court had erred when it assumed the right to rule upon arbitrability by deciding that the claims fell within the scope of the agreement and, therefore, should be arbitrated.

It also rejected Simply Wireless' contention that this holding would be counter-productive because under this ruling, "every arbitration demand, no matter how frivolous must automatically be submitted to arbitration and placed in the hands of a fee-based arbitrator whose financial self-interest mitigates [sic] in favor of retaining the dispute."

The court explained that a district court is not obliged to give effect, even to a provision that clearly and unmistakably delegates questions of arbitrability to an arbitrator, if "it is clear that the claim of arbitrability is wholly groundless." District courts "need not, and should not, enforce a delegation provision when a parties' assertion that the claim falls within an arbitration clause is frivolous or otherwise illegitimate."

Here, the district court's conclusion that the claims fell within the scope of the agreement only reflected that it "necessarily found that T-Mobile's assertion of arbitrability was not frivolous or otherwise illegitimate." Therefore, it was bound by the parties' clear intent, as reflected in the JAMS rules, to enforce the delegation and submit this determination to the arbitrator.

The court's holding, therefore, was:

- When two sophisticated parties expressly incorporate JAMS rules that delegate questions of arbitrability to the arbitrator, this must be accepted as constituting "the parties' clear and unmistakable intent to let an arbitrator determine the scope of arbitrability."
- Accordingly, the district court erred by ruling on arbitrability through its order dismissing the complaint, "without prejudice to the parties' right to seek arbitration."
- Nevertheless, the court's dismissal of the complaint was affirmed because this ruling achieved the parties' intention that all disputes, including arbitrability, would be resolved by the arbitrator.

The minority opinion, while agreeing generally with the above principles of law, disagreed with the majority's holding because, in addition to the JAMS rules, the parties had provided that "the parties agree that the Federal Arbitration Act, 9 U.S.C. 1-15, not state law, shall govern the arbitrability of all disputes under this agreement." Moreover, the FAA, at Section 4, "by contrast provides that, once a party petitions for an order directing

arbitration, “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.”

Thus, while the dissent agreed that the JAMS rules, standing alone, would have warranted a finding that rulings on arbitrability were to be made by the arbitrator, the insertion in the agreement of a reference to the court’s authority under the FAA to determine arbitrability “muddies the waters” of the majority’s analysis and is “sufficient to call into question the conclusion that the parties clearly and unmistakably intended to put the question of arbitrability before the arbitrator.”

These two opinions emphasize a critical lesson often noted in these articles. In adopting any arbitration agreement, counsel should examine closely their provisions (whether those of an ADR provider or individually tailored) not only as they relate to arbitrability but also to such other issues such as choice of law, venue, discovery and evidence. Counsel should not rely solely on:

- Legal or judicial presumptions.
- General expansive language in the agreement.
- The incorporated rules of the ADR provider.

Rather, if the issue is of particular importance, a party must carefully consider whether the language itself is crystal clear and will succeed in overcoming any later claim of ambiguity.

That is not to say that the holding in this case is necessarily the final word on the subject. On April 12, Simply Wireless filed a petition for certiorari with the U.S. Supreme Court, which had not been ruled upon as this article was being prepared. •

Abraham J. Gafni is a retired judge and mediator/arbitrator with ADR Options. He is also a Professor of Law Emeritus at the Villanova University Charles Widger School of Law.

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