

Review the Arbitration Providers' Rules Carefully



Mandatory arbitration clauses have proliferated in online consumer contracts in recent years. And with their increased use, courts have been confronted with whether the terms of those clauses, which often incorporate the arbitration rules of an arbitration provider, should be binding. In particular, much attention has been given to whether the courts or the arbitration provider's arbitrator have the authority to resolve the gateway issue of whether a valid agreement to arbitrate exists.

A recent case from California resolved this issue based upon the differing arbitration provisions contained in the rules of two of the nation's largest arbitration providers.

The case from the U.S. District Court for the Northern District of California, *Nguyen v. OKCoin USA*, 2023 WL 2095926 (2023), involved a web-based cryptocurrency exchange, which offered retail investors a marketplace to buy and sell cryptocurrencies. The plaintiffs were the customers of the defendants. To open their accounts, the plaintiffs were required to agree to defendant's terms of service (TOS).

In response to the plaintiffs' class action complaint, which asserted a panoply of breach of contract and fraud claims, defendant moved to compel arbitration on the basis of its TOS. The TOS required that arbitration be conducted by JAMS and that "the JAMS streamlined arbitration rules and procedures, as modified by this agreement shall apply." The TOS further provides, however, that if "arbitration before JAMS is unavailable or impossible for any valid reason, such arbitration will be conducted by, and according to the rules and regulations then in effect of the American Arbitration Association (AAA)."

But who decides the gateway issues of whether a valid arbitration exists and, if so, whether the agreement encompasses the dispute at issue? Should these be resolved in an arbitration to be conducted before JAMS, the AAA or, rather, in court?

The court recognized that generally, in deciding whether a dispute is subject to an arbitration provision, the court determines this gateway issue. [READ MORE..](#)

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