



## Review the Arbitration Providers' Rules Carefully

*Judge Abraham J. Gafni (Ret.)*

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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.

This issue may be removed from the court, and delegated to the arbitrator, however, where the parties clearly and unmistakably so provide. But what if the rules of the arbitration provider would appear to prevent the provider from accepting the administration of the arbitration?

In considering this issue, the court focused initially on JAMS' streamlined arbitration rules and procedures. It noted that these provide for a clear and unmistakable intent to delegate the arbitrability issue to an arbitrator; and the rulings by the arbitrator are intended to address all aspects of the agreement, including formation, scope, existence, validity and scope.

Nonetheless, the court concluded that the JAMS delegation clause was "unenforceable" in this case. It noted that JAMS has a "policy on consumer arbitrations pursuant to pre-dispute clauses minimum standards of procedural fairness." Under this policy, JAMS "will administer arbitrations pursuant to mandatory pre-dispute resolution clauses between companies and consumers only if the contract arbitration clause and specified applicable rules comply with the following minimum standards of fairness."

Among these minimum standards of fairness were that a consumer is not required to pay more than a \$250 fee, no party is precluded from seeking remedies in a small claims court and the consumer has a right to an in-person hearing in their hometown area.

The court held that the TOS did not satisfy these minimum standards because:

- The TOS required that the parties split the JAMS arbitrator fees—and even warned that "the costs of the arbitration could exceed the costs of the litigation."
- The TOS did not permit claims to be brought in small claims court as it required that all claims be arbitrated.
- The TOS required that the arbitration be conducted in San Francisco absent agreement by defendant to a different JAMS location.

The court recognized the defendant's argument that the plaintiffs had agreed to arbitrate with JAMS rules "as modified by the TOS." Nonetheless, the court found that the policy reflected that JAMS would conduct arbitrations involving consumers only if the TOS met the JAMS minimum standards of fairness, without regard to whether plaintiffs had agreed to such modifications. Accordingly, the court concluded that as JAMS would not be available under its minimum standards, the delegation-to-JAMS clause was void and not enforceable.

But what about the alternative delegation to the AAA?

The AAA consumer rules also broadly delegate to the arbitrator the authority to rule on jurisdiction, including any objections with respect to scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

Here, the plaintiffs argued, as they had with respect to the JAMS protocols, that the AAA has a consumer due process protocol that would make it "questionable whether AAA would even be available as an arbitral forum."

The court disagreed that the AAA protocols would necessarily cause it to refuse to administer the arbitration. Thus, the AAA protocol states that the AAA "will exercise its authority to decline administration of arbitration demands where an arbitration clause contains material violations of the AAA consumer due process protocol." But, the court noted, the AAA protocol provides no clarity in determining whether the TOS arbitration provisions materially violate the protocol. For instance: The AAA protocol states, "consumer ADR agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction." Unlike the JAMS protocol, however, this protocol is not mandatory.

With respect to the location of the hearing, the AAA protocol states that the proceedings "should be conducted at a location which is reasonably convenient to both parties. But this less-than-clear protocol "neither requires a mutually convenient location nor sets a clear standard for what is reasonably convenient to both parties."

"Finally, unlike JAMS, the AAA protocol does not set limits for fee requirements."

For these reasons, the court concluded that the AAA protocol would not necessarily cause the AAA to refuse to administer the arbitration. Because arbitration before the AAA "does not appear impossible the court found that "the case must be compelled to arbitration before

the AAA, which will determine whether the arbitration agreement is enforceable.” “Of course, should the AAA decline administration of the arbitration, “the parties would presumably be required to return to the court to determine whether there is an enforceable arbitration clause.”

The lesson from this case is clear. Arbitration provisions often incorporate the rules or protocols of an ADR provider—and these rules and protocols may differ significantly. They, therefore, must be carefully reviewed to ascertain whether, as here, the provisions in the main agreement may be undone by them.

Thus, in the instant case, had the underlying agreement only incorporated the JAM rules and protocols, the gateway issues would not have been submitted to arbitration and would have been returned to the court. It was only because the AAA rules and protocols were found by the court to not necessarily conflict with the parties’ contract that the initial delegation of these issues to the AAA was found acceptable. Such delegation, of course, would be subject to the AAA’s acceptance of the matter.

In short, courts regularly find that the incorporated rules of an ADR provider are binding. Review them carefully, therefore, to assure that there is nothing in those rules which imposes the unexpected upon your clients.

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