

No. 20-1724

In The
Supreme Court of the United States

DAVID JAMES MURPHY,

Petitioner,

v.

CITIGROUP GLOBAL MARKETS, INC.,
CITICORP SECURITIES SERVICES, INC.,
AND OKAN PEKIN,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of New York,
Appellate Division, First Department**

**PETITION FOR REHEARING
FROM ORDER DENYING
PETITION FOR WRIT OF CERTIORARI**

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OCTOBER 7, 2021

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner, David James Murphy, respectfully petitions for a rehearing of the order of October 4, 2021 denying Petitioner's Petition for a Writ of Certiorari.

GROUND FOR REHEARING

In the present action, Petitioner challenged the enforceability of an arbitration agreement on the grounds of fraudulent inducement and breach. The arbitration agreement contained a delegation clause and Petitioner moved to compel arbitration of arbitrability thereunder. That motion was denied.

In Petitioner's Petition for a Writ of Certiorari, dated May 19, 2021, he argued that in similar circumstances, a party accused of fraudulently inducing an arbitration agreement would be permitted to enforce the delegation clause. It did not take long for Petitioner to be proven correct.

In *Noble Capital Group, LLC v. US Capital Partners, Inc.*, No. 20-50721, 2021 WL 3477481 (5th Cir. Aug. 6, 2021), there was a contract containing arbitration and delegation clauses. The plaintiff claimed the arbitration clause was fraudulently induced. The defendant successfully compelled arbitration of that challenge to arbitrability.

In both of these FAA cases, the plaintiff claimed an arbitration agreement had been fraudulently induced.

In one, the party accused of fraudulent inducement was permitted to enforce the delegation clause, in the other, the party alleging fraudulent inducement was prevented from doing so.

This is the least just, most egregious possible approach to deciding who decides arbitrability and arises from a failure by the courts below to correctly apply a simple legal principle – severability.

In *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71-72 (2010), this Court held that a delegation clause is a “written provision . . . to settle by arbitration a controversy” and is severable from the “rest of the agreement to arbitrate claims.”

As a general rule, if a contract is rescinded, no terms in that contract can be enforced. However, if a contract is severable, rescission of one portion of the contract does not prevent either party from enforcing the other, severed portion. See *Ripley v. Int. Rys. of Cent. Am.*, 8 N.Y.2d 430, 437 (Ct. App. 1960), quoting from *Black on Rescission and Cancellation* (2d ed., Vol. 3 § 585). Cf. *Kaplan v. Keith*, 60 Ill. App. 3d 804, 808, 377 N.E.2d 279 (Ill. App. Ct. 1978) (“the rule that rescission of a contract must be in toto does not apply to a contract of which the parts are so severable as to form independent contracts”); *County of Morris v. Fauver*, 153 N.J. 80, 97, 707 A.2d 958 (Sup. Ct. N.J. 1998) (“Only where a contract is severable into different transactions may one of those separate transactions be avoided.”); and *Straits Financial LLC v. Ten Sleep Cattle Co.*, 900 F.3d 359, 372 (7th Cir. 2018).

In the present action, Petitioner relied on the severability of the delegation clause. He commenced this action in court, because he claims not to be bound by the arbitration agreement. However, asserting a right to rescind an arbitration agreement is not a bar to enforcing a delegation clause therein. When Respondents argued Petitioner's claims were subject to mandatory arbitration, and should have been brought in an earlier arbitration, Petitioner promptly moved to compel arbitration of arbitrability. The courts below denied that motion, saying it was inconsistent with Petitioner's claim not to be bound by the arbitration agreement.

During oral argument before the court of first instance, Justice Hagler said: "It seems inconsistent where on the one hand you are pressing the court to take it [arbitrability] from this Court, and on the other hand, you take the vehement decision that you correctly filed this action in [the] Supreme Court." Justice Hagler said Petitioner was trying to "have your cake and eat it the same way." The First Department agreed. "How can you claim that it is not within the [arbitration] agreement, but that they [arbitrators] decide arbitrability? It's inconsistent. This is for the court to decide."

In denying Petitioner the right to enforce the delegation clause, because he claimed a right to rescind the contract containing it, the courts below treated the delegation clause as non-severable. That is inconsistent with *Rent-a-Center*, 561 U.S. 63 (2010) and has far-reaching implications.

It means a plaintiff challenging the enforceability of an arbitration agreement can never ensure those challenges are arbitrated. On the First Department's reasoning, if a plaintiff, like Petitioner, submitted his challenges to arbitrability directly to arbitration, the defendant could stay that proceeding. To resist such a stay, the plaintiff must rely on the delegation clause, but the First Department considers such reliance inconsistent with the plaintiff challenging the enforceability of the arbitration agreement.

In contrast, if a plaintiff attempts to challenge arbitrability in court, the defendant can compel arbitration of arbitrability on the basis that the delegation clause is severable. *Noble Capital Group, LLC v. US Capital Partners, Inc.*, No. 20-50721, 2021 WL 3477481 (5th Cir. Aug. 6, 2021).

Therefore, all challenges to the enforceability of an arbitration agreement, containing a delegation clause, will be determined in the forum chosen by the party resisting such challenges. The delegation clause is treated as severable when one party seeks to enforce it and non-severable when the other party does so. This is contrary to law and unjust. It "prevent[s] even the injured party who wishes to arbitrate from doing so"; and it allows the party accused of misconduct to "take the plaintiff's claim from the arbitrator" (*Lummus Company v. Commonwealth Oil Refining Company*, 280 F.2d 915, 924 (1st Cir. 1960)), or force that claim to arbitration, as it chooses. As a result, challenges to arbitrability will be decided in the forum where they are least likely to succeed.

In addition, if considerations of justice and the consistent application of the law do not move this Court, perhaps judicial efficiency will. Some challenges to arbitrability face better prospects of success in court, some in arbitration. If a delegation clause can be enforced by both parties, almost all challenges to arbitrability will be decided in arbitration. However, if a delegation clause can only be enforced by one party, many challenges to arbitrability will be decided in court.

I am a pro se litigant living in Australia, relying primarily on google.com and leagle.com for my research. I worked out that a party can challenge the enforceability of an arbitration agreement and enforce the delegation clause therein, because that clause is severable. Yet the courts denied my motion to compel arbitration of arbitrability out of hand.

Justice Hagler wrote a 26-page opinion, but devoted only half a page to analyzing Petitioner's motion to compel. The First Department declared from the bench that arbitrability was for the court to decide and did not address the issue further in its written opinion. These courts erred badly without the slightest inkling they were doing so. If not corrected, this error will be repeated.

Finally, this petition warrants a response and, with due respect, one should be requested. Respondents will have nothing of merit to say in defense of the First Department's reasoning. That decision is too clearly wrong at law, the comparison with *Noble*, No. 20-50721,

2021 WL 3477481 (5th Cir. Aug. 6, 2021) too outrageously unjust to be defended.

CONCLUSION

For the foregoing reasons, and those stated in the Petition for a Writ of Certiorari, the Court should grant rehearing, grant the Petition for a Writ of Certiorari, and review the judgment below.

Respectfully submitted,

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OCTOBER 7, 2021

CERTIFICATION

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

Respectfully submitted,

DAVID JAMES MURPHY