App. 1

336 So.3d 698
Supreme Court of Florida.

AIRBNB, INC., Petitioner,
v.
John DOE, et al., Respondents.

No. SC20-1167
|
March 31, 2022

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Opinion

POLSTON, J.

Airbnb, Inc. (Airbnb) seeks review of the Second District Court of Appeal's decision in *Doe v. Natt*, 299 So. 3d 599, 610 (Fla. 2d DCA 2020) (certifying conflict).[1] The issue before this Court involves who decides arbitrability—"whether a dispute is subject to a contract's arbitration provision"—an arbitrator or a judge. *Id.* at 600. Specifically, we address whether Airbnb's Terms of Service that incorporate by reference the American

[1] We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

Arbitration Association (AAA) Rules that expressly delegate arbitrability determinations to an arbitrator constitute "clear and unmistakable" evidence of the parties' intent to empower an arbitrator, rather than a court, to resolve questions of arbitrability. As explained below, we hold that under the Federal Arbitration Act (FAA), it does and quash the Second District's decision in *Natt*.

I. BACKGROUND

The Second District set forth the following pertinent facts:

> A Texas couple, who will be referred to as John and Jane Doe to preserve their confidentiality, decided to vacation in Longboat Key. Through a business, Airbnb, Inc. (Airbnb), they located a condominium unit online that was available for a short-term rental in the Longboat Key area. Using Airbnb's website, Mr. and Mrs. Doe rented the unit for a three-day stay in May of 2016.
>
> The condominium unit was owned by Wayne Natt. Unbeknownst to the Does, Mr. Natt had installed hidden cameras throughout the unit. The Does allege that Mr. Natt secretly recorded their entire stay in his unit, including some private and intimate interactions. After they learned of Mr. Natt's recordings, the Does filed a complaint in the circuit court of Manatee County, naming both Mr. Natt and Airbnb as defendants. Their complaint included claims of intrusion against Mr. Natt,

> constructive intrusion against Airbnb, and loss of consortium against both Mr. Natt and Airbnb. In their constructive intrusion claims, the Does alleged that Airbnb failed to warn them of past invasions of privacy that had occurred at other properties rented through Airbnb. They also alleged that Airbnb failed to ensure that Mr. Natt's property did not contain electronic recording devices.
>
> In response to the Does' complaint, Airbnb filed a motion to compel arbitration. Airbnb argued that the Does' claims were subject to arbitration under Airbnb's Terms of Service, which the Does agreed to be bound to pursuant to a "clickwrap" agreement[2] they had entered when they first created their respective Airbnb accounts online.

Natt, 299 So. 3d at 600-01 (footnote omitted).

Airbnb's Terms of Service began with the following statement:

> PLEASE READ THESE TERMS OF SERVICE CAREFULLY AS THEY CONTAIN IMPORTANT INFORMATION REGARDING YOUR LEGAL RIGHTS, REMEDIES AND OBLIGATIONS. THESE INCLUDE VARIOUS LIMITATIONS AND EXCLUSIONS, A CLAUSE THAT GOVERNS THE JURISDICTION AND

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[2] The Second District defined a clickwrap agreement "as one that is entered online by proposing contractual terms and conditions of service to a user, who then indicates his or her assent to the terms and conditions by clicking an 'I agree' box." *Doe v. Natt*, 299 So. 3d 599, 601 n.2 (Fla. 2d DCA 2020).

VENUE OF DISPUTES, AND OBLIGATIONS TO COMPLY WITH APPLICABLE LAWS AND REGULATIONS.

The "Dispute Resolution" clause, by which Airbnb seeks to compel arbitration, appeared in the Terms of Service and set forth the following:

Dispute Resolution

You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site or Application (collectively, "**Disputes**") will be settled by binding arbitration, except that each party retains the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents, or other intellectual property rights. You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action or representative proceeding. Further, unless both you and Airbnb otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided

> in the preceding sentence, this "Dispute Resolution" section will survive any termination of these Terms.
>
> Arbitration Rules and Governing Law. The arbitration will be administered by the American Arbitration Association ("**AAA**") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "**AAA Rules**") then in effect, except as modified by this "Dispute Resolution" section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.) The Federal Arbitration Act will govern the interpretation and enforcement of this section.

Rule 7 of the AAA Rules[3] provided: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement *or to the arbitrability of any claim or counterclaim*." (Emphasis added.)

After conducting a hearing on Airbnb's motion to compel arbitration, the circuit court granted the motion and stayed the lawsuit pending arbitration. *Natt*, 299 So. 3d at 602. The circuit court found "that the parties entered an express agreement which incorporated

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[3] Before the Does filed suit, the AAA reorganized the relevant rules. The reorganization caused the Consumer Arbitration Rules to become a standalone set of rules instead of a supplement to the Commercial Arbitration Rules. The relevant AAA Rule was relocated from Rule 7 to Rule 14 without any alterations to its language or this Court's legal analysis.

the AAA rules, and that [it was] therefore bound to submit the issue of arbitrability to the arbitrator." *Id.*

On appeal, the Does argued that the circuit court erred in compelling arbitration because the Terms of Service did not clearly and unmistakably evidence the parties' intent to delegate questions of arbitrability to an arbitrator. In a 2-to-1 decision, the Second District reversed the circuit court's order, holding "that the clickwrap agreement's arbitration provision and the AAA rule it references that addresses an arbitrator's authority to decide arbitrability did not, in themselves, arise to 'clear and unmistakable' evidence that the parties intended to remove the court's presumed authority to decide such questions." *Id.* at 609-10 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.")). The Second District concluded that the agreement contained "an arguably permissive and clearly nonexclusive conferral of an adjudicative power to an arbitrator, found within a body of rules that were not attached to the agreement, that itself did nothing more than identify the applicability of that body of rules if an arbitration is convened." *Id.* at 609. The Second District reasoned that "the provision Airbnb relies upon is two steps removed from the agreement itself, hidden within a body of procedural rules, and capable of being read as a permissive direction. It is at best ambiguous." *Id.*

The Second District explained that the AAA rules "were referenced in the clickwrap agreement as a generic body of procedural rules, and that reference was limited to how 'the arbitration' was supposed to be 'administered,' " which the Second District interpreted to mean "an arbitration that is actually commenced." *Id.* at 606. The Second District further explained that "the reference to the AAA Rules was broad, nonspecific, and cursory" because it "simply identified the entirety of a body of procedural rules." *Id.* The Second District also criticized the AAA Rule itself, explaining that the "rule confers an adjudicative power upon the arbitrator, but it does not purport to make that power exclusive. Nor does it purport to contractually remove that adjudicative power from a court of competent jurisdiction." *Id.* at 607.

The Second District acknowledged that its "decision may constitute something of an outlier in the jurisprudence of arbitration," citing numerous federal cases that "have concluded that an arbitration rule that confers a general authority on an arbitrator to decide questions of arbitrability, when incorporated into an agreement, evinces a sufficiently clear and unmistakable intent to withdraw the issue from a court's consideration." *Id.* at 607-08. The Second District also certified conflict with the Fifth District Court of Appeal's decision in *Reunion West Development Partners, LLLP v. Guimaraes*, 221 So. 3d 1278, 1280 (Fla. 5th DCA 2017) (concluding that "[w]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves

as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator"), and further disagreed with the Third District Court of Appeal's decision in *Glasswall, LLC v. Monadnock Construction, Inc.*, 187 So. 3d 248, 251 (Fla. 3d DCA 2016) (holding "that by incorporating the Construction Industry Rules of the AAA which make the issue of arbitrability subject to arbitration, there [was] 'clear and unmistakable' evidence of [the parties'] intent to submit the issue of arbitrability to an arbitrator"). *Natt*, 299 So. 3d at 608, 610.

Judge Villanti dissented "from the majority's outlier determination that the clickwrap agreement used by Airbnb did not exhibit an unmistakable intent to assign the issue of arbitrability to the arbitrator." *Id.* at 610 (Villanti, J., dissenting). Specifically, Judge Villanti disagreed "with the majority's assertion that '[p]lainly, the agreement's reference to the AAA Rules and AAA's administration addresses an arbitration that is actually commenced.'" *Id.* at 610-11. The dissent explained: "The question of whether a claim is arbitrable must, by necessity, be determined before the commencement of arbitration. Thus, [the AAA Rule] can only apply at the outset of a claim, not after the arbitration has already commenced." *Id.* at 611. Also important to the dissent was addressing "the majority's attempt to minimize the scope of [the AAA Rule] because, the majority says, it does not give the arbitrator the *exclusive* power to decide arbitrability." *Id.* Judge Villanti explained that "[t]his ignores the obvious: the power to decide *is* the power to decide," and

"[t]o contend that the absence of the term 'exclusive' (or words to that effect) in relation to the arbitrator gives exclusive power to the trial court sub silentio to make that decision is . . . a stretch too far." *Id.* Ultimately, Judge Villanti "conclude[d] that the incorporation by reference of [the AAA Rule] into a contract comprises 'clear and unmistakable evidence' of the parties' agreement to arbitrate arbitrability." *Id.* at 612.

II. ANALYSIS

Airbnb argues that incorporation by reference of the AAA Rules that expressly delegate arbitrability determinations to an arbitrator clearly and unmistakably evidences the parties' intent to empower an arbitrator to resolve questions of arbitrability.[4] The circuit court agreed with Airbnb and compelled arbitration and stayed the lawsuit pending arbitration. We agree with Airbnb and the circuit court and quash the Second District's decision.

The parties agree that issues of arbitrability are governed by the FAA, as required by the contract. *See* 9 U.S.C. §§ 1-16. Federal substantive law controls arbitration issues arising under contracts governed by the FAA, including in state court. *See Preston v. Ferrer*, 552 U.S. 346, 349, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). In reviewing issues of federal law, this Court is bound by decisions of the United States Supreme Court but may consider lower federal court decisions as advisory. *See*

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[4] We review this issue de novo. *See Hernandez v. Crespo*, 211 So. 3d 19, 24 (Fla. 2016).

Carnival Corp. v. Carlisle, 953 So. 2d 461, 465 (Fla. 2007).

Under the FAA, arbitration is a creature of contract: an arbitrator may resolve "only those disputes . . . that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943, 115 S.Ct. 1920; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) (noting that the FAA requires courts to "give effect to the contractual rights and expectations of the parties," parties who are free to structure their arbitration agreement regarding how the arbitration is to be done and what it will cover (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989))). The United States Supreme Court has "recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). "[W]hen courts decide whether a party has agreed that arbitrators should decide arbitrability," courts "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944, 115 S.Ct. 1920 (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)).

The majority in the Second District's decision below properly characterized its opinion as an "outlier."

Natt, 299 So. 3d at 607. All of the federal circuit courts of appeal to consider the issue have consistently agreed that incorporation by reference of arbitral rules into an agreement that expressly empower an arbitrator to resolve questions of arbitrability clearly and unmistakably evidences the parties' intent to empower an arbitrator to resolve questions of arbitrability. *See In re Checking Acct. Overdraft Litig.*, 856 F. App'x 238, 243 (11th Cir. 2021); *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 845-46 (6th Cir. 2020); *Richardson v. Coverall N. Am., Inc.*, 811 F. App'x 100, 103 (3d Cir. 2020); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1248 (10th Cir. 2018); *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017), *abrogated on other grounds by Henry Schein, Inc. v. Archer & White Sales, Inc.*, ___ U.S. ___, 139 S. Ct. 524, 202 L.Ed.2d 480 (2019); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207-08 (D.C. Cir. 2015); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006), *abrogated on other grounds by Henry Schein*, 139 S. Ct. 524; *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005). The United States Court of Appeals for the Seventh Circuit, which has not ruled directly on this issue, has held that an "agreement of the parties to have any arbitration governed by the rules of the AAA incorporated those rules into the agreement."

Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1272 (7th Cir. 1976).

This federal precedent has explained that when an agreement incorporates a set of arbitral rules, such as the AAA Rules, those rules become part of the agreement. And where those rules specifically empower the arbitrator to resolve questions of arbitrability, incorporation of the rules is sufficient to clearly and unmistakably evidence the parties' intent to empower an arbitrator to resolve questions of arbitrability. And as the Supreme Court has emphasized, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Henry Schein*, 139 S. Ct. at 528.

Here, Airbnb and the Does clearly and unmistakably agreed that an arbitrator decides questions of arbitrability. Airbnb's Terms of Service explicitly incorporate by reference the AAA Rules: "The arbitration will be administered by the American Arbitration Association ('**AAA**') in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the '**AAA Rules**') then in effect." The Terms of Service also provide a hyperlink to the AAA Rules and a phone number for the AAA. Further, the incorporated AAA Rules specifically provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement *or to the arbitrability of any claim or counterclaim*." (Emphasis added.) The

Terms of Service incorporate the AAA Rules, and the express language in the AAA Rules empowers the arbitrator to decide arbitrability. Accordingly, consistent with the persuasive and unanimous federal circuit court precedent, we conclude that incorporation by reference of the AAA Rules that expressly delegate arbitrability determinations to an arbitrator clearly and unmistakably evidences the parties' intent to empower an arbitrator to resolve questions of arbitrability.

Notably, most federal circuit courts to address whether the incorporated AAA Rules meet the "clear and unmistakable" standard analyzed a version of the AAA Rules that predates the version at issue here. *See*, *e.g.*, *JPay, Inc. v. Kobel*, 904 F.3d 923, 938 (11th Cir. 2018); *Blanton*, 962 F.3d at 845; *Contec Corp.*, 398 F.3d at 208. The predecessor AAA Rule stated that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." The United States Court of Appeals for the First Circuit described this language as "about as 'clear and unmistakable' as language can get." *Awuah*, 554 F.3d at 11. The current version of the AAA Rules—the version at issue here—provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement *or to the arbitrability of any claim or counterclaim*." (Emphasis added.) The current AAA Rule includes the exact language of its predecessor, but specifically adds "or to the arbitrability of any claim or

counterclaim." This additional language expressly addresses the arbitrator's power to rule on the arbitrability of any claim. Accordingly, the predecessor language federal circuit courts deemed "clear and unmistakable" gained further clarity with the additional arbitrability language in the current rule.

The Second District's decision in *Natt* arrived at the opposite conclusion based on its determination that "the provision Airbnb relies upon is two steps removed from the agreement itself, hidden within a body of procedural rules, and capable of being read as a permissive direction." 299 So. 3d at 609. The Second District first criticized that the AAA Rules "were referenced in the clickwrap agreement as a generic body of procedural rules, and that reference was limited to how 'the arbitration' was supposed to be 'administered,'" which the Second District interpreted to mean "an arbitration that is actually commenced." *Id.* at 606. However, the parties do not dispute that the Terms of Service or the AAA Rules are part of the contract, and it is settled law that the parties can incorporate by reference materials, including the AAA Rules, in contracts. Indeed, Airbnb's Terms of Service incorporate by reference more than one dozen extracontractual policies, programs, rules, guides, and other materials. And consistent with our holding above, incorporation by reference of the AAA Rules that expressly delegate arbitrability determinations to an arbitrator clearly and unmistakably evidences the parties' intent to empower an arbitrator to resolve questions of arbitrability.

Moreover, regarding the "administered" language in the Terms of Service, as explained in Judge Villanti's dissent in *Natt*, the AAA Rules "can only apply at the outset of a claim, not after the arbitration has already commenced." *Id.* at 611 (Villanti, J., dissenting). "The question of whether a claim is arbitrable must, by necessity, be determined before the commencement of arbitration." *Id.* Otherwise, the AAA Rule delegating arbitrability determinations to an arbitrator would be superfluous.

The Second District also concluded that the AAA Rule "confers an adjudicative power upon the arbitrator, but it does not purport to make that power exclusive." *Id.* at 607. However, as succinctly stated by Judge Villanti's dissenting opinion, "the power to decide *is* the power to decide." *Id.* at 611 (Villanti, J., dissenting). The Supreme Court has explained that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator . . . a court possesses no power to decide the arbitrability issue." *Henry Schein, Inc.*, 139 S. Ct. at 529. The Supreme Court further stated, "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530; *see also Blanton*, 962 F.3d at 849 (explaining why "the AAA Rules are best read to give arbitrators the exclusive authority to decide questions of 'arbitrability' "). The AAA Rules empower the arbitrator "to rule on his or her jurisdiction," the "scope . . . of the arbitration agreement," and "the

arbitrability of any claim or counterclaim." Accordingly, this language is clear and unmistakable and expressly delegates arbitrability determinations to the arbitrator.[5]

III. CONCLUSION

We hold that, because Airbnb's Terms of Service incorporate by reference the AAA Rules that expressly delegate arbitrability determinations to an arbitrator, the agreement clearly and unmistakably evidences the parties' intent to empower an arbitrator, rather than a court, to resolve questions of arbitrability. Accordingly, we quash the Second District's decision in *Natt* and approve the Fifth District's decision in *Reunion* and the Third District's decision in *Glasswall* to the extent they are consistent with this opinion. The case is remanded to the district court for further proceedings consistent with this opinion.

It is so ordered.

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[5] While the Second District's decision below did not reach the question of whether the "clear and unmistakable" analysis should account for the sophistication of the parties, we also conclude that this argument is without merit.

CANADY, C.J., and LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

LABARGA, J., dissents with an opinion.

LABARGA, J., dissenting.

In considering the question of who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate, the United States Supreme Court, in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), warned that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." Because the arbitrability provisions relied upon by the majority to reach its decision in this case were buried within voluminous pages of rules and policies incorporated only by reference in a clickwrap agreement, the parties' agreement to defer the consequential decision of arbitrability to the arbitrator was anything but clear and unmistakable. I respectfully dissent.

When a non-negotiable, standardized form agreement empowers an arbitrator to resolve the fundamental question of whether a legal matter must be submitted to arbitration, too often the courtroom door closes, and the parties are prevented from seeking any remedy outside of arbitration. We therefore must "presume that parties have not authorized arbitrators to resolve" this "gateway" question—especially where the agreement is silent or ambiguous on the issue—"because 'doing so might too often force unwilling parties

to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.'" *Lamps Plus v. Varela*, ___ U.S. ___, 139 S. Ct. 1407, 1416-17, 203 L.Ed.2d 636 (2019) (emphasis omitted) (quoting *First Options*, 514 U.S. at 945, 115 S.Ct. 1920).

Airbnb's clickwrap agreement is entirely silent on the question of who determines arbitrability. Instead, the arbitrability provision is buried in the AAA rules, amidst more than 100 pages of policies, rules, and conditions incorporated by reference in the clickwrap agreement. The clickwrap agreement containing Airbnb's Terms of Service, itself a 22-page document, directs consumers to navigate through Airbnb's Payment Terms of Service, Guest Refund Policy, Content Policy, Community Policy, Copyright Policy, Host Guarantee, Privacy Policy, Referral Program Terms and Conditions, and the terms of service of Apple App Store and Google Maps, among others—before even reaching the reference to the AAA rules. Unsuspecting consumers should not be expected to find the proverbial needle in the haystack in order to make a clear and unmistakable decision about arbitrability—that choice should be conspicuously located in the clickwrap agreement for the consumer to consider.

I fully agree with the analysis of the Second District Court of Appeal in *Doe v. Natt*, 299 So. 3d 599, 606 (Fla. 2d DCA 2020), and its explanation of why the clickwrap agreement lacked clear and unmistakable evidence of the parties' intent to arbitrate the threshold question of arbitrability:

[A]lthough the circuit court concluded that the AAA Rules had been "incorporated" into the parties' clickwrap agreement for purposes of determining arbitrability (which, the court then determined, precluded its authority to decide arbitrability), the agreement did not actually say that. Indeed, whatever may be gleaned from the AAA Rules . . . those rules were referenced in the clickwrap agreement as a generic body of procedural rules, and that reference was limited to how "the arbitration" was supposed to be "administered." Plainly, the agreement's reference to the AAA Rules and AAA's administration addresses an arbitration that is actually commenced. . . . But if the question were put, "Who should decide if this dispute is even subject to arbitration under this contract?" to respond, "The arbitration will be administered by the American Arbitration Association ('AAA') in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes," is not a very helpful answer and not at all clear.

Moreover, *the reference to the AAA Rules was broad, nonspecific, and cursory: the clickwrap agreement simply identified the entirety of a body of procedural rules*. The agreement did not quote or specify any particular provision or rule, such as the one Airbnb now relies upon. And the AAA Rules were not attached to the agreement. Instead, the agreement directed the Does to AAA's website and phone number if they wished to learn more about what was in the AAA Rules. *Which strikes us*

> *as a rather obscure way of evincing "clear and unmistakable evidence" that the parties intended to preclude a court from deciding an issue that would ordinarily be decided by a court*.

(Emphasis added.) (Footnote omitted.)

Because consumers' access to the courts should be carefully guarded, I cannot agree with the majority's conclusion that Airbnb's mere reference to the AAA Rules is sufficient to notify the parties that they were empowering an arbitrator to answer such a fundamental question. Clearly, the arbitrability provision should have been conspicuously included in the text of the clickwrap agreement itself. Because it was not, under these circumstances, this Court cannot assume that the parties agreed to arbitrate a matter they reasonably would have thought a judge would decide.

For these reasons, I respectfully dissent.

299 So.3d 599
District Court of Appeal of Florida, Second District.

John DOE and Jane Doe, Appellants,
v.
Wayne NATT and Airbnb, Inc., Appellees.

Case No. 2D19-1383
|
Opinion filed July 10, 2020

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No appearance for remaining Appellee.

Opinion

LUCAS, Judge

BY ORDER OF THE COURT:

Appellee's "motion for rehearing en banc, and in the alternative, request for certification from the en banc panel" is denied. On the court's own motion, the prior opinion dated March 25, 2020, is withdrawn and the attached opinion is issued in its place. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

This appeal requires us to delve into the "rather arcane" issue in arbitration[1] of who decides whether a dispute is subject to a contract's arbitration provision: an arbitrator or a judge. As we will explain, the contract's provision in this case did not provide clear and unmistakable evidence that only the arbitrator could decide the issue of arbitrability. Therefore, we must reverse the circuit court's order which held to the contrary.

I.

A Texas couple, who will be referred to as John and Jane Doe to preserve their confidentiality, decided to vacation in Longboat Key. Through a business, Airbnb, Inc. (Airbnb), they located a condominium unit online that was available for a short-term rental in the Longboat Key area. Using Airbnb's website, Mr. and Mrs. Doe rented the unit for a three-day stay in May of 2016.

The condominium unit was owned by Wayne Natt. Unbeknownst to the Does, Mr. Natt had installed hidden cameras throughout the unit. The Does allege that

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[1] *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ("[T]he former question—the 'who (primarily) should decide arbitrability' question—is rather arcane.").

Mr. Natt secretly recorded their entire stay in his unit, including some private and intimate interactions. After they learned of Mr. Natt's recordings, the Does filed a complaint in the circuit court of Manatee County, naming both Mr. Natt and Airbnb as defendants. Their complaint included claims of intrusion against Mr. Natt, constructive intrusion against Airbnb, and loss of consortium against both Mr. Natt and Airbnb. In their constructive intrusion claims, the Does alleged that Airbnb failed to warn them of past invasions of privacy that had occurred at other properties rented through Airbnb. They also alleged that Airbnb failed to ensure that Mr. Natt's property did not contain electronic recording devices.

In response to the Does' complaint, Airbnb filed a motion to compel arbitration. Airbnb argued that the Does' claims were subject to arbitration under Airbnb's Terms of Service, which the Does agreed to be bound to pursuant to a "clickwrap" agreement[2] they had entered

[2] A clickwrap agreement has been defined as one that is entered online by proposing contractual terms and conditions of service to a user, who then indicates his or her assent to the terms and conditions by clicking an "I agree" box. See Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016). In its motion to compel arbitration, Airbnb styled its agreement with the Does as "a modified click-wrap presentation" of Airbnb's terms of service, while the Does refer to it simply as a "clickwrap agreement." Inasmuch as Airbnb's different nomenclature does not appear to encompass any substantive definitional distinction, we will use the more widely understood term clickwrap agreement in this opinion.

when they first created their respective Airbnb accounts online.

Specifically, Airbnb's motion relied upon the following language that appears near the end of the twenty-two-page clickwrap agreement:

> **Dispute Resolution**
>
> You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services of use of the Site or Application (collectively, "Disputes") will be settled by binding arbitration. . . . You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury. . . .
>
> Arbitration Rules and Governing Law. The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this Dispute Resolution section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.) The Federal Arbitration Act will govern the interpretation and enforcement of this section.

Airbnb's motion argued that the Does' complaint's allegations "that Airbnb failed to do what [the Does] alleged should have been done, or otherwise breached certain duties alleged to be owed to them, are claims

for negligence, which have been held to be within the scope of broad arbitration provisions, such as the one here." But according to Airbnb, the circuit court should not even consider whether the Does' claims were arbitrable because the scope of what is or is not arbitrable had to be decided by American Arbitration Association's (AAA) arbitrator, not the circuit court. Issues about the scope of arbitrability had been contractually assigned to the arbitrator, according to Airbnb, by virtue of the clickwrap agreement's reference to the American Arbitration Association's Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes ("AAA Rules"). Although the AAA Rules were not reproduced within the clickwrap agreement, the clickwrap agreement did direct the Does to a AAA website (and telephone number) through which, Airbnb contended, they would have found AAA Rule 7, which states: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim."

A hearing was held before the circuit court on Airbnb's motion on February 6, 2019. On March 7, 2019, the court issued an order granting Airbnb's motion to compel arbitration. The order is noteworthy in two respects. First, the court seemed to be persuaded by the Does' argument that their claims would have been outside the scope of the clickwrap agreement's arbitration provision. However, the circuit court went on to conclude that it was powerless to make that

determination because the issue of arbitrability had to be decided by the arbitrator, not the court. The circuit court held "that the parties entered an express agreement which incorporated the AAA rules, and that this court is therefore bound to submit the issue of arbitrability to the arbitrator." In so holding, the circuit court distinguished this court's prior holding in Morton v. Polivchak, 931 So. 2d 935, 939 (Fla. 2d DCA 2006), as a case that was "fact-specific" and confined to the "particular provision" before that panel and instead relied upon the cases of Reunion West Development Partners, LLLP v. Guimaraes, 221 So. 3d 1278 (Fla. 5th DCA 2017); Younessi v. Recovery Racing, LLC, 88 So. 3d 364 (Fla. 4th DCA 2012); and Terminix International Co. v. Palmer Ranch Ltd. Partnership, 432 F.3d 1327 (11th Cir. 2005), to stay the proceedings and order the parties to proceed to arbitration.

The Does have appealed the circuit court's order pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv).

II.

Generally, we review an order on a motion to compel arbitration de novo. Hernandez v. Crespo, 211 So. 3d 19, 24 (Fla. 2016); Wilson v. AmeriLife of E. Pasco, LLC, 270 So. 3d 542, 545 (Fla. 2d DCA 2019). Issues of contract interpretation are also subject to de novo review. Bethany Trace Owners' Ass'n v. Whispering Lakes I, LLC, 155 So. 3d 1188, 1191 (Fla. 2d DCA 2014). The particular arbitration provision before us is

governed by the Federal Arbitration Act (FAA),[3] which can be applied in both federal and state court proceedings. Global Travel Mktg., Inc. v. Shea, 908 So. 2d 392, 396-97 (Fla. 2005).

A.

When a question over arbitrability arises, who should decide the answer—the arbitrator or the court—can pose something of an analytical challenge. However, the United States Supreme Court provided a framework to resolve that first order issue in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). In First Options, a plaintiff firm brought an arbitration proceeding against a husband, his wife, and his wholly owned corporation. In connection with a "workout agreement," the husband's corporation had signed a contract with the plaintiff that contained an arbitration provision, but neither the husband nor his wife had ever executed an agreement with a similar provision. The arbitrators determined they had the power to rule on all the issues before them, including the husband and wife's objections to arbitration, and their award was confirmed by the district court. After the Third Circuit reversed the district court's confirmation, the case came before the Supreme Court. Id. at 940-41, 115 S.Ct. 1920.

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[3] See generally 9 U.S.C. §§ 1-307 (2018).

The First Options Court began its analysis by highlighting the importance of the "who decides" arbitrability question under the FAA:

> Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.

Id. at 942, 115 S.Ct. 1920 (citations omitted). The First Options Court then went on to explain how to go about deciding the "who decides" question of arbitrability and the practical concerns that inform that analysis:

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? . . .
>
> . . . .

When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. . . .

This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: **Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so.** In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement"—for in respect to this latter question the law reverses the presumption.

But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. On the other hand, the former

> question—the "who (primarily) should decide arbitrability" question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 943-45, 115 S.Ct. 1920 (fourth and fifth alterations in original) (bold emphasis added) (citations omitted). The Court concluded that there was no clear and unmistakable evidence that either the husband or wife had agreed to submit the issue of arbitrability to an arbitrator and affirmed the judgment of the Third Circuit. Id. at 946-47, 115 S.Ct. 1920; cf. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84, 86, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (characterizing First Options' clear and unmistakable evidence standard as an "interpretive rule" and a "strong pro-court presumption" that applies "where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing

parties to arbitrate a matter that they may well not have agreed to arbitrate").

In a more recent term, the Supreme Court made it a point to repeat First Options' "who decides" arbitrability test under the FAA: "This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." Henry Schein, Inc. v. Archer & White Sales, Inc., ___ U.S. ___, 139 S. Ct. 524, 530, 202 L.Ed.2d 480 (2019) (quoting First Options, 514 U.S. at 944, 115 S.Ct. 1920). Thus, as the Supreme Court has repeatedly instructed, under the FAA there must be clear and unmistakable evidence that the parties agreed to have the arbitrator decide threshold questions about arbitrability; short of that, the assumption remains that such disputes are to be decided by a court.

Our district applied First Options in a case that holds certain similarities to the case at bar. In Morton, 931 So. 2d at 938, a dispute arose between a seller and a buyer of a residential property over drainage problems that were later discovered on the property. Pursuant to the purchase contract, the buyer filed a demand for arbitration alleging fraud against the seller, to which the seller responded with various counterclaims. Id. Both parties sought punitive damages, but the arbitration panel concluded it did not have the authority to award punitive damages. Id. Apparently dissatisfied with that ruling, the buyer filed a separate complaint in the circuit court. Id. When he attempted to assert a claim for punitive damages in the civil

proceeding, the trial court agreed with the seller that it did not have the authority to review the arbitration panel's ruling that the arbitration panel had no power to award punitive damages. Id. The buyer appealed, arguing that the circuit court, not the arbitration panel, should have decided the scope of arbitrability for his claim of punitive damages. Id.

Like the Does' clickwrap agreement, the real estate contract in Morton did "not expressly address the question of who decides issues of arbitrability." Id. And, like the clickwrap agreement here, the contract before the Morton court stated that a set of AAA rules would apply in an arbitration proceeding under the contract. Id. There, however, the similarities between the cases appear to diminish.

From what is reported in the Morton opinion, the AAA rules that were adopted in the parties' real estate contract contained a section that generally addressed the timing of raising objections to the arbitrability of a claim; but the rule section did not explicitly state who could decide those objections. Id. at 939. Although one could fairly infer that that section likely contemplated the arbitrator hearing such objections (it was, after all, found within a body of rules promulgated by an arbitration business for use by its arbitrators and customers), the Morton court held otherwise. We explained:

> "[D]ecisions regarding arbitrability are to be made by the trial court, unless the parties have entered an agreement stating otherwise." Romano v. Goodlette Office Park, Ltd., 700 So. 2d 62, 64 (Fla. 2d DCA 1997) (relying

> on Thomas W. Ward & Assocs. v. Spinks, 574 So. 2d 169 (Fla. 4th DCA 1991)); see also Royal Prof'l Builders, Inc. v. Roggin, 853 So. 2d 520, 523 (Fla. 4th DCA 2003); Premier Med. Mgmt., Ltd. v. Salas, 830 So. 2d 959, 961 n.2 (Fla. 1st DCA 2002). "Contractual silence or ambiguity regarding who determines the questions of arbitrability is insufficient to give that authority to the arbitrators." Romano, 700 So. 2d at 64. "If . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." Id. at 944, 115 S. Ct. 1920 (quoting AT & T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)).

Id. at 938-39 (alterations in original).

The Morton court found "no merit" in the seller's argument that the circuit court could not decide arbitrability of the punitive damages claim because the AAA rule, we observed, "only addresses the procedure of raising an objection to arbitrability in an arbitration proceeding when the arbitration panel has the authority to decide issues of arbitrability. The provision does

not itself grant the arbitration panel that authority." Id. at 939 (emphasis omitted).

The question we did not answer in Morton—and which we must now decide—is whether a contract's arbitration provision's reference to an arbitration rule that *does* grant an arbitrator the authority to decide arbitrability clearly and unmistakably supplants a court's power to rule on the issue of arbitrability. In this case, we hold it does not.

B.

Arbitration provisions are creatures of contract and must be construed as "a matter of contract interpretation." See Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999) (citing Seaboard Coast Line R.R. v. Trailer Train Co., 690 F.2d 1343, 1352 (11th Cir. 1982); R.W. Roberts Constr. Co. v. St. Johns River Water Mgmt. Dist., 423 So. 2d 630, 632 (Fla. 5th DCA 1982)); 4927 Voorhees Road, LLC v. Mallard, 163 So. 3d 632, 634 (Fla. 2d DCA 2015). "[C]ourts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (citations omitted) (first citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006); and then citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). "'When interpreting a contract, the court must first examine

the plain language of the contract for evidence of the parties' intent.' . . . 'Intent unexpressed will be unavailing. . . .'" Beach Towing Servs., Inc. v. Sunset Land Assocs., 278 So. 3d 857, 860 (Fla. 3d DCA 2019) (first quoting Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017); and then quoting Moore v. Stevens, 90 Fla. 879, 106 So. 901, 903 (1925)). It is often observed that if there is a dispute over the scope of arbitrability in a contract, courts will generally resolve the dispute in favor of arbitration. See Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013). The question we are faced with, though, is not *what* the scope of arbitration is under the clickwrap agreement, but *who* should decide that issue. That question is answered from a different perspective: "[C]ourts should not assume that the parties agreed to submit issues concerning arbitrability to the arbitrator, unless there is a clear and unmistakable agreement to do so[,]" and furthermore, contractual ambiguity "is insufficient to give that authority to the arbitrators." Romano v. Goodlette Office Park, Ltd., 700 So. 2d 62, 64 (Fla. 2d DCA 1997) (citing First Options, 514 U.S. at 944, 115 S.Ct. 1920)); see also Henry Schein, 139 S. Ct. at 530; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69 n.1, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010)

With that in mind, we will begin by pointing out what is conspicuously missing in the clickwrap agreement's language. The agreement itself is silent on the issue of who should decide arbitrability. Cf. Romano, 700 So. 2d at 64. And although the circuit court

concluded that the AAA Rules had been "incorporated" into the parties' clickwrap agreement for purposes of determining arbitrability (which, the court then determined, precluded its authority to decide arbitrability), the agreement did not actually say that. Indeed, whatever may be gleaned from the AAA Rules (a point we will turn to shortly), those rules were referenced in the clickwrap agreement as a generic body of procedural rules, and that reference was limited to how "the arbitration" was supposed to be "administered." Plainly, the agreement's reference to the AAA Rules and AAA's administration addresses an arbitration that is actually commenced. In other words, the directive is necessarily conditional on there being an arbitration. If a claim is arbitrated, then the AAA Rules apply. But if the question were put, "Who should decide if this dispute is even subject to arbitration under this contract?" to respond, "The arbitration will be administered by the American Arbitration Association ('AAA') in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes," is not a very helpful answer and not at all clear.

Moreover, the reference to the AAA Rules was broad, nonspecific, and cursory: the clickwrap agreement simply identified the entirety of a body of procedural rules. The agreement did not quote or specify any particular provision or rule, such as the one Airbnb now relies upon. And the AAA Rules were not attached

to the agreement.[4] Instead, the agreement directed the Does to AAA's website and phone number if they wished to learn more about what was in the AAA Rules. Which strikes us as a rather obscure way of evincing "clear and unmistakable evidence" that the parties intended to preclude a court from deciding an issue that would ordinarily be decided by a court.

Assuming the clickwrap agreement's passing reference to AAA and the AAA Rules sufficiently showed an intent that those rules (whatever they may say) *could* supplant the trial court's presumed authority to decide arbitrability, there is then the added uncertainty of whether the AAA Rules, in fact, *did* so. Again, the pertinent arbitration rule Airbnb relies upon states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim." And, again, we find something missing. This rule confers an adjudicative power upon the arbitrator, but it does not purport to make that power exclusive. Nor does it purport to contractually remove that adjudicative power from a court of competent jurisdiction. See Ajamian v. CantorCO2e, L.P., 203 Cal.App.4th 771, 137 Cal. Rptr. 3d 773, 790 (2012) ("[T]he rule merely states that the arbitrator shall have 'the power' to determine issues of its own

[4] In their brief, the Does also suggested that the hyperlink to the AAA Rules in the clickwrap agreement was inoperative, but the record appears to be silent on this point (no one proffered any evidence below as to whether or not the link worked).

jurisdiction. . . . This tells the reader almost nothing, since a court *also* has the power to decide such issues, and nothing in the AAA rules states that the AAA arbitrator, as opposed to the court, *shall* determine those threshold issues, or has *exclusive* authority to do so. . . .”). Indeed, in most interpretive contexts, the statement, “shall have the power,” does not even constitute a mandatory directive. See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984) (concluding that the phrase “Congress shall have the power” is permissive (citing Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 530, 92 S.Ct. 1700, 32 L.Ed.2d 273 (1972))); People ex rel. Oak Supply & Furniture Co. v. Dep’t of Rev., 62 Ill.2d 210, 342 N.E. 2d 53, 55 (1976) (construing state statute that authorized state’s department of revenue to issue subpoenas, concluding that “the word ‘shall’ is to be read as permissive—‘shall have the power to’ or ‘may’ ”); Johnson v. Commonwealth ex rel. Meredith, 291 Ky. 829, 165 S.W.2d 820, 825 (1942) (observing that the statutory phrase “shall have the power and the authority” is equivalent to “the permissive word, ‘may’ ”)

In our view, the parties’ “manifestation of intent,” see Rent-A-Center, 561 U.S. at 69 n.1, 130 S.Ct. 2772 (emphasis omitted), in the clickwrap agreement fell short of the clear and unmistakable evidence of assent that First Options requires.

C.

We recognize that our decision may constitute something of an outlier in the jurisprudence of arbitration. Several federal circuit courts of appeal have concluded that an arbitration rule that confers a general authority on an arbitrator to decide questions of arbitrability, when incorporated into an agreement, evinces a sufficiently clear and unmistakable intent to withdraw the issue from a court's consideration. See, e.g., Belnap v. Iasis Healthcare, 844 F.3d 1272, 1290 (10th Cir. 2017) ("[A]lthough this is a question of first impression in our court, a majority of our sister circuits have concluded that a finding of clear and unmistakable intent to arbitrate arbitrability—which may be inferred from the parties' incorporation in their agreement of rules that make arbitrability subject to arbitration—obliges a court to decline to reach the merits of an arbitrability dispute regarding the substantive claims at issue."); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. . . . We see no reason to deviate from the prevailing view. . . ." (citations omitted)); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012) ("We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.");

Terminix Int'l Co., 432 F.3d at 1332 ("By incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid."); Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005) ("We have held that when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); Apollo Computer, Inc. v. Berg, 886 F.2d 469, 473 (1st Cir. 1989) ("By contracting to have all disputes resolved according to the Rules of the ICC, however, Apollo agreed to be bound by Articles 8.3 and 8.4. These provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate whose continued existence and validity is being questioned.").

Two of our sister district courts of appeal have followed this trend. See Reunion W. Dev. Partners, LLLP, 221 So. 3d at 1280 ("[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." (alterations in original) (quoting Contec Corp., 398 F.3d at 208)); Glasswall, LLC v. Monadnock Constr., Inc., 187 So. 3d 248, 251 (Fla. 3d DCA 2016) ("In so holding, we note that the parties are in agreement that the majority of federal courts considering similar circumstances

where the AAA's arbitration rules have been incorporated by reference into a contract likewise have found that the parties sufficiently evidenced their intent to have arbitrators, not a court, hear and decide issues of arbitrability.").

We respectfully disagree with these holdings because we do not believe they comport with what First Options requires. As the Does point out, none of these cases have ever examined how or why the mere "incorporation" of an arbitration rule such as the one before us (which the Belnap court candidly likened to "inferring" assent, 844 F.3d at 1290) satisfies the heightened standard the Supreme Court set in First Options, nor how it overcomes the "strong pro-court presumption" that is supposed to attend this inquiry. See Howsam, 537 U.S. at 86, 123 S.Ct. 588. Most of the opinions have simply stated the proposition as having been established with citations to prior decisions that did the same. Both parties identify the principal case (from which all these holdings appear to have derived) as the First Circuit's Apollo decision. But Apollo was issued years before the Supreme Court's First Options opinion, and so the Apollo court could not have had First Options' instructions in mind when it issued its opinion. Moreover, Apollo's analysis on this point was quite limited, comprising of (1) identifying an arbitration rule that conferred a generalized power to decide arbitrability to the arbitrator, (2) observing that the rule had been incorporated into the parties' agreement, and (3) stating "[t]hese provisions clearly and unmistakably allow the arbitrator to determine her own

jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate." 886 F.2d at 473.[5] Apparently, the court simply deemed the requisite clarity to have been self-evident.[6]

If it was, we confess our failure to see it here. In the case at bar we have an arguably permissive and clearly nonexclusive conferral of an adjudicative power to an arbitrator, found within a body of rules that were not attached to the agreement, that itself did nothing more than identify the applicability of that body of rules if an arbitration is convened. That is not "clear and unmistakable evidence" that these parties agreed to delegate the "who decides" question of arbitrability from the court to an arbitrator. To the contrary, the

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[5] Apollo also cited to the First Circuit's prior case of Societe Generale de Surveillance, S.A. v. Raytheon European Management & Systems Co., 643 F.2d 863, 869 (1st Cir. 1981), as authority for its conclusion. However, the Societe Generale case was not a dispute over whether a court or an arbitrator should decide arbitrability but rather one about *which arbitrator*, in Massachusetts or in Switzerland, was authorized to preside over a commercial dispute between a French corporation and a Massachusetts corporation. The First Circuit simply concluded that a district court acted "well within its discretion" to allow the Swiss arbitrator to decide the question of its jurisdiction because the applicable rules empowered that arbitrator to do so and "[s]ince the arbitrators there are more likely to be familiar with commercial dealings in this area and with French law." Societe Generale, 643 F.2d at 869.

[6] Airbnb's argument for affirmance runs the same course. In its brief, Airbnb dismisses the absence of a more in-depth consideration of this question in Apollo because "no further analysis was required of the court in Apollo. The parties in Apollo agreed to be bound by the ICC Rules. The ICC Rules contained a delegation clause. The [c]ourt's analysis properly ended there."

provision Airbnb relies upon is two steps removed from the agreement itself, hidden within a body of procedural rules, and capable of being read as a permissive direction. It is at best ambiguous. We may quibble over what the precise measure of the Supreme Court's "clear and unmistakable evidence" standard should entail,[7] but it surely means evidence of intent that is not ambiguous. Cf. Romano, 700 So. 2d at 64. Otherwise, we will be treating the "who decides" issue of arbitrability no differently than any other issue of arbitration, when the Supreme Court has instructed, repeatedly, that it is a qualitatively different inquiry with a different analysis. See First Options, 514 U.S. at 944-45, 115 S.Ct. 1920 ("[T]he law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable . . . for in respect to this latter question the law reverses the presumption. But, this difference in treatment is understandable." (citations omitted)).

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[7] Cf. Richard W. Hulbert, Institutional Rules and Arbitral Jurisdiction: When Party Intent is not "Clear and Unmistakable", 17 Am. Rev. Int'l Arb. 545, 571-72 (2006) ("Courts can stop misreading arbitral institutional rules. The doctrine that has resulted is a judicial creation and judicial action could readily resolve it. If that step alone were taken, the question of party intent would be dealt with as the matter of fact it is and not a matter of law to be determined by a factitious inference from institutional rules. It might then prove to be the rare case where it would be found as a fact that the parties actually intended that the arbitrators' decision as to their jurisdiction should constitute the final and determinative decision of that issue." (footnote omitted)).

III.

We hold that the clickwrap agreement's arbitration provision and the AAA rule it references that addresses an arbitrator's authority to decide arbitrability did not, in themselves, arise to "clear and unmistakable" evidence that the parties intended to remove the court's presumed authority to decide such questions. The evidence on what these parties may have agreed to about the "who decides" arbitrability question was ambiguous; therefore, the court retained its presumed authority to decide the arbitrability dispute. The circuit court did not have the benefit of our decision today and so was bound to rely upon the Fifth District's Reunion decision and the Fourth District's Younessi opinion when it entered the order below. See Conquest v. Auto-Owners Ins. Co., 637 So. 2d 40, 43 (Fla. 2d DCA 1994) ("[I]f this court has not spoken on a subject but another district has, the trial courts of this district must follow that decision." (citing Chapman v. Pinellas County, 423 So. 2d 578 (Fla. 2d DCA 1982))). Because we disagree with the conclusion those courts appeared to reach concerning what constitutes sufficient clarity and unmistakability of intent to have an arbitrator, rather than a court, resolve questions of arbitrability, we certify conflict with Reunion and Younessi to the extent they are inconsistent with our decision today.

Reversed; remanded with instructions; conflict certified.

SLEET, J., Concurs.

VILLANTI, J., Dissents with opinion.

VILLANTI, Judge, Dissenting.

I respectfully dissent from the majority's outlier determination that the clickwrap agreement used by Airbnb did not exhibit an unmistakable intent to assign the issue of arbitrability to the arbitrator. For better or worse, we, as a society, have decided to choose the speed and convenience of the Internet over more traditional modes of communication. A fully electronic stream of commerce is now firmly embedded in our society, and we have long since crossed the point of no return. When paper is eliminated in favor of speed and convenience, it should come as no surprise that contracting parties resort to incorporating material by reference—which in this instance includes the AAA rules and specifically Rule 14(a),[8] which allows the

[8] When the Does originally signed up with Airbnb, when they made their reservation, and when they stayed at the condo in Naples, the Airbnb clickwrap agreement incorporated the AAA "Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes" and required that disputes would be handled under the rules in effect at the time of the dispute. Under the Commercial Arbitration Rules, the jurisdictional provision was in Rule 7. Subsequently, after the Does stayed in Naples but before they filed suit, Airbnb amended its Terms of Service because the AAA had amended and renamed the Supplementary Procedures for Consumer Related Disputes to be the AAA Consumer Arbitration Rules. Under those rules, the jurisdictional provision is in Rule 14(a). See https://adr.org/sites/default/files/Consumer_Rules_Web_0.pdf. Hence, when the Does filed their complaint on May 15, 2018, the applicable rules were the Consumer Arbitration Rules. Regardless of which set of rules

arbitrator to decide arbitrability in the first instance. Cf. ADP, LLC v. Lynch, Nos. 2:16-01053, 2:16-01111, 2016 WL 3574328, at *4 (D.N.J. June 30, 2016) ("[C]lickwrap agreements that incorporate additional terms by reference will generally provide 'reasonable notice' that the additional terms apply."); Nathan J. Davis, Presumed Assent: The Judicial Acceptance of Clickwrap, 22 Berkeley Tech. L.J. 577, 579 (2007) ("[T]he courts have unanimously found that clicking is a valid way to manifest assent since the first clickwrap agreement was litigated in 1998.").

As an initial point, I take issue with the majority's assertion that "[p]lainly, the agreement's reference to the AAA Rules and AAA's administration addresses an arbitration that is actually commenced. In other words, the directive is necessarily conditional on there being an arbitration." With respect to the application of Rule 14(a), this is illogical: The question of whether a claim is arbitrable must, by necessity, be determined before the commencement of arbitration. Thus, Rule 14(a) can only apply at the outset of a claim, not after the arbitration has already commenced.

I also take issue with the majority's statement, "Like the Does' clickwrap agreement, the real estate contract in Morton did 'not expressly address the question of who decides issues of arbitrability.'" (Quoting Morton, 931 So. 2d at 938). This is misleading. The rule at issue in Morton came from the Commercial

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is reviewed, however, the relevant language of the two provisions is the same.

Arbitration and Mediation Center for the Americas (CAMCA) Mediation and Arbitration Rules. In that case, the rule at issue said only, "[O]bjections to the arbitrability of a claim must be raised no later than thirty (30) days after notice to the parties of the commencement of the arbitration." 931 So. 2d at 939. But, as we observed in Morton, "This provision only addresses the procedure of raising an objection to arbitrability in an arbitration proceeding *when the arbitration panel has the authority to decide issues of arbitrability.* The provision does not itself grant the arbitration panel that authority." Id. (underline emphasis added). Thus, Morton is distinguishable from the instant case because in Morton, the question of who had the authority to decide issues of arbitrability was not addressed in the cited provisions of the CAMCA rules at all; whereas the referenced provision at issue in this case does address the question. Although the majority admits that Morton is distinguishable, the premise that the contract in Morton was similar to the contract in this case in that it failed to "expressly address the question of who decides issues of arbitrability" is, in my view, a false premise.

Most importantly, I take issue with the majority's attempt to minimize the scope of Rule 14(a) because, the majority says, it does not give the arbitrator the exclusive power to decide arbitrability. This ignores the obvious: the power to decide is the power to decide. To contend that the absence of the term "exclusive" (or words to that effect) in relation to the arbitrator gives exclusive power to the trial court sub silentio to make

that decision is, in my view, a stretch too far. Indeed, the word "exclusive," emphasized by the majority, does not appear at all in First Options, the Supreme Court case upon which the majority hangs its hat, or in Howsam, Henry Schein, Morton, Petrofac, Terminix, Reunion, or Glasswall. Although the term is used in Rent-A-Center and Ajamian, that is only because the contracts at issue in those cases employed the word. The word is also used in Oracle America—but that case provides a particularly on-point object lesson which I think supports my view. In Oracle America, the contract provided, "Any dispute arising out of or relating to this License shall be finally settled by arbitration as set out herein, except that either party may bring any action, in a court of competent jurisdiction (which jurisdiction shall be exclusive)." 724 F.3d at 1071 (emphasis added). However, the contract also incorporated by reference the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), which contained a clause that provided either that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement" (1976 version), or that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement" (2010 version).[9] Id. at 1073. Either version of the

[9] The parties disagreed as to whether the 1976 or 2010 version of the rules applied. The Ninth Circuit held that the

provision, concluded the court, "vest[ed] the arbitrator with the apparent authority to decide questions of arbitrability" and therefore "constitute[d] clear and unmistakable evidence that the parties intended to arbitrate arbitrability." Id. Thus, the arbitration rules incorporated into the contract by reference—although not containing the word "exclusive" or words to that effect—constituted clear and unmistakable evidence of the parties' intent to arbitrate arbitrability, despite the provision that a court would have "exclusive" jurisdiction over disputes relating to intellectual property rights or the software license at issue in that case.

In sum, the rule expressed in First Options and the other cited opinions is "clear and unmistakable," not "exclusive." These words do not mean the same thing. Here, the majority has created a new requirement that the contract must confer an "exclusive" power upon the arbitrator or arbitration panel to determine the arbitrability of an issue. This result is at odds with a substantial body of law; and I think the analysis leading to this outlier result is both hypertechnical and an unnecessary exercise in legal polemics.

I conclude that the incorporation by reference of AAA Consumer Arbitration Rule 14(a) into a contract comprises "clear and unmistakable evidence" of the parties' agreement to arbitrate arbitrability and is fully consistent with the principles announced in

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difference in the wording between the two versions was immaterial. Oracle America, 724 F.3d at 1073.

First Options. For this reason, I would follow our sister courts' decisions in Reunion and Glasswall, as well as the long line of federal cases aptly cited by the majority that are in accord, and would affirm.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

JOHN DOE and JANE DOE, Individually,

Plaintiffs,

Case No.: 2018-CA-2203

vs.

WAYNE NATT and AIRBNB, INC., A Foreign Profit Corporation,

Defendants. /

ORDER DENYING PLAINTIFF'S TIME-SENSITIVE MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO COMPEL ARBITRATION

(Filed Apr. 5, 2019)

THIS CAUSE came before the Court on April 5, 2019, for hearing on Plaintiffs Time-Sensitive Motion for Reconsideration of Order Granting Motion to Compel Arbitration. The Court, having the benefit of the argument of counsel, having reviewed the written arguments, and otherwise being fully informed on the issues, it is:

ORDERED AND ADJUDGED that Plaintiffs Time-Sensitive Motion for Reconsideration of Order Granting Motion to Compel Arbitration is **DENIED**.

DONE AND ORDERED in Chambers, Bradenton, Manatee County, Florida, this ___ day of April 2019.

ORIGINAL SIGNED

/s/ APR 05 2019
CHARLES SNIFFEN
CIRCUIT COURT JUDGE

Copies furnished to:
Counsel of Record

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY, FLORIDA

JOHN DOE and JANE DOE,
Plaintiffs,

vs.

WAYNE NATI' and AIRBNB, INC., etc.
Defendants. /

Case No. 2018-CA-2203

ORDER GRANTING MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS PENDING ARBITRATION

(Filed Mar. 8, 2019)

THIS CAUSE having come before the Court for hearing on Defendant AIRBNB, Inc.'s on to compel arbitration and stay proceedings, and the Court having reviewed the motions and t file, heard argument of counsel, reviewed the relevant legal authority and being otherwise advised, it is hereby,

ORDERED AND ADJUDGED as follows:

1. For the reasons set forth the motion is **GRANTED**.

2. In resolving this threshold question, the court must determine: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.

3. Plaintiffs urge the court to find that no valid written agreement exists, because its complaint alleges reliance on representations made by AIRBNB before a contractual relationship existed between the parties. Notwithstanding this argument, the court finds that Plaintiff's theory of recovery can affect only whether an arbitrable issue exists, and does not affect the existence or non-existence of a written agreement. The Court finds that a valid written agreement to arbitrate exists.

4. Regarding whether an arbitrable issue exists, the Court finds Plaintiffs' arguments based on the holding in *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999) to be compelling, as Plaintiffs have alleged that their claims are based upon representations and obligations to the general public that do not specifically arise from the parties' contractual relationship. The mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one that falls within the scope of arbitrability. *Id.*

5. However, because a valid written agreement to arbitrate exists, the Court finds that the parties are bound by that provision of their agreement (and the incorporated rules of the American Arbitration Association (AAA)) which dictates that the issue of arbitrability be decided by the arbitrator and not the trial court.

6. On the issue of the determination of arbitrability, Plaintiffs rely in part on *Morton v. Polivchak*, 931 So. 2d 935, 939 (Fla. 2d DCA 2006) for the proposition that mere incorporation of AAA rules is insufficient to establish an express agreement to delegate the issue of arbitrability to the arbitrator. However, this court finds that the decision in *Morton* was fact-specific, in that it was the particular provision incorporated in the *Morton* case that was the basis for the appellate court's ruling. On this subject the court in *Morton* stated:

> "*There is no merit in Polivchak's contention that the reference in the arbitration agreement to the rules of the AAA authorized the arbitrators to decide issues of arbitrability. The provision in the AAA rules on which Polivchak relies provides simply that "[o]bjections to the arbitrability of a claim must be raised no later than thirty (30) days after notice to the parties of the commencement of the arbitration."*[1] *This provision only addresses the procedure of raising an objection to arbitrability in an arbitration proceeding when the arbitration panel has the authority to decide issues of arbitrability. The provision does not itself grant the arbitration panel that authority.*

7. Based on both *Morton* and the other authority cited by the parties the Court finds that the parties entered an express agreement which incorporated the AAA rules, and that this

court is therefore bound to submit the issue of arbitrability to the arbitrator. See also, *Reunion W. Dev. Partners, LLLP v. Guimaraes*, 221 So. 3d 1278 (Fla. 5th DCA 2017) (Where the language of the contract clearly states that AAA rules govern, then said rules are expressly incorporated into the contract.) (citing *Younessi v. Recovery Racing, LLC*, 88 So.3d 364 (Fla. 4th DCA 2012) and *Terminix Int'l Co. v. Palmer Ranch Ltd.*, 432 F.3d 1327 (11th Cir. 2005)).

8. The court does not find that the right to arbitration was waived.

9. In light of the foregoing this action is hereby STAYED and the parties are ordered to proceed to arbitration in the manner contemplated by their express agreement.

DONE AND ORDERED in Bradenton, Manatee County, Florida this 7th day of Mar., 2019.

/s/ Charles Sniffen
CHARLES SNIFFEN
County Judge

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the above-named parties this 8th day of Mar., 2019.

/s/ [Illegible]
Judicial Assistant

9 U.S.C. § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

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9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the

revocation of any contract or as otherwise provided in chapter 4.

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9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

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9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order

directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. 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. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the

court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

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9 U.S.C. § 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

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9 U.S.C. § 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

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9 U.S.C. § 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

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9 U.S.C. § 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared

generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

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9 U.S.C. § 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

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9 U.S.C. § 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

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9 U.S.C. § 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

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9 U.S.C. § 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

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9 U.S.C. § 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

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9 U.S.C. § 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

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9 U.S.C. § 16. Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.
