OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: FIRST OPTIONS OF CHICAGO, INC., Petitioner v. MANUEL KAPLAN, ET UX. AND MK INVESTMENTS, INC.

CASE NO: 94-560

PLACE: Washington, D.C.

DATE: Wednesday, March 22, 1995

PAGES: 1-55

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IN THE SUPREME COURT OF THE UNITED STATES

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FIRST OPTIONS OF CHICAGO, INC., Petitioner : v. : No. 94-560

MANUEL KAPLAN, ET UX. AND MK INVESTMENTS, INC. :

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Washington, D.C.

Wednesday, March 22, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

JAMES D. HOLZHAUER, ESQ., Chicago, Illinois; on behalf of the Petitioner.

JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 94-560, First Options of Chicago v. Manuel Kaplan.

Mr. Holzhauer, you may proceed.

ORAL ARGUMENT OF JAMES D. HOLZHAUER

ON BEHALF OF THE PETITIONER

MR. HOLZHAUER: Thank you, Mr. Chief Justice, and may it please the Court:

The primary issue in this case is whether the courts should give normal deference to an arbitration decision on the issue of arbitrability when the objecting party asks the arbitrators to decide that issue.

First Options filed claims against MK Investments, its president and sole shareholder, Manuel Kaplan, and his wife, Carol Kaplan. There was no dispute as to the arbitrability of the claims against MK Investments, but the Kaplans objected to the arbitrability of the claims against them individually.

They withdrew those objections at a prehearing conference, but 2 years later, they filed a motion stating that the arbitrators had not yet ruled on their objections, and asking the panel for a ruling. Their motion included a detailed memorandum of law addressing

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all of the bases for arbitrability asserted by First Options. The arbitration panel gave the issue full consideration, and ruled that the claims against the Kaplans individually were arbitrable.

Respondents' arguments cannot diminish the fact that they asked for and received the arbitrator's ruling on the arbitrability issue, so the question is whether such a ruling, like rulings on other issues submitted to arbitration, is entitled to deference, or must be reviewed by courts de novo.

Although parties are clearly entitled to an initial judicial determination of arbitrability, this Court's decisions in AT&T Technologies and Warrior & Gulf make it equally clear that the parties can submit the arbitrability issue to the arbitrators instead.

Now, respondents agree that if the parties formally agree to submit the arbitrability issue to the arbitrators for a conclusive determination, deferential review may well be appropriate, but they apparently believe that deference is due only if the parties enter into a formal written agreement or stipulation to have the arbitrators finally decide that issue.

There is no principal distinction --

QUESTION: What do you have here -- what is the closest thing to a formal stipulation to have the

arbitrator decide that you have here?

MR. HOLZHAUER: We have a motion that they filed with an accompanying memorandum of law saying, addressing the issue of jurisdiction, and asking the arbitrators to determine whether or not they had jurisdiction. Of course, they asked the arbitrators to determine they did not have jurisdiction.

QUESTION: Where did it say that moreover, we will be content with whatever determination the arbitrator makes? It seems to me what your case comes down to is that whenever you choose to litigate jurisdiction before the arbitrator, you have automatically conceded that whatever the arbitrator says goes, and I don't see that that follows. I --

MR. HOLZHAUER: We don't say that whatever the arbitrators say goes. We're saying that whatever the arbitrator says is in entitled to the usual form of deference.

QUESTION: Not an arbitrator's determination that the parties have agreed to submit the dispute to arbitration. Don't you agree with that?

MR. HOLZHAUER: The determination of whether they've agreed to submit it to arbitration?

QUESTION: Yes.

MR. HOLZHAUER: I think that that is obviously

entitled to -- that should be reviewed by the Court.

In AT&T Technologies in particular, the question was whether the parties -- the issue that was raised by the dictum in that case was whether the parties had clearly and unmistakable agreed to submit the arbitrability issue to the arbitrators, but it's important to keep in mind that in that case the issue came up in the first instance in the courts.

QUESTION: But that's a different thing than whether the parties agreed to arbitrate at all, isn't it?

MR. HOLZHAUER: Yes, it is. Yes, it is, but --

QUESTION: What was the law in the Third Circuit at the time of this arbitration? I understood that the Third Circuit had taken the position that by objecting to the arbitrator's jurisdiction, which the respondent did here initially, a party does not waive the right to judicial determination of arbitrability.

MR. HOLZHAUER: The law in the Third Circuit was very confused before this case, and continues to be confused. There have been a number of courts that have said that in all situations there will be judicial review on a de novo basis of arbitrability determinations, but the Third Circuit wasn't one of those courts.

In at least four cases that I know of, the United Industrial Workers case, the Yorkaire case, which

was a district court decision affirmed by the Third Circuit, Pennsylvania Power, and a case called GK Management, the Third Circuit took our position and said that when the arbitrators argue the issue of arbitrability, when the parties argue the issue of arbitrability to the arbitrators, the arbitrators' determination is entitled to deference, so the issue is quite up in the air in the Third Circuit.

QUESTION: Mr. --

QUESTION: What if the parties were expressly reserved judicial review before submitting it to the arbitrator.

MR. HOLZHAUER: Sure. That's the question that is posed most directly by the Ninth Circuit's George Day decision. There --

QUESTION: What would your position be?

MR. HOLZHAUER: My position would be that that would not be sufficient. Now, that's not in this case. The parties didn't do anything like that here, object and say, we'll go on but we don't want you to reach that issue.

QUESTION: So you would force anybody who didn't want to lose the right of judicial review to litigate that issue first.

MR. HOLZHAUER: I would force them to litigate

the issue in one forum or another. Clearly they have the right to litigate that or to obtain initial --

QUESTION: Well, you would force them to litigate it in district court if they ever wanted district court review at all.

MR. HOLZHAUER: If they wanted district court review on a de novo basis, yes, I would say they would have to go to district court at the outset, but as the slew of cases that this Court sees and that we all see going to arbitration demonstrates, parties submit very difficult and complex issues to arbitration all the time.

QUESTION: That just seems to kind of defeat the whole purpose of arbitration. It just -- it complicates life for the courts, and it complicates life under the arbitration setup. I don't see why we have to do that.

MR. HOLZHAUER: I don't think that's correct at all. In fact, in the Sixth, Eighth, and Ninth Circuits, we've had the rule for some time that arbitrability determinations of arbitration will be entitled to deferential review, and I don't think that there's any evidence that respondents have cited or that I've been able to find that in those circuits we have a difficulty with arbitration --

QUESTION: It reminds me --

MR. HOLZHAUER: -- right to court.

QUESTION: -- of the old-fashioned rule, which we've left behind a long time ago in all jurisdictions as far as I know, that you could not challenge the jurisdiction of a court, that if you appeared to argue that the court had no jurisdiction, you automatically submit yourself to the court's jurisdiction. That rule's been, you know, superseded with regard to law courts for a long time. I don't know why we should bring it back in with regard to arbitrators.

QUESTION: You could even -- you could make a special appearance, even at common law.

MR. HOLZHAUER: Well, to begin with, we're not arguing at all that the parties waive or forego their right to determination of arbitrability when they present that issue to the arbitrator.

QUESTION: No, but they forego that determination on a de novo standard of review. They give up something.

MR. HOLZHAUER: They give up the right to have a judicial determination de novo, but in return, they achieve --

QUESTION: And to that extent --

MR. HOLZHAUER: -- the benefits of arbitration.

QUESTION: -- the analogue seems to me, just as Justice Scalia said, it's like the analogue of the person

who files a special appearance and then argues jurisdiction. In that case, in the old -- under the old rule they lost completely. Under this rule, they lose the de novo judicial determination.

MR. HOLZHAUER: There are a lot of differences between court jurisdiction and arbitral jurisdiction. Arbitral jurisdiction is a product of the consent of the parties. It's a contractual matter. The --

QUESTION: But you say consent of the parties, and this is what puzzles me about your case. You seem to make no distinction at all between the question that typically would come up under a labor arbitration of what -- the what question, what is arbitrable --

MR. HOLZHAUER: That's correct.

QUESTION: -- from who submitted to arbitration, and here we have that who submitted to arbitration, and on that question, like a personal jurisdiction question, what authority is there that who is treated just like what, and that if you put it before the arbitrator, then you get, in essence, what the old special appearance was. You can argue jurisdiction. If you lose on that, forget it, you're out.

MR. HOLZHAUER: There are many situations in which arbitrability, arbitration is not set by a particular preexisting contract but by the agreement of

the parties. They have a dispute, and they decide that they're going, rather than go through the more lengthy and perhaps more expensive process in the Federal courts or the State courts, they're going to submit that dispute to arbitration.

In this case, the parties had a dispute as to lots of issues, and one of the issues they had a dispute as to was arbitrability, and in this case the party that objected to arbitrability, the two parties that objected to arbitrability, submitted that issue to the arbitrator. Now, clearly --

QUESTION: Are you saying there's no difference between a who and a what question?

MR. HOLZHAUER: Yes, as far as whether the parties have the authority or the right to submit that to arbitration if they want to.

QUESTION: But I thought you -- I thought in response to a question I asked you earlier you agreed that the parties always had a right to de novo review of the question of whether they had agreed to arbitrate at all.

MR. HOLZHAUER: Whether they had agreed to arbitrate at all? No, I don't think -- I misunderstood that question, and no, I don't think they have a right to de novo review of whether they agreed to arbitrate at all if they submit that question to the arbitrators.

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QUESTION: And you say the only way to avoid submission is you don't simply say to the arbitrators, we didn't agree to submit this, or we didn't even agree to arbitrate, you must go into district court and get a -- file an unnamed action of some sort?

MR. HOLZHAUER: If you're not satisfied with having the arbitrators determine arbitrability, the alternative is to go into court.

QUESTION: But you talk about arbitrability as -- when you say arbitrability, do you mean the agreement to arbitrate, or do you mean whether a particular part of the dispute is subject to the agreement to arbitrate?

MR. HOLZHAUER: Both. Whether a dispute is arbitrable --

QUESTION: Well, but I think you would clarify things for several of us up here if you could break it down and look at it as first, did a party agree to arbitrate at all, and second, what did the party agree to arbitrate, as Justice Ginsburg suggested in her question.

MR. HOLZHAUER: I think that we can make those issues quite separate, but I believe the result is the same under both situations. I believe that the question is whether somebody had agreed to arbitrate a dispute, that that party has -- is perfectly entitled to submit

that issue to the arbitrators, and I don't think that the respondents disagree with that, that the parties can submit the question of arbitral jurisdiction over them to the arbitrators.

QUESTION: Sure, but it's a question of what is the reasonable implication of the mere fact that the party appears to argue the point.

If what's at issue is whether a particular action came within the scope of the arbitration or not, arguing that point before the arbitrator is arguably an implicit submission of the point to the arbitrator, but where what your contention is quite simply, Mr. Arbitrator, you have no jurisdiction over me at all, I don't even want to be before you, arguing that before the arbitrator is not implicitly, is in no way implicitly saying, and moreover, even though you have no right over me, whatever you decide is okay with me. That is certainly not reasonable a implication to take from the mere appearance in argument.

MR. HOLZHAUER: I disagree with that. I think that the party has the right to submit that issue, along with the subject matter issue, to the arbitrators, and that by going to the arbitrators and saying, okay, we have this objection to arbitrability, these are the four issues that we claim, reasons why we claim this is not

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arbitrable, we're going to go ahead and argue those to you and submit those to you along with our counterclaim and along with our defense to the rest of this case.

QUESTION: Are you saying if they had not done that, they had just said to the arbitrator, we don't think you have this authority, but we won't argue it because we don't want to waive it, would they then have been entitled to de novo review?

MR. HOLZHAUER: That's the George Day decision, and I agree with respondent's point on that. Respondents thought that that would be a very inefficient and wasteful way, that it would be better off having the parties argue the issue of arbitrability either to the court or to the arbitrators in the first instance.

I also think that that kind of scheme could result in an inappropriate form of gamesmanship.

QUESTION: I'm not sure I have your answer. Had they consented to a -- if they had not, would they have consented had they not made these arguments before the arbitrator?

MR. HOLZHAUER: My -- that again, you know, it's not this case, but my view is that would be a waiver of the argument, and I think there's a big difference between waiver and deference in this case.

QUESTION: Well, what's the difference also,

then, between that situation and the situation which I thought your brief was referring to in which there is simply a straight refusal to arbitrate? I am going to stay home.

I thought you were arguing that in the absence of a default rule, you can perfectly well do that, and that simply puts the burden on the other side to haul you into court.

MR. HOLZHAUER: Absolutely. Under the Federal Arbitration Act, under those circumstances, the parties seeking arbitration would be required to file a motion to compel to get that --

QUESTION: So you haven't changed --

MR. HOLZHAUER: -- before them.

QUESTION: A moment ago, I thought you might be changing your position on that --

MR. HOLZHAUER: No.

QUESTION: -- because I thought you said that if they did not want to suffer the effects of implicit agreement by submission, they would have to, they the objecting party would have to go into court, and you're not saying that --

MR. HOLZHAUER: No, I'm not. As I understood the question, it was whether -- it was basically the George Day question, whether a party can say, I object to

arbitrability. I don't want to even waive that question here because I'm afraid of waiving it. I'll go ahead with the rest of the case, but I want the courts to determine arbitrability de novo.

QUESTION: This is --

MR. HOLZHAUER: I think that should be a waiver.

QUESTION: Well, that's what I wonder, maybe. Why should we decide this question, aside from the fact we granted cert to decide it, but the -- look, as I understand it, someone has a piece of paper called a contract, and it's filled with references to arbitration.

And then they get into a fight.

MR. HOLZHAUER: Mm-hmm.

QUESTION: And the question is, is this part of the thing subject to arbitration, and Smith says it is, and Jones says it isn't.

MR. HOLZHAUER: Right.

QUESTION: Now, that fight, they're free to submit to arbitration, aren't they?

MR. HOLZHAUER: That's right.

QUESTION: So the whole question is, have they agreed to do it?

MR. HOLZHAUER: Right.

QUESTION: All right. Then what about our old friend the objective theory of contracts, which I guess

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was invented by Christopher Columbus Langdell, or Galileo, or Williston or someone, where what you do is say to the district judge, this is a contracts question like many others. Use the objective theory of contracts, look at the circumstances, and decide what they agreed to.

Maybe their going to this arbitration reflects the fact that they wanted the arbitrator to decide it like any other question. Maybe it just represents one of the parties being dragged there kicking and screaming, and saying, oh well, you know, I'm not giving up my right to court review.

What it does, in fact, depend on are the circumstances. Why do we need some special rule?

MR. HOLZHAUER: The reason we need a special rule in this situation is because we have a Federal Arbitration Act and a well announced Federal policy regarding arbitration that encourages arbitration and enforces agreements to arbitrate and gives strong deference to arbitral decisions, and the question, I think, should be is, not why should this contract question be treated any differently than any other contract question, but why should this contract question decided by an arbitrator be treated differently than any other contract question --

QUESTION: Oh, the answer to that question --

MR. HOLZHAUER: -- by an arbitrator?

QUESTION: -- of course is, in my mind is, it shouldn't be, but the issue in this case is whether or not they did agree to submit that question to arbitration, and obviously the parties could make it clear. They could write in their agreement, we are submitting the question of whether this is an arbitrable question to arbitration, pure and simple. That's it. Then, if the arbitrator decided that, fine. It would be like any other question.

They might also say, by the way, we're here kicking and screaming. We don't give up our right.

MR. HOLZHAUER: Right.

QUESTION: And then we have the ambiguous middle case, which is this one. So you say to the district judge, decide it.

MR. HOLZHAUER: Well, if what you're saying is, is basically that the courts should decide this issue with the same kinds of standards that they apply --

QUESTION: Yes.

MR. HOLZHAUER: -- to other deferen -- other arbitration decisions --

QUESTION: No.

MR. HOLZHAUER: -- on contract matters.

QUESTION: -- contract decisions, namely, you're trying to decide what the parties agreed to.

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MR. HOLZHAUER: Well, there also is a question in this case, for example, as to whether Mr. Kaplan had agreed to pay over certain money, and as to whether First Options had agreed, or First Options had increased Mr. Kaplan's losses and therefore was responsible for some of those debts, and those questions were in large part contractual questions governed by the four-part workout agreement.

I think this Court's rulings and the entire scheme of Federal arbitration is quite clear that we don't treat arbitrators' resolution of those questions the same as we treat other contract questions. We treat them the same as we treat other contract questions that have been submitted to arbitration.

The first decisionmaker is the arbitrator, and that decisionmaker is entitled to a substantial amount of deference, and I think that should be the same rule in this case.

I think what we come down to at bottom, and this is clear from your questions, Justice Breyer, what we come down to at bottom is a question of what should the rule be --

QUESTION: I thought you agreed that the starting point is there must be a clear and unmistakable submission of the issue. Whether it's the who question or

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the what question, there must be a clear and unmistakable submission, and everything else about who is parties can preserve the question of whether the tribunal has authority over them, so why shouldn't that be the presumption going in?

MR. HOLZHAUER: By a clear and unmistakable submission -- I think we should go back to what we mean by that language in AT&T Technologies, and again, that was a case where the issue came up in the first instance in the courts, and the court was speculating as to, well, what would the rule be if one party is saying, but they agreed to submit this to arbitration, so you should submit it to arbitration? They agreed to submit the arbitrability issue.

There can be doubt about that. Did they really agree to that? Before the courts can compel somebody to go to arbitration, the courts should determine that they clearly and unmistakably agreed to do that.

Here, we have a very different situation. The party that's objecting to arbitration did, in fact, submit that issue to arbitration. They did --

QUESTION: Are you saying that the clear and unmistakable standard doesn't apply, or that when they go to the arbitrator and say, we don't think we belong before you but we're ready to let you decide it, that that's a

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clear and unmistakable submission that the arbitrators' decision will get only deferential review?

MR. HOLZHAUER: Exactly. The submission of the issue to arbitration is a clear and unmistakable agreement to submit the issue to arbitration.

QUESTION: Oh, well, that's -- look, that's exactly the point that's bothering me. There is language in a Supreme Court opinion that says that the -- this agreement, Jones and Smith, do you agree, Jones, to submit the issue of arbitrability to arbitration? Jones: Yes, I do. Jones: Do you agree to build my house? Smith: Yes, I do.

Why does the first agreement have to be clear and unmistakable, but the second doesn't? I mean, why -- why can't you just say, look, the issue is whether or not they agreed to submit the arbitrability issue to arbitration.

MR. HOLZHAUER: Right.

QUESTION: The issue is whether they agreed to submit the house issue to arbitration, and then you just look at it like any other agreement.

MR. HOLZHAUER: Right --

QUESTION: Now, there is this language, though, about clear and unmistakable, but I don't see where in the Arbitration Act that policy would come from and, indeed,

you might think it was the opposite, if anything, but I don't see why it isn't neutral.

MR. HOLZHAUER: That comes from the AT&T Technologies case --

QUESTION: Yes.

MR. HOLZHAUER: -- and it's completely different from this situation, and I think you're exactly right, the question of whether the parties have agreed to arbitration is a different question from whether the case is arbitrable --

QUESTION: But --

MR. HOLZHAUER: -- and I think the submission in this case is the key indication that they've agreed to submit.

QUESTION: Well, why is that? Somebody speaking of -- somebody shows up at my house with a bulldozer and says, I own this property. I'm going to raze this house and build a different one here, and I say, no, wait a minute, I don't think you own this house. Let's discuss that. And I argue with him about whether he in fact owns the house.

I am unable to persuade him. He says, no, I've listened to you, I conclude you don't own the house. He therefore -- he then proceeds to bulldoze it down.

Would you come into court and say, well, you

know, Scalia, you shouldn't have argued with him about it?

(Laughter.)

QUESTION: Once you argued with him about it, you subjected yourself to his decision, whatever it was. He decided you didn't own it.

And that's what's going on here.

MR. HOLZHAUER: I --

QUESTION: This fellow comes to the arbitrator and he says, I'm about to arbitrate this case. But wait a minute. Don't arbitrate this case. You have no business arbitrating it. He says, I'm sorry. You argued it. You lost. You had your fair day in court.

MR. HOLZHAUER: I think --

QUESTION: That's just not fair, it really isn't.

MR. HOLZHAUER: I suggest that when the gentleman showed up with the bulldozer, you had a few fewer options than Mr. Kaplan had.

QUESTION: Well --

MR. HOLZHAUER: Mr. Kaplan had the right to refuse to go ahead with arbitration. I am not going to go ahead with arbitration. Nobody would have bulldozed his house, and nobody would have seized his bank account.

Mr. Kaplan also had the right, if he objected that way, to proceed to Federal court, but he also had the

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right to ask the arbitrators to decide that issue.

QUESTION: But he certainly would have spoken to the bulldozer first, then he'd run off to court, and so also here. He'd speak to the arbitrator first. He'd -- oh, look, I really think you don't belong in this case, and then he'd try to persuade you.

MR. HOLZHAUER: He could have gone and said, I object to arbitrability and I'm going to -- I'm not going to show up. I'm going to go to Federal court --

QUESTION: Isn't there --

MR. HOLZHAUER: -- and I'm going to require you to go to court.

QUESTION: Isn't there a line of authority -- it may be minority authority somewhere -- that says if you don't show up before the arbitrator, you can nonetheless be held liable for the arbitrator's decision?

MR. HOLZHAUER: There is, and that's often in the rules that parties have agreed to. In this case, in the Philadelphia Exchange rules, there was a provision that if a party doesn't show up he can be subjected to liability, and that's one of the reason why in some situations merely refusing to show up may not be an adequate remedy.

QUESTION: Well, that seems to me it's all the more important then that there be some clear -- a finding

that there's been a clear agreement to arbitrate in the first place, if that can happen to you if you do agree to arbitrate.

MR. HOLZHAUER: But the issue in this case is not so much whether there's an agreement to arbitrate. The question is, how do we treat the decision on the agreement to arbitrate?

QUESTION: But I thought it was contested by the respondents that the respondent individually ever agreed to arbitrate, that they're -- in those four documents.

MR. HOLZHAUER: Well, first of all, I think it's important to point out in this case there are four different ways in which arbitrability could have been found. The four-part workout document was one of them. The Philadelphia Exchange Rules in two different ways was another one, and there was a waiver argument as well, so it's not just the contract. There's a four-part workout document.

QUESTION: What is the waiver argument?

MR. HOLZHAUER: The waiver argument is that they initially filed objections to arbitrability. They showed up at a prehearing conference and specifically withdrew those objections. They didn't raise them again until 2 years later.

QUESTION: And what had gone on in the

intervening 2 years?

MR. HOLZHAUER: Not a lot.

QUESTION: Not anything, isn't that right?

MR. HOLZHAUER: Well, I assume the parties spent time during those 2 years preparing their case and working on their witnesses. There was nothing formal.

QUESTION: The arbitrator wasn't doing anything.

MR. HOLZHAUER: The arbitrator, the arbitration panel was not doing anything during that time, but that waiver, if it took place, took place in front of the arbitration panel. This was a prehearing conference in front of the arbitration panel. They were there, and certainly they --

QUESTION: That's a much different argument. You're saying -- first, I don't see where they said we specifically waive. They argued against, in effect, personal jurisdiction before the arbitrator. They lost. they went on.

MR. HOLZHAUER: No, that's not correct. In this prehearing conference they withdrew their objections to arbitrability. The parties disagree as to whether they withdrew those objections for the purpose of proceeding with that conference, or whether they withdrew them in a more general sense, which is our position.

Then 2 years passed.

QUESTION: The essence of your argument, I take it, is that everything must be made a Federal case by the person who says, I never agreed to arbitrate, because you can't -- if you put it to the arbitrator and the arbitrator agrees, that's the end of the matter, and the litigation becomes unnecessary. You make litigation in Federal court necessary for everyone who says, I didn't agree to submit myself to arbitration.

MR. HOLZHAUER: We give those parties the alternative to either refuse to arbitrate, which can be a viable option in some cases, or to go to Federal court themselves, or to submit the arbitrability issue along with everything else to the arbitrators, and in this case that's what the parties did, and the question in this case is not whether there's an agreement to arbitrate, but whether, when the parties decided to go ahead and submit that issue --

QUESTION: Do I gather that your answer to my question is yes --

MR. HOLZHAUER: Yes.

QUESTION: -- that if you want to protect your right to a Federal forum, you must go to Federal court, you cannot hope that the arbitrator will say, right, you never agreed to arbitrate, which would leave out a certain number of these cases, but every time a person says, I

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didn't agree to arbitrate, it must be brought up in Federal court, otherwise you lose that.

MR. HOLZHAUER: Two points about that. First of all, there have been several circuits that have had this rule for quite some time, and we haven't found that to be a huge problem.

The parties in those circuits defer to the -- decide to go ahead with the arbitration and have the arbitrators decide the issue.

The second point is, we're not saying that the parties get no review at that point. If the arbitration decision on arbitrability is off the wall, or implausible, as Judge Kozinski said in a very similar case, they still get review, but the arbitration decision is entitled to deference.

QUESTION: Mr. Holzhauer, are you going to deal at all with the second question?

MR. HOLZHAUER: Well, my time is up, and I'd like to reserve some time for rebuttal. I think that question is pretty well addressed in the briefs, and I think it's of diminished importance depending upon the outcome of the first question.

QUESTION: Very well --

MR. HOLZHAUER: Thank you.

QUESTION: -- Mr. Holzhauer. Mr. Roberts, we'll

hear from you.

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE RESPONDENTS

MR. ROBERTS: Thank you, Mr. Chief Justice, may it please the Court:

This Court has emphasized as recently as Mastrobuono that arbitration is a matter of contract, of agreement between the parties. A party cannot be forced to enter into binding arbitration unless it has agreed to do so and because arbitration involves the relinquishment of constitutional rights, this Court has held that the question of arbitrability -- did the parties agree to arbitrate? -- is for the courts to decide, not arbitrators, unless the parties "clearly and unmistakable provide otherwise.

Here, the Kaplans never signed an agreement --

QUESTION: Mr. Roberts, when you use the term, arbitrability, you mean the agreement of the parties to, the consent of the parties to have a dispute arbitrated?

MR. ROBERTS: That's arbitrability, and the question in this case is, did the Kaplans agree to arbitrate that question, the question of arbitrability? Did they agree to be bound by the arbitrator's decision on the arbitrator's own jurisdiction?

QUESTION: Then how would you describe a

question of whether a particular subject is subject to the arbitration agreement, which the parties concededly agreed to?

MR. ROBERTS: Well, in other words, there is an arbitration contract, and there's a dispute. Is that -- that's also called arbitrability.

QUESTION: Yes, that's what confuses me. It seems to me it's two distinct things, and people call them the same thing.

MR. ROBERTS: The term is used simultaneously in both instances. This case is the question of arbitrability of arbitrability. Did we say, we don't think there's any arbitral jurisdiction, but we're going to let the arbitrators be judge in their own case, and decide whether there's arbitral jurisdiction, and in that instance, as the Court said in the AT&T case, the party arguing that that situation is applied has the burden of proving that by a clear demonstration of evidence and clearly and unmistakably.

QUESTION: Do you think our law is or should be that there is a difference when the question is whether or not the person is subject to the arbitration as opposed to the case where the question is whether the subject is --

MR. ROBERTS: I think --

QUESTION: -- is within the arbitration?

MR. ROBERTS: I think in both instances the appropriate standard of review is de novo. It calls for a judicial determination.

QUESTION: Do you think in each case there has to be a clear and unmistakable reference to the arbitrator?

MR. ROBERTS: Yes, I do, and particularly --

QUESTION: So you think there's no difference in the two instances?

MR. ROBERTS: I think as a practical matter in applying the standard there may be a difference when you have a conceded agreement to arbitrate, and the parties said yes, there is an arbitration agreement between us, but we don't think this issue is within it.

There, it may be more likely that that would go to the arbitrators, but when the basic claim is, we never agreed to arbitrate at all, then I think you have the clearest case for judicial determination and no deference to the arbitrators.

QUESTION: Well then, you are making a difference between a personal jurisdiction question and a subject matter jurisdiction question.

MR. ROBERTS: Well, I think a subject matter jurisdiction question is also a question of arbitrability. It's outside the scope of the arbitration agreement.

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QUESTION: Yes, but I thought your answer to Justice Kennedy was that that might be subject to different treatment.

MR. ROBERTS: Well, I think as a practical matter, it is more likely that a court will determine that an issue is within the scope of an arbitration clause if the parties agree that there is one.

QUESTION: You mean, the legal standard is the same, but in effect they're usually going to apply it differently to a subject matter question?

MR. ROBERTS: I guess what I'm saying is that the likelihood of deferring to an arbitrator's decision when the issue is, is there an agreement to arbitrate, is far -- it's far less likely that you would defer to an arbitrator's decision then.

QUESTION: Yes, but isn't it because there's a different standard?

MR. ROBERTS: No, I don't think the standard's different. The standard is the same. It's de novo. It's a matter for the courts to decide.

QUESTION: We tend to regard the subject matter cases as being cases in which -- it's whether this closely related issue is within the arbitration, but -- and that's why I think you're getting the response you do, but one can conceive of a subject matter case, for example, in

which I've agreed to have my relations with my broker determined by stock exchange arbitration, and the stock exchange arbitrator wants to decide a tort action between me and somebody who's hit me with his car.

It may be a subject matter dispute technically, but I'd certainly apply the same kind of notion that it's not implicitly given to the arbitrator.

MR. ROBERTS: And the question here is not even that question. Was that given to the arbitrator? The question here is, did these parties agree to let the arbitrator decide whether it was given to the arbitrator.

QUESTION: Okay, but just to go back to your answer to Justice Kennedy, the reason you answered him as you did, then, is that you in effect were assuming most subject matter questions are close.

MR. ROBERTS: Yes.

QUESTION: That's all you meant by that.

MR. ROBERTS: Yes, Your Honor, in other words, sort of scope of the arbitrator's authority.

QUESTION: Since they're close, it's easy to think that implicitly that call was left to the arbitrator.

MR. ROBERTS: It may make more sense to assume that the parties would agree that it was left to the arbitrators, but in a situation --

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QUESTION: Why aren't some parties' issues close? That is to say, agents, principals, joint ventures --

MR. ROBERTS: They may be, Your Honor, but this one -- this one is --

QUESTION: Well, so that there can be some questions of -- what we'll call personal jurisdiction that are subject to a less deferential rule. There does not need to be a clear and unmistakable delegation?

MR. ROBERTS: Your Honor, I guess my point is that the distinction between who and what is not the important distinction. The distinction is, is there an arbitration agreement, and the question is simply where on the edges of that agreement does this dispute lie, or is the basic dispute, is there any kind of an agreement at all?

QUESTION: Well, are you talking judicial psychology, or law?

MR. ROBERTS: Law, Your Honor. In the former case, it could be a close case. For example, in the labor context, where you have an ongoing relationship, parties will often give the issue of arbitrability to the arbitrators, but here, that's not the context.

The Kaplans never signed an agreement with an arbitration in it. They refused to sign the submission

agreement. We heard that they submitted this dispute to arbitration. They expressly refused to sign the submission agreement, even though MKI, the corporation, did.

They filed a formal, written objection to arbitral jurisdiction at the outset of the proceeding, and when the proceedings continued, they filed a motion to dismiss reiterating their objection. Against this background, the Third Circuit correctly ruled that they did not agree to arbitrate any issue with First Options, let alone clearly and unmistakably agree to arbitrate the issue of arbitrability.

QUESTION: What happened at this prehearing conference where they assertedly withdrew their objection? What specifically happened?

MR. ROBERTS: It's difficult to say, because as the court of appeals noted, the fact of the withdrawal and its scope are not even docketed or noted in the arbitration record. The stipulation of the parties says that we withdrew the objection from consideration at that conference, at the February 26, 19 --

QUESTION: So the issue is whether that means we withdrew it from consideration at the conference, or whether it means, we withdrew it from consideration at the conference, right?

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(Laughter.)

MR. ROBERTS: And in our respective briefs we underscore different portions --

QUESTION: That's a nice question.

MR. ROBERTS: -- of the stipulation.

QUESTION: Who wrote that, I wonder?

MR. ROBERTS: Well, it was a joint stipulation, so we preserved each argument. I think it's clear that it doesn't --

(Laughter.)

MR. ROBERTS: From that very ambiguity shows that that certainly cannot be cited as clear and unmistakable evidence that we agreed to submit the issue to bind mutual arbitrability to binding arbitration.

QUESTION: It could have come out the other way. That is, if the arbitrator had said, there is no -- they didn't agree to submit this to arbitration, and I guess you would have had -- on your theory you would have had to say, they have a right to come into court and try to get the judge to send it back to arbitration.

MR. ROBERTS: Certainly, under section 4 of the Federal --

QUESTION: All right, so it's a typical contract question again, and sort of -- I mean, the law's so complicated, I hate to proliferate standards

unnecessarily, so when you're dealing with that first question, the first one, namely, is there or is there not an agreement here to submit this issue, call it X, because it happens to be called, whether or not there's an arbitra -- did they or did they not agree to submit this issue, the issue of whether or not there's arbitrability, did they agree to submit this one itself to arbitration?

Is there some reason to apply some specially strict standard --

MR. ROBERTS: Well --

QUESTION: -- such as clear and -- I know that there is language to that effect. What I'm looking for, is there a reason for that? Is there -- I mean, if there weren't, you see, a special standard, it would be the same as everywhere else in the law and lawyers would get less confused and so forth. But is there some reason for it?

MR. ROBERTS: Yes, there is. First, in the first instance, did they agree to arbitrate a dispute, not arbitrability, that's de novo review, straight contract interpretation, but in the arbitrability question, AT&T insisted on a higher standard I think because you're asking -- you would otherwise be asking the arbitrators to be the judge in their own case, turn it over to them. You tell us whether you have jurisdiction.

QUESTION: Well, why -- judges all the time are

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judges in the case of whether they have jurisdiction.

MR. ROBERTS: Well, judges are, yes.

QUESTION: Yes, but I mean, so why couldn't you have -- what does the arbitrator -- do you think he cares?

MR. ROBERTS: Yes. I think arbitrators are likely to find arbitral jurisdiction, and that's why there's a higher standard, and why this Court in not only AT&T, but Warrior & Gulf before that, said that an argument that arbitrability had been committed to the arbitrators must be shown by a clear demonstration of facts.

QUESTION: Do arbitrators get paid by the case that they take to arbitrate, as opposed to a judge that gets paid the same salary whether or not the judge hears the case?

MR. ROBERTS: I think it varies from arbitral forum to arbitral forum. I don't think there's a general rule.

QUESTION: But in general, if you go out and engage an arbitrator, presumably they're paid by the case they agree to take.

MR. ROBERTS: I think that's the general situation, yes.

QUESTION: Do you intend to address the second question on which we granted certiorari?

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MR. ROBERTS: I'll do so now. Petitioner argues that the court of appeals should apply a different standard of review depending on whether the district court upheld an arbitration award or vacated an arbitration award.

If a district court vacates an arbitration award, that's normal appellate review, plenary review of questions of law, clearly erroneous questions of fact, but they say if the district court upholds the arbitration award, you should apply an abuse of discretion standard. They cite the Eleventh Circuit for that rule.

I think this Court should adhere to the rule that prevails in at least nine other circuits, which is, you apply normal appellate review regardless of the outcome below. Standards of appellate review should depend on the institutional capabilities of the respective courts and the nature of the issue, not who won.

QUESTION: And what is normal appellate review in this situation?

MR. ROBERTS: Plenary review of questions of law, and clearly erroneous review of questions of fact.

QUESTION: And what about, say, the decision of a court that an agreement either was or was not submitted to arbitration?

MR. ROBERTS: The district court is supposed to

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find that it was submitted to arbitration, if it's the question of arbitrability, as in our case, by clear and unmistakable evidence, and the court of appeals in reviewing that steps into the shoes of the district court.

QUESTION: So that is a question of law, in your view.

MR. ROBERTS: Yes.

QUESTION: I once looked up these questions of law versus fact in the contract area, where a court of appeals is supposed to review a decision as to what were the terms of a contract by a district court, and it just struck me, it wasn't that simple. It seemed like quite a nightmare --

MR. ROBERTS: Well, there are --

QUESTION: -- as to where exactly you give deference to the decision, because here we're really talking about -- you're very specific. We're talking about whether, when they went to the arbitrator, a term of going to the arbitrator was the Kaplans thinking, we are going to the arbitrator for an initial decision, but we do not mean to give up our right to de novo judicial review on the question of arbitrability. That's sort of like a term of the thing.

I mean, I'm just concerned about being overly simple as to what this -- I agree, if you're willing to

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say, yes, the standards are the same as in any other contract dispute in respect to judicial review at the appellate level of the district court decision. Is that the proposition you'll stand by?

MR. ROBERTS: Yes. Yes, Your Honor.

QUESTION: Regardless of how complicated it is, and it is complicated.

MR. ROBERTS: Well, it is complicated in some situations. This one doesn't strike me as a complicated situation because there is no contract between these parties providing for any kind of arbitration, let alone arbitration of the issue of arbitrability.

QUESTION: Unless the district judge took this ambiguous agreement that we have this very sparse record on and said, I think they really agree to submit the issue there, and on review you'd say, really it's 50-50, but you couldn't say that would be clearly erroneous.

MR. ROBERTS: Well, the court of appeals did conclude that the district court's finding was clearly erroneous, and to the extent it relied upon that waiver, and again, that's not even docketed in the arbitration record, so it's difficult to debate too much what happened. It's certain --

QUESTION: Mr. Roberts, what about the submission of the counterclaim, which wasn't compulsory?

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MR. ROBERTS: Well --

QUESTION: Why isn't that a submission to the authority of the arbitrator?

MR. ROBERTS: First, it's very unclear whether those were compulsory counterclaims or not, and once the Kaplans -- first of all, Mrs. Kaplan did not submit any counterclaims, so that rationale would not apply to submitting her to arbitral jurisdiction, but once the arbitrators had decided to go forward, it would have been foolhardy for Mr. Kaplan to sit on his rights and not raise his claims so that they wouldn't have a full picture of what happened under his version of the facts.

There's no requirement. If you have objected to jurisdiction, done your best to explain to the arbitrators why they have no jurisdiction, and they're going to go ahead anyway, you had better put in your side of the story, or you may well have been held to have lost it later on if a court does not agree with your jurisdictional position.

QUESTION: As far as the difference that has been described as personal jurisdiction versus subject matter, who and what, you have been candid in saying you don't draw that line, and I'm curious why --

MR. ROBERTS: Well, I --

QUESTION: -- you don't say that it's a

different question, once they agreed to arbitration, what was the scope of the arbitration from, did they ever agree to arbitrate.

MR. ROBERTS: Well, arbitration is a matter of contract, and the question is, is this within the scope of the contract, and if, for example, you have an agreement with a broker to arbitrate issues, disputes with respect to investments, and you're walking down the street, and your broker happens to be driving by and hits you, your tort suit is not subject to that arbitration agreement, and it seems to me that that's as clear as a situation where you have a contract between First Options and MKI Investments with an arbitration clause, and they try to say, well, because of that contract, you, Mr. and Mrs. Kaplan, have to arbitrate.

It seems to me that the distinction is between the scope of the contract and not whether it covers individuals or events. Contracts and agreements to arbitrate can single out particular disputes and events, and can single out particular individuals.

QUESTION: Why don't you fall back to this as just kind of a secondary position. The argument would go something like this. Whenever you submit issues to arbitration, in effect you're consenting to a kind of rough-and-ready disposition of whatever your claims or

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disputes may be, and therefore there's no reason to sort of draw fine lines as to what you were rough and ready about.

But on the question of whether you decide or agree or not to appear before an arbitrator in the first place, that in fact is an agreement sort of to be distinguished, because if you didn't agree to that, then nobody can claim that, in effect, you asked for a rough-and-ready procedure and that's what you got, so why don't you say that there is, in fact, a superior value to be served by making this distinction between subject and person, and the person agreement at least must be clear and unmistakable, regardless of what the subject agreement is?

MR. ROBERTS: Well, I suppose it's a workable distinction, although I think it may have been just backed to where we were a while ago, in suggesting when you have a conceded agreement to arbitrate between parties, the questions are going to be closer than when the basic dispute is over whether there's an agreement at all.

QUESTION: So simply by varying the standard, we'd get to the same point that we would get to on your analysis if we didn't vary the standard, because the one question is not going to be close, and the other question is going to be close, but Justice Kennedy said the

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subject -- the personal jurisdiction questions can be close when you get into agency and so on.

MR. ROBERTS: Well, again there are questions, though, about the scope of a conceded agreement. When the dispute is, there was no agreement, it seems to me that the questions are not close, and you're in AT&T's clear and unmistakable evidence standard.

Now, the approach of the Third Circuit, which is also the approach in the First, the Fourth, the Seventh, and the D.C. Circuits, allows arbitrators to consider jurisdictional objections in the first instance without penalizing a party by saying that it forfeits its right to a judicial determination of arbitrability.

The main benefit of that approach is that it may obviate the need for court involvement at all if the objecting party wins, if the arbitrators arrive at a compromise, or if the development of evidence before the arbitrators dissuades the objecting party from pursuing its objection.

Petitioner's approach would require, as counsel recognized this morning, resort to courts every time there was a dispute as to arbitrability and the objecting party desired to preserve its right to a judicial determination of that issue. It would, to borrow language from the Allied-Bruce Terminex case, be breeding litigation from a

statute that seeks to avoid it.

QUESTION: I gather in some circuits, or under some regimes of law, and perhaps State court, a party can simply not show up at the arbitration if that party claims he never agreed to arbitrate, and will not be defaulted, or prevented from later getting review.

MR. ROBERTS: Well, that depends on what the rules of the arbitration forum provide. Here, the rules of the Philadelphia Exchange said if you don't show up, the arbitrators can go ahead without you, and so what the petitioner apparently would have us do is show up, because we don't want a default entered, object in some way so that we don't waive our objection, but don't say too much, because if we say too much, then we're going to be held to have submitted the issue to the arbitrators.

That's a very fine line, and it's a fine line in an area where the Court has emphasized we don't want fine lines. If you're going to tell us that this person agreed to arbitrate arbitrability, you have to show that by a clear demonstration, as the Court said in Warrior and Gulf, or clearly and unmistakably, as it said in AT&T.

QUESTION: Practically, the Kaplans must show up, because MKI unquestionably has submitted to arbitration --

MR. ROBERTS: Yes.

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QUESTION: -- and not as individuals, but as -- and on the closeness of the "who" question, wasn't there some issue here about whether, was it Manuel Kaplan was the alter ego of MKI, so that they were interchangeable?

MR. ROBERTS: That was argued by the petitioners. The court of appeals concluded that that was not a proper basis for exercising jurisdiction.

You had in the workout agreement four separate contracts. Only one contained an arbitration clause. That was signed only by First Options and MKI, and the Kaplans only signed one, and it did not contain an arbitration clause.

Now, the district court, reading those, said well, we're going to read them altogether so that everybody arbitrates, but it seems to me the more natural reading is to say, they knew how to put an arbitration clause in the contract when they wanted to, and they didn't put one in the one that the individual signed.

QUESTION: Did the district court hear live testimony in connection with its decision on this respect, or did they just review the documents?

MR. ROBERTS: No. There was a stipulation of facts, and the parties agreed that there was no need for a hearing, or the taking of any witness testimony.

Now, in considering whether to defer to an

arbitrator's decision on arbitrability, I think it's important to consider why we defer to arbitrators' decisions on the merits when we do defer.

It is not because of any presumed experience or expertise on the part of the arbitrator. Parties can choose anyone they want to be their arbitrator. It is because the parties have agreed to be bound by the arbitrator's decision, not the courts, and any more searching judicial review would in effect substitute the court's decision for that of the arbitrator's. It would undermine the parties' agreement.

QUESTION: So that makes the second question the same as the first. That is, assume that A and B say, we want the arbitrator to decide the question of arbitrability. We really want it. We're giving up any de novo thing. And then the arbitrator does decide it. Then, in your view, that decision would have the same right to deference as any other decision.

MR. ROBERTS: Oh, absolutely. We don't dispute that parties can, if they do it clearly and unmistakably, agree to have --

QUESTION: Then they clearly and unmistak -- in all the situations you say, look, the Kaplans are drawn into this. They have to show up and so forth, and you gave a lot of good reasons why they do, but those reasons,

of course, also show that the fact of showing up is not -- whether you have clearly and unmistakably or not, they show without any such standard, that simply showing up is not an agreement to give up your right to court.

MR. ROBERTS: It is not -- particularly in AT&T, the Court said the usual way you do that is by stipulation.

QUESTION: Yes. That's why I don't see the breeding litigation. I mean, if they -- if you stay away from the arbitrator, maybe you could get an injunction, the Kaplans, against the arbitration. That's questionable, I guess. Or you'd at least make them run and compel the arbitration. That's the court part.

The Kaplans might go there, and they might say, hey, we're here anyway. We don't want to give up a damn thing, but if they want to go decide this first, that's their -- go ahead. That would be clearly and unmistakably that they weren't giving up their right.

MR. ROBERTS: Well, but the petitioner today refused to acknowledge --

QUESTION: Yes.

MR. ROBERTS: -- that simply saying they weren't giving up their right --

QUESTION: Yes. Yes.

MR. ROBERTS: -- had the effect of preserving

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their right --

QUESTION: I may be wrong.

MR. ROBERTS: -- and I think that's true.

The agreement to be bound is the basis for deference. When the very question is, is there an agreement to be bound, there's no basis for deference.

Now, we didn't hear much about the Federal Arbitration Act from the petitioner, and I think the reason is that it strongly supports the Third Circuit's position. The Federal Arbitration Act provides for post arbitration vacatur of an arbitral decision if the arbitrators exceeded their powers. Section 10(a)(4).

It doesn't provide any mechanism for a prearbitration determination of arbitrability on the part of an objecting party. Now, we are not saying that there is no such judicial remedy, but we do think it's hard to argue that the act contemplates only prearbitration judicial determinations of arbitrability when the only mechanism in the act is for post arbitration determinations of arbitrability, and if you look at section 10(a), it seems clear that the 10(a)(4) determination that the arbitrators exceeded their powers is one that calls for de novo judicial review.

The reason is that the other subsections plainly do. 10(a)(1), the arbitrators were corrupt, or guilty of

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fraud. 10(a)(2), they were guilty of bias. 10(a)(3), they were guilty of misconduct. Those are not determinations, by their nature, in which a court would defer to what the arbitrators thought. A court is not going to defer to the arbitrator's decision upon careful consideration that they're not corrupt.

QUESTION: Well, you say 10(a)(4) does not apply to the arbitrators exceeding their jurisdiction in the context where the parties have submitted jurisdiction to the arbitrator?

MR. ROBERTS: If the parties have clearly and unmistakably agreed that the arbitrator is to decide arbitrability --

QUESTION: Yes.

MR. ROBERTS: -- then his decision on arbitrability is not --

QUESTION: Is not reviewed de --

MR. ROBERTS: -- is not in excess of his powers, no.

QUESTION: Well, wait. I'm not talking about whether it's in excess of his powers. I'm talking about whether it should be reviewed de novo or not. You would not review it de novo.

MR. ROBERTS: No. I think it should be subject to the deferential standard of review --

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QUESTION: Okay.

MR. ROBERTS: -- because the parties have clearly and unmistakably agreed to commit it --

QUESTION: So then --

MR. ROBERTS: -- to the arbitrators.

QUESTION: -- how can you argue that the Federal Arbitration Act requires de novo review of all jurisdictional matters?

MR. ROBERTS: Not all jurisdictional matters, just the allegations that the arbitrators exceeded their powers, and if there is an agreement to commit that to the arbitrators' decision, it's not in excess of its powers.

The provision obviously --

QUESTION: I see. I see.

MR. ROBERTS: -- contemplates a distinction between --

QUESTION: I see.

MR. ROBERTS: -- a wrong decision and a decision in excess of their powers.

Now, the petitioner also argues that the result in this case is somehow unfair, because the Kaplans were able to renew their jurisdictional objection in court after having proceeded to have the merits decided by the arbitrators, but the Kaplans did not want the arbitrators to decide the merits. They never signed an arbitration

agreement, refused to sign the submission agreement, formally objected to the arbitrator's jurisdiction, and moved to dismiss.

The situation that the petitioner objects to is, of course, the same situation that applies to a party who objects to jurisdiction in district court. They are not only allowed to go ahead to trial on the merits if they lose on jurisdiction, but they must do so before they can renew their objection in the court of appeals.

Unless there are any further questions, thank you, Your Honor.

QUESTION: Thank you, Mr. Roberts.

Mr. Holzhauer, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JAMES D. HOLZHAUER

ON BEHALF OF THE PETITIONER

MR. HOLZHAUER: Thank you.

I think everyone in this case agrees that the parties are entitled to allow the arbitrators to decide the issue of arbitrability. The only question is how they do that, or how they signal that, whether that has to be for some reason especially clear and unmistakable, and that the action of submitting it to the arbitrators itself is not enough.

I believe the argument that Mr. Roberts makes that submission must be especially clear and unmistakable,

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and must include language saying, yes, I agree to be permanently bound by this, or to waive de novo review, is based on a misreading of this Court's cases in John Wiley and Sons, Warrior & Gulf, and AT&T Technologies.

In none of those cases, remember, had an arbitrator decided the issue of arbitrability, and the central principal underlying those cases is not involved here.

The issue there was whether the courts could compel a party to submit a dispute to arbitration without first determining that the party had agreed to arbitrate.

As the Court put it in John Wiley, a compulsory submission to arbitration cannot precede a judicial determination because a party can't be compelled to arbitrate if arbitration does not bind it at all. Nobody compelled the Kaplans to submit their arbitrability objections to the arbitrator in this case. They asked the arbitration panel to rule on arbitrability, and having done so, they're bound by the result, and the only question that really is before this Court is whether their act of submission constitutes an agreement to submit that issue and have it considered in a binding way by the arbitrators.

There were --

QUESTION: The issue is in fact that if they --

to preserve that, they must get into a Federal court.

As Mr. Roberts pointed out, the case could wash in many ways before the arbitrators, so the issue -- there would never have to be any Federal litigation.

MR. HOLZHAUER: Right. If they want to do that, if they want to preserve judicial review de novo, they have to get the court to do it initially.

Now, perhaps I'm wrong about saying the George Day rule is wrong, and that we should have an initial objection, and that should suffice, but that's not this case. There's no initial objection here, there was actual submission, so that wouldn't determine the outcome of the case and shouldn't be decided here.

I think the notion that there's some special magic to going to court and getting a de novo review is a manifestation of the old hostility to arbitration. Parties submit this issue to arbitration all the time.

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Holzhauer.

The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)

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FIRST OPTIONS OF CHICAGO, INC., Petitioner v. MANUEL KAPLAN, ET UX. AND MK INVESTMENTS, INC.

CASE NO.: 94-560

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BY Ann Mari Federico

(REPORTER)