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American Bar Association Litigation Section

Standards of Judicial Review of Arbitration-Related Disputes

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Litigants may seek assistance from the courts before and after conclusion of the arbitration proceedings (and, in some jurisdictions, under exceptional circumstances during the proceedings) by, among other things, filing petitions to compel or enjoin arbitration and filing applications to confirm, vacate, or modify arbitral awards. The legal standards that district courts apply in reviewing such requests involve diverse, complex, and important issues that require the attention of both transactional attorneys who draft arbitration clauses and litigators who handle arbitrations and related proceedings in courts.

The language of the arbitration agreement can have a significant impact on critical questions such as whether a court or an arbitrator decides key issues and, as a result, on the standard that governs review of the adjudicator's decisions. It is important to think about these matters when drafting an arbitration agreement.

This note touches on general standards of judicial review of arbitration-related disputes in the context of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq.

The Core Premise

The core premise for analyzing disputes over arbitration agreements, arbitrability, and arbitration awards is a simple one: arbitration is “a matter of contract between the parties.” [First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 \(1995\)](#). The Supreme Court of the United States has made it abundantly clear that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration—and not issues it reasonably would have thought that a judge, not an arbitrator, would decide. *See, e.g., Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 303 (2010); [AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649 \(1986\)](#).

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Review of Formation, Enforceability, and Arbitrability Questions

The power to decide issues related to formation of an agreement to arbitrate remains with the court. Courts force the parties to arbitrate a dispute “only where the court is satisfied that neither the formation of the parties’ arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue.” *Granite Rock*, 561 U.S. at 299–300 (emphasis in original) (citations omitted). “Where a party contests either or both matters, ‘the court’ must resolve the disagreement.” *Id.*

In drafting arbitration clauses, therefore, it is important to consider that the arbitration agreement can cover issues related to enforceability and arbitrability—i.e., the very questions of whether certain disputes fall under the scope of the parties’ agreement to arbitrate (the “which” question) and whether the parties agree to allow the arbitrator (not the courts) to decide disputes over whether they have agreed to submit an issue to arbitration (the “who” question)—but not formation. *See id.*; *see also, e.g., Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 (2010) (describing arbitrability questions as “whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy”); *First Options of Chi.*, 514 U.S. at 942–43 (addressing the question of “who should have the primary power to decide” whether the parties “agreed to arbitrate the merits”). It is also crucial for litigators facing challenges related to these questions to carefully analyze them before taking a position during the arbitration and/or court proceedings.

To ensure that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, a district court independently determines whether the parties have agreed to arbitrate and to submit enforceability and arbitrability questions to arbitration. *See, e.g., First Options of Chi.*, 514 U.S. at 944; *Granite Rock*, 561 U.S. at 299–300. If it finds that they did, it will apply the same (restrictive) standard applied to the arbitrator’s decisions regarding the merits, *see infra*, to its review of the arbitrator’s ruling on enforceability or arbitrability. *See, e.g., First Options of Chi.*, 514 U.S. at 944; *Granite Rock*, 561 U.S. at 299–300; *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960).

If the district court finds that the parties did not agree to submit the enforceability or arbitrability question to arbitration, it decides this issue, like any other issue that is not submitted to arbitration, independently. *See, e.g., First Options of Chi.*, 514 U.S. at 943. The difference between the restrictive FAA standard, *see infra*, and the independent decision-

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making standard highlights the importance of the question of “who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate.” *Id.* at 942.

Appellate courts’ reviews of such district court decisions, however, are no different from review of other district court decisions, such as review of administrative decisions. They accept the district court’s findings of (historical) fact that are not clearly erroneous, *see* Katayoun Donnelly, *Mixed Questions of Fact and Law: Deferential or Plenary Review?*, A.B.A. App. Prac. J., Spring 2020, but decide questions of law de novo—bearing in mind the restrictive FAA standard for vacating an award, *see infra*, when reviewing a district court’s review of the questions the parties have submitted to arbitration. *See, e.g., First Options of Chi.*, 514 U.S. at 943, 947–48.

Because the answers to questions of substantive and gateway procedural arbitrability (procedural condition precedent to arbitration) will determine “whether the underlying controversy will proceed to arbitration on the merits,” there is a presumption that such questions should be decided by a court—not an arbitrator. *See, e.g., BG Grp., PLC v. Republic of Arg.*, [572 U.S. 25](#), 34 (2014); *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion) (describing questions of “whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy” as gateway questions that “contracting parties would likely have expected a court to decide”); *John Wiley & Sons, Inc. v. Livingston*, [376 U.S. 543](#), 546–47, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964) (a court should decide whether arbitration agreement survived corporate merger and bound resulting corporation). This presumption can be overcome only by “clear and unmistakable evidence” of the parties’ agreement, as construed under the relevant state law, to submit this question to arbitration. *First Options of Chi.*, 514 U.S. at 944.

Review of the Questions Arbitrated (Merits Question)

To be enforceable, arbitration awards must be converted to judicial orders by courts. *See, e.g., D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006). The FAA provides tightly confined judicial review to confirm, vacate, or modify arbitration awards. Pursuant to section 9, a court must confirm an award unless it is vacated, modified, or corrected as prescribed in sections 10 and 11.

An arbitration “award is legitimate only so long as it draws its essence from the . . . agreement.” [United Steelworkers of Am. v. Enter. Wheel & Car Corp.](#), [363 U.S. 593, 597 \(1960\)](#). Pursuant to the restrictive standard of section 10, an award does not draw its essence from the agreement and district courts can vacate it in unusual circumstances where it was procured by corruption, fraud, or undue means; or where the arbitrators

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were guilty of misconduct, evident partiality, refusal to hear evidence pertinent and material to the controversy, misbehavior by which the rights of any party have been prejudiced, or exceeding the powers given to them in the parties' agreement. Pursuant to section 11, the grounds for modifying or correcting an award include evident material miscalculation, evident material mistake, and imperfections in a matter of form not affecting the merits. 9 U.S.C. §§ 9, 10, 11.

Conclusion

The FAA allows courts to set aside or modify arbitration awards only in certain narrow circumstances. Therefore, practitioners should pay close attention to the question of who—court or arbitrator—has the authority to decide whether a party has submitted an issue to arbitration, both when drafting arbitration clauses and when arbitrating or litigating arbitration-related disputes.