

Florida Supreme Court Weighs in on Delegation Language in Arbitration Provisions, Affirms Sufficiency of "Reference to Rules" Approach

April 08, 2022

On March 31, 2022, the Florida Supreme Court issued a 6-1 decision in [Airbnb Inc. v. Doe](#) that resolved a split among Florida state appellate courts as to how specific a delegation of arbitrability must be to delegate the issue to an arbitrator properly.

Ultimately, the Florida Supreme Court held that an arbitration agreement need not specifically delegate the issue of arbitrability to the arbitrator. Instead, so long as an agreement incorporates - even by reference - a set of arbitration rules that give the arbitrator authority to decide its own jurisdiction (such as the JAMS and AAA rules), that is sufficient to delegate the issue.

Background on Arbitration Agreements and the "Arbitrability Question"

Arbitration agreements are a ubiquitous part of everyday life as a consumer or an employee in America - and companies with consumer-facing interactions or employees should at least think about including an arbitration provision in their terms and conditions and employment agreements.

In a typical lawsuit in which arbitration may be in play, a court will ask the following three questions in deciding whether to send a case to arbitration:

1. Have the parties formed a valid contract requiring arbitration?

2. If so, are the claims at issue subject to arbitration?
3. Is there any overriding public policy that would preclude arbitration?

These questions are sometimes called the "contract formation question," the "arbitrability question," and the "unconscionability question," respectively. The *Airbnb* decision concerns the second: the very important arbitrability question.

The default is that the court decides that question. However, the Supreme Court has said that the parties can "delegate" the arbitrability question to the arbitrator as long as the delegation is "clear and unmistakable."

Some arbitration agreements will specify that the arbitrability question is delegated to the arbitrator. But it is also common for an arbitration agreement to not address delegation and instead state that the arbitration will be conducted pursuant to the rules of a particular arbitration forum. Most of the prominent arbitration forums, such as the AAA (whose rules were at issue in the *Airbnb* case) and JAMS, have rules that do specifically delegate the arbitrability question to the arbitrator.

The Florida Supreme Court's Decision in *Airbnb*

This was the question before the court in *Airbnb* - whether merely referencing specific arbitration rules that include delegation constitutes a valid delegation of the arbitrability issue to the arbitrator. In recent years, a split emerged on this issue in the intermediate Florida appellate courts. The Lakeland, Florida-based Second District Court of Appeal, whose jurisdiction includes the Tampa Bay area (the 18th largest metropolitan area in the country), took what it admitted was an "outlier" position and ruled that reference to a set of rules was not a sufficient delegation. The Second District Court of Appeal acknowledged that the other Florida appellate courts and every federal appellate court had gone the other way.

The Florida Supreme Court's decision made quick work of the issue and aligned itself with the clear majority of decisions that accept the reference to rules approach.

Best Practices for Companies Going Forward

So what does this mean for companies that do business with consumers in Florida or have employees in Florida?

1. If you have an arbitration agreement that incorporates AAA or JAMS rules (or another arbitral forum whose rules delegate arbitrability to an arbitrator), this should mean that you can enforce the delegation provision in any case in state or federal court in Florida, since both the Florida Supreme Court and Eleventh Circuit have spoken on the issue.
2. We note, though, that there are still a few state courts outside Florida, including the supreme courts in Montana, New Jersey, and South Dakota, that reject the reference to rules approach.
3. And the U.S. Supreme Court has recently noted a few times at oral arguments that it has reserved on this issue.

For these reasons, we still recommend as a "best practice" to specifically state in the arbitration clause that arbitrability is delegated to the arbitrator.

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