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Arbitrators Can Decide Validity of Arbitration Provision in Construction Contracts

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Binding arbitration of construction disputes is frequently required by standard industry contracts. For example, the contract forms published by the American Institute of Architects either require or provide an option for arbitration under the Construction Industry Rules of the American Arbitration Association ("AAA"). The latter rules authorize the arbitrator to decide whether the contractual arbitration agreement is enforceable. (See, e.g. Rule 9 of AAA Construction Industry Rules). However some courts have decided this issue should be determined by the courts, rather than the arbitrator.

But a recent Supreme Court decision determined that an arbitrator can decide enforceability issues if the arbitration clause expressly provides such authority, similar to the AAA Rule 9. In *Rent-A-Center West, Inc. v. Jackson*, the United States Supreme Court held in a 5-4 decision that under the Federal Arbitration Act ("FAA"), a contractual arbitration clause which "clearly and unmistakably" delegates to the arbitrator the authority to determine the validity of the arbitration agreement is enforceable and binding on the parties, and that the issue is not to be decided by the court. In doing so, the Supreme Court reversed the prior ruling of the Ninth Circuit Court of Appeals, which had held that it is for the court and not the arbitrator to decide whether the arbitration agreement is valid and enforceable in the first instance. 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)

Plaintiff Jackson was a former employee of Rent-A-Center who had sued for employment discrimination under state and federal law. In the course of his employment, Jackson and Rent-A-Center had signed a Mutual Agreement to Arbitrate

Claims ("Agreement") which stated called for arbitration of all disputes arising out of Jackson's employment. The Agreement also provided that the "Arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including . . . any claim that all of part of this Agreement is void or voidable." The trial court ruled that based on the Agreement, it was for the arbitrator to decide whether the agreement was unconscionable and unenforceable, and therefore ordered that the case proceed in arbitration rather than court. On appeal the Ninth Circuit reversed and ruled that, as the plaintiff contended he did not consent to the contract as a whole, the question of whether he consented to the arbitration agreement contained within the contract was a question for the court, not the arbitrator.

In reversing the decision of the Ninth Circuit, the majority of the Supreme Court focused on its prior decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 87 Sup. Ct. 1801, 18 L.Ed.2d 1270 (1967). In *Prima Paint*, the Court had held that under § 2 of the FAA, an arbitration agreement in a contract is "severable" and may be enforced by a federal court even if the balance of the contract is unenforceable. In *Rent-A-Center*, the majority relied on Prima Paint to focus its inquiry on the procedural issues in the case. The Court emphasized that Jackson had challenged the contract as a whole on the ground that it was unconscionable, but that he had not raised a specific challenge in the trial court to agreement allowing the arbitrator rather than the court to decide whether the arbitration provision was enforceable. It further relied on the fact that Jackson's reasoning for why the contract was unconscionable focused on the contract as a whole, and that Jackson did not specify grounds as to why the specific agreement to delegate the decision to the arbitrator was unconscionable.

The Court explained that although "agreements to arbitrate are severable," that "does not mean that they are unassailable. If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4" of the FAA. 130 S. Ct. 2778. The Court then noted that the "District Court correctly concluded that Jackson challenged only the validity of the contract as a whole," not specifically the validity of the agreement to allow the arbitrator to decided the validity of the agreement. 130 S. Ct. at 2779. Jackson had argued that fee-sharing procedures and discovery limitations in the agreement rendered it unconscionable. But the Court concluded that because

"Jackson . . . did not make any arguments specific to the delegation provision; [but instead] he argued that the fee-sharing and discovery procedures rendered the *entire* Agreement invalid," his challenge was procedurally insufficient to invoke federal court review of the enforceability of the delegation provision. 130 S. Ct. at 2780.

Many construction contracts involve use of materials purchased in interstate commerce, and the FAA is therefore often applicable to arbitration provisions in such contracts, *Allied Bruce Terminix Cos. Inc. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834 (1995). Contractors and developers who wish to preserve the right to judicial review of the enforceability of an arbitration delegation provision should first ensure the language of the contract is clear that the court and not an arbitrator is to decide issues of enforceability of the arbitration agreement. On the other hand, if a party wishes to challenge such an agreement, it must be careful to satisfy the procedural requirements. First, it must raise a specific challenge to the agreement to allow the arbitrator to decide the validity of the contract, not merely a challenge the general enforceability of the contract as a whole. Second, the party must support the challenge with reasons why the agreement to allow the arbitrator to decide the issue is unconscionable (or otherwise invalid), not merely reasons why the contract as a whole is unconscionable.

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