WHO DECIDES

Not every party to an arbitration agreement will abide by it. Shocking, we know. So, let's say an adverse party started a lawsuit over a claim that you believe is arbitrable, what do you do? One of the first things you have to do is identify the arguments for and against arbitrability and figure out which should be determined by the court and which by the arbitrator. Doing so involves a two-step process. First, determine whether the issues are presumptively for the court or arbitrator(s). Second, assess whether the parties' arbitration agreement alters those presumptions. This piece will outline the basic considerations of that two-step process below. However, we note that this is a rapidly developing area of the law (especially with respect to issues of class actions) and this is not meant to be an all-encompassing treatise. Therefore, it is important that advocates treat this as an overview that helps them spot issues, and then perform their own research and analysis.

Step One: Is this Issue Presumptively For the Court?

In determining whether an issue is presumptively for the court, counsel should first determine whether it is a "gateway" issue (alternately called "substantive arbitrability"). When faced with enforcing an arbitration agreement, courts are authorized to decide only "gateway issues" of arbitrability, while all other aspects of the parties' dispute are reserved for the arbitrator. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013). In general, those gateway issues are: whether the parties agreed to arbitrate, whether that agreement is valid and enforceable, and whether the arbitration agreement covers the present dispute. *Id.* Gateway issues of arbitrability, which default to the courts, have also been described as "substantive arbitrability," whereas arbitrators are authorized to decide issues of "procedural arbitrability." *See Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 85 (2002). "[I]n the absence of an

agreement to the contrary, . . . issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Id.*

Here are some examples of common issues regarding arbitrability and the presumptive decision maker—the court or the arbitrator—who decides:

Arbitrability Issue	**Presumptive Decision-Maker**
Is the dispute time-barred?	Arbitrator. *See BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014).
Did defendant waive its right to arbitrate by participating in litigation?	Court. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *JPD, Inc. v. Chronimed Holdings, Inc*. 539 F.3d 388, 393-94 (6th Cir. 2008). *But see Nat'l Amer. Ins. Co v. Transamerica Occidental Life Ins. Co.*, 328 F. 3d 462, 466 (8th Cir. 2003).
Is the arbitration agreement valid?	Court. *See Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 445 (2006) ("Guided by § 4 of the FAA, we held [in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)] that 'if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it.'").

Is the entire contract valid?	Arbitrator. *See Buckeye Check Cashing v. Cardegna*, 546 U.S. 440,445 (2006) ("[T]he statutory language [of § 4 of the FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally.").
Is the current dispute within the scope of the parties' arbitration agreement?[1]	Court. See *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship,* 432 F.3d 1327 (11th Cir.2005).
Does this arbitration agreement exist?	Court. *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 445 n.2 (2006) (leaving undisturbed cases holding that it is for courts to determine "whether any agreement between the alleged obligor and obligee was ever concluded").
Is this dispute governed by the FAA?	Court. *See New Prime v. Oliveira,* 139 S.Ct. 532, 537 (2019) ("[T]o invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's

1 If you are arguing scope, take advantage of the federal presumption in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."). That presumption—which does not apply to questions of formation or validity—applies as a tie-breaker in favor of arbitration when questions of scope are litigated.

	terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2.").
Is this non-signatory bound?	Court. *Eckert/Wordell Architects, Inc. v. FJM Properties of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014) ("Whether a particular arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is a threshold question of arbitrability. . . . We presume threshold questions of arbitrability are for a court to decide, unless there is clear and unmistakable evidence the parties intended to commit questions of arbitrability to an arbitrator.") (internal citation omitted).
Can the plaintiffs proceed as a class in arbitration?	Court. But there is a circuit split on whether, and how, this question can be delegated to arbitrators. *See Spirit Airlines v. Maizes*, 899 F.3d 1230 (11th Cir. 2018) (acknowledging split).

If you reviewed the chart above, you may have noticed a theme: if the issue is whether the *arbitration agreement* is valid, that is presumptively for the court, but if the issue is whether

the *contract as a whole* is valid, that is for the arbitrator. That divide is a result of the "severability doctrine," which was first established in *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395 (1967), but has since been re-affirmed in *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006) and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). Under the severability doctrine, an arbitration provision is severable from the remainder of the contract. The practical effect of the severability doctrine is that courts must enforce arbitration clauses within contracts, even if the entire contract is illegal or unenforceable.

Step Two: Does the Arbitration Agreement Alter the Presumption?

While substantive arbitrability is presumptively decided by the courts, parties can vary that presumption by agreeing to arbitrate even those gateway issues. Often called a "delegation clause," the contractual provision delegates authority to the arbitrator. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). Any delegation clause must be "clear and unmistakable." *Henry Schein v. Archer & White Sales,* 139 S. Ct. 524 (2019). Nearly all federal circuit courts have found that if the parties' arbitration agreement incorporates the commercial rules of the AAA, the parties have a valid delegation clause (because Rule R-7 give the arbitrator authority to determine jurisdiction). *See Simply Wireless, Inc v. T-Mobile US, Inc*, 877 F.3d 522, 527 (4th Cir. 2017) (summarizing caselaw).

When there is a delegation clause in the parties' arbitration agreement, the court is limited to addressing whether that delegation clause is valid. In other words, the party seeking to avoid arbitration must prove that the delegation clause is unenforceable. This is a difficult obstacle for most litigants. *E.g.*, *Rent-a-Center, West v. Jackson,* 561 U.S. 63, 73 (2010).

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