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The issue of arbitrability

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Abstract

In the realm of arbitration law, the landmark decision in *First Options of Chicago, Inc. v. Kaplan* established that the question of arbitrability—whether parties have agreed to submit a particular dispute to arbitration—is a matter for judicial determination unless there is a clear and unmistakable agreement to the contrary. Recently, the Florida Supreme Court reviewed the Second District Court of Appeal's decision in *Doe v. Natt, 299 So. 3d 599 (Fla. 2d DCA 2020)*, which ruled in favor of *Airbnb*. This article delves into the issue of arbitrability, using the *Airbnb* case as a focal point. It explores the critical takeaways from the case, emphasizing how the court's decision aligns with or deviates from established arbitration principles. The discussion aims to provide a nuanced understanding of arbitrability, offering insights into the judicial reasoning that underpins such determinations and the implications for future arbitration agreements. By dissecting the *Airbnb* case, this paper sheds light on the evolving landscape of arbitration law and the judiciary's role in resolving questions of arbitrability.

Keywords: International Arbitration; Arbitrability of Disputes; Alternative Dispute Resolution (ADR); Arbitration Law; Airbnb v. Doe; Florida Court; Arbitration Agreements

1. Introduction

1.1. Prelude

As a prelude to this article, it is necessary to state that since *First Options of Chicago, Inc. v. Kaplan* [1], the law has been settled that "[t]he question whether the parties have submitted a particular dispute to arbitration, i.e., the '*question of arbitrability*,' is an 'issue for judicial determination [u]nless the parties clearly and unmistakably agree otherwise."

The Florida Supreme Court recently reviewed the decision of the Second District Court of Appeal's decision in *Doe v. Natt* [2] and decided in favour of *Airbnb*. The essence of this paper is to discuss the issue of Arbitrability while referring the case of *Airbnb* and highlighting the takeaways as identified by this writer.

1.2. Brief introduction and procedural history of Airbnb v. Doe

A Texas couple—John and Jane Doe (the "Does")—decided to spend a vacation in Longboat Key. Through a business—Airbnb, Inc. (Airbnb)—the Does located a condominium unit online that was available for a short-term rental in the Longboat Key area. Using Airbnb's website, the Does rented the unit for a three-day stay in May of 2016. The condominium unit was owned by Wayne Natt. Unknown to the Does, Natt had installed hidden cameras throughout the unit.

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The Does alleged that Natt secretly recorded their entire stay in his unit, including some private and intimate interactions. After they learned of Natt's recordings, the Does filed a complaint in the circuit court of Manatee County, naming both Natt and Airbnb as defendants. Their complaint included claims of intrusion against Natt, constructive intrusion against Airbnb, and loss of consortium against both Natt and Airbnb. In their constructive intrusion claims, the Does alleged that Airbnb failed to warn them of past invasions of privacy that had occurred at other properties rented through Airbnb. They also alleged that Airbnb failed to ensure that Natt's property did not contain electronic recording devices.

In response to the Does' complaint, Airbnb filed a motion to compel arbitration in line with the provisions of the Federal Arbitration Act ("FAA") [3], which stipulates that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction . . . in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . . ."

In its motion, Airbnb argued, and the Florida Supreme Court agreed, that the Does' claims were subject to arbitration under Airbnb's Terms of Service, which the Does agreed to be bound by pursuant to a "clickwrap" agreement they entered into when they first created their respective Airbnb accounts online. Specifically, Airbnb's motion relied upon the following language that appears near the end of the twenty-two-page clickwrap agreement:

- *Dispute Resolution*

You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site or Application (collectively "Disputes") will be settled by binding arbitration . . . . You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury . . . .

- *Arbitration Rules and Governing Law*

The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this Dispute Resolution section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879). The Federal Arbitration Act will govern the interpretation and enforcement of this section.

Before proceeding further, it is helpful to understand what a "clickwrap agreement" is. Citing the case of Berkson v. Gogo [4], Judge Weinstein of the District Court for the Eastern District of New York described the four general types of online contracts as follows: (a) Browsewrap, (b) Clickwrap, (c) Scrollwrap, and (d) Sign-in-wrap agreements.

1.3. Types of Agreement

1.3.1. Browsewrap agreements

Browsewrap agreements "can take various forms but basically the website will contain a notice that—by merely using the services of, obtaining information from, or initiating applications within the website—the user is agreeing to and is bound by the site's terms of service." *United States v. Drew*, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009). Because of the passive nature of acceptance in browsewrap agreements, courts closely examine the factual circumstances surrounding a consumer's use. "Despite their ubiquity, browsewrap agreements are still relatively new to courts." *Be In, Inc. v. Google Inc.*, No. 12-CV-03373, 2013 U.S. Dist. LEXIS 147047, 2013 WL 5568706, at *7 (N.D. Cal. Oct. 9, 2013). For an internet browsewrap contract to be binding, consumers must have reasonable notice of a company's "terms of use" and exhibit "unambiguous assent" to those terms. *Specht*, 306 F.3d at 35; see also *Be In*, 2013 WL 5568706, at *6-8 (collecting cases).

1.3.2. Clickwrap agreements

Clickwrap agreements "necessitate an active role by the user of a website. Courts, in general, find them enforceable." *Drew*, 259 F.R.D. at 462 n.22. "Clickwrap agreements require a user to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of service before he or she is allowed to proceed with further utilization of the website." *Id*. "By requiring a physical manifestation of assent, a user is said to be put on inquiry notice of the terms assented to."

1.3.3. Scrollwrap agreements

Scrollwrap agreement "requires users to physically scroll through an internet agreement and click on a separate 'I agree' button in order to assent to the terms and conditions of the host website."

1.3.4. Sign-in-wrap agreements

Sign-in-wrap agreement "couples assent to the terms of a website with signing up for use of the site's services [5]."

1.4. Airbnb's motion to compel arbitration

In its motion, Airbnb argued that the Does' complaints (alleging that Airbnb failed to do what [the Does] alleged should have been done, or otherwise breached certain duties alleged to be owed to them) are claims for negligence, which have been held to be within the scope of broad arbitration provisions, such as the one here. Airbnb further argued that the circuit court should not have even considered whether the Does' claims were arbitrable because the scope of what is or is not arbitrable had to be decided by AAA's arbitrator, and not the circuit court. This is more so as issues about the scope of arbitrability had been contractually assigned to the arbitrator by virtue of the clickwrap agreement's reference to the AAA Rules.

Although the AAA Rules were not reproduced within the clickwrap agreement, neither was it directly linked to the agreement at least by way of a hyperlink. The clickwrap agreement merely directed the Does to AAA website (and telephone number) through which, Airbnb contended, the Does would have found the AAA Rule 7. But is that enough to meet the threshold of (adequate) notice needed to constitute the requisite bindingness on the Does or anyone for that matter that falls into the category of (a) renter(s) like the Does!

Rule 7(a) of the AAA Rules stipulates that: "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim." In a nutshell, Airbnb's argument was that by the incorporation of the AAA Rules into the dispute resolution agreement and the Does' acceptance of the same, the Does had, by implication, agreed to the ceding to the Arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement, or the arbitrability of any claim or counterclaim."

1.5. The court's ruling

After hearing Airbnb's motion on February 6, 2019, the circuit court delivered its ruling on March 7, 2019, granting the motion to compel arbitration. On appeal to the second District Court of Appeal of Florida by the Does, that decision was overturned in a majority decision of two-to-one. In granting the appeal and overturning the decision of the circuit court of Manatee County, the court held *inter alia* that:

Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so . . . , the clickwrap agreement's arbitration provision and the AAA rule it reference[d] that addresse[d] an arbitrator's authority to decide arbitrability did not, in themselves, arise to be "clear and unmistakable" evidence that the parties intended to remove the court's presumed authority to decide such questions. The evidence on what these parties may have agreed to about the 'who decides' arbitrability question was ambiguous; therefore, the court retained its presumed authority to decide the arbitrability dispute [6].

2. What is arbitrability?

It is believed that American courts have generated much perplexity with their use of the word 'arbitrability' as a ragtag into which a bewildering variety of things have been stuffed. In his brief filed on July 26, 2021, before the Supreme Court of Florida, as an *amicus* in the Airbnb case, Professor George Bermann observed that *'serious confusion' results from use of the word to denote, on the one hand, 'any and all threshold issues,' and on the other hand, the domain within which the law permits arbitral decision-making.* Steven Reisberg on the other hand contended that the word 'arbitrability' has been used to refer to 'two completely distinct legal issues,' namely the existence of an arbitration agreement as opposed to its scope, leading to 'considerable confusion as to how a court is to decide which forum, the court or the arbitrator, has the jurisdiction to decide this threshold issue.

2.1. First Options of Chicago, Inc. v. Kaplan

A much-discussed *dictum* by the US Supreme Court in *First Options,* in which an agreement was signed on behalf of the husband's company—MKI—by the husband and wife, sets the stage. First Options commenced arbitration against all of

them (MKI, the husband, and the wife). The husband and wife raised objection that although MKI signed an agreement to arbitrate the dispute, they—husband and wife—were not bound by the agreement, as they did not sign it (in their personal capacities). The arbitral panel ruled in favour of *First Options*. However, on appeal, the Supreme Court held *inter alia* that:

> because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts.

The above decision of the court, in my humble opinion, appears to have been premised on the separate legal personality doctrine of a company that stipulates that the company is separate and distinct from the human beings (minds, arms, and legs) i.e. its Directors and Officers, by which it operates. This doctrine of separate legal personality was established in the landmark case of *Salomon v. Salomon & Co. Ltd [7].*

In analyzing *First Options,* Professor Paulsson, in his book 'The Idea of Arbitration [8], referred the *dictum* of the Supreme Court that *"if parties have agreed to submit 'arbitrability' to arbitrate, then the court's standard for reviewing the arbitrator's decision about the matter should not differ from the standard courts apply when they review any other matter that the parties have agreed to arbitrate . . . . That is to say the courts should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances."*

Prof. Paulsson stated that to make sense of that *dictum*, we must understand that threshold issues are not always jurisdictional. Indeed, what may be a jurisdictional issue in one context may be non-jurisdictional in another. To take a simple example, suppose parties have signed a contract (Contract 1) containing an arbitration clause calling imprecisely for arbitration by the 'London International Chamber of Arbitration (LCIA).' A dispute arises. One party gives notice of its intention to take the matter to the LCIA. The other party answers that it never agreed to LCIA arbitration. Now, the parties sign Contract 2, where they agree that Ms X will arbitrate their dispute as to whether Contract 1 was intended to refer to the LCIA, and she will then either go forward under the LCIA Rules or rule that there is no effective arbitration agreement.

He stated further that the issue which would have been jurisdictional if an arbitration had been brought under Contract 1 is no longer jurisdictional under Contract 2. It is an explicit part of the substance of what is referred to arbitration under Contract 2. Ms X may yet face jurisdictional issues, but they would have to relate to Contract 2, for example, if the latter document was not signed by an authorized representative of a party. This is straightforward: if the parties have agreed that arbitrators are to decide a particular issue, the debate about that issue is simply not jurisdictional. In other situations, the analysis is more challenging.

On this point, he (Professor Paulsson) observed that in *First Options* case*,* instead of saying that the objection raised by Mr and Mrs Kaplan (the owners of [MKI]) was an issue of arbitral jurisdiction, which could not be finally decided by the arbitral tribunal, the Supreme Court explained that this was an issue of arbitrability, and that the answer depended on the 'fairly simple' question: "Did the parties agree to submit the arbitrability question itself to arbitration!"

The analogies that Professor Paulsson used may appear a bit too technical. In my understanding, in simple terms, the decision of the majority of the Supreme Court (in *First Options*) is to the effect that absent a clear (unequivocal) and unmistakable (not open to multiple interpretations) agreement to arbitrate, the Kaplans were not obligated to arbitrate. Still, this does not appear to address the issue of "arbitrability." Hence, in attempting to answer this seemingly elusive concept, I shall now draw on the interesting exchange from the transcript of the oral argument in *First Option* as follows:

- Question: … when you use the term, arbitribality, you mean the agreement of the parties to, the consent of the parties to have a dispute arbitrated?
- Answer: 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?
- Answer: 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.

- Answer: The term is used simultaneously in both instances. This case is the question of arbitrability of arbitrability.

The above extract highlights the confusion of the term "arbitrability," so much that Alan Scott [9], observed as follows:

Now "arbitrability" is a word that might well be banned from our vocabulary entirely—or at least restricted, as in other legal systems, to the notion of what society will permit arbitrators to do. Its use is particularly confusing here since *Kaplan*, obviously, has nothing whatever to say about the limits imposed by mandatory law—as to which any "agreement" of the parties is by definition irrelevant. That words channel, and ultimately congeal, thought cannot be an unfamiliar idea to anyone who has taught entering law students—for there the entire enterprise of education at its best comes down to breaking the hardened carapace of language in which they seek refuge and comfort. Similarly, lower courts that have struggled with *Kaplan* could hardly have advanced the ball very far when their efforts have focused, not on functional analysis, but on the search for proper terminology—that is, on the futile quest for the correct definition of "*First Options* arbitrability ."

First Options highlights the apparent difficulty that one may encounter in attempting to properly understand and appropriately use the term "arbitrability." We shall look at another case in which the term was similarly used.

2.2. Rent-A-Center, WEST, INC., V. JACKSON, 561 U.S. 63 (2010)

The brief facts of this case is that Jackson filed a complaint in the Nevada federal district court alleging racial discrimination and retaliation. The employer, Rent-A-Center West, Inc., moved to dismiss the proceedings and compel arbitration. The district court granted the motion and compelled arbitration. On appeal, the U.S. Court of Appeals for the Ninth Circuit held in part that the district court was required to determine in the first instance whether the coverage and discovery provisions of the arbitration agreement were unconscionable. The question that fell for determination was "whether the district court required in all cases to determine whether an arbitration agreement subject to the Federal Arbitration Act is unconscionable, even when the parties to the contract have clearly and unmistakably assigned the issue to an arbitrator for decision."

In a majority (five to four) decision, the Supreme Court held that under the FAA, where an agreement to arbitrate includes a provision that the arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that particular provision, it is the district court will consider the challenge. But if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator to determine. With Justice Scalia writing for the majority, the Court reasoned that Jackson challenged the enforceability of the agreement as a whole, and thus, the determination is left to the arbitrator, not the district court.

The Court reaffirmed that to constitute a delegation, the language used by the parties must unambiguously establish their "manifestation of intent" to withdraw from courts the authority to determine arbitrability. Thus, whether a party chooses to contest arbitrability initially before a court or a tribunal, it is entitled to an independent judicial determination of arbitrability—an entitlement that cannot be overcome with anything less than "clear and unmistakable" evidence.

3. Did the Does "clearly and unmistakably"agree to the arbitration of arbitrability?

The FAA [10] provides that *"[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable . . . ."* In AT&T Mobility LLC v. Concepción [11], the Supreme Court (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)), stated that the FAA reflects *"a liberal federal policy favoring arbitration." That it was Congress's intention to "reverse centuries of judicial hostility to arbitration agreements . . . and to place arbitration agreements 'upon the same footing as other contracts.'"* See also Scherk v. Alberto-Culver Co., [12]. Nevertheless, the *"FAA does not require parties to arbitrate (including arbitrability) when they have not agreed to do so* (Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., [13]," "particularly as agreements to arbitrate are essentially creatures of contract." (See: Goldberg v. Bear, Stearns [14]).

It is not in dispute that the Does entered into a contractual agreement with Airbnb and Natt (whether jointly or severally) for temporary residence. It is also not in dispute that the Does accepted a "clickwrap agreement" in entering into the contract. What is in dispute is whether the Does agreed that the arbitrator should also decide the issue of arbitrability.

In the case of *Ajemian v. Yahoo!, Inc.* [15] *(Ajemian)*, the Massachusetts Appeals Court addressed the enforceability of forum selection and limitation clauses within an online contract and that court's decision is "trustworthy data for

ascertaining state law." (See also the cases of *Losacco v. F.D. Rich Constr. Co.,* 992 F.2d 382, 384 (1st Cir.), cert. Denied; 510 U.S. 923 (1993); see also *Candelario Del Moral v. UBS Fin. Servs. Inc. of P.R.,* 699 F.3d 93, 103 n.7 (1st Cir. 2012) (citing Fid. Union Trust Co. v. Field, 311 U.S. 169, 177-78 (1940)).

While the clauses at issue in *Ajemian* did not include an arbitration clause, "the pertinent question presented was the same: what level of notice and assent is required in order for a court to enforce an online adhesion contract?" (See Cullinane 2016 WL 3751652, at *6). Similarly, in *Meyer v. Uber Techs., Inc.,* [16], the Appeal Court further explained that "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."

With this in mind, the Appeals Court set forth a two-step inquiry for the enforceability of forum selection clauses in online agreements. The first inquiry is whether the contract terms were "reasonably communicated to the plaintiffs," i.e. whether the Does were given 'reasonable notice.' The second is whether the record shows that those terms were "accepted, and if so, the manner of acceptance," i.e. whether the Does have their assent to the agreement to arbitrability.

3.1. Reasonable notice and assent.

3.1.1. Reasonable notice

What constitutes 'reasonable notice?' A reasonable notice is a "[n]otice that is fairly to be expected or required under the particular circumstances [17]." The reasonable notice test here will not be with respect to the "Dispute Resolution" stipulating arbitration as the means of resolution. Rather, it will be with Airbnb's claim with respect to the arbitrator's power to arbitrate arbitrability. In the case of *Meyer v. Uber Techs., Inc.,* [18], it was held that "in the context of web-based contracts . . . , clarity and conspicuousness are a function of the design and content of the relevant interface." Also, that "a clause will be enforced provided they have been reasonably communicated and accepted."

From the above paragraph, the pertinent question in this case is "were the Does given 'reasonable notice" (perhaps not as to the mode of dispute resolution but) of the the provision relating to the arbitrator's power to determine arbitrability? This is an arguable point, which may not be easily resolved in the pages of this paper. The outcome of the *Airbnb* case may have turned on that singular point, when the Supreme Court of Florida *per* Polston J, observed *inter alia* as follows:

All of the federal circuit courts of appeal to consider the issue have consistently agreed that incorporation by reference of arbitral rules into an agreement that expressly empowers an arbitrator to resolve questions of arbitrability clearly and unmistakably evidences the parties' intent to empower an arbitrator to resolve questions of arbitrability. See In re Checking Acct. Overdraft Litig., 856 F. App'x 238, 243 (11th Cir. 2021); Blanton v. Domino's Pizza Franchising - 12 - LLC, 962 F.3d 842, 845-46 (6th Cir. 2020); Richardson v. Coverall N. Am., Inc., 811 F. App'x 100, 103 (3d Cir. 2020); Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1248 (10th Cir. 2018); Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522, 528 (4th Cir. 2017), abrogated on other grounds by Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019); Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015); Chevron Corp. v. Ecuador, 795 F.3d 200, 207-08 (D.C. Cir. 2015); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009); Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 11 (1st Cir. 2009); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed. Cir. 2006), abrogated on other grounds by Henry Schein, 139 S. Ct. 524; Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005). The United States Court of Appeals for the Seventh Circuit, which has not ruled directly on this issue, has held that an 'agreement of the parties to have any arbitration governed by the rules of the AAA incorporated those rules into the agreement.' Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1272 (7th Cir. 1976)."

That Supreme Court of Florida further held in the *Airbnb* case that "*this federal precedent has explained that when an agreement incorporates a set of arbitral rules, such as the AAA Rules, those rules become part of the agreement*." However, this writer queries whether the mere reference to Rule 7 of the AAA Rules satisfies the 'reasonable notice' test by which the Does could be said to be bound by it. This leads us to the issue of "assent."

3.1.2. Assent

"Assent" is defined in the Black's Law Dictionary as 'agreement, approval, or permission; especially verbal or non-verbal conduct reasonably interpreted as willingness.' The requirement of assent, which is fundamental to the formation of a binding contract, implies in a general way that both parties to an exchange shall have a reasonably clear conception of what they are getting and what they are giving up. In *Meyer,* the court further clarified that the burden of showing that the terms were reasonably communicated and accepted lies on the party seeking to enforce [it].

With this in mind, two questions need to be asked. Firstly, whether the Airbnb's claim and reliance on the alleged incorporation of the provisions of section 7 of the AAA Rules by reference is sufficient in the facts and circumstances of this case, and, without more, capable of being assented to. Secondly, whether the Does assented to the same, and therefore are bound by it. Without doubt, the District court answered these posers in the negative when it held *inter alia* (on page 15 of the decision) that "[i]n our view, the parties' 'manifestation of intent,' *Rent-A-Center,* 561 U.S. at 69 n. 1 (emphasis omitted), in the clickwrap agreement, fell short of the clear and unmistakable evidence of assent that *First Options* requires. This writer agrees with the District Court and Labarga J.'s dissent, wherein the honourable judge (on page 19) held *inter alia* that:

In considering the question of who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate, the United States Supreme Court, in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995), warned that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." Because the arbitrability provisions relied upon by the majority to reach its decision in this case were buried within voluminous pages of rules and policies incorporated only by reference in a clickwrap agreement, the parties' agreement to defer the consequential decision of arbitrability to the arbitrator was anything but clear and unmistakable. I respectfully dissent.

4. Conclusion

From the generality of the foregoing, this writer is of the view that it would have been neater and tidier for Airbnb to have explicitly disclosed the totality of its terms and conditions in the same text, without leaving out anything or enshrouding part of the text in some form of "incorporation by reference" toga. In other words, the AAA Rules (and any other) should have been reproduced in the body of the clickwrap agreement for the purpose of being clear and unmistakable.

It is helpful to keep in mind that all what the Does, and presumably the class of persons who approach Airbnb for rentals, want(ed) to do was to simply rent accommodation, albeit temporarily, similar to renting a hotel accommodation. To this end, the ease of doing such business should have been of paramount importance to Airbnb. This class of customers does not need to be unduly burdened with the rigors associated with entering into complex business transactions or contracts for which a party would need a lawyer. Simplicity should have been observed in dealing with the Does, and essentially the public at large, so as to encourage and emphasize the ease of doing business.

In final analysis, the position of the Second District of Appeal of Florida, to the effect that the clickwrap agreement's arbitration provision and the AAA rule that the agreement referenced, purportedly giving an arbitrator authority to decide arbitrability, did not in themselves arise or appear to be "clear and unmistakable" is unassailable. So, the evidence alluded to in support of Airbnb's claim that the parties intended to remove the court's presumed authority to decide such questions, is not quite convincing.

Therefore, I agree with the submission of Professor Bermann in his *amicus* brief that "[f]or an intention to be 'clear and unmistakable,' it must be conspicuous. The way to make delegation language conspicuous is to place it in the arbitration agreement itself, not in a separate set of procedural rules understood as addressing only how the arbitration is to be conducted."

Compliance with ethical standards

Disclosure of conflict of interest

No conflict of interest to be disclosed.

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[1] First Options of Chicago, Inc. v. Kaplan, 514 US 938 (1995).

[2] Doe v. Natt, 299 So. 3d 599, 610 (Fla. 2d, DCA 2020).

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[9] Alan Scott Rau. The Arbitrability Question Itself. 10 Am. Rev. Int'l Arb. 1999. 287, 308 (1999).

[10] Federal Arbitration Act 9 U.S.C. § 2 (2012).

[11] AT&T Mobility LLC v. Concepción, 563 U.S. 333, 346 (2011)

[12] Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (quoting H.R. Rep. No. 68-96, at 2 (1924)).

[13] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 478 (1989).

[14] Goldberg v. Bear, Stearns & Co., 912 F.2d 1418, 1420 (11th Cir. 1990).

[15] Ajemian v. Yahoo!, Inc., 987 N.E.2d 604, 611-15 (Mass. App. Ct. 2013).

[16] Meyer v. Uber Techs., Inc., 868 F.3d 66, 75 (2d Cir. 2017).

[17] Black Law's Dictionary (11th ed. 2019) by Bryan A. Garner.

[18] Meyer v. Uber Techs., Inc., 868 F.3d 66, 75 (2d Cir. 2017)