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Arbitration Alert

May 28, 2024

## **Who determines arbitrability when plaintiffs claim the agreement with an arbitration provision delegating disputes about arbitrability to the arbitrator has been superseded by a subsequent contract?**

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The Court's decision in *Coinbase, Inc. v. Suski* may appear to apply only to situations involving allegedly superseding contracts. The opinion contains language that may be cited more broadly to potentially increase the scope of arbitrability challenges that courts will decide, including where the parties have delegated such disputes to an arbitrator to resolve.



### **What's the impact?**

- The holding seems narrow:—"We conclude that a court, not an arbitrator, must decide whether the parties' first agreement was superseded by their second."
- The principle is broader and may favor plaintiffs:—" [A] court needs to decide what the parties have agreed to."

- Some courts may apply the decision to retain jurisdiction any time one party claims that a different contract touches any part of a dispute.
- The decision increases the complexity of contract drafting and disputes over arbitration clauses.

For years, the Supreme Court has held that arbitration is a matter of contract. If the parties have agreed to have an arbitrator decide whether their contract requires arbitration, that is—by contract—not a question for a court. But what happens if there are two contracts, one that has an arbitration clause that delegates the issue to an arbitrator, another that has a forum selection clause for a court, and a dispute over which applies? In their May 23, 2024, decision, the Supreme Court held that this is a question for a court to decide.

## ***Coinbase, Inc. v. Suski***

In *Coinbase, Inc. v. Suski*, the Supreme Court holds that when one contract has an arbitration clause and provides for an arbitrator to decide whether that arbitration clause applies to a dispute, and another, later, contract has instead a forum selection clause specifying a particular court for deciding a dispute, it is up to a court, not an arbitrator, to decide whether the arbitration clause in the first contract applies.

## **Background**

The plaintiffs below, David Suski and three other users of cryptocurrency services offered by Coinbase, Inc., entered into a “Coinbase User Agreement” when they each created their Coinbase accounts. That agreement included an arbitration clause. It also provided that an arbitrator would decide whether any dispute between the user and Coinbase would be covered by that arbitration clause.

The language of the Coinbase arbitration clause was typical of clauses that delegate to arbitrators the authority to resolve disputes over the scope of the arbitration clause itself—that is, whether a particular dispute is covered by the clause and must be arbitrated:

This Arbitration Agreement includes, without limitation, disputes arising out of or related to the interpretation or application of the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement. All such matters shall be decided by an arbitrator and not by a court or judge.

*Coinbase, Inc. v. Suski*, No. 23-3, 2024 U.S. LEXIS 2263, at \*6 (U.S. May 23, 2024) (emphasis added).

Later on, however, the plaintiffs entered a sweepstakes promotion from Coinbase. In doing so, they agreed to its “Official Rules.” Those rules provided that California state and federal courts “shall have *sole* jurisdiction of any controversies regarding” the sweepstakes. *Id.* at \*6-7 (U.S. May 23, 2024) (emphasis added).

The plaintiffs then filed a class action against Coinbase, in a California federal court, claiming that the sweepstakes violated California law. Coinbase responded by moving to compel arbitration, pointing to the broad language in the arbitration clause of the User Agreement.

The District Court disagreed with Coinbase. It held that the issue of whether the Coinbase arbitration clause applied was for the court to decide and that, as a matter of California law, the sweepstakes rules without an arbitration clause superseded the user agreement with the arbitration clause.

Coinbase appealed that decision, as Section 16 of the Federal Arbitration Act (the “FAA”) allows, see 9 U.S.C. § 16. But the Court of Appeals upheld District Court’s decision. See *Suski v. Coinbase, Inc.*, 55 F.4th 1227 (9th Cir. 2022). Coinbase sought a petition for certiorari, which the Supreme Court granted.

## The Supreme Court’s Decision

Justice Jackson, in an opinion joined by seven other Justices, with a separate concurrence by Justice Gorsuch, described the issue before the Court as a basic matter of contract law:

Coinbase says the User Agreement’s delegation clause controls. Respondents counter that the Official Rules’ forum selection clause superseded that agreement. If Coinbase is right that the User Agreement’s delegation clause was meant to govern all agreements moving forward, then the parties agreed to arbitrate all subsequent arbitrability disputes. If respondents are correct that the Official Rules’ forum selection clause superseded the User Agreement’s delegation clause, then the parties meant to send sweepstakes disputes—including those over arbitrability—to California courts.

2024 U.S. LEXIS 2263, at \* 11. Stating the principle that “disputes are subject to arbitration if, and only if, the parties actually agreed to arbitrate those disputes,” the Court concluded that “a court needs to decide what the parties have agreed to—*i.e.*, which contract controls.” *Id.* at \*5. In other words, “the question is whether the parties agreed to send the given dispute to arbitration—and per usual, *that* question must be answered by a court.” *Id.* at \*12 (emphasis in original).

## The Relation of the Supreme Court’s Decision to Existing Law

The problem with the simple assertion of business as usual at the heart of the Court’s decision is that when the parties have delegated the question of what is arbitrable to an arbitrator, it is actually *not* “per usual” that a court automatically decides “whether the parties agreed to send the given dispute to arbitration”, if by “the given dispute” the Court means the underlying claim by the plaintiff. The focus should be on the dispute about delegation instead. But in her analysis, Judge Jackson held that this was not an issue because where a party’s challenge to arbitration “applied ‘equally’ to the whole contract *and* to an arbitration or delegation provision, a court must address that challenge.” *Id.* at \*13 (emphasis added).

This language might at first seem to expand, or even reverse, the requirement set by the Supreme Court more than a decade ago in *Rent-A-Center, West, Inc. v. Jackson*, 561 U. S. 63 (2010). There, the Court held that when “the claimed basis for the invalidity of the contract as a whole” is the same as the basis for the invalidity of a provision in the contract delegating the question of arbitrability to an arbitrator instead of a court, then “unless [the plaintiff] challenge[s] the delegation provision *specifically*, we *must* treat it as valid under § 2 [of the FAA] and *must* enforce it under §§ 3 and 4 [of the FAA] . . . .” *Id.* at 71 (emphasis added).

But the Court’s new decision properly should not be read to change the rule in *Rent-A-Center*. As Justice Jackson noted in an unnumbered footnote in her opinion, Coinbase had “forfeited” any argument that the plaintiffs had not complied with the *Rent-A-Center* rule because “Coinbase did not raise that argument before the Ninth Circuit, and the Ninth Circuit did not address it.” 2024 U.S. LEXIS 2263, at \*13 n.\*. Then, in *dicta*, Justice Jackson went on to say that any such “argument is also meritless” because the plaintiffs’ District Court challenge was “directed specifically to” the delegation provision. *Id.* (quoting *Rent-A-Center*, 561 U.S., at 71).

## The Effect of the Supreme Court’s Decision

Justice Jackson scoffed at Coinbase’s suggestion that the Court’s new decision would create “chaos” by inviting challenges to delegation clauses. *Id.* at \*14. In the penultimate paragraph, she argued that:

where parties have agreed to only one contract, and that contract contains an arbitration clause with a delegation provision, then, absent a successful challenge to the delegation provision, courts must send all arbitrability disputes to arbitration. But, where, as here, parties have agreed to two contracts—one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitrability disputes to the courts—a court must decide which contract governs.

Had Justice Jackson not eliminated the *Rent-A-Center* rule from her opinion as an issue forfeited by Coinbase, this paragraph could also be read as an expansion of the law—because the *Rent-A-*

*Center* rule requires a specific challenge to a delegation clause itself, not just a challenge to the contract containing it. And nothing in *Rent-A-Center* indicates that its rule is different depending on the number of contracts at issue.

But even properly read not to change the rule in *Rent-A-Center*, the Court's new decision contains language that will likely encourage more efforts to avoid arbitration clauses. Despite the Court's attempt to cast the issue presented as limited to situations involving two successive contracts, we would expect to see arbitration opponents cite *Coinbase* in more expansive ways.

First, ignoring the footnoted "forfeiture" of any *Rent-A-Center* argument by *Coinbase*, arbitration opponents (whether litigants or courts) will likely use the Court's new decision to characterize objections to a contract as a whole as challenges to any delegation provision in an arbitration clause in that contract. Second, arbitration opponents will likely use the Court's new decision in any situation in which one contract contains an arbitration clause and another contract between the same or similar parties does not, no matter in what order those contracts were executed. The end result will be more challenges to arbitration.

Those who favor arbitration will also likely respond in at least two ways. First, they will likely take extra care not to give up on *Rent-A-Center* arguments and to insist that courts maintain a narrow focus on whether the party opposing arbitration has specifically established a failure of any delegation clause. Second, they will likely want to add to their contracting processes a new concern for preservation of delegation clauses, whether by drafting exceptions in later provisions or by including heightened procedural conditions for amendment in the delegation clauses themselves.

So, whether viewed from the perspective of an opponent of arbitration, or a supporter of arbitration, one thing is clear. Despite its brevity and claim of business as usual, *Coinbase, Inc. v. Suski* will add to the complexities of arbitration practice.

For more information on the content of this alert, including issues of drafting or enforcement of arbitration clauses, please contact your Nixon Peabody attorney or:

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