

Arbitrability Issues in US Arbitration: Determination by a Court or Arbitrator

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A Practice Note explaining how US courts determine whether the court or the arbitral tribunal decides whether a claim is arbitrable. Specifically, this Note explains when judicial review of arbitrability is appropriate and how parties can delegate arbitrability to the arbitrator, including by delegating the decision to the arbitrator expressly in the arbitration agreement or by adopting institutional rules that delegate this authority. This Note also discusses the resolution of a circuit split on whether courts may conduct a limited threshold review to determine if the arbitrability claim is wholly groundless.

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Scope of This Note

Parties to a contract requiring **arbitration** of their disputes may disagree about whether a particular dispute is covered by the arbitration clause. In the US, the party resisting arbitration often either:

- Seeks court intervention to stay the arbitration.

- Commences a lawsuit to resolve the dispute in court.

The party attempting to arbitrate may respond by asking the court to compel arbitration. However, before a court may determine whether the claim the party seeks to arbitrate is arbitrable, it must first determine whether the court or the arbitrator decides issues of arbitrability. This Note explains how US courts determine whether the court or the arbitrator decides the arbitrability of a claim.

For information on determining arbitrability in nonUS international arbitration, see [Practice Notes, Arbitrability in international arbitration](#) and [Jurisdictional issues in international arbitration](#).

Arbitrability in US Arbitration

The question of arbitrability in US arbitration proceedings generally turns on whether the parties agreed to submit a particular dispute to arbitration, including questions about whether:

- The parties are bound by an arbitration clause.
- An arbitration clause applies to a particular dispute.

(See *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010); see also *BG Grp. PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014) (arbitrability disputes "include questions such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy'") (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 71 (2d Cir. 2012).)

In determining whether the court or the arbitrator decides arbitrability, courts are guided by:

- The [Federal Arbitration Act](#) (FAA).
- The parties' arbitration agreement.

The FAA

The FAA governs most arbitrations in the US. Questions of arbitrability may arise under the FAA where a party:

- **Moves to compel arbitration.** Arbitration agreements are valid and enforceable under the FAA, except where there are grounds for revoking that agreement ([9 U.S.C. § 2](#)). The FAA also requires courts to stay judicial proceedings that involve matters referable to arbitration and to issue orders compelling arbitration of those matters the parties agreed to arbitrate ([9 U.S.C. §§ 3-4](#)). When a party asks a court to enforce an arbitration agreement, the court refers to the parties' arbitration agreement and determines whether it applies to the parties and their dispute.

- Seeks vacatur or confirmation of an arbitration award.** A court also may need to address the issue of arbitrability in the context of a motion to confirm or vacate an arbitration award under Section 10 of the FAA, which permits vacatur of an arbitration award when the arbitral tribunal exceeds its authority. For example, if an arbitral tribunal determines it has jurisdiction to proceed with an arbitration against a nonsignatory to the arbitration agreement, the nonsignatory may object and at the end of the case move to vacate the arbitration award based on the tribunal exceeding its authority (9 U.S.C. §10(a)(4)). If the arbitration clause does not clearly and unmistakably delegate arbitrability determinations to the tribunal, the court deciding the motion to vacate reviews the arbitrability question *de novo* (see *Trina Solar US, Inc. v. Jasmin Solar Pty Ltd*, 954 F.3d 567, 570 (2d Cir. 2020); *Consol. Rail Corp. v. Metro. Transp. Auth.*, 1996 WL 137587, at *8 (S.D.N.Y. Mar. 22, 1996) (explaining "that without a clear and unmistakable showing that a party agreed to arbitrate arbitrability a district court must review the arbitrator's decision on arbitrability *de novo*") (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)); see also *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 71 (2d Cir. 2012)).

For information on joining nonsignatories to an arbitration, see [Practice Note, Joining Nonsignatories to an Arbitration in the US](#). For more information on the determination of threshold issues under the FAA, see [Practice Notes, Understanding the Federal Arbitration Act and Compelling and Enjoining Arbitration in US Federal Courts](#).

The Arbitration Agreement

Under the FAA, arbitration is a matter of contract, which courts place on an equal footing with other contracts and enforce according to their terms (*Rent-A-Center*, 561 U.S. at 67; see also *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)). Whether the parties agreed to arbitrate is a matter the court decides (see *K.F.C. v. Snap Inc.*, 2022 WL 871996, at *1-2 (7th Cir. Mar. 24, 2022) (affirming order compelling child to arbitrate dispute over social media account; child's age is a state law contract defense that the arbitrator must decide)). If the court finds a valid arbitration agreement, the court looks to the terms of the parties' agreement to determine whether the parties agreed to submit the question of arbitrability to the arbitrator. (*Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 298 (2010); *Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1106 (10th Cir. 2020).)

The parties' agreement to arbitrate certain disputes involving their contract does not necessarily mean they also agreed to arbitrate the arbitrability of those disputes. Just as the four corners of the parties' arbitration agreement define the matters subject to arbitration, the "gateway" issue of whether a court or an arbitrator determines the arbitrability of a claim depends on the parties' intent as expressed in their arbitration agreement (see *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. at 649 (parties may agree to arbitrate the issue of arbitrability); *Rent-A-Center*, 561 U.S. at 69 ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other"); *Belnap v. IASIS Healthcare*, 844 F.3d 1272, 1280 (10th Cir. 2017) ("Because 'arbitration is simply a matter of contract,' '[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter") (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995))).

Courts retain the power to decide the gateway issue of arbitrability even in the face of an apparent delegation provision if a party challenges the formation or existence of the arbitration agreement or the contract containing it (see *Ahlstrom v. DHI Mort. Co.*, 21 F.4th 631, 635 (9th Cir. 2021) (parties cannot delegate to arbitrator issues concerning the formation of the arbitration agreement); *In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 880-83 (6th Cir. 2021) (if court determines a contract containing delegation clause exists, court may also consider issues of enforceability and validity if they pertain only to the delegation clause); *MZM Constr. Co., Inc. v. N. J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 401-02 (3d Cir. 2020); *In re Auto. Parts Antitrust Litig.*, 951 F.3d 377, 385-86 (6th Cir. 2020); *Fedor v. United Healthcare, Inc.*,

976 F.3d 1100, 1104 (10th Cir. 2020); *Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 (4th Cir. 2019); *Edwards v. Doordash, Inc.*, 888 F.3d 738, 744 (5th Cir. 2018)).

Judicial Review of Arbitrability

The question of whether the parties agreed to submit their dispute to arbitration generally is an issue for judicial determination that a court must decide (see *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (a "gateway" dispute about whether the parties are bound by an arbitration clause raises an issue of arbitrability that a court must decide); and see *First Options of Chi.*, 514 U.S. at 944; *AT&T Techs., Inc.*, 475 U.S. at 649); *Energy Ventures Mgmt, L.L.C. v. United Energy Grp., Ltd.*, 999 F.3d 257, 263-65 (5th Cir. 2021) (reversing district court order compelling arbitration; arbitration agreement did not contract around presumption that court determines whether plaintiff's litigation conduct waived arbitration)). Some state arbitration statutes codify this approach (§ 682.02, Fla. Stat. (requiring the court to determine whether the existence of an arbitration agreement and whether it covers the parties' dispute)). Courts use a two-step inquiry to determine the issue of whether the parties agreed to arbitrate the issue of arbitrability. The court first determines if the parties have a valid arbitration agreement, and if so, the court determines whether the parties' agreement includes having the arbitrator determine arbitrability. (See *McKenzie v. Brannan*, 19 F.4th 8, 16-20 (1st Cir. 2021); *Robinson v. Home Owners Mgt. Enter., Inc.*, 590 S.W.3d 518, 531-32 (Tex. 2019) (construing the FAA); *Revis v. Schwartz*, 140 N.Y.S.3d 68, 73-75 (2d Dep't 2020) (construing the FAA and New York arbitration law), *aff'd* 2022 WL 801429 (N.Y. Mar. 17, 2022); *Lloyd's Syndicate 457 v. FloaTec, L.L.C.*, 921 F.3d 508, 514 (5th Cir. 2019).)

When deciding whether the parties agreed to arbitrate a matter (including arbitrability), courts generally apply ordinary state-law principles governing the formation of contracts. However, courts may not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. Under this approach, courts generally determine arbitrability if either:

- The parties do not agree that an arbitrator must decide the issue.
- The parties' agreement is silent on whether a court or an arbitrator decides issues of arbitrability.

(See *First Options of Chi.*, 514 U.S. at 944-45; *Biller v. S-H OpCo Greenwich Bay Manor, LLC*, 961 F.3d 502, 509 (1st Cir. 2020).)

Courts that have considered the question have determined that the availability of class arbitration is an issue for the court, not an arbitrator, to determine (see *20/20 Comms., Inc. v. Crawford*, 930 F.3d 715, 718-19 (5th Cir. 2019); *Herrington v. Waterstone Morg. Corp.*, 907 F.3d 502, 508-09 (7th Cir. 2018); *JPAY, Inc. v. Kobel*, 904 F.3d 923, 936 (11th Cir. 2018); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972-73 (8th Cir. 2017); *Del Webb Comm's v. Carlson*, 817 F.3d 867, 877 (1st Cir. 2016); *Opalinski v. Robert Half Intern., Inc.*, 761 F.3d 326, 333-34 (3d Cir. 2014); *LexisNexis Div. v. Crockett*, 734 F.3d 594, 598-99 (6th Cir. 2013)). However, the arbitrator decides the availability of class arbitration where the parties clearly and unmistakably agree the arbitrator decides all questions of arbitrability, including the specific question of whether they agreed to class arbitration (see *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1232-33 (11th Cir. 2018); *Catamaran Corp.*, 864 F.3d at 973). Some circuit courts have held that an arbitration agreement's incorporation of institutional rules that empower the arbitrator to determine arbitrability constitutes clear and unmistakable evidence the parties agreed the arbitrator decides class arbitrability (see *Jpay, Inc.*, 904 F.3d at 937; *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396-97 & n.2 (2d Cir. 2018); see also *Shivkov v. Artex Risk Solutions, Inc.*, 974 F.3d 1051, 1068 (9th Cir. 2020) (noting the circuit split); see [Implied Delegation Provisions](#)).

On April 24, 2019, the US Supreme Court decided the question left open by *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.* (559 U.S. 662 (2010)) and *Oxford Health Plans LLC v. Sutter* (569 U.S. 564 (2013)), holding that courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a class-wide basis (*Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417-18 (2019)).

For more information on class arbitration, see [Class Arbitration Waivers in the US: Case Tracker](#).

Delegating Arbitrability to the Arbitrator

If the parties want the arbitrator to decide issues of arbitrability instead of the court, the parties must express that intent "clearly and unmistakably" in their arbitration agreement (see *First Options of Chi.*, 514 U.S. at 944).

What constitutes clear and unmistakable evidence varies significantly by jurisdiction in the US. Depending on the jurisdiction, parties can clearly and unmistakably delegate arbitrability to the arbitrator by including in their arbitration agreement:

- An express provision delegating questions of arbitrability to the arbitrator.
- Broad language requiring arbitration of "any and all" disputes between the parties.
- An agreement to arbitrate under institutional rules that empower tribunals to determine challenges to their own jurisdiction.

That a party raises an arbitrability objection with the arbitrator does **not** constitute clear and unmistakable evidence of the party's intent to delegate arbitrability determinations to the arbitrator (see *First Options of Chic., Inc.*, 514 U.S. at 946 ("merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i.e., a willingness to be effectively bound by the arbitrator's decision on that point")); see also *Trina Solar*, 229 F. Supp. 3d 176, 184 (S.D.N.Y. 2017) (rev'd on other grounds, 954 F.3d 567 (2d Cir. 2020)).

Where the parties' agreement delegates arbitrability to the arbitrator, the court enforces that agreement by deferring to the arbitrator to resolve the issue (see *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530-31 (2019); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013); *E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000) (where parties send a matter to arbitration, a court will set aside the "arbitrator's interpretation of what their agreement means only in rare instances"); see also *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (on matters committed to arbitration, the FAA permits only the "limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway" and to prevent it from becoming a mere "prelude to a more cumbersome and time-consuming judicial review process"))).

Express Delegation Provisions

The most straightforward way for parties to evidence their intent to have the arbitrator determine gateway arbitrability issues is to include a provision in their arbitration agreement expressly saying so. For example, the provision may:

- Outline specific kinds of disputes the arbitrator may and may not hear.

- State simply that "the arbitrator is empowered to resolve all disputes, including disputes regarding their jurisdiction or the arbitrability of any claim."

(See, for example, *Bosse v. N.Y. Life Ins. Co.*, 992 F.3d 20, 23 (1st Cir. 2021) (parties agreed that "any dispute, claim or controversy arising between them, including ... any dispute as to whether such [c]laim is arbitrable, shall be resolved by [] arbitration"); *Swiger v. Rosette*, 989 F.3d 501, 503 (6th Cir. 2021) (parties agreed to arbitrate "any issue concerning the validity, enforceability, or scope" of their arbitration agreement); *Matter of Willis*, 944 F.3d 577, 583 & n.19 (5th Cir. 2019) (arbitrator to decide arbitrability where the parties agreed the arbitrator rules the arbitrability of any claim or counterclaim and the agreement applies to any dispute over where a claim must be arbitrated); *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1267 (11th Cir. 2017) (clear and unmistakable delegation where parties' agreement stated "The Arbitrator, and not any federal, state, or local court or agency, shall have authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable."); *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) (clear and unmistakable delegation where agreement's arbitration clause required arbitration of any dispute that "arises out of or relates to this Agreement, the relationships that result from this Agreement, the breach of this Agreement or the validity or application of any of the provisions of this [arbitration clause]"); *Symonds v. Credico (USA) LLC*, 2020 WL 7075028, at *4-5 (D. Mass. Dec. 3, 2020) (clear and unmistakable delegation where agreement provided that the arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of the arbitration agreement).)

Courts generally defer to the arbitrator to decide the issue of arbitrability if the provision clearly and unmistakably delegates the issue of arbitrability to the arbitrator (see *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016) (reversing a district court's denial of a motion to compel arbitration and holding that under the parties' express provision in arbitration agreement, the arbitrator, not the court, must determine the enforceability of the arbitration agreement with a **class action** waiver)).

Where a party challenges the validity of an arbitration clause and the delegation of arbitrability issues to the arbitrator, there is a circuit split on the issue of whether the court must consider the enforceability of the delegation provision first as a threshold matter. In the US Court of Appeals for the Ninth Circuit, the court must first determine whether the delegation provision is enforceable and, if it is, allow the arbitrator to determine whether the arbitration agreement as a whole is enforceable (*Brice v. Plain Green, LLC*, 13 F.4th 823, 827-32 (9th Cir. 2021)). In the US Courts of Appeals for the Second, Third, and Fourth Circuits, however, the court determines the enforceability of the arbitration clause at the same time as the delegation provision as a threshold matter (see *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 126 (2d Cir. 2019); *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 238 (3d Cir. 2020); *Gibbs v. Haynes Investments, LLC*, 967 F.3d 332, 339 (4th Cir. 2020)).

For information on drafting arbitration clauses, see [International arbitration clauses toolkit](#).

Implied Delegation Provisions

Courts disagree on whether parties can impliedly delegate arbitrability by including in their arbitration agreement broad language requiring arbitration of "any and all" disputes between the parties.

A minority view embraced by some courts is that this broad language can evidence the parties' clear and unmistakable intention to delegate the resolution of all issues to the arbitrator, including issues regarding arbitrability (see *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 898 (2d Cir. 2015) (agreement that required arbitration of "any and all" disputes between the parties relating to their agreement constitutes clear and unmistakable evidence of parties' intent for arbitrator to decide arbitrability); *Shaw Grp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 121 (2d Cir. 2003) ("[E]ven absent an express contractual commitment of the issue of arbitrability to arbitration, a referral of 'any and all' controversies reflects such a

'broad grant of power to the arbitrators' as to evidence the parties' clear 'inten[t] to arbitrate issues of arbitrability.")(quoting *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199-1200 (2d Cir. 1996))).

Most courts, however, require the parties to delegate arbitrability issues expressly and do not consider this broad language to constitute a sufficiently clear delegation of power to authorize the arbitrator to decide arbitrability (see *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998) (reference to the arbitrator handling "any and all disputes arising out of or relating to the contract" not clear and unmistakable, because "there is no hint in the text of the clause or elsewhere in the contract that the parties expressed a specific intent to submit to an arbitrator the question whether an agreement to arbitrate exists."); *Peabody Holding Co. v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 102 (4th Cir. 2012) ("arbitration clause committ[ing] all interpretive disputes relating to or arising out of the agreement does not satisfy the clear and unmistakable test."); *Local 744, Int'l Bhd. of Teamsters v. Hinckley & Schmitt, Inc.*, 76 F.3d 162, 163-65 (7th Cir. 1996) (provision requiring arbitration of "all differences arising out of the interpretation or application of any provision of [the] agreement" not sufficiently clear and unmistakable); *Sec. Serv. Network, Inc. v. Cromwell*, 62 F.3d 1418 (table), 1995 WL 456374, at *3 (6th Cir. 1995) ("[T]he arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties" not sufficiently clear and unmistakable)).

Adopting Institutional Rules That Delegate Arbitrability

Courts generally hold that parties clearly and unmistakably intend to have the arbitrator decide arbitrability issues if the parties' arbitration agreement provides for the arbitral proceedings to be conducted under institutional arbitration rules that confer this power on the arbitrator.

These rules include:

- **The JAMS Comprehensive Arbitration Rules and Procedures (JAMS Rules)**, which provide that the arbitrator determines jurisdictional and arbitrability disputes (JAMS R. 11(b)). Courts have held that an arbitration agreement that incorporates the JAMS Rules constitutes clear and unmistakable evidence of the parties' intent to have the arbitrator, not the courts, determine gateway disputes concerning arbitrability (see *Green Tree Servicing, LLC v. House*, 2017 WL 5709594, at *4 (S.D. Miss. Feb. 6, 2017), aff'd 890 F.3d 493, 503-04 (5th Cir. 2018) (parties' adoption of the JAMS rules presented clear and unmistakable evidence that they agreed to arbitrate arbitrability); *Belnap*, 844 F.3d at 1282-83; *Cooper v. WestEnd Capital Mgmt., L.L.C.*, 832 F.3d 534, 546 (5th Cir. 2016) (same); *Emilio v. Sprint Spectrum L.P.*, 508 Fed. App'x 3, 5 (2d Cir. 2013) (incorporation of JAMS Rules "clearly and unmistakably delegated questions of arbitrability to the arbitrator); *Wynn Resorts, Ltd. v. Atl.-Pac. Capital, Inc.*, 497 Fed. App'x 740, 742 (9th Cir. 2012) ("By incorporating the JAMS rules, the parties demonstrated their clear and unmistakable intent to have an arbitrator resolve the issue of arbitrability.")). For more information on JAMS arbitration, see [JAMS Arbitration Toolkit](#).
- **The American Arbitration Association (AAA) Commercial Arbitration Rules and Mediation Procedures (AAA Rules)** and the AAA's **International Centre for Dispute Resolution (ICDR) International Arbitration Rules (effective March 1, 2021) (ICDR Rules)**, which provide that the arbitrator has the power to rule on the arbitrator's own jurisdiction, including any objections to the arbitrability of any claim or counterclaim (AAA Rule R-7(a) and Article 21 of the ICDR Rules). Courts have held that an arbitration agreement incorporating the AAA Rules or ICDR Rules constitutes clear and unmistakable evidence that the parties intend the arbitrator to resolve arbitrability issues (see *AirBNB, Inc. v. Doe*, 2022 WL 969184, at *6 (Fla. Mar. 31, 2022) (applying the FAA); *Commc'ns Workers of Am. v. AT&T Inc.*, 6 F.4th 1344, 1346-48 (D.C. Cir. 2021); *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020) (listing cases and agreeing with "every one of our sister circuits to address the question – eleven out

of twelve by our count – [which] has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability.'"); *Arnold v. HomeAway, Inc.*, 890 F.3d 546, 553 (5th Cir. 2018) (by incorporating the AAA rules, the parties clearly and unmistakably demonstrated their intent to delegate threshold arbitrability issues to the arbitrator); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (noting that "[v]irtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability"); *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 345 (2d Cir. 2010) (the predecessor rule to Article 19, ICDR Rules, specifically empowers the arbitrator to decide questions of arbitrability, extending to the arbitrator "the power to rule on [his] own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement"); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) ("Most of our sister circuits that have considered this issue agree with our conclusion that an arbitration provision's incorporation of the AAA Rules—or other rules giving arbitrators the authority to determine their own jurisdiction—is a clear and unmistakable expression of the parties' intent to reserve the question of arbitrability for the arbitrator and not the court"); *Auwah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) (incorporation of the AAA Rules "is about as 'clear and unmistakable' as language can get"). However, at least one court has held that a general reference to "the AAA rules" without identifying a specific set of AAA rules (such as commercial, construction, or accounting) is too broad and ambiguous to constitute a delegation of arbitrability issues to the arbitrator (see *Fallang Family Limited P'ship v. Privcap Cos., LLC*, 2021 WL 1115388, at *5-6 (Fla. DCA 4th Mar. 24, 2021)). For more information on AAA and ICDR arbitration, see [AAA Arbitration Toolkit](#) and [ICDR Arbitration Toolkit](#).

- **The arbitration rules of the International Chamber of Commerce (ICC)**, which provide that the arbitral tribunal has the authority to decide its own jurisdiction and the arbitrability of claims (2012 ICC Rules Art. 6(5) and 2017 ICC Rules Art. 6(5)). Courts have held that an arbitration agreement providing for arbitration under the ICC arbitration rules constitutes clear and unmistakable evidence that the parties intend to empower the arbitral tribunal to decide questions of arbitrability (see, for example, *Shaw Grp., Inc. v. Triplefine Intern. Corp.*, 322 F.3d 115, 122 (2d Cir. 2003); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 472-73 (1st Cir. 1989); *PPT Rsch., Inc. v. Solvay USA, Inc.*, 2021 WL 2853269, at *3-4 (E.D. Pa. July 7, 2021); *Daiei, Inc. v. United States Shoe Corp.*, 755 F. Supp. 299, 303 (D. Haw. 1991)). For more information on ICC arbitration, see [ICC Arbitration Toolkit](#).
- **The arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL)**, which provide that the arbitral tribunal has the power to rule on its own jurisdiction, including any objections regarding the existence or validity of the arbitration agreement (UNCITRAL R. 23(1)). Courts have held that an arbitration agreement incorporating the UNCITRAL rules constitutes clear and unmistakable evidence of the parties' intent to have the arbitral tribunal determine issues of arbitrability (see *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72-73 (2d Cir. 2012) (by adopting 1976 version of UNCITRAL rules [which in Article 21 contains similar provision to Article 23 of 2013 rules], the parties clearly and unmistakably agreed for the arbitrator to decide arbitrability); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207-08 (D.C. Cir. 2015) (incorporation by reference of the UNCITRAL rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability)). For more information on UNCITRAL arbitration, see [UNCITRAL arbitration toolkit](#).
- **The arbitration rules of the London Court of International Arbitration (LCIA)**, which provide for the arbitral tribunal to rule on its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness, or scope of the arbitration agreement (LCIA Rule 23.1). Courts have held that an arbitration agreement incorporating the LCIA Rules constitutes clear and unmistakable evidence the parties intended the arbitral tribunal to decide these arbitrability issues (see *Innospec Ltd. v. Ethyl Corp.*, 2014 WL 5460413, at *3-4 (E.D. Va. Oct. 27, 2014); *Garthon Bus., Inc. v. Stein*, 30 N.Y.3d 943, 944 (2017)). For more information on LCIA arbitration, see [LCIA arbitration toolkit](#).

- **The arbitration rules of the California Code of Civil Procedure**, which empowers arbitrators to rule on their own jurisdiction (Cal. C. Civ. P. § 1297.161). At least one court has held that this provision constitutes clear and unmistakable evidence of the parties' intent to delegate arbitrability determinations to the arbitrator (see *Rohm Semiconductor USA, LLC v. MaxPower Semiconductor, Inc.*, 17 F.4th 1377, 1382-84 (Fed. Cir. 2021)).

However, the Restatement rejects the cases restricting the court's authority as based on a misinterpretation of the institutional rules being applied (Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.8 PFD, Reporter's Note (b)(iii) (2019)). The authors of the Restatement argue that the institutional rules merely authorize the arbitral tribunal to proceed with the arbitration, but do not divest the court's power to determine arbitrability. At least one court has similarly held that adoption of the institutional arbitration codes of the **Financial Industry Regulatory Authority (FINRA)**, which authorize the arbitral panel to interpret and determine the applicability of the arbitration codes, does not strip the court of power to determine the arbitrability of a dispute, especially where other provisions of the parties' agreement suggest the parties did not intend to delegate arbitrability issues to the arbitrator (see *Metropolitan Life Ins. Co. v. Bucsek*, 919 F.3d 184, 192-93 (2d Cir. 2019) (affirming **injunction** enjoining arbitration of employment claim where events giving rise to employee's claim occurred many years after employer ceased membership in FINRA)).

The Supreme Court has expressly left open the question of whether incorporation of institutional rules in fact delegates the arbitrability question to the arbitrator (*Henry Schein*, 139 S. Ct. at 531).

There is a circuit split on the question of whether the adoption of institutional arbitration rules constitutes clear and unmistakable evidence of the parties' intent to have the arbitral tribunal decide issues of class arbitrability. Some circuit courts have held that the parties' adoption of the AAA rules in their agreement is not clear and unmistakable evidence of the parties' intent to have the arbitrator decide whether the agreement allows class arbitration (see *Catamaran Corp.*, 864 F.3d at 972-73; *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 762-63 (3d Cir. 2016); *Del Webb*, 817 F.3d at 876-77; *LexisNexis*, 734 F.3d at 599-600). At least one circuit court has held the parties' agreement to arbitrate under the AAA rules, which are supplemented by the AAA Supplementary Rules for Class Arbitration, is clear and unmistakable evidence the parties intended the arbitrator to decide the availability of class arbitration (see *Spirit Airlines*, 899 F.3d at 1233-34).

The "Wholly Groundless" Approach to Determining Arbitrability

Parties that delegate questions of arbitrability to the arbitrator run the risk of facing arbitration of claims that are entirely outside the scope of their arbitration agreement, at least until the arbitrator determines that the claim is not arbitrable. This situation arguably undermines the twin goals of arbitration: "settling disputes efficiently and avoiding long and expensive litigation" (see *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005)). In the past, some courts sought to avoid this situation by holding that even if the parties clearly and unmistakably delegated arbitrability issues to the arbitrator, the court should perform a limited threshold inquiry to determine whether the assertion of arbitrability is wholly groundless (see, for example, *Evans v. Building Materials Corp. of Am.*, 858 F.3d 1377, 1380-81 (Fed. Cir. 2017); *Douglas v. Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014); *Turi v. Main Street Adoption Servs., LLP*, 633 F.3d 496, 511 (6th Cir. 2011); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006)).

In early 2019, however, the Supreme Court resolved a circuit split on this issue by rejecting the "wholly groundless" approach for determining arbitrability. Under the FAA, when the parties' contract clearly and unmistakably delegates arbitrability issues to the arbitrator, courts must respect the parties' choice and not conduct a threshold inquiry about whether the claim of arbitrability is wholly groundless. (*Henry Schein, Inc.*, 139 S. Ct. at 529-31.)