Who Should Decide Whether the Parties Formed a Valid Agreement to Arbitrate?

Author : Robert Hillman

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David Horton, *Arbitration About Arbitration*, 70 **Stan. L. Rev.** 363 (2018).

David Horton's *Arbitration About Arbitration* is a thorough and insightful treatment, with both normative and descriptive elements, of the law's approach to delegation clauses in contracts calling for arbitration. Delegation clauses assign to arbitrators the question of the validity of an agreement to arbitrate (including defenses such as unconscionability and the like) that would otherwise be decided by courts. A typical delegation clause would go something like this: "Enforceability of the arbitration clause shall be determined by the arbitrator and not by a court" or "[t]he arbitrator[s] shall determine all issues regarding the arbitrability of the dispute." Horton focuses on delegation clauses in employment and consumer adhesion contracts, where delegation is most troubling.

The article first sets forth a very helpful history detailing the rise of delegation clauses against the backdrop of initial judicial hostility to arbitration, Congress's enactment of the Federal Arbitration Act (FAA), and the Supreme Court's recent championing of arbitration, including the enforcement of delegation clauses. As for the latter, in *First Options of Chicago, Inc. v. Kaplan*, the Supreme Court established that enforcement depends on the parties' intentions, but the Court required "clea[r] and unmistakabl[e] evidence" of an agreement to delegate. Then in *Rent-A-Center, West, Inc. v. Jackson*, Justice Scalia diluted the "clear and unmistakable" rule, by observing that courts should enforce delegation clauses if a party merely manifested an intent to delegate. As a result, a court can justify enforcement of a delegation clause by finding that a consumer clicked on an "I agree" button or signed a form contract, even if the consumer never saw or understood the clause. Horton also observes that the treatment of delegation clauses also "rode the wake" of additional Supreme Court decisions, such as *AT&T Mobility LLC v. Concepcion*, that for practical and legal reasons all but excluded consumers from pursuing rights in court.

Horton is clearly right that the state of the law on delegation clauses in consumer and employee adhesion contracts is problematic. Perhaps most worrisome is the point that arbitrators face what amounts to a conflict of interest when deciding the validity of an agreement to arbitrate. Arbitrators are often paid handsomely for their efforts, so if they decide an agreement to arbitrate is unenforceable, they've short circuited their chance for considerable compensation. When this conflict is combined with the common hurdles for consumers and employees in arbitration, such as far-off venues, expenses, and biased arbitrators, a strong argument exists that the threshold issue—whether the case should be arbitrated at all—belongs in a court.

But what is to be done? Horton's series of solutions is sensible and pragmatic, if somewhat cautious. Despite noting the strong argument that "adhesive delegation clauses never satisfy the 'clear and unmistakable' criterion," (P. 404) he does not go that far. Rather, he calls for treating delegation clauses as "'lite' arbitration clauses" (P. 405) that should be "presumptively valid," (P. 375) but should be subject to various exceptions, including defenses such as unconscionability and "wholly groundless." Further, despite Section 4 of the FAA's language that "[t]he court shall hear the parties . . . [i]f the making of arbitration agreement . . . [is] in issue,"[1] Horton finds that the FAA is not "ironclad and unyielding" (P. 403) in part because courts "have insisted for decades that parties can arbitrate arbitrability." (P. 403.) Instead, the FAA should "exist halfway between inexorable commands and pure background principles," and its rules should be "hard to draft around." (P. 403.)

In addition, Horton urges that unconscionability defenses "should have a particularly sharp bite" (P. 406) when the issue is delegation, although Horton points out that a challenger faces a high hurdle to demonstrate unconscionability

when the delegation clause alone is the subject of examination. (P. 396.) Finally, although quite critical of the decision, Horton does not argue that *Rent-A-Center* is simply wrongly decided. Instead, he proposes that courts should read *Rent-A-Center* narrowly, which would allow a "more nuanced account of delegation clauses." (P. 399.) Specifically, Horton observes that the "clear and unmistakable" test survives the case, as evidenced by a Scalia footnote. (P. 406.) Further, Horton distinguishes the case on its facts, which he says are atypical and include an unusual delegation clause.

Perhaps, in light of the Supreme Court's strong sponsorship of arbitration, combined with general contract law's rather permissive attitude towards assent issues in boilerplate adhesion contracts, Horton's careful analysis is the best solution. Nevertheless, it is not crazy to argue that, in the context of consumer and employee adhesion contracts, businesses should not have the power to use contracts to avoid the rights of challengers to have courts determine the validity of agreements to arbitrate. Personally, I am most moved by the argument that arbitrators have a strong economic incentive to allow arbitration to proceed. Therefore, delegation clauses in this context should be presumptively unenforceable, not the other way around.

In sum, *Arbitration About Arbitration* is an excellent article that should be a "must read" for anyone interested in the current treatment of arbitration clauses in the context of adhesion contracts. Though no fault of Horton's, however, consumers and employee advocates will come away with some trepidation about the state of the law in this area and its future.

1. 9 U.S.C. 4 (2016).

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