Supreme Court of Texas

No. 25-0686

Stewart Title Company,
Petitioner,

v.

Qualia Labs, Inc. d/b/a Qualia Software, Inc.,
Respondent

On Petition for Review from the
Court of Appeals for the Fourteenth District of Texas

JUSTICE BUSBY, dissenting from the denial of the petition for review.

"[A] party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). In this case, the court of appeals compelled arbitration under a clause providing for arbitration under Rules of the American Arbitration Association even though the parties agreed that claims for injunctive relief would be resolved by a court "[n]otwithstanding anything to the contrary in this Agreement." ___ S.W.3d ___, 2025 WL 1523686, at *2, *4-5 (Tex. App.—Houston [14th Dist.] May 29, 2025).

Had this case been filed in federal court in Texas, that court—not an arbitrator—would have decided the arbitrability issue: whether the claims here are ones for injunctive relief that the parties agreed to litigate rather than arbitrate. *See Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 281-82 (5th Cir. 2019). And even though this Court has split from the Fifth Circuit on that "who decides" question, we have recognized that "parties *can* contractually limit their delegation of arbitrability issues to only certain claims and controversies." *TotalEnergies E&P USA, Inc. v. MP Gulf of Mex., LLC*, 667 S.W.3d 694, 712 (Tex. 2023). As this case illustrates, however, our courts of appeals cannot agree on what limiting language is sufficient. The court in this case compelled arbitration even though our contract-interpretation cases dictate that the "notwithstanding" provision trumps the arbitration clause: "in the event of any conflict, [the notwithstanding provision] prevails." *G.T. Leach Builders v. Sapphire V.P., LP*, 458 S.W.3d 502, 532 (Tex. 2015). Because Texas courts need guidance on this important issue and the Court declines to grant this petition to provide it, I respectfully dissent.

I

We presume that courts adjudicate arbitrability issues "absent clear and unmistakable evidence of the parties' intent to submit that matter to arbitration." *Jody James Farms, JV v. Altman Grp.*, 547 S.W.3d 624, 631 (Tex. 2018) (citing *First Options*, 514 U.S. at 944). This bedrock principle is essential to ensuring that courts do not "too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945.

This Court has held, and most federal circuit courts and state supreme courts agree, that the parties' contractual incorporation of the Rules of the American Arbitration Association (AAA) or similar rules—without any carve-outs or limitations—constitutes a clear and unmistakable delegation of arbitrability disputes to the arbitrator. *TotalEnergies*, 667 S.W.3d at 704-08. American courts are sharply divided, however, regarding whether a *limited* incorporation of the AAA rules still constitutes clear and unmistakable evidence of the parties' intent to delegate arbitrability issues to an arbitrator.

Some courts, including the Fifth Circuit, have held that arbitrability issues are left for courts to resolve when the parties incorporate the AAA rules for some circumstances but not others.[1] These courts reason that the parties incorporated the AAA rules (and their delegation of arbitrability disputes to an arbitrator) only if the case falls outside the scope of the carve-out provision. Therefore, the courts must make an initial arbitrability determination whether the dispute falls within the limited incorporation of the AAA rules. *See Archer & White Sales*, 935 F.3d at 279. As these courts explain, the limited incorporation of the AAA rules creates ambiguity regarding whether the parties intended to send all arbitrability issues to an arbitrator. The general rule favoring judicial adjudication resolves this ambiguity, as

[1] *See DDK Hotels, LLC v. Williams-Sonoma, Inc.*, 6 F.4th 308, 321 (2d Cir. 2021); *Archer & White Sales*, 935 F.3d at 281-82; *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80-81 (Del. 2006); *Nethery v. CapitalSouth Partners Fund II, L.P.*, 257 So. 3d 270, 274-75 (Miss. 2018).

courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* at 282 (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 72 (2019)).

Other courts, including this Court, have rejected this view and held that even a limited adoption of the AAA rules constitutes clear and unmistakable evidence that the parties agreed to delegate all arbitrability issues to an arbitrator.[2] These courts reason that a rule requiring a court to determine arbitrability would render the incorporation of the AAA rules superfluous. *TotalEnergies*, 667 S.W.3d at 714; *but see id.* at 730 (Busby, J., dissenting). These courts instead interpret the carve-out to limit only the scope of the agreement, not the scope of the arbitrator's authority to decide questions of arbitrability. *Blanton*, 962 F.3d at 848. Accordingly, in these jurisdictions, the carve-out alone does not affect the arbitrability delegation. *WasteCare Corp.*, 822 F. App'x at 896.

In *TotalEnergies*, I filed a dissenting opinion explaining that the contractual language before us was different from the language addressed in these prior cases. 667 S.W.3d at 729-730 (Busby, J., dissenting). Rather than including a carve-out ("Arbitrate all disputes except ABC under the AAA rules") or a limitation ("Arbitrate XYZ

[2] *See TotalEnergies*, 667 S.W.3d at 714-19; *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 848 (6th Cir. 2020); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1075-76 (9th Cir. 2013); *Brayman v. KeyPoint Gov't Sols., Inc.*, 83 F.4th 823, 833-34 (10th Cir. 2023); *WasteCare Corp. v. Harmony Enters.*, 822 F. App'x 892, 896 (11th Cir. 2020); *Ally Align Health, Inc. v. Signature Advantage, LLC*, 574 S.W.3d 753, 758 (Ky. 2019).

disputes under the AAA rules"), the parties in *TotalEnergies* chose to create a condition precedent to the incorporation of the AAA rules ("If XYZ, then arbitrate under the AAA rules"). *Id.* at 728. This language "did not clearly and unmistakably delegate to arbitrators the power to decide whether the preconditions are met." *Id.* at 730. Instead, because the AAA rules empowering arbitrators to resolve arbitrability disputes do not apply until the preconditions are met, courts must resolve any dispute regarding the preconditions.

II

The contractual language at issue here presents an even stronger indication of the parties' intent for a court to resolve arbitrability disputes. Rather than include a carve-out or condition precedent, the parties used a notwithstanding provision: "*Notwithstanding anything to the contrary in this Agreement*, either party may seek appropriate injunctive or other equitable relief, at any time, in a court of competent jurisdiction . . . when injunctive relief is the only appropriate relief." (Emphasis added.) Use of the term "notwithstanding" shows the parties' intent for this clause to control over all clauses to the contrary—including the adoption of the AAA rules. *See G.T. Leach*, 458 S.W.3d at 532 (holding that a notwithstanding provision constitutes clear instructions that "in the event of any conflict, [the notwithstanding provision] prevails"); *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 290 (2017) ("In statutes, 'notwithstanding' clauses show that one provision prevails over another in the event of a conflict.").

The clause incorporating the AAA rules conflicts with this notwithstanding provision because the clause requires arbitrators to resolve issues of arbitrability, whereas the notwithstanding provision permits courts to resolve all issues related to claims for injunctive or equitable relief. Under black-letter contract law, the parties' agreement that courts resolve appropriate claims for injunctive or equitable relief "[n]otwithstanding anything to the contrary in this Agreement" controls over the conflicting adoption of AAA rules in a separate provision of the contract.

At least two courts, however, have concluded that the adoption of the AAA rules prevails over a notwithstanding provision. In *Brayman v. KeyPoint Government Solutions, Inc.*, the Tenth Circuit acknowledged that "the purpose of *notwithstanding* language is to override contrary language in the document," but concluded that the adoption of the AAA rules was not contrary to the notwithstanding provision because "the rest of th[e notwithstanding] provision says nothing about who decides arbitrability." 83 F.4th 823, 834, 836 (10th Cir. 2023). In *Ally Align Health v. Signature Advantage, LLC*, the Supreme Court of Kentucky treated the notwithstanding provision as if it were a carve-out and concluded that this language did not affect the incorporation of the AAA rules. 574 S.W.3d 753, 758 (Ky. 2019). Justice Wright dissented, explaining that the majority failed to give proper weight to the notwithstanding provision. *Id.* at 759 (Wright, J., dissenting) ("Since the [notwithstanding provision] clearly states that it controls over *any* other provision of the contract, its provision that 'any party shall have the right to seek equitable relief, in a court of competent jurisdiction . . .' vests the court with the decision of whether the issue should be submitted to arbitration or decided by the court.").

Justice Wright's approach to notwithstanding provisions respects the bedrock principle that arbitration clauses are treated neither more nor less favorably than other contracts and must be enforced according to their terms. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). In addition, the reasoning used by the Second and Fifth Circuits and the Supreme Courts of Delaware and Mississippi is even more applicable when the parties use a notwithstanding provision rather than a carve-out.

Those courts explained that the parties incorporated the AAA rules only if the case fell outside the scope of the carve-out provision, and therefore a court must determine whether the case falls within the carve-out's scope before assuming the AAA rules were incorporated. *Archer & White Sales*, 935 F.3d at 279. A notwithstanding provision takes this logic one step further by expressing the parties' intent for the notwithstanding provision's invocation of the courts to prevail over the incorporation of the AAA rules. *See G.T. Leach*, 458 S.W.3d at 532. In other words, the parties agree that the notwithstanding provision takes precedence over the adoption of the AAA rules. Courts must resolve the arbitrability issue to ensure the case falls outside the scope of the notwithstanding provision before sending the case to an arbitrator. Requiring courts to send the arbitrability issue to an arbitrator without first confirming the case falls outside the notwithstanding provision's scope would require courts to "assume that the parties agreed to arbitrate arbitrability" without "clear and unmistakable evidence that they did so." *First Options*, 514 U.S. at 944 (citation modified).

I cannot say that these parties clearly and unmistakably delegated arbitrability disputes to the arbitrator when they expressly agreed that either party could seek injunctive relief in court "[n]otwithstanding anything to the contrary in this Agreement." In the absence of clear and unmistakable evidence of the parties' intent to delegate arbitrability issues to an arbitrator, the presumption favoring a judicial determination controls. *Jody James Farms*, 547 S.W.3d at 632 & n.21.

In *TotalEnergies*, this Court noted that "parties *can* contractually limit their delegation of arbitrability issues to only certain claims and controversies." 667 S.W.3d at 712. But we have not yet offered any guidance on what contractual language could accomplish this goal, leaving lower courts to interpret this nebulous language without support. *See, e.g.*, *BlueCross BlueShield of Tex. v. Decatur Hosp. Auth.*, No. 02-25-00081-CV, 2025 WL 3248094, at *14 (Tex. App.—Fort Worth Nov. 20, 2025, no pet.) (acknowledging it was "in uncharted territory" when applying *TotalEnergies* to a contract with a notwithstanding provision); *Amazon.com Servs., LLC v. De La Victoria*, 711 S.W.3d 250, 262 (Tex. App.—Houston [14th Dist.] 2024, no pet.) (recognizing that parties "may agree to delegate to the arbitrator disputes regarding some, but not all, of the arbitrability issues"). I would have granted the petition for review to explain how parties should go about limiting their delegation of arbitrability issues. If a notwithstanding provision does not accomplish this goal, the Court should explain what language would successfully limit a delegation of arbitrability issues to only certain claims and controversies.

For these reasons, I respectfully dissent from the denial of the petition for review.

J. Brett Busby
Justice

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