Divide and Conquer: More line drawing by the US Supreme Court on the competence-competence of arbitral tribunals

In last week's update, Justice Kavanaugh's first opinion from the bench of the US Supreme Court prompted us to look at arbitrability. Specifically, we looked at whether a court or an arbitral tribunal would rule on the scope, or validity of an arbitration clause. We compared the treatment of the issue in the US, UK, and Continental Europe: Arbitrability in the US, UK, and Continental Europe.

In today's update, we consider another arbitration case as Justice Gorsuch's opinion in *NEW PRIME INC. v. OLIVEIRA*, 586 U. S. ____ (January 15, 2019) invites us to look to the Federal Arbitration Act (FAA) once more, adding another layer to questions of arbitrability and competence-competence.

The Opinion

In *New Prime*, Justice Gorsuch considers an issue closely connected to competence-competence of arbitral tribunals: Exceptions under FFA § 1. A strict application of the principle of competence-competence would require that the arbitrator be the one to decide whether an exception under the rules (here the FAA) applies and would thus except the dispute from arbitration.

Indeed, that is the issue in the case at hand. Petitioner New Prime Inc. is an interstate trucking company, and Respondent Oliveira was one of its drivers. Respondent worked under an agreement that contained an arbitration provision and, notably, designated Respondent as an independent contractor. New Prime asked the court to invoke its statutory authority under the FAA to compel arbitration. Respondent argued the court lacked authority to compel arbitration because §1 of the Act excepts disputes involving "contracts of employment" of certain transportation workers. New Prime contended that any question regarding §1's applicability belonged to the arbitrator to resolve. The District Court and First Circuit Court of Appeals agreed with Mr. Oliveira, 857 F. 3d 7 (2017).

The Supreme Court affirms, holding that courts should determine whether a §1 exclusion applies before ordering arbitration. A court's authority to compel arbitration under the Act does not extend to all private contracts, no matter how clearly they may express a preference for arbitration. Instead, the Court finds, FAA provisions limit the scope of a court's §§3 and 4 powers to stay litigation and compel arbitration. For a court to invoke its statutory authority under §§3 and 4, it must first determine whether the parties' agreement is excluded from the Act's coverage by the terms of §§1 and 2. If it is, the court is not statutorily charged with compelling arbitration under the FAA; the Act does simply not apply.

This outcome remains unchanged by clear language in the contract. New Prime argues that the parties' contract contains a delegation clause, giving the arbitrator authority to decide threshold questions of arbitrability, and that the "severability principle" requires that both sides take all their disputes to arbitration. But the Court is not convinced, holding a delegation clause enforceable under §§3 and 4 only if it appears in a contract consistent with §2 that does not trigger exceptions under FAA §1. Justice Gorsuch further elaborates that because the Act's term "contract of employment" refers to any agreement to perform work, and is to be understood so historically as well, Mr. Oliveira's agreement with New Prime falls within §1's exception. This may seem surprising as the contract called Respondent an independent contractor and employment is generally understood to exclude independent contractors, but the Court, in truly originalist fashion, finds support in the contemporary meaning of the term (the FAA was adopted in 1925), case law, and the intention of the legislature to create a broad and sweeping rule, see *New Prime Inc. v. Oliviera*, 586 U. S. _____(2019) at p. 7-14.

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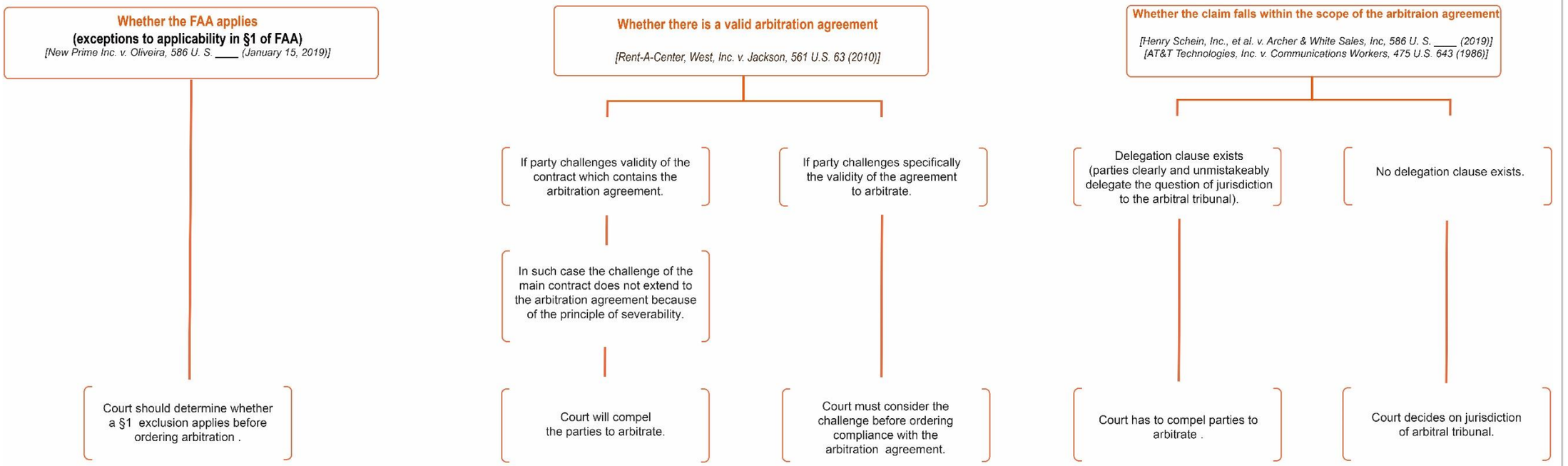
Who decides on arbitrability and the validity of the arbitration agreement under the FAA?



Conclusion

This case illustrates that the FAA contains significant limitations contrary to a broad understanding of competence-competence in the US. It is not the arbitral tribunal that may rule on the exceptions found in FAA §1, but the courts that rule on them as a precursory matter. The opinion also adds an additional layer to the aforementioned issues. When looking back to decisions regarding the scope of the arbitration agreement and its validity, US courts maintain a variety of grounds upon which they may exercise jurisdiction over a dispute and keep a case from going to arbitration. Fine lines are drawn here, separating issues that may be ruled on by the courts, others by arbitral tribunals. *New Prime* is no exception and discerning between the several "gateway" issues is key to preparing an adequate legal strategy when faced with a dispute.

SCOTUS last remaining case on arbitration issues this term is *Lamps Plus v. Varela*, Docket No. 17-988. It was argued before the Court on October 29, 2018.

Find *NEW PRIME INC. v. OLIVEIRA*, 586 U. S. ____ (January 15, 2019) at: Website Supreme Court

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