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Attack an Arbitration Agreement with a Rifle, Not a Shotgun

When a contract contains multiple severable agreements to arbitrate—including an agreement that the arbitrator itself will determine arbitrability—a party seeking to challenge the contract's enforceability must challenge the specific arbitration clause at issue. *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015). In short, you need to attack an arbitration provision with a rifle, not a shotgun.

Brennan signed an employment agreement when he took an executive position with Opus Bank. The employment agreement provided that Brennan could terminate his employment for "Good Reason" and receive a substantial severance payment. Brennan believed there had been a material negative change in his work responsibilities, so he sent Opus Bank a Notice of Termination with Good Reason. Opus Bank hired an independent attorney to investigate whether Brennan's termination was in fact for Good Reason. After receiving the attorney's report, Opus Bank determined that Brennan lacked Good Reason to terminate his employment, so Opus Bank advised Brennan that it considered his Notice of Termination as a voluntary resignation, for which Brennan would not be entitled to a severance payment.

Although the employment agreement contained an arbitration provision, Brennan filed a breach of contract lawsuit in federal court, arguing that his causes of action should be resolved by litigation, not arbitration, because the arbitration provisions were unconscionable, and therefore unenforceable.

Opus Bank responded with a motion to strike Brennan's complaint and a motion to compel arbitration. The bank's motions argued that like the parties' dispute over Brennan's termination, the unconscionability of the arbitration clause had to be decided by the arbitrator. The bank asserted that the court lacked jurisdiction because the employment agreement expressly incorporated the Rules of the American Arbitration Association (AAA), one of which states that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the…validity of the arbitration agreement." The district court granted the bank's motion and dismissed the complaint.

On appeal, the Ninth Circuit made two complementary findings. First, the court held that incorporation of the AAA rules constitutes clear and unmistakable evidence that the contracting parties agreed to arbitrate arbitrability. Having made the first determination, the court noted that the parties' contract effectively contained three agreements: (1) Brennan's employment agreement, (2) the arbitration clause, and (3) the incorporation of the AAA rules that delegates enforceability questions to the arbitrator.

Following the Supreme Court's decision in *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010), the court held that when a contract contains multiple, severable agreements to arbitrate, it is critical for a party challenging one of the nested provisions to do so specifically, rather than merely challenging the arbitration clause as a whole. Because Brennan's contract with the bank was about employment, not exclusively about arbitration, Brennan was required to specifically challenge the enforceability of the provision delegating arbitrability questions to the arbitrator in order to bring the dispute within the court's purview. Since he did not do so, the court upheld the dismissal of his complaint.

Practice Pointer: An agreement incorporating the AAA rules that delegate enforceability questions to the arbitrator contains multiple layers of arbitration provisions—both an agreement to arbitrate and an agreement to delegate questions of enforceability to the arbitrator. For a court to hear a dispute over enforceability, therefore, a party must specifically attack the contract's delegation provision.

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