

# 4 Arbitration Takeaways From High Court Coinbase Ruling

By **Charles Schoenwetter** and **Eric Olson** (May 29, 2024, 3:39 PM EDT)

On May 23, the U.S. Supreme Court issued a unanimous **decision** in *Coinbase Inc. v. Suski* providing clarity to parties faced with successive contracts containing conflicting dispute resolution provisions.

The effect of the Coinbase decision is fourfold: (1) The Supreme Court reaffirmed the primacy of contractual intent when resolving arbitration disputes; (2) consumers will not automatically be relegated to arbitration before being substantively heard by a court; (3) the presumption of arbitrability does not apply before a court determines the contractual intent of the parties; and (4) parties are reminded of the importance of clear contract drafting and of consistent dispute resolution procedures.

This last point is of particular importance for parties seeking to avoid putative class actions by requiring dispute resolution in an arbitral forum.

When parties face successive contracts, with the earlier contract containing arbitration provisions that include a valid delegation clause but the later contract mandating that all disputes must be decided by a specific court, then which contract's dispute resolution procedures control?

This situation occurs frequently and often arises when parties resolve their disputes in a settlement agreement without stating that the arbitration provisions in their underlying contract(s) are superseded by the settlement agreement. It also arises with some frequency with parties that contract with each other over a number of years with respect to multiple transactions of a disparate but overlapping nature.

The Supreme Court's decision in *Coinbase* provides guidance to contracting parties.

## The Supreme Court's Holding

In a unanimous opinion, the Supreme Court held that whether the parties' prior agreement was superseded by a subsequent agreement was for a court, not an arbitrator, to determine, if the dispute resolution procedures in successive contracts are in conflict regarding whether a court or an arbitrator should determine the issue of arbitrability.

## The Specific Issue

The dispute at issue involved a conflict between two contracts executed by Coinbase and the respondents, putative members of a class action who initially joined a sweepstakes run by Coinbase and who subsequently asserted claims alleging violations of California's Unfair Competition Law.

The dispute resolution procedures in the two contracts conflicted with one another. The first provided for arbitration, the second litigation.

## The Two Contracts



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Respondents entered into two contracts with Coinbase:

1. The Coinbase user agreement that respondents agreed to when they created their accounts contained an arbitration provision with a delegation clause. Pursuant to the delegation clause, an arbitrator must decide all disputes under the contract, including whether a given disagreement is arbitrable.
2. The official rules for the sweepstakes were accepted by the respondents by entering into a sweepstakes offered by Coinbase. The official rules contained a forum selection clause providing that all disputes related to that contract must be decided in California courts, which would possess "sole jurisdiction."

### **Procedural Posture Below**

The U.S. District Court for the Northern District of California denied a motion in 2022 to compel arbitration based on the Coinbase user agreement containing the delegation clause.[1] The U.S. Court of Appeals for the Ninth Circuit affirmed the trial court later that year.[2]

### **General Analysis of the Issues**

The Supreme Court based its decision on "[b]asic legal principles":

Arbitration is a matter of contract and consent, and we have long held that disputes are subject to arbitration if, and only if, the parties actually agreed to arbitrate those disputes. Here, then, before either the delegation provision or the forum selection clause can be enforced, a court needs to decide what the parties have agreed to—i.e., which contract controls.

Writing for the unanimous court, Justice Ketanji Brown Jackson reminded the parties that "the first question in any arbitration dispute must be: What have these parties agreed to?"

Justice Jackson characterized the types of arbitration agreements by generally separating them into two categories: agreements to send the merits of a dispute to an arbitrator; and agreements that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes.

Justice Jackson clarified that these different kinds of arbitration agreements relate to different types of disputes: first-order disagreements, second-order disputes, third-order disputes and fourth-order disputes.

A contest over the merits of the dispute is a first-order disagreement, the resolution of which depends on the applicable law and relevant facts. A second-order dispute occurs when parties dispute whether they agreed to arbitrate the merits, i.e., arbitrability.

A third-order dispute may arise over who — a judge or an arbitrator — should have the primary power to decide a second-order dispute. And a fourth-order dispute occurs when parties have multiple agreements that conflict as to the third-order question of who decides arbitrability.

Second- and third-order disputes are also matters of consent and turn on what the parties agreed to concerning that matter.

Justice Jackson reaffirmed the contractual nature of arbitration by emphasizing that a party that has not agreed to arbitrate will normally have a right to the court's decision about the merits of its dispute and that courts should not assume the parties agreed to arbitrate arbitrability issues unless there is clear and unmistakable evidence that they did so. Traditional contract principles also apply to fourth-order disputes.

### **Specific Analysis of the Fourth-Order Issues in Coinbase**

Justice Jackson decisively articulated the Supreme Court's opinion that fourth-order disputes over whether parties agreed to arbitrate issues of arbitrability "can be answered only by determining which contract applies."

When examining the conflict between the delegation clause in a prior contract and the forum selection clause in a subsequent contract, "the question is whether the parties agreed to send the given dispute to arbitration." Without any equivocation, the unanimous Supreme Court stated, "per usual, that question must be answered by a court."

In reaching its decision, the Supreme Court rejected the so-called severability principle without deciding whether it applied here. Under the severability principle, a party challenging arbitration must specifically challenge the validity of the arbitration provisions or the delegation clause rather than the contract as a whole, if it seeks to avoid arbitration.

Because the issue in Coinbase involved which of two whole contracts applied, the Supreme Court concluded a court must address that challenge.

The Supreme Court buttressed its reasoning by explaining that, as a matter of "basic principles of contract," if a party claims an entire contract is invalid, a "court must consider the challenge before ordering compliance."

In Coinbase, because the challenge applied "equally" to the whole contract, and to the arbitration and delegation provisions in that same contract, severability principles did not apply. In other words, the fundamental contract principles upon which all arbitration lies were reinforced. If there is no contract to arbitrate, no arbitration is required.

The holding in Coinbase expressly did not consider whether the Ninth Circuit wrongly held that the official rules' forum selection clause superseded the user agreement's delegation provision. That "auxiliary issue" was outside the scope of the question presented to the Supreme Court.

In his concurring opinion, Justice Neil Gorsuch seized upon the limited scope of the appeal before the Supreme Court, explaining, "sometimes, the parties' agreements may be best read as vesting th[e] power [to determine a fourth-order dispute] in an arbitrator."

Justice Gorsuch hypothesized an arbitration agreement that unmistakably required all disputes about arbitrability to be determined by an arbitrator — without any later amendment.

He noted, "[i]t is not clear ... whether the Ninth Circuit appreciated this point." Justice Gorsuch then clarified the limitations of the majority's decision, explaining: "[T]he Court does not endorse the reasoning in the Ninth Circuit's opinion, let alone its state contract law analysis of the parties' agreements."

### **Practical Impacts of the Coinbase Decision**

First, the Coinbase decision reminds businesses of the absolute importance of drafting contracts in a manner clearly setting forth the parties' intent — especially when multiple contracts are involved.

In particular, if dispute resolution provisions are not consistent, then clarity needs to be provided in the drafting process to ensure clear and unmistakable evidence of the parties' mutual intent to have an arbitrator decide fourth-order disputes about who determines arbitrability issues in circumstances that arguably implicate multiple contracts — if arbitration of the arbitrability issue is intended.

This is a particular concern for parties wishing to avoid putative class actions.

Second, as foreshadowed by Justice Gorsuch's concurring opinion, the state law issue of whether a forum selection clause providing sole jurisdiction to a court supersedes an earlier arbitration agreement will be a primary battleground when these types of disputes are resolved in the future.

Again, careful contract drafting will be important to demonstrate the parties' mutual intent that a subsequent forum selection clause is amending and superseding a prior arbitration agreement — if resolution of the arbitrability issue by a court is intended.

Third, consumer advocate groups will take solace in the fact that disputes with consumers will no longer be presumed subject to arbitration, but will be subject to review by courts to make an initial

determination based on state contract principles whether those disputes will remain in court or proceed to arbitration.

This should help allay fears that the mere existence of arbitration provisions will automatically be enforced to unfairly suppress claims initiated by consumers.

Fourth, the Coinbase decision, in conjunction with other Supreme Court decisions involving the Federal Arbitration Act, may reflect a possible chilling in the traditional favored status of arbitration provisions.

In *Bissonnette v. LePage Bakeries Park St. LLC*, decided on April 12, the Supreme Court **interpreted** the residual clause in Section 1 of the FAA so the class of workers exempt from arbitration under its provisions was not narrowly limited to just transportation workers working for a company in the transportation industry. *Bissonnette* arguably expanded the scope of disputes falling outside the mandates of arbitration under the FAA.

In *Smith v. Spizzirri*, **decided** on May 16, the Supreme Court applied Section 3 of the FAA as overriding the inherent authority of courts to dismiss cases subject to arbitration, and highlighted the "supervisory role that the FAA envisions for the courts."

*Spizzirri* generally requires courts to stay a proceeding when satisfied that all issues involved in the proceeding are referable to arbitration, and expressly "anticipat[es]" the possibility that "parties can return to federal court if arbitration breaks down or fails to resolve [a] dispute."

And, most recently, in *Coinbase*, the Supreme Court minimized the application of both the severability rule and delegation clauses in favor of granting courts the discretion to determine whether prior agreements containing delegation clauses are superseded by subsequent agreements.

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[1] See *Suski v. Marden-Kane, Inc.* , 2022 WL 103541, at \*1 (N.D. Cal. Jan. 11, 2022).

[2] See *Suski v. Coinbase, Inc.* , 55 F.4th 1227 (9th Cir. 2022).