# Arbitration Clauses ~ Who Decides their Validity?

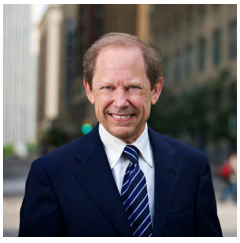
By Ronald N. Ricketts

Recently, the U.S. Supreme Court vacated an opinion of the Oklahoma Supreme Court stating the Oklahoma Court "disregards this Court's precedents" interpreting the Federal Arbitration Act (FAA"). *Nitro-Lift Technologies, L.L.C. v. Howard*, 568 U.S. _____ (2012). The dispute involved the validity under Oklahoma law of Nitro-Lift's non-compete agreements with two former employees. The non-compete agreements contained an arbitration clause that was governed by the FAA. At issue was whether the arbitrator or the court should determine the validity of the non-compete agreements. The Oklahoma Supreme Court said the call belonged to the court—the U.S. Supreme Court disagreed holding that the FAA required that the arbitrator decide their validity.

In its *Nitro-Lift* decision the U.S. Supreme Court applied the "separability" doctrine outlined in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). That doctrine provides that under the FAA an attack on the validity of the underlying contract, as distinct from an attack on the validity of the arbitration clause alone, is to be resolved "by the arbitrator in the first instance, not by a federal or state court." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008). Where the validity of the arbitration clause alone is being challenged, the court decides the validity of the clause. If the court decides the arbitration clause is valid the dispute proceeds to arbitration, if not, it does not.

While *Nitro-Lift* resolves the issue in instances where the FAA applies, a question remains about the applicability of the "separability" doctrine under Oklahoma law. In 2000 Oklahoma adopted the Revised Uniform Arbitration Act, 12 Okla. Stat § 1852-1881 (the "Act"). Section 1875(C) of the Act provides that the arbitrator shall decide "whether a contract containing a valid agreement to arbitrate is enforceable…". According to the comments to the Act this language "is intended to follow the "separability" doctrine outlined in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967)." (*See*, Official Comment to Uniform Arbitration Act ((2000)) U.L.A. § 6).

What is unclear at this point is whether, in cases arising under the Act, and not under the FAA, the Oklahoma Supreme Court will apply the "separability" doctrine when validity of the underlying agreement is challenged as distinguished from the validity of the arbitration clause itself. Up to this point the Oklahoma Supreme Court has taken the position that the validity of the agreement containing an arbitration clause is a matter for the courts to decide. Accordingly, if the intent is to have the arbitrator, rather than the Court, decide the validity and enforceability of the underlying agreement, then that should clearly set that out in the underlying agreement.



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