

# Is there really an agreement to arbitrate?

## When faced with a motion to compel arbitration, your first question is "does an agreement to arbitrate that dispute exist?"

**By Brian J. Malloy**

An arbitration clause can throw havoc into your case and prevent the public from learning of wrongdoing. If your case involves an arbitration clause, a lot of great articles exist discussing the various aspects of opposing a motion to compel arbitration. This article will focus on a threshold issue: Is there even an agreement to arbitrate the dispute at issue?

While this question may sound too basic, defendants have frequently attempted to invoke broad arbitration clauses and the "strong federal policy" favoring arbitration to situations that were never contemplated by the parties. This article will highlight the caselaw and situations to look for in determining whether an agreement to arbitrate the dispute even exists.

### Arbitration is a matter of contract law, not more and not less

The Federal Arbitration Act ("FAA") governs written agreements to settle by arbitration disputes involving commerce. (9 U.S.C. § 2.) Section 2 of the FAA states that a written agreement to arbitrate "a controversy thereafter arising out of such contract or transaction" to be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity" to revoke a contract. (9 U.S.C. § 2.) The FAA was passed to counter what some saw as a judicial hostility to the enforceability of arbitration agreements.

Defendants will often cite the U.S. Supreme Court's statements that there is a "strong federal presumption in favor of arbitration." That is only partially correct. The FAA actually reflects *two* policies: a "liberal federal policy favoring arbitration," but also, the "fundamental principle that arbitration is a matter of contract." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 (citations omitted).) Arbitration clauses are not to be placed on a greater footing than other contracts. Rather, the FAA reflects the principle that courts must place agreements to arbitrate future disputes "on an equal footing with" other types of contracts. (*Ibid.*)

This is important because the "policy favoring arbitration" is not meant to be a vehicle to impose arbitration where application of general contract principles would not. Instead, arbitration is only to be placed on the same level as other contracts. (*Granite Rock Co. v. Int' Bhd. of Teamsters* (2010) 561 U.S. 287, 302; *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 478.)

The U.S. Supreme Court has rendered many pro-arbitration decisions over the past several decades. However, there is also a line of authority that rejects the imposition of arbitration where contract law would otherwise not result in arbitration. (See, e.g., *Granite Rock Co.*, 561 U.S. at 302; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404 n.12.) The Supreme Court recognizes that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (*AT&T Techs., Inc. v. Commc'ns Workers of Am.* (1986) 475 U.S. 643, 648 (quotation omitted); see also *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 219-20.) Arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." (*Volt*, 489 U.S. at 479.)

If you are faced with an arbitration clause, it is important to keep the above in mind. Basic contract law principles apply, and arbitration is not to be enforced where application of contract law would not result in arbitration of the dispute.

***The presumption in favor of arbitration is absent on the issue of whether there is an agreement to arbitrate the dispute***

That arbitration clauses are to be treated no differently than other types of contracts becomes important in the threshold issue of whether there is even an agreement to arbitrate the dispute at issue. While a court's role has been called "limited" when faced with a motion to compel arbitration, a court does have two issues to resolve: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." (*Chiron Corp. v. Ortho Diagnostic Sys., Inc.* (9th Cir. 2000) 207 F.3d 1126, 1130.) If both questions are answered in the affirmative, the FAA requires the court "to enforce the terms of the arbitration agreement in accordance with its terms." (*Ibid.*; *Revitch v. DIRECTV, LLC* (9th Cir. 2020) 977 F.3d 713, 716.)

While there is a strong federal presumption in favor of arbitration, where a party challenges the very existence of an agreement to arbitrate, "the presumption in favor of arbitrability

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does not apply." (*Goldman, Sachs & Co. v. City of Reno* (9th Cir. 2014) 747 F.3d 733, 742.) Just last year, the Supreme Court reaffirmed that arbitration is to be placed on the *same* footing as contract law, but not more so. (See *Morgan v. Sundance, Inc.* (May 23, 2022) __U.S.__, 142 S.Ct. 1708.) In *Morgan*, the Court unanimously rejected an arbitration-specific procedural rule that a party waives its arbitration right by litigating only when its conduct prejudices the other side. (*Id.* at 1711-12.) Lower courts adopted this extra prejudice requirement, typically not found in the waiver analysis of other rights, due to the FAA's "policy favoring arbitration." (*Ibid.*)

The Supreme Court in *Morgan* explained that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." (*Id.* at 1713 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24).) That policy, instead, "is to make 'arbitration agreements as enforceable as other contracts, but not more so.'" (*Ibid.* (quoting *Prima Paint*, 388 U.S. at 404 n.12).) Courts therefore should not create "custom-made rules, to tilt the playing field in favor of (or against) arbitration." (*Id.* at 1714.)

The Ninth Circuit has followed the Supreme Court directive and recognized that "'[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" (*Knutson v. Sirius XM Radio Inc.* (9th Cir. 2014) 771 F.3d 559, 565 (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.* (1960) 363 U.S. 574, 582).) It is the party seeking to compel arbitration who bears the burden of demonstrating by a preponderance that the parties entered into a valid agreement to arbitrate the claim at issue. (*Ibid.*)

The guiding principle on this threshold issue is "[a]rbitration is a matter of contract" and "[s]tate contract law controls whether the parties have agreed to arbitrate." (*Knutson*, 771 F.3d at 565 (citations omitted).) Contract law effectuates the mutual intent and reasonable expectation of the parties as they existed at the time of contracting. (*Miller v. Glenn Miller Prods., Inc.* (9th Cir. 2006) 454 F.3d 975, 989.)

Therefore, if you are faced with a motion to compel arbitration, one of the first questions is whether an agreement to arbitrate that dispute exists. The court will analyze that issue under general contract laws and not apply any presumption in favor of sending your case to arbitration.

## Courts do not impose arbitration where there is no agreement to arbitrate the dispute at issue

But when would a defendant try to enforce an arbitration clause where there is none? A common situation is when there are multiple agreements or transactions amongst the parties, one of which is governed by an arbitration clause, one of which is not. A dispute may develop over the agreement or transaction without the arbitration clause, but the defendant may seek arbitration based on the arbitration-containing agreement. Many courts will not compel arbitration based on the unrelated arbitration-containing agreement. (*Revitch*, 977 F.3d at 715-18; *Int'l Ambassador Programs, Inc. v. Archexpo* (9th Cir. 1995) 68 F.3d 337, 340; *Calderon v. Sixt Rent a Car, LLC* (11th Cir. 2021) 5 F.4th 1204, 1207; *Smith v. Steinkamp* (7th Cir. 2003) 318 F.3d 775, 776-77. See also, e.g., *Goodrich Cargo Sys. v. Aero Union Corp.* (N.D. Cal. Dec. 14, 2006) No. C-06-06226, 2006 WL 3708065, at *2 [arbitration provision inapplicable to dispute over separate agreement, even though parties were the same and the two agreements pertained to a single transaction]; *Converged IT, LLC v. Business Development Solutions, Inc.* (D. Ariz. Feb. 10, 2006) No. CV-05-2489 PHX ECV, 2006 WL 322468, at *1-2.)

Whether a dispute is subject to arbitration is grounded in contract law, and courts do not allow parties to use prior or unrelated arbitration agreements to bootstrap a dispute not involving an arbitration clause into one that does.

***WalMart and the tire service contract***

The recent Ninth Circuit case of *Johnson v. Walmart, Inc.* (9th Cir. 2023) 57 F.4th 677 is illustrative. There, the plaintiff entered into two different agreements with Walmart. The first agreement involved the purchase of tires and contained an arbitration clause. The second agreement concerned the purchase of lifetime tire balancing and rotation services and did not contain an arbitration clause. The underlying lawsuit involved whether Walmart breached its service contract for failing to provide lifetime tire balancing and rotation services.

Walmart sought to compel arbitration based on the first agreement involving the purchase of tires, but the Ninth Circuit affirmed the denial of Walmart's motion to compel arbitration. Because the case involved the existence of an arbitration clause over the dispute at issue, the Ninth Circuit did not apply the "strong federal presumption in favor of arbitration." (*Id.* at 681-82.) It instead applied general contract principles with Walmart bearing the burden of proof of showing that an agreement to arbitrate existed over the dispute involving the service contract. (*Ibid.*) The court rejected Walmart's argument that the plaintiff's two purchases were merely interrelated contracts in an ongoing series of transactions for which the first agreement's arbitration clause should apply, finding that the two contracts were separate, independent agreements. (*Id.* at 682-83.)

Another situation where this issue may be raised is when the dispute does not arise out of the arbitration-containing contract at issue. In order to be enforceable, the FAA requires the controversy sought to be arbitrated "aris[e] out of" the contract between the parties. (9 U.S.C. § 2.)

***Orbitz.com and the rental-car contract***

The Eleventh Circuit addressed the meaning of section 2's "arising out of" limitation, recognizing a dispute does not arise out of a contract simply because the dispute would not have arisen if the

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contract had never existed. (*Calderon*, 5 F.4th at 1212-13.) Instead, a dispute arises out of the contract when the dispute was an immediate, foreseeable result of performing contractual duties. (*Id.* at 1213.) There, the plaintiff entered into an agreement containing an arbitration clause with online travel booking company Orbtiz.com, where he made a car-rental reservation. The arbitration provision required the customer to arbitrate disputes related to "any services or products provided." (*Id.* at 1206-07.) When the customer later picked up the rental car, he signed a separate agreement with the rental car company, which did not contain an arbitration clause. (*Id.* at 1207.) The customer sued the rental car company for breach of contract and violation of state consumer laws. In response, the rental car company attempted to invoke the arbitration clause contained in the Orbitz agreement.

*Calderon* held that the plaintiff's lawsuit against the rental car company did not arise out of his contract with Orbitz, as it was not an immediate, foreseeable result of performing the contractual duties with Orbitz. (*Id.* at 1213-14.) Further, *Calderon* also addressed the FAA canon that any ambiguity should be resolved in favor of arbitration. (*Id.* at 1212-14.) This canon, the court explained, only applies after the party invoking the arbitration agreement shows that the FAA governs the arbitration agreement at issue. (*Id.* at 1212.) Thus, where a lawsuit is not "arising out of" the arbitration containing contract, then the pro-arbitration canon does not apply. (*Ibid.*)

Therefore, where the dispute is not related to the arbitration clause-containing contract, arbitration should not be imposed on such unrelated disputes because those disputes are not arising out of the contract governed by the FAA. (See *Munro v. Univ. of S. Cal*. (9th Cir. 2018) 896 F.3d 1088, 1091-92 ; *Telecom Italia, Spa v. Wholesale Telecom Corp.* (11th Cir. 2001) 248 F.3d 1109, 1116 ["Disputes that are not related – with at least some directness – to performance of duties specified by the contract do not count as disputes 'arising out of' the contract, and are not covered by the standard arbitration clause."]; see also, e.g., *McFarlane v. Altice USA, Inc.* (S.D.N.Y. 2021) 524 F.Supp.3d 264, 275-79; *Wexler v. AT & T Corp.* (E.D. N.Y. 2016) 211 F.Supp.3d 500, 504-05 ; *In re Jiffy Lube Intern., Inc., Text Spam Litigation* (S.D. Cal. 2012) 847 F.Supp.2d 1253, 1262-63.)

## Conclusion

If you are faced with a motion to compel arbitration, remember that general contract principles apply to whether an agreement to arbitrate the dispute at issue exists, and the pro-arbitration canons will not apply to this threshold issue.



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