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Must I/May I Arbitrate in Bankruptcy?

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I. The Federal Arbitration Act and Arbitration Clauses Generally.

The Federal Arbitration Act ("FAA") was enacted by Congress in 1925 and became effective in 1926. It is codified at Title 9 of the United States Code and is predicated upon Congress's exercise of the Commerce Clause powers granted in the Constitution. The FAA contemplates the judiciary's respect for and enforcement of private parties' agreements to resolve disputes through arbitration. The FAA provides:

> "A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[1]

Thus, arbitration, pursuant to the FAA, is entirely a matter of contract. And, where a contract contains a provision in which parties agreed to submit future disputes thereunder to arbitration, these provisions should be enforced according to their terms. Section 4 of the FAA specifically directs a court to order parties to arbitrate upon a request by a party that is entitled to demand arbitration in a written contract. The courts have often stated that the FAA reflects a liberal federal policy favoring arbitration, and requires arbitration agreements to be rigorously enforced according to their terms.[2] The FAA "expresses a strong national policy favoring arbitration of disputes, and all doubts concerning the arbitrability of claims should be resolved in

[1] 9 U.S.C. § 2.

[2] *See AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011) (citations omitted).

favor of arbitration."[3] A party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity.[4]

When a court is confronted in any litigation with a party's motion to compel arbitration, the Fifth Circuit has generally held there are two threshold questions: (1) whether an arbitration agreement is valid (that is, whether the parties entered into any arbitration agreement at all); and (2) whether the parties' dispute falls within the scope of (or is covered by) the agreement.[5] To evaluate the first prong, courts apply the contract law of the state that governs the agreement.[6] With regard to the second prong—*i.e.,* whether the dispute falls within the scope of what the parties agreed would be arbitrated (sometimes referred to as the "arbitrability question")—courts have held that this "gating" issue is a matter of federal substantive law.[7] Note that sometimes arbitration agreements have "delegation clauses," delegating this "arbitrability question" to an arbitrator to decide—arguably, an odd chicken/egg conundrum. In other words, the agreement is drafted so that a court is supposed to send any contested question of whether a dispute between the parties falls within the arbitration clause to an arbitrator for him or her to decide. "When an agreement contains a valid delegation clause, the court, absent exceptional circumstances,

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[3] *Primerica Life Ins. Co. v. Brown,* 304 F.3d 469, 471 (5th Cir. 2002) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

[4] *Carter v. Countrywide Credit Indus., Inc.,* 362 F.3d 294, 297 (5th Cir. 2004).

[5] *See Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016); *Agere Sys. Inc. v. Samsung Elec. Co. Ltd.*, 560 F.3d 337, 339 (5th Cir. 2009).

[6] *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004) (citation omitted).

[7] *Graves v. BP America, Inc.,* 568 F.3d 221, 222-23 (5th Cir. 2009). Under federal law, courts "resolve doubts concerning the scope of coverage of an arbitration clause in a contract in favor of arbitration." *Neal v. Hardee's Food Sys., Inc.,* 918 F.2d 34, 37 (5th Cir. 1990). Thus, the party seeking to compel arbitration need only show that the arbitration clause can plausibly be read to cover the dispute at issue. *See id.*

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