IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

July 10, 2020

JOHN DOE and JANE DOE, Appellants, v. WAYNE NATT and AIRBNB, INC., Appellees.	)	Case No. 2D19-1383

BY ORDER OF THE COURT:

Appellee's "motion for rehearing en banc, and in the alternative, request for certification from the en banc panel" is denied. On the court's own motion, the prior opinion dated March 25, 2020, is withdrawn and the attached opinion is issued in its place. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOHN DOE and JANE DOE, Appellants, v. WAYNE NATT and AIRBNB, INC., Appellees.	)	Case No. 2D19-1383

Opinion filed July 10, 2020.

Appeal from the Circuit Court for Manatee County; Charles Sniffen, Circuit Judge.

Thomas J. Seider of Brannock & Humphries, Tampa, and Damian Mallard and Alan L. Perez of Mallard Law Firm, P.A., Sarasota, for Appellants.

Charles E. Stoecker and William L. Grimsley of McGlinchey Stafford, PLLC, Fort Lauderdale, for Appellee Airbnb, Inc.

No appearance for remaining Appellee.

LUCAS, Judge

This appeal requires us to delve into the "rather arcane" issue in arbitration[1] of who decides whether a dispute is subject to a contract's arbitration provision: an arbitrator or a judge. As we will explain, the contract's provision in this

[1]See First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995) ("[T]he former question—the 'who (primarily) should decide arbitrability' question—is rather arcane.").

case did not provide clear and unmistakable evidence that only the arbitrator could decide the issue of arbitrability. Therefore, we must reverse the circuit court's order which held to the contrary.

I.

A Texas couple, who will be referred to as John and Jane Doe to preserve their confidentiality, decided to vacation in Longboat Key. Through a business, Airbnb, Inc. (Airbnb), they located a condominium unit online that was available for a short-term rental in the Longboat Key area. Using Airbnb's website, Mr. and Mrs. Doe rented the unit for a three-day stay in May of 2016.

The condominium unit was owned by Wayne Natt. Unbeknownst to the Does, Mr. Natt had installed hidden cameras throughout the unit. The Does allege that Mr. Natt secretly recorded their entire stay in his unit, including some private and intimate interactions. After they learned of Mr. Natt's recordings, the Does filed a complaint in the circuit court of Manatee County, naming both Mr. Natt and Airbnb as defendants. Their complaint included claims of intrusion against Mr. Natt, constructive intrusion against Airbnb, and loss of consortium against both Mr. Natt and Airbnb. In their constructive intrusion claims, the Does alleged that Airbnb failed to warn them of past invasions of privacy that had occurred at other properties rented through Airbnb. They also alleged that Airbnb failed to ensure that Mr. Natt's property did not contain electronic recording devices.

In response to the Does' complaint, Airbnb filed a motion to compel arbitration. Airbnb argued that the Does' claims were subject to arbitration under Airbnb's Terms of Service, which the Does agreed to be bound to pursuant to a

"clickwrap" agreement[2] they had entered when they first created their respective Airbnb accounts online.

Specifically, Airbnb's motion relied upon the following language that appears near the end of the twenty-two-page clickwrap agreement:

> **Dispute Resolution**
>
> You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services of use of the Site or Application (collectively, "Disputes") will be settled by binding arbitration . . . . You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury . . . .
>
> Arbitration Rules and Governing Law. The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this Dispute Resolution section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.) The Federal Arbitration Act will govern the interpretation and enforcement of this section.

Airbnb's motion argued that the Does' complaint's allegations "that Airbnb failed to do what [the Does] alleged should have been done, or otherwise breached certain duties alleged to be owed to them, are claims for negligence, which have been held to be within the scope of broad arbitration provisions, such as the one here." But

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[2]A clickwrap agreement has been defined as one that is entered online by proposing contractual terms and conditions of service to a user, who then indicates his or her assent to the terms and conditions by clicking an "I agree" box. See Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016). In its motion to compel arbitration, Airbnb styled its agreement with the Does as "a modified click-wrap presentation" of Airbnb's terms of service, while the Does refer to it simply as a "clickwrap agreement." Inasmuch as Airbnb's different nomenclature does not appear to encompass any substantive definitional distinction, we will use the more widely understood term clickwrap agreement in this opinion.

according to Airbnb, the circuit court should not even consider whether the Does' claims were arbitrable because the scope of what is or is not arbitrable had to be decided by American Arbitration Association's (AAA) arbitrator, not the circuit court. Issues about the scope of arbitrability had been contractually assigned to the arbitrator, according to Airbnb, by virtue of the clickwrap agreement's reference to the American Arbitration Association's Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes ("AAA Rules"). Although the AAA Rules were not reproduced within the clickwrap agreement, the clickwrap agreement did direct the Does to a AAA website (and telephone number) through which, Airbnb contended, they would have found AAA Rule 7, which states: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim."

A hearing was held before the circuit court on Airbnb's motion on February 6, 2019. On March 7, 2019, the court issued an order granting Airbnb's motion to compel arbitration. The order is noteworthy in two respects. First, the court seemed to be persuaded by the Does' argument that their claims would have been outside the scope of the clickwrap agreement's arbitration provision. However, the circuit court went on to conclude that it was powerless to make that determination because the issue of arbitrability had to be decided by the arbitrator, not the court. The circuit court held "that the parties entered an express agreement which incorporated the AAA rules, and that this court is therefore bound to submit the issue of arbitrability to the arbitrator." In so holding, the circuit court distinguished this court's prior holding in Morton v.

Polivchack, 931 So. 2d 935, 939 (Fla. 2d DCA 2006), as a case that was "fact-specific" and confined to the "particular provision" before that panel and instead relied upon the cases of Reunion West Development Partners, LLLP v. Guimaraes, 221 So. 3d 1278 (Fla. 5th DCA 2017); Younessi v. Recovery Racing, LLC, 88 So. 3d 364 (Fla. 4th DCA 2012); and Terminix International Co. v. Palmer Ranch Ltd. Partnership, 432 F.3d 1327 (11th Cir. 2005), to stay the proceedings and order the parties to proceed to arbitration.

The Does have appealed the circuit court's order pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv).

II.

Generally, we review an order on a motion to compel arbitration de novo. Hernandez v. Crespo, 211 So. 3d 19, 24 (Fla. 2016); Wilson v. AmeriLife of E. Pasco, LLC, 270 So. 3d 542, 545 (Fla. 2d DCA 2019). Issues of contract interpretation are also subject to de novo review. Bethany Trace Owners' Ass'n v. Whispering Lakes I, LLC, 155 So. 3d 1188, 1191 (Fla. 2d DCA 2014). The particular arbitration provision before us is governed by the Federal Arbitration Act (FAA),[3] which can be applied in both federal and state court proceedings. Global Travel Mktg., Inc. v. Shea, 908 So. 2d 392, 396-97 (Fla. 2005).

A.

When a question over arbitrability arises, who should decide the answer—the arbitrator or the court—can pose something of an analytical challenge. However, the United States Supreme Court provided a framework to resolve that first order issue in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995). In First Options, a

[3]See generally 9 U.S.C. §§ 1–307 (2018).

plaintiff firm brought an arbitration proceeding against a husband, his wife, and his wholly owned corporation. In connection with a "workout agreement," the husband's corporation had signed a contract with the plaintiff that contained an arbitration provision, but neither the husband nor his wife had ever executed an agreement with a similar provision. The arbitrators determined they had the power to rule on all the issues before them, including the husband and wife's objections to arbitration, and their award was confirmed by the district court. After the Third Circuit reversed the district court's confirmation, the case came before the Supreme Court. Id. at 940-41.

The First Options Court began its analysis by highlighting the importance of the "who decides" arbitrability question under the FAA:

> Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.

Id. at 942 (citations omitted). The First Options Court then went on to explain how to go about deciding the "who decides" question of arbitrability and the practical concerns that inform that analysis:

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? . . .

> . . . .
>
> When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. . . .
>
> This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: **Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so.** In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement"—for in respect to this latter question the law reverses the presumption.
>
> But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. On the other hand, the former question—the "who (primarily) should decide arbitrability" question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 943-45 (fourth and fifth alterations in original) (bold emphasis added) (citations omitted). The Court concluded that there was no clear and unmistakable evidence that

either the husband or wife had agreed to submit the issue of arbitrability to an arbitrator and affirmed the judgment of the Third Circuit. Id. at 946-47; cf. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84, 86 (2002) (characterizing First Options' clear and unmistakable evidence standard as an "interpretive rule" and a "strong pro-court presumption" that applies "where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate").

In a more recent term, the Supreme Court made it a point to repeat First Options' "who decides" arbitrability test under the FAA: "This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530 (2019) (quoting First Options, 514 U.S. at 944). Thus, as the Supreme Court has repeatedly instructed, under the FAA there must be clear and unmistakable evidence that the parties agreed to have the arbitrator decide threshold questions about arbitrability; short of that, the assumption remains that such disputes are to be decided by a court.

Our district applied First Options in a case that holds certain similarities to the case at bar. In Morton, 931 So. 2d at 938, a dispute arose between a seller and a buyer of a residential property over drainage problems that were later discovered on the property. Pursuant to the purchase contract, the buyer filed a demand for arbitration alleging fraud against the seller, to which the seller responded with various

counterclaims. Id. Both parties sought punitive damages, but the arbitration panel concluded it did not have the authority to award punitive damages. Id. Apparently dissatisfied with that ruling, the buyer filed a separate complaint in the circuit court. Id. When he attempted to assert a claim for punitive damages in the civil proceeding, the trial court agreed with the seller that it did not have the authority to review the arbitration panel's ruling that the arbitration panel had no power to award punitive damages. Id. The buyer appealed, arguing that the circuit court, not the arbitration panel, should have decided the scope of arbitrability for his claim of punitive damages. Id.

Like the Does' clickwrap agreement, the real estate contract in Morton did "not expressly address the question of who decides issues of arbitrability." Id. And, like the clickwrap agreement here, the contract before the Morton court stated that a set of AAA rules would apply in an arbitration proceeding under the contract. Id. There, however, the similarities between the cases appear to diminish.

From what is reported in the Morton opinion, the AAA rules that were adopted in the parties' real estate contract contained a section that generally addressed the timing of raising objections to the arbitrability of a claim; but the rule section did not explicitly state who could decide those objections. Id. at 939. Although one could fairly infer that that section likely contemplated the arbitrator hearing such objections (it was, after all, found within a body of rules promulgated by an arbitration business for use by its arbitrators and customers), the Morton court held otherwise. We explained:

> "[D]ecisions regarding arbitrability are to be made by the trial court, unless the parties have entered an agreement stating otherwise." Romano v. Goodlette Office Park, Ltd., 700 So. 2d 62, 64 (Fla. 2d DCA 1997) (relying on Thomas W. Ward & Assocs. v. Spinks, 574 So. 2d 169 (Fla. 4th DCA 1991)); see also Royal Prof'l Builders, Inc. v. Roggin, 853

> So. 2d 520, 523 (Fla. 4th DCA 2003); Premier Med. Mgmt., Ltd. v. Salas, 830 So. 2d 959, 961 n.2 (Fla. 1st DCA 2002). "Contractual silence or ambiguity regarding who determines the questions of arbitrability is insufficient to give that authority to the arbitrators." Romano, 700 So. 2d at 64. "If . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." Id. at 944, 115 S. Ct. 1920 (quoting AT & T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)).

Id. at 938-39 (alterations in original).

The Morton court found "no merit" in the seller's argument that the circuit court could not decide arbitrability of the punitive damages claim because the AAA rule, we observed, "only addresses the procedure of raising an objection to arbitrability in an arbitration proceeding when the arbitration panel has the authority to decide issues of arbitrability. The provision does not itself grant the arbitration panel that authority." Id. at 939 (emphasis omitted).

The question we did not answer in Morton—and which we must now decide—is whether a contract's arbitration provision's reference to an arbitration rule that *does* grant an arbitrator the authority to decide arbitrability clearly and unmistakably supplants a court's power to rule on the issue of arbitrability. In this case, we hold it does not.

B.

Arbitration provisions are creatures of contract and must be construed as "a matter of contract interpretation." See Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999) (citing Seaboard Coast Line R.R. v. Trailer Train Co., 690 F.2d 1343, 1352 (11th Cir. 1982); R.W. Roberts Constr. Co. v. St. Johns River Water Mgmt. Dist., 423 So. 2d 630, 632 (Fla. 5th DCA 1982)); 4927 Voorhees Road, LLC v. Mallard, 163 So. 3d 632, 634 (Fla. 2d DCA 2015). "[C]ourts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 339 (2011) (citations omitted) (first citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006); and then citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)). " 'When interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent.' . . . 'Intent unexpressed will be unavailing . . . .' " Beach Towing Servs., Inc. v. Sunset Land Assocs., 278 So. 3d 857, 860 (Fla. 3d DCA 2019) (first quoting Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017); and then quoting Moore v. Stevens, 106 So. 901, 903 (Fla. 1925)). It is often observed that if there is a dispute over the scope of arbitrability in a contract, courts will generally resolve the dispute in favor of arbitration. See Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013). The question we are faced with, though, is not *what* the scope of arbitration is under the clickwrap agreement, but *who* should decide that issue. That question is answered from a different perspective: "[C]ourts should not assume that the parties agreed to submit issues concerning arbitrability to the arbitrator, unless there is a clear and unmistakable agreement to do so[,]" and furthermore, contractual ambiguity "is insufficient to give that authority to the

arbitrators." Romano v. Goodlette Office Park, Ltd., 700 So. 2d 62, 64 (Fla. 2d DCA 1997) (citing First Options, 514 U.S. at 944)); see also Henry Schein, 139 S. Ct. at 530; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69 n.1 (2010)

With that in mind, we will begin by pointing out what is conspicuously missing in the clickwrap agreement's language. The agreement itself is silent on the issue of who should decide arbitrability. Cf. Romano, 700 So. 2d at 64. And although the circuit court concluded that the AAA Rules had been "incorporated" into the parties' clickwrap agreement for purposes of determining arbitrability (which, the court then determined, precluded its authority to decide arbitrability), the agreement did not actually say that. Indeed, whatever may be gleaned from the AAA Rules (a point we will turn to shortly), those rules were referenced in the clickwrap agreement as a generic body of procedural rules, and that reference was limited to how "the arbitration" was supposed to be "administered." Plainly, the agreement's reference to the AAA Rules and AAA's administration addresses an arbitration that is actually commenced. In other words, the directive is necessarily conditional on there being an arbitration. If a claim is arbitrated, then the AAA Rules apply. But if the question were put, "Who should decide if this dispute is even subject to arbitration under this contract?" to respond, "The arbitration will be administered by the American Arbitration Association ('AAA') in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes," is not a very helpful answer and not at all clear.

Moreover, the reference to the AAA Rules was broad, nonspecific, and cursory: the clickwrap agreement simply identified the entirety of a body of procedural rules. The agreement did not quote or specify any particular provision or rule, such as

the one Airbnb now relies upon. And the AAA Rules were not attached to the agreement.[4] Instead, the agreement directed the Does to AAA's website and phone number if they wished to learn more about what was in the AAA Rules. Which strikes us as a rather obscure way of evincing "clear and unmistakable evidence" that the parties intended to preclude a court from deciding an issue that would ordinarily be decided by a court.

Assuming the clickwrap agreement's passing reference to AAA and the AAA Rules sufficiently showed an intent that those rules (whatever they may say) *could* supplant the trial court's presumed authority to decide arbitrability, there is then the added uncertainty of whether the AAA Rules, in fact, *did* so. Again, the pertinent arbitration rule Airbnb relies upon states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim." And, again, we find something missing. This rule confers an adjudicative power upon the arbitrator, but it does not purport to make that power exclusive. Nor does it purport to contractually remove that adjudicative power from a court of competent jurisdiction. See Ajamian v. CantorCO2e, L.P., 137 Cal. Rptr. 3d 773, 790 (Cal. Ct. App. 2012) ("[T]he rule merely states that the arbitrator shall have 'the power' to determine issues of its own jurisdiction . . . . This tells the reader almost nothing, since a court *also* has the power to decide such issues, and nothing in the AAA

[4]In their brief, the Does also suggested that the hyperlink to the AAA Rules in the clickwrap agreement was inoperative, but the record appears to be silent on this point (no one proffered any evidence below as to whether or not the link worked).

rules states that the AAA arbitrator, as opposed to the court, *shall* determine those threshold issues, or has *exclusive* authority to do so . . . ."). Indeed, in most interpretive contexts, the statement, "shall have the power," does not even constitute a mandatory directive. See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984) (concluding that the phrase "Congress shall have the power" is permissive (citing Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 530 (1972))); People ex rel. Oak Supply & Furniture Co. v. Dep't of Rev., 342 N.E. 2d 53, 55 (Ill. 1976) (construing state statute that authorized state's department of revenue to issue subpoenas, concluding that "the word 'shall' is to be read as permissive—'shall have the power to' or 'may' "); Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820, 825 (Ky. 1942) (observing that the statutory phrase "shall have the power and the authority" is equivalent to "the permissive word, 'may' ")

In our view, the parties' "manifestation of intent," see Rent-A-Center, 561 U.S. at 69 n.1 (emphasis omitted), in the clickwrap agreement fell short of the clear and unmistakable evidence of assent that First Options requires.

C.

We recognize that our decision may constitute something of an outlier in the jurisprudence of arbitration. Several federal circuit courts of appeal have concluded that an arbitration rule that confers a general authority on an arbitrator to decide questions of arbitrability, when incorporated into an agreement, evinces a sufficiently clear and unmistakable intent to withdraw the issue from a court's consideration. See, e.g., Belnap v. Iasis Healthcare, 844 F.3d 1272, 1290 (10th Cir. 2017) ("[A]lthough this is a question of first impression in our court, a majority of our sister circuits have

concluded that a finding of clear and unmistakable intent to arbitrate arbitrability—which may be inferred from the parties' incorporation in their agreement of rules that make arbitrability subject to arbitration—obliges a court to decline to reach the merits of an arbitrability dispute regarding the substantive claims at issue."); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. . . . We see no reason to deviate from the prevailing view . . . ." (citations omitted)); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012) ("We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); Terminix Int'l Co., 432 F.3d at 1332 ("By incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid."); Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005) ("We have held that when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); Apollo Computer, Inc. v. Berg, 886 F.2d 469, 473 (1st Cir. 1989) ("By contracting to have all disputes resolved according to the Rules of the ICC, however, Apollo agreed to be bound by Articles 8.3 and 8.4. These provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there

exists a *prima facie* agreement to arbitrate whose continued existence and validity is being questioned.").

Two of our sister district courts of appeal have followed this trend. See Reunion W. Dev. Partners, LLLP, 221 So. 3d at 1280 ("[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." (alterations in original) (quoting Contec Corp., 398 F.3d at 208)); Glasswall, LLC v. Monadnock Constr., Inc., 187 So. 3d 248, 251 (Fla. 3d DCA 2016) ("In so holding, we note that the parties are in agreement that the majority of federal courts considering similar circumstances where the AAA's arbitration rules have been incorporated by reference into a contract likewise have found that the parties sufficiently evidenced their intent to have arbitrators, not a court, hear and decide issues of arbitrability.").

We respectfully disagree with these holdings because we do not believe they comport with what First Options requires. As the Does point out, none of these cases have ever examined how or why the mere "incorporation" of an arbitration rule such as the one before us (which the Belnap court candidly likened to "inferring" assent, 844 F.3d at 1290) satisfies the heightened standard the Supreme Court set in First Options, nor how it overcomes the "strong pro-court presumption" that is supposed to attend this inquiry. See Howsam, 537 U.S. at 86. Most of the opinions have simply stated the proposition as having been established with citations to prior decisions that did the same. Both parties identify the principal case (from which all these holdings appear to have derived) as the First Circuit's Apollo decision. But Apollo was issued

years before the Supreme Court's First Options opinion, and so the Apollo court could not have had First Options' instructions in mind when it issued its opinion. Moreover, Apollo's analysis on this point was quite limited, comprising of (1) identifying an arbitration rule that conferred a generalized power to decide arbitrability to the arbitrator, (2) observing that the rule had been incorporated into the parties' agreement, and (3) stating "[t]hese provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate." 886 F.2d at 473.[5] Apparently, the court simply deemed the requisite clarity to have been self-evident.[6]

If it was, we confess our failure to see it here. In the case at bar we have an arguably permissive and clearly nonexclusive conferral of an adjudicative power to an arbitrator, found within a body of rules that were not attached to the agreement, that itself did nothing more than identify the applicability of that body of rules if an arbitration

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[5]Apollo also cited to the First Circuit's prior case of Societe Generale de Surveillance, S.A. v. Raytheon European Management & Systems Co., 643 F.2d 863, 869 (1st Cir. 1981), as authority for its conclusion. However, the Societe Generale case was not a dispute over whether a court or an arbitrator should decide arbitrability but rather one about *which arbitrator*, in Massachusetts or in Switzerland, was authorized to preside over a commercial dispute between a French corporation and a Massachusetts corporation. The First Circuit simply concluded that a district court acted "well within its discretion" to allow the Swiss arbitrator to decide the question of its jurisdiction because the applicable rules empowered that arbitrator to do so and "[s]ince the arbitrators there are more likely to be familiar with commercial dealings in this area and with French law." Societe Generale, 643 F.2d at 869.

[6]Airbnb's argument for affirmance runs the same course. In its brief, Airbnb dismisses the absence of a more in-depth consideration of this question in Apollo because "no further analysis was required of the court in Apollo. The parties in Apollo agreed to be bound by the ICC Rules. The ICC Rules contained a delegation clause. The [c]ourt's analysis properly ended there."

is convened. That is not "clear and unmistakable evidence" that these parties agreed to delegate the "who decides" question of arbitrability from the court to an arbitrator. To the contrary, the provision Airbnb relies upon is two steps removed from the agreement itself, hidden within a body of procedural rules, and capable of being read as a permissive direction. It is at best ambiguous. We may quibble over what the precise measure of the Supreme Court's "clear and unmistakable evidence" standard should entail,[7] but it surely means evidence of intent that is not ambiguous. Cf. Romano, 700 So. 2d at 64. Otherwise, we will be treating the "who decides" issue of arbitrability no differently than any other issue of arbitration, when the Supreme Court has instructed, repeatedly, that it is a qualitatively different inquiry with a different analysis. See First Options, 514 U.S. at 944-45 ("[T]he law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable . . . for in respect to this latter question the law reverses the presumption. But, this difference in treatment is understandable." (citations omitted)).

III.

We hold that the clickwrap agreement's arbitration provision and the AAA rule it references that addresses an arbitrator's authority to decide arbitrability did not, in

[7]Cf. Richard W. Hulbert, Institutional Rules and Arbitral Jurisdiction: When Party Intent is not "Clear and Unmistakable", 17 Am. Rev. Int'l Arb. 545, 571-72 (2006) ("Courts can stop misreading arbitral institutional rules. The doctrine that has resulted is a judicial creation and judicial action could readily resolve it. If that step alone were taken, the question of party intent would be dealt with as the matter of fact it is and not a matter of law to be determined by a factitious inference from institutional rules. It might then prove to be the rare case where it would be found as a fact that the parties actually intended that the arbitrators' decision as to their jurisdiction should constitute the final and determinative decision of that issue." (footnote omitted)).

themselves, arise to "clear and unmistakable" evidence that the parties intended to remove the court's presumed authority to decide such questions. The evidence on what these parties may have agreed to about the "who decides" arbitrability question was ambiguous; therefore, the court retained its presumed authority to decide the arbitrability dispute. The circuit court did not have the benefit of our decision today and so was bound to rely upon the Fifth District's Reunion decision and the Fourth District's Younessi opinion when it entered the order below. See Conquest v. Auto-Owners Ins. Co., 637 So. 2d 40, 43 (Fla. 2d DCA 1994) ("[I]f this court has not spoken on a subject but another district has, the trial courts of this district must follow that decision." (citing Chapman v. Pinellas County, 423 So. 2d 578 (Fla. 2d DCA 1982))). Because we disagree with the conclusion those courts appeared to reach concerning what constitutes sufficient clarity and unmistakability of intent to have an arbitrator, rather than a court, resolve questions of arbitrability, we certify conflict with Reunion and Younessi to the extent they are inconsistent with our decision today.

Reversed; remanded with instructions; conflict certified.

SLEET, J., Concurs.
VILLANTI, J., Dissents with opinion.

VILLANTI, Judge, Dissenting.

I respectfully dissent from the majority's outlier determination that the clickwrap agreement used by Airbnb did not exhibit an unmistakable intent to assign the issue of arbitrability to the arbitrator. For better or worse, we, as a society, have

decided to choose the speed and convenience of the Internet over more traditional modes of communication. A fully electronic stream of commerce is now firmly embedded in our society, and we have long since crossed the point of no return. When paper is eliminated in favor of speed and convenience, it should come as no surprise that contracting parties resort to incorporating material by reference—which in this instance includes the AAA rules and specifically Rule 14(a),[8] which allows the arbitrator to decide arbitrability in the first instance. Cf. ADP, LLC v. Lynch, Nos. 2:16-01053, 2:16-01111, 2016 WL 3574328, at *4 (D.N.J. June 30, 2016) ("[C]lickwrap agreements that incorporate additional terms by reference will generally provide 'reasonable notice' that the additional terms apply."); Nathan J. Davis, Presumed Assent: The Judicial Acceptance of Clickwrap, 22 Berkeley Tech. L.J. 577, 579 (2007) ("[T]he courts have unanimously found that clicking is a valid way to manifest assent since the first clickwrap agreement was litigated in 1998.").

As an initial point, I take issue with the majority's assertion that "[p]lainly, the agreement's reference to the AAA Rules and AAA's administration addresses an

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[8]When the Does originally signed up with Airbnb, when they made their reservation, and when they stayed at the condo in Naples, the Airbnb clickwrap agreement incorporated the AAA "Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes" and required that disputes would be handled under the rules in effect at the time of the dispute. Under the Commercial Arbitration Rules, the jurisdictional provision was in Rule 7. Subsequently, after the Does stayed in Naples but before they filed suit, Airbnb amended its Terms of Service because the AAA had amended and renamed the Supplementary Procedures for Consumer Related Disputes to be the AAA Consumer Arbitration Rules. Under those rules, the jurisdictional provision is in Rule 14(a). See https://adr.org/sites/default/files/Consumer_Rules_Web_0.pdf. Hence, when the Does filed their complaint on May 15, 2018, the applicable rules were the Consumer Arbitration Rules. Regardless of which set of rules is reviewed, however, the relevant language of the two provisions is the same.

arbitration that is actually commenced. In other words, the directive is necessarily conditional on there being an arbitration." With respect to the application of Rule 14(a), this is illogical: The question of whether a claim is arbitrable must, by necessity, be determined before the commencement of arbitration. Thus, Rule 14(a) can only apply at the outset of a claim, not after the arbitration has already commenced.

I also take issue with the majority's statement, "Like the Does' clickwrap agreement, the real estate contract in Morton did 'not expressly address the question of who decides issues of arbitrability.' " (Quoting Morton, 931 So. 2d at 938). This is misleading. The rule at issue in Morton came from the Commercial Arbitration and Mediation Center for the Americas (CAMCA) Mediation and Arbitration Rules. In that case, the rule at issue said only, "[O]bjections to the arbitrability of a claim must be raised no later than thirty (30) days after notice to the parties of the commencement of the arbitration." 931 So. 2d at 939. But, as we observed in Morton, "This provision only addresses the procedure of raising an objection to arbitrability in an arbitration proceeding *when the arbitration panel has the authority to decide issues of arbitrability.* The provision does not itself grant the arbitration panel that authority." Id. (underline emphasis added). Thus, Morton is distinguishable from the instant case because in Morton, the question of who had the authority to decide issues of arbitrability was not addressed in the cited provisions of the CAMCA rules at all; whereas the referenced provision at issue in this case does address the question. Although the majority admits that Morton is distinguishable, the premise that the contract in Morton was similar to the contract in this case in that it failed to "expressly address the question of who decides issues of arbitrability" is, in my view, a false premise.

Most importantly, I take issue with the majority's attempt to minimize the scope of Rule 14(a) because, the majority says, it does not give the arbitrator the exclusive power to decide arbitrability. This ignores the obvious: the power to decide is the power to decide. To contend that the absence of the term "exclusive" (or words to that effect) in relation to the arbitrator gives exclusive power to the trial court sub silentio to make that decision is, in my view, a stretch too far. Indeed, the word "exclusive," emphasized by the majority, does not appear at all in First Options, the Supreme Court case upon which the majority hangs its hat, or in Howsam, Henry Schein, Morton, Petrofac, Terminix, Reunion, or Glasswall. Although the term is used in Rent-A-Center and Ajamian, that is only because the contracts at issue in those cases employed the word. The word is also used in Oracle America—but that case provides a particularly on-point object lesson which I think supports my view. In Oracle America, the contract provided, "Any dispute arising out of or relating to this License shall be finally settled by arbitration as set out herein, except that either party may bring any action, in a court of competent jurisdiction (which jurisdiction shall be exclusive)." 724 F.3d at 1071 (emphasis added). However, the contract also incorporated by reference the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), which contained a clause that provided either that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement" (1976 version), or that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of

the arbitration agreement" (2010 version).[9] Id. at 1073. Either version of the provision, concluded the court, "vest[ed] the arbitrator with the apparent authority to decide questions of arbitrability" and therefore "constitute[d] clear and unmistakable evidence that the parties intended to arbitrate arbitrability." Id. Thus, the arbitration rules incorporated into the contract by reference—although not containing the word "exclusive" or words to that effect—constituted clear and unmistakable evidence of the parties' intent to arbitrate arbitrability, despite the provision that a court would have "exclusive" jurisdiction over disputes relating to intellectual property rights or the software license at issue in that case.

In sum, the rule expressed in First Options and the other cited opinions is "clear and unmistakable," not "exclusive." These words do not mean the same thing. Here, the majority has created a new requirement that the contract must confer an "exclusive" power upon the arbitrator or arbitration panel to determine the arbitrability of an issue. This result is at odds with a substantial body of law; and I think the analysis leading to this outlier result is both hypertechnical and an unnecessary exercise in legal polemics.

I conclude that the incorporation by reference of AAA Consumer Arbitration Rule 14(a) into a contract comprises "clear and unmistakable evidence" of the parties' agreement to arbitrate arbitrability and is fully consistent with the principles announced in First Options. For this reason, I would follow our sister courts' decisions

[9]The parties disagreed as to whether the 1976 or 2010 version of the rules applied. The Ninth Circuit held that the difference in the wording between the two versions was immaterial. Oracle America, 724 F.3d at 1073.

in Reunion and Glasswall, as well as the long line of federal cases aptly cited by the majority that are in accord, and would affirm.