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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2015-2016

1141153

Federal Insurance Company

v.

Kert Reedstrom

Appeal from Marshall Circuit Court
(CV-14-900463)

STUART, Justice.

Federal Insurance Company appeals the order of the Marshall Circuit Court denying its motion to compel arbitration of the breach-of-contract claim asserted against it by Kert Reedstrom. We reverse and remand.

I.

In 2008, Reedstrom entered into a written employment agreement with Marshall-Jackson Mental Health Board, Inc., d/b/a Mountain Lakes Behavioral Healthcare ("MLBHC"), to begin serving as its executive director in Guntersville. During the course of Reedstrom's employment with MLBHC, MLBHC held an executive-liability, entity-liability, and employment-practices-liability policy issued by Federal Insurance ("the Federal Insurance policy") that generally protected certain MLBHC officers and employees described as "insureds" in the policy from loss for actions committed in the course of their employment with MLBHC. It is undisputed that Reedstrom was in fact an "insured" covered by the Federal Insurance policy.

The Federal Insurance policy contained the following arbitration provision:

> "Any dispute between any insured and [Federal Insurance] based upon, arising from, or in consequence of any actual or alleged coverage under this coverage section, or the validity, termination or breach of this coverage section, including but not limited to any dispute sounding in contract or tort, shall be submitted to binding arbitration.
>
> "[MLBHC], however, shall first have the option to resolve the dispute by non-binding mediation pursuant to such rules and procedures, and using such mediator, as the parties may agree. If the

> parties cannot so agree, the mediation shall be administered by the American Arbitration Association pursuant to its then prevailing commercial mediation rules.
>
> "If the parties cannot resolve the dispute by non-binding mediation, the parties shall submit the dispute to binding arbitration pursuant to the then-prevailing commercial arbitration rules of the American Arbitration Association, except that the arbitration panel shall consist of one arbitrator selected by the insureds, one arbitrator selected by [Federal Insurance], and a third arbitrator selected by the first two arbitrators."

A separate endorsement to the Federal Insurance policy further highlighted the arbitration provision and explained that its effect was that any disagreement related to coverage would be resolved by arbitration and not in a court of law.

In July 2010, MLBHC terminated Reedstrom's employment and, in December 2010, Reedstrom sued MLBHC in the Marshall Circuit Court alleging that MLBHC's termination of his employment constituted a breach of his employment contract. Subsequently, MLBHC asserted various counterclaims against Reedstrom based on his alleged misconduct while serving as executive director. Thereafter, Reedstrom gave Federal Insurance notice of the claims asserted against him and requested coverage under the terms of the Federal Insurance policy. Federal Insurance ultimately denied his claim,

however, and refused to provide him with counsel to defend against MLBHC's claims.

In May 2014, Reedstrom and MLBHC's claims were the subject of a jury trial, at the conclusion of which the jury returned a verdict awarding Reedstrom $150,000 on his claim against MLBHC and awarding MLBHC $60,000 on its claims against Reedstrom. Consistent with its previous denial of his request for coverage, Federal Insurance refused Reedstrom's request to satisfy the judgment entered against him.

On September 17, 2014, Reedstrom sued Federal Insurance, asserting one claim of breach of contract and seeking $72,000 in damages -- $60,000 based on the judgment entered against him and $12,000 for the attorney fees he incurred in defending those claims. On November 7, 2014, Federal Insurance moved the trial court to compel the arbitration of Reedstrom's claim based on the arbitration provision in the Federal Insurance policy that Reedstrom was alleging had been breached. Reedstrom opposed the motion and, on May 20, 2015, the trial court conducted a hearing to consider the parties' arguments relating to arbitration. On June 16, 2015, the trial court denied Federal Insurance's motion to compel arbitration, and,

on July 27, 2015, Federal Insurance appealed that judgment to this Court pursuant to Rule 4(d), Ala. R. Civ. P.

II.

Our standard of review of a ruling denying a motion to compel arbitration is well settled:

> "'This Court reviews de novo the denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Yarbrough, 779 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. "[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question." Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n. 1 (Ala. 1995) (opinion on application for rehearing).'"

Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003) (quoting Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000)).

III.

It is undisputed that there exists a contract calling for arbitration -- the Federal Insurance policy -- and that that contract evidences a transaction affecting interstate

commerce. Inasmuch as Federal Insurance established these undisputed facts when moving the trial court to compel arbitration, the burden of proof shifted to Reedstrom to establish that the arbitration provision in the Federal Insurance policy was either invalid or did not apply to his dispute with Federal Insurance. The trial court did not, in its order denying Federal Insurance's motion to compel arbitration, articulate the rationale for that denial; however, Reedstrom argues to this Court that the denial was proper because (1) Federal Insurance allegedly waived its right to invoke the arbitration provision in the Federal Insurance policy and (2) Reedstrom was not a signatory to the Federal Insurance policy. Federal Insurance argues that there is no merit to either of those arguments; however, it also argues that, to the extent the trial court even considered those arguments, the trial court erred because, pursuant to the arbitration provision in the Federal Insurance policy, issues of arbitrability were to be decided by the arbitrators, not a trial court.

In Anderton v. Practice-Monroeville, P.C., 164 So. 3d 1094, 1098-1102 (Ala. 2014), we recognized the general rules

that apply in arbitration cases providing that both waiver and nonsignatory issues of the type raised by Reedstrom should be resolved by the trial court before the underlying dispute is sent to arbitration if, in fact, arbitration is ultimately determined to be the proper forum for the dispute. However, we also recognized that these general rules have their exceptions. With specific regard to the waiver issue, we stated:

> "As a threshold matter, we address whether the waiver issue is one for the circuit court or the arbitrator to decide. This Court has stated that 'the issue whether a party has waived the right to arbitration by its conduct during litigation is a question for the court and not the arbitrator.' Ocwen Loan Servicing, LLC v. Washington, 939 So. 2d 6, 14 (Ala. 2006). However, the general rule that the court and not the arbitrator decides whether a party has waived the right to arbitration has an exception: issues typically decided by the court will be decided by the arbitrator instead when there is '"clear and unmistakable evidence"' of such an agreement in the arbitration provision. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (quoting AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (alterations omitted)); see also Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 14 (1st Cir. 2005) (citing First Options)."

Anderton, 164 So. 3d at 1098 (footnote omitted).[1] The Anderton Court thereafter addressed the nonsignatory issue as well, stating:

> "The question whether an arbitration provision may be used to compel arbitration of a dispute between a nonsignatory and a signatory is a question of substantive arbitrability (or, under the Supreme Court's terminology, simply 'arbitrability'). In First Options [of Chicago, Inc. v. Kaplan], 514 U.S. [938,] 943-46 [(1995)], the Supreme Court analyzed the question whether an arbitration agreement binds a nonsignatory as a question of arbitrability. See also Howsam [v. Dean Witter Reynolds], 537 U.S. [79,] 84 [(2002)] (noting that in First Options the Supreme Court held that the question 'whether the arbitration contract bound parties who did not sign the agreement' is a question of arbitrability for a court to decide). More recently, the United States Court of Appeals for the Eighth Circuit succinctly addressed the threshold issue before us. In Eckert/Wordell Architects, Inc. v. FJM Properties of Willmar, LLC, 756 F.3d 1098 (8th Cir. 2014), a nonsignatory sought to compel arbitration of a dispute with a signatory, as in this case. The court stated:
>
> > "'Whether a particular arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is

[1]Although this Court in Anderton held that an arbitrator should decide whether a party has waived its right to arbitration if the arbitration provision clearly and unmistakably indicates that the parties agreed that the arbitrator should make that decision, the Anderton Court ultimately declined to consider whether the parties in that case had made such an agreement because the appellants had failed to raise that issue in a timely manner. 164 So. 3d at 1098-99.

> a threshold question of arbitrability. See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84-85, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (delineating potentially dispositive threshold issues between "questions of arbitrability" and "procedural questions"). We presume threshold questions of arbitrability are for a court to decide, unless there is clear and unmistakable evidence the parties intended to commit questions of arbitrability to an arbitrator. Id. at 83, 123 S.Ct. 588; Express Scripts, Inc. v. Aegon Direct Mktg. Servs., Inc., 516 F.3d 695, 701 (8th Cir. 2008). We have previously held the incorporation of the AAA [American Arbitration Association] Rules into a contract requiring arbitration to be a clear and unmistakable indication the parties intended for the arbitrator to decide threshold questions of arbitrability.... Eckert Wordell's drafting of the architectural services contract here to incorporate the AAA Rules requires the same result.'

"756 F.3d at 1100. See also Knowles v. Community Loans of America, Inc. (No. 12-0464-WS-B, Nov. 20, 2012) (S.D. Ala. 2012) (not reported in F.Supp. 2d) ('A question as to "whether the arbitration contract bound parties who did not sign the agreement" is one that "raises a 'question of arbitrability' for a court to decide."' (quoting Howsam, 537 U.S. at 84)).

"Like the Eighth Circuit, we have held 'that an arbitration provision that incorporates rules that provide for the arbitrator to decide issues of arbitrability clearly and unmistakably evidences the parties' intent to arbitrate the scope of the arbitration provision.' CitiFinancial Corp. v. Peoples, 973 So. 2d 332, 340 (Ala. 2007). See also

> Joe Hudson Collision Ctr. v. Dymond, 40 So. 3d 704, 710 (Ala. 2009) (concluding that an arbitrator decides issues of substantive arbitrability when the arbitration provision incorporated the same AAA rule as in the present case); and Wells Fargo Bank, N.A. v. Chapman, 90 So. 3d 774, 783 (Ala. Civ. App. 2012) (same). The relevant AAA rule incorporated by the arbitration provision provides: '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.' Thus, although the question whether an arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is a threshold question of arbitrability usually decided by the court, here that question has been delegated to the arbitrator. The arbitrator, not the court, must decide that threshold issue."

164 So. 3d at 1101-02. Thus, the law in Alabama is such that a trial court considering a motion to compel arbitration should resolve both waiver and nonsignatory issues unless the subject arbitration provision clearly and unmistakably indicates that those arguments should instead be submitted to the arbitrator.

Like the arbitration agreement in Anderton, the arbitration provision in this case provides that any arbitration proceedings will be conducted "pursuant to the then-prevailing commercial arbitration rules of the American Arbitration Association." The relevant commercial arbitration

rule, Rule 7(a), expressly provides, in its current form, 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 to the arbitrability of any claim or counterclaim." See Chris Myers Pontiac-GMC, Inc. v. Perot, 991 So. 2d 1281, 1284 (Ala. 2008) (noting that we may take judicial notice of the commercial arbitration rules of the American Arbitration Association even when they do not appear in the record). Thus, pursuant to Rule 7(a), both the question of whether Federal Insurance has waived its right to enforce the arbitration provision and the question of whether the arbitration provision may be enforced against a nonsignatory such as Reedstrom have been delegated to the arbitrators, and the arbitrators, not the trial court, must decide those threshold issues. Accordingly, the trial court erred to the extent it considered those issues and resolved them adversely to Federal Insurance so as to justify denying Federal Insurance's motion to compel arbitration.[2]

[2]It is unnecessary for us to consider whether the trial court correctly resolved the waiver and nonsignatory issues because it was error for the court to consider those issues at all. Accordingly, we express no opinion on the ultimate

IV.

Federal Insurance has appealed the order of the trial court denying its motion to compel arbitration of the breach-of-contract claim asserted against it by Reedstrom. The trial court did not articulate its rationale for denying the motion to compel arbitration; however, the denial was apparently based on the court's resolving at least one of the arbitrability issues raised by Reedstrom in his favor and against Federal Insurance. However, because the subject arbitration provision delegated to the arbitrators the authority to resolve such issues, the trial court erred by considering the waiver and nonsignatory issues raised by Reedstrom instead of granting the motion to compel arbitration and allowing the arbitrators to resolve those issues. Accordingly, the judgment of the trial court is reversed and the cause remanded for the trial court to enter an order granting Federal Insurance's motion to compel arbitration.

REVERSED AND REMANDED.

Bolin, Shaw, Main, Wise, and Bryan, JJ., concur.

Moore, C.J., and Parker and Murdock, JJ., dissent.

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merits of Reedstrom's arguments opposing the motion to compel arbitration; that determination is for the arbitrators to make.

MOORE, Chief Justice (dissenting).

I respectfully dissent. The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ...." Likewise, Article I, § 11, Ala. Const. 1901, provides: "[T]he right of trial by jury shall remain inviolate." Because of these constitutional safeguards, this Court once held to the following rule regarding the waiver of jury trials through arbitration agreements:

> "We must emphasize that any arbitration agreement is a waiver of a party's right under Amendment VII of the United States Constitution to a trial by jury and, regardless of the federal courts' policy favoring arbitration, we find nothing in the [Federal Arbitration Act] that would permit such a waiver unless it is made knowingly, willingly, and voluntarily."

Allstar Homes, Inc. v. Waters, 711 So. 2d 924, 929 (Ala. 1997) (emphasis added). See also Mall, Inc. v. Robbins, 412 So. 2d 1197, 1199 (Ala. 1982) ("This Court recently enunciated three factors in determining whether to enforce a contractual waiver of the right to trial by jury: (1) whether the waiver is buried deep in a long contract; (2) whether the bargaining power of the parties is equal; and (3) whether the waiver was

intelligently and knowingly made" (citing Gaylord Dep't Stores of Alabama v. Stephens, 404 So. 2d 586 (Ala. 1981))).

In contrast, I believe that the Court's decision in this case, like another recent decision of this Court, is a far departure from Allstar's requirement that a waiver be made knowingly, willingly, and voluntarily. In this Court's recent decision of American Bankers Insurance Co. of Florida v. Tellis, [Ms. 1131244, June 26, 2015] ___ So. 3d ___ (Ala. 2015), this Court held that five policyholders had assented to a predispute arbitration agreement with an insurance company, even though they never received or signed copies of the arbitration agreement. This Court reasoned that the insurance policies referenced the form numbers of the stand-alone arbitration provisions, which should have notified the policyholders that they were agreeing to "something" in addition to the plain language of the agreement. The Court concluded that the policyholders ratified the entire agreement, including the stand-alone arbitration provisions that they did not even receive, because they had renewed the policies and paid the required premiums.

Like the Court's decision in American Bankers, the Court's decision in the present case makes it easier, instead of more difficult, for people to unwittingly waive their right to a trial by jury. In both cases, there was no evidence indicating that the plaintiffs had signed an arbitration agreement. Moreover, this case goes even one step further than American Bankers: the plaintiffs in American Bankers were all policyholders, but the plaintiff in this case was not even a party to the original agreement. Dissenting in American Bankers, I wrote: "Policyholders are entitled to know in advance what their obligations are and whether they are expected to give up their rights, instead of being subjected to a game of insurance-company 'peek-a-boo.'" American Bankers, ___ So. 3d at ____ (Moore, C.J., dissenting). Under the reasoning of today's case, insurance companies can play "peek-a-boo" not only with the constitutional rights of their policyholders, but also with the constitutional rights of persons who are not even parties to the insurance policy.

Furthermore, as to the specific issue whether to arbitrate arbitrability, I believe that the Court's decision is inconsistent with the precedent of the United States

Supreme Court. As to the issue of arbitrability, the United States Supreme Court has held: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (quoting AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986) (emphasis added)). The Court further noted in First Options:

> "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."

514 U.S. at 944-45. Thus, even the United States Supreme Court, which usually favors construing ambiguities in favor of arbitration, presumes that the issue of arbitrability is for the court, not the arbitrator, to decide.[3]

[3]The Court later held that some matters of arbitrability, called "procedural arbitrability," are for the arbitrator, not for the court, to decide. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84-85 (2002). However, this Court has held that the issues "whether a valid agreement to arbitrate" and "whether the specific dispute falls within the scope of that agreement" are questions of "substantive arbitrability," which are for the court, not the arbitrator, to decide. Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C., 35 So. 3d 601, 604

However, in this case, the Court holds that it is for the arbitrator, not the court, to decide the issue of arbitrability. The Court reasons that, under Anderton v. Practice-Monroeville, P.C., 164 So. 3d 1094 (Ala. 2014), the issue of arbitrability is properly submitted to the arbitrators so long as the arbitration agreement says that arbitration will be governed by the rules of the American Arbitration Association ("the AAA") and so long as those rules provide that arbitrability will be decided by the arbitrators. I dissented in Anderton, and I dissent in this case, partly because I cannot agree that stating that the rules of the AAA will govern the arbitration, without more, constitutes "clear and unmistakable evidence" that the parties intended to submit the issue of arbitrability to the arbitrators. Nothing on the face of the policy indicates that the arbitrators would have the power to decide whether they had the power to decide the case. In the absence of such language, I cannot agree that a mere reference to the AAA's rules constitutes "clear and

(Ala. 2009). "The question whether an arbitration provision may be used to compel arbitration of a dispute between a nonsignatory and a signatory is a question of substantive arbitrability (or, under the Supreme Court's terminology, simply 'arbitrability')." Anderton v. Practice-Monroeville, P.C., 164 So. 3d 1094, 1101 (Ala. 2014).

unmistakable evidence" that the issue of arbitrability was intended to be submitted to the arbitrator.

I believe that today's decision is the result of following the crooked path of precedent. See Lorence v. Hospital Bd. of Morgan Cnty., 294 Ala. 614, 618-19, 320 So. 2d 631, 634-35 (1975) (reproducing a poem by Sam Walter Foss illustrating the dangers of blindly following precedent). As I argued in my dissent in American Bankers, the right to trial by jury has suffered greatly because of the decisions of the United States Supreme Court, which have not even taken the Seventh Amendment into account. I continue to maintain, as I said in American Bankers, that predispute arbitration agreements are unenforceable under the Seventh Amendment. American Bankers, ___ So. 3d at ___ (Moore, C.J., dissenting); see also Ex parte First Exchange Bank, 150 So. 3d 1010, 1010 (Ala. 2013) (Moore, C.J., concurring specially). But even if predispute arbitration agreements are enforceable, Allstar requires us to ask whether the agreement was made "knowingly, intelligently, and voluntarily," and First Options requires us to ask whether there is "clear and unmistakable evidence" that the issue of arbitrability was intended to be submitted to the

arbitrators. Instead of protecting the right of trial by jury, we have drifted far from that right, blindly following the crooked path of precedent, arriving in a place where the right to trial by jury is but a meaningless phrase in our cherished Bill of Rights.

I respectfully dissent.

MURDOCK, Justice, (dissenting).

I respectfully dissent.

The main opinion notes that the general rule is that questions of "arbitrability" are to be decided by the court, not the arbitrator. __ So. 3d at __ (quoting Anderton v. Practice-Monroeville, P.C., 164 So. 3d 1094, 1098 (Ala. 2014)). Such questions are to be decided by the arbitrator only when the parties have "clearly and unmistakably" so agreed. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

The Federal Insurance Company policy underlying this dispute contains the following provision: "If the parties cannot resolve the dispute by non-binding mediation, the parties shall submit the dispute to binding arbitration pursuant to the then-prevailing commercial arbitration rules of the American Arbitration Association," i.e., the Commercial Rules of the American Arbitration Association ("the AAA"). Following this provision is a statement describing agreed-upon variations from the particular procedures that would otherwise be prescribed by the AAA rules for the selection of the arbitrators.

In my view, the aforesaid language referencing the use of the AAA's rules of procedure is sufficient to prescribe the rules of procedure to be used when a matter otherwise falls within the categories of disputes the parties have agreed to arbitrate. (As set out in an earlier provision in the policy, those categories are disputes "based upon, arising from, or in consequence of any actual or alleged [insurance] coverage under this coverage section, or the validity, termination or breach of this coverage section."). I cannot agree, however, that this reference to the use of AAA rules of procedure rises to the level of a "clear and unmistakable" agreement that the issue of arbitrability is to be one of those categories.[4]

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[4]I concurred in Ex parte Johnson, 993 So. 2d 875 (Ala. 2008), in which this Court found a reference to AAA rules of procedure to be sufficient to assign issues of arbitrability to the arbitrator. The underlying arbitrability issue in that case, however, was whether class arbitration was appropriate, a question that at the time had been deemed to be one of "procedural arbitrability" by a plurality of the Court in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003). Matters of "procedural arbitrability," as discussed in note 5 infra, are not the type of "gateway" or "substantive" arbitrability questions to which the general rule that, absent a "clear and unmistakable" agreement, the courts decide "arbitrabililty" questions actually applies. In addition, apart from any reference to the AAA rules, language in one of the contracts at issue in Johnson directly and explicitly stated that the issue of arbitrability would be decided by the arbitrator.

It might be argued that the foregoing analysis is not applicable to the issue of waiver referenced in the main opinion because "waiver" was identified in Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002), as an issue of "procedural arbitrability" as to which the aforesaid general rule regarding who decides matters of "arbitrability" would not apply in the first place.[5]

Since this Court issued its opinion in Johnson, federal courts have indicated that the issue of class certification is more properly considered a matter of substantive arbitrability. See, e.g., Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 598 (6th Cir. 2013) (observing that in Oxford Health Plans LLC v. Sutter, __ U.S. __, __ n.2, 133 S. Ct. 2064, 2068 n.2 (2013), and Stolt-Nielsen v. AnimalFeeds International Corp., 559 U.S. 662 (2010), the Supreme Court itself took care to note the plurality nature of the opinion in Bazzle and concluding that "recently the [Supreme] Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question [for the courts] rather than a subsidiary one [for the arbitrator]."). Based on this development in the law (with which I agree), as well as what I believe now to be a better understanding of applicable legal principles regarding what is necessary for the parties to assign an issue of "substantive arbitrability" to an arbitrator, I could not repeat my Johnson vote today.

[5]In Howsam, the United States Supreme Court explained that the "general rule" discussed above and the issue of "arbitrability" to which it relates are concerned with what might be called "substantive arbitrability" issues, rather than questions of "procedural arbitrability." The Court explained:

> "Linguistically speaking, one might call any potentially dispositive gateway question a 'question

of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits. The Court's case law, however, makes clear that, for purposes of applying the interpretive rule, the phrase 'question of arbitrability' has a far more limited scope. See 514 U.S., at 942. The Court has found the phrase applicable in the kind of narrow circumstance 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.

"Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide. See id., at 943-946 (holding that a court should decide whether the arbitration contract bound parties who did not sign the agreement); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-547 (1964) (holding that a court should decide whether an arbitration agreement survived a corporate merger and bound the resulting corporation). Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court. See, e.g., AT&T Technologies,[Inc. v. Communcations Workers of America, 475 U.S. 643,] 651-652 [(1986)] (holding that a court should decide whether a labor-management layoff controversy falls within the arbitration clause of a collective-bargaining agreement); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241-243 (1962) (holding that a court should decide whether a clause providing for arbitration of various 'grievances' covers claims for damages for breach of a no-strike agreement).

In point of fact, however, this Court and some other courts have concluded that Howsam did not intend to disturb the traditional rule that the issue whether a party has waived the right to arbitration by its conduct during litigation is a substantive question of arbitrability for the court and not the arbitrator. See Ocwen Loan Servicing, LLC v. Washington, 939 So. 2d 6, 12-14 (Ala. 2006) (thoroughly discussing the issue of waiver). Furthermore, the general rule is without question applicable to the substantive-arbitrability signatory issue in the present case. Accordingly, I must dissent.

Parker, J., concurs.

> "At the same time the Court has found the phrase 'question of arbitrability' not applicable in other kinds of general circumstance where parties would likely expect that an arbitrator would decide the gateway matter. Thus '"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide. John Wiley, supra, at 557 (holding that an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration). So, too, the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.' Moses H. Cone Memorial Hospital[v. Mercury Constr. Corp., 460 U.S. 1,] 24-25 [(1982)]."

537 U.S. at 83-84 (final emphasis added). See generally Anderton, 164 So. 3d at 1104 n.4 (Murdock, J., dissenting).