

# One Minute Memo®



## Delegating Arbitration Agreement Enforceability to an Arbitrator

By Joshua A. Rodine and Maya Harel

The U.S. Supreme Court has repeatedly affirmed that courts must place arbitration agreements on an equal footing with other contracts. Heeding this call, on May 15, 2014, in *Tiri v. Lucky Chances, Inc.*, the California Court of Appeal held that a trial court lacked the authority to rule on the enforceability of an arbitration agreement because the agreement included a “delegation clause,” which vested decisions regarding enforceability of the agreement with the arbitrator rather than the court.

### The Facts

Lourdes Tiri started to work as a cook for Lucky Chances, a card-club casino and restaurant. A few years thereafter, Tiri signed an agreement requiring any disputes between her and Lucky Chances to be resolved by arbitration. One of the agreement’s provisions, a so-called delegation clause, referred all questions about the enforceability of the agreement to an arbitrator, instead of a court:

The Arbitrator, and not any federal, state, or local court of agency shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including but not limited to, any claim that all or any part of this Agreement is void or voidable.

Five years later, when Tiri was fired, she sued Lucky Chances for wrongful termination. Lucky Chances petitioned the Superior Court to compel arbitration. Tiri opposed the petition, arguing that the arbitration agreement was unconscionable. Lucky Chances argued that, under the express terms of the delegation clause, this challenge to the agreement was for the arbitrator to resolve, not the court.

The trial court disagreed with Lucky Chances, and denied the petition to compel arbitration on the grounds that the arbitration agreement was both substantively and procedurally unconscionable. Lucky Chances appealed the trial court’s decision.

### The Appellate Court Decision

The Court of Appeal reversed the order denying Lucky Chances’s petition to compel arbitration, holding that the trial court lacked the authority to rule on the enforceability of the agreement in light of the delegation clause.

For a delegation clause to be effective, it must satisfy two prerequisites: (1) the language of the clause must be clear and unmistakable, and (2) the clause must not be revocable under state contract defenses such as fraud, duress, or unconscionability. Accordingly, the Court of Appeal held that a trial court must first determine whether the delegation clause is enforceable. If it is, then the court lacks power to determine whether the entire agreement is enforceable; that would be an issue for the arbitrator to resolve.

The Court of Appeal based its reasoning on the U.S. Supreme Court's 2010 decision in *Rent-A-Center, West, Inc. v. Jackson*, which also involved an employment arbitration agreement with a delegation clause. In *Rent-A-Center*, the Supreme Court explained that any claim of unconscionability must be specific to the delegation clause. A claim that the agreement was generally unconscionable would be asking the court to overstep the arbitrator's authority under the delegation clause.

Assessing the unconscionability of the delegation clause de novo, the Court of Appeal found that it was procedurally unconscionable because it was part of a contract that was presented on a take-it-or-leave-it basis. Nonetheless, the Court of Appeal ultimately held that because the delegation clause mutually applied to claims brought by either Tiri or Lucky Chances, the clause was not substantively unconscionable. For this reason, the Court of Appeal determined that the delegation clause was valid and that the trial court's denial of the petition to compel arbitration was improper. Accordingly, the matter will be sent to arbitration for the arbitrator to consider the unconscionability of the agreement as a whole.

## What Does *Lucky Chances* Mean for Employers?

The Court of Appeal's decision suggests that delegation clauses in employment arbitration agreements subject to California law will be enforced—provided the clause is not substantively unconscionable. Had the Court of Appeal affirmed the trial court's order, delegation clauses in California arbitration agreements would have been rendered meaningless.

While the decision affirms the opportunity for employers to have the enforceability of their arbitration agreements assessed by arbitrators—who would tend to view employment arbitration more favorably than most of California's courts—the decision may be a trap for the unwary. First, an employer's ability to appeal an adverse decision in arbitration is highly limited. So, if an arbitrator rules that an agreement is unenforceable, the employer will not have the same appellate review available following an adverse ruling regarding an agreement's enforceability by a trial court. Second, there may be circumstances under which an employer would prefer to proceed in court rather than in arbitration, and in such cases it may prove disadvantageous to delegate authority to an arbitrator to decide whether a matter must proceed in arbitration or court. For example, an employee may want to arbitrate a non-employment related claim even though the arbitration agreement covers only employment disputes. If the arbitrator—who has been delegated the authority to determine the enforceability of the arbitration agreement—concludes that the claim is arbitrable, then the employer will be forced to incur the expense of arbitration of the matter even though the employer never had any intent of arbitrating non-employment related claims.

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