

Which came first: Forum selection clause or arbitration provision? SCOTUS to decide

November 07, 2023

For the second time in as many years, the Supreme Court of the United States has agreed to hear an appeal from a prominent cryptocurrency exchange regarding the enforceability of its arbitration clause in the exchange's user agreements¹. The latest case involves a decision from the Ninth Circuit which affirmed a lower court's decision to deny the defendant's motion to compel arbitration, finding that a forum selection clause in a Sweepstake's "Official Rules" superseded an arbitration clause in a user agreement.

When consumers created their accounts with the exchange, they agreed to its "User Agreement," which contains an arbitration provision. Consumers then later opted into the Sweepstakes' "Official Rules," which include a forum selection clause providing that California courts have exclusive jurisdiction over any controversies regarding the sweepstakes. A putative class action was filed on behalf of a number of defendant's users, asserting various claims under California state law. In response, defendant sought to compel the putative class action to arbitration, but the district court disagreed, finding: (1) the delegation clause in the arbitration provision did not delegate to an arbitrator the issue of which contract governed the dispute, and (2) that under California contract law, the Sweepstakes' "Official Rules" superseded the user agreement, and, therefore, the applicability of the arbitration provision.

Defendant appealed and the Ninth Circuit affirmed. First, the Ninth Circuit found that the issue was one of existence, and not scope, of the arbitration agreement. Thus, the delegation clause did not apply to the question of whether the issue was delegated to an arbitrator to decide because this was a contract formation issue that could not be delegated in the first place. Second, the Ninth Circuit agreed with the district court that the forum selection clause in the Sweepstakes' "Official Rules" superseded the arbitration provision.

Under California law, "[a] contract containing a forum selection clause supersedes an arbitration agreement where "the forum selection clause[] . . . sufficiently demonstrate[s] the parties' intent to do so." To that end:

"... the general rule is that when parties enter into a second contract dealing with the same subject matter as their first contract without stating whether the second contract operates to discharge or substitute for the first contract, the two contracts must be interpreted together and the latter contract prevails to the extent they are inconsistent."

The Ninth Circuit followed the general rule and disregarded defendant's arguments to the contrary, including the claim that the User Agreement and Official Rules concerned different subject matters and that the agreements should be read harmoniously.

Defendant prevailed on its previous appeal to the Supreme Court last term. In *Coinbase Inc. v. Bielski*, the justices held that defendant should not have had to face discovery while its appeal on the merits of the denial of its arbitration motion was pending.

¹ *Suski v. Coinbase, Inc.*, No. 22-15209 (9th Cir. 2022).

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