Deciding who Decides: the Supreme Court Revisits Arbitrability

This fall, the United States Supreme Court will hear argument in *Oliveira v. New Prime, Inc.*, a case which may very well have implications for the enforceability of some arbitration provisions contained in construction contracts.[1] In *Oliveira*, the First Circuit added an exception to the long-standing rule, originating with the *Prima Paint* decision and further refined in *Rent-A-Center*, that questions related to the validity of an arbitration provision itself are matters for the court to resolve, except in circumstances where the parties have agreed to have the arbitrator decide such gateway questions of arbitrability.[2]

In *Oliveira*, the plaintiff entered into an employment agreement with an interstate trucking company, New Prime, Inc. ("Prime"), which set forth a mandatory arbitration provision requiring the parties to arbitrate "any disputes arising under, arising out of or relating to [the contract], . . . **including the arbitrability of disputes between the parties**."[3] The plaintiff subsequently brought a class action lawsuit against Prime alleging that it violated the Fair Labor Standards Act and state labor laws by failing to pay its truck drivers minimum wages.[4] Prime moved to compel arbitration and stay the proceedings.[5] On appeal, the First Circuit held that when confronted with a motion to compel arbitration under Section 4 of the Federal Arbitration Act ("FAA"), the district court – and not the arbitrator – must decide whether the FAA's Section 1 exemption applies.[6] The First Circuit justified its deviation from *Rent-A-Center*'s rule by explaining that the issue in *Oliveira* – the Section 1 exemption's applicability – raised "the 'distinct inquiry' of whether the district court has the authority to act under the FAA – specifically, the authority under § 4 to compel the parties to engage in arbitration."[7] Prime appealed the First Circuit's decision to the Supreme Court, which granted certiorari in February 2018.[8]

Oliveira affords the Supreme Court another opportunity to clarify the circumstances in which the court is to decide the issue of arbitrability where the parties have entered into an agreement stipulating that the arbitrator will decide that issue.[9] If the Supreme Court affirms the First Circuit's holding, litigants may have a greater opportunity to avoid an express agreement to arbitrate the threshold question of arbitrability.

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[1] *Oliveira v. New Prime Inc.*, 857 F.3d 7 (1st Cir. 2017), *cert. granted*, No. 17-340, 2018 WL 1037577 (U.S. Feb. 26, 2018).
[2] *Oliveira v. New Prime Inc.*, 857 F.3d 7, 12 (1st Cir. 2017). *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-75 (2010).
[3] *Oliveira*, 857 F.3d at 9-10 (emphasis added).
[4] *Oliveira*, 857 F.3d at 11.
[5] *Oliveira*, 857 F.3d at 11.
[6] *Oliveira*, 857 F.3d at 24.
[7] *Oliveira*, 857 F.3d at 14.
[8] *Oliveira*, 857 F.3d at 9, *cert. granted*, No. 17-340, 2018 WL 1037577 (U.S. Feb. 26, 2018).
[9] *See Oliveira*, 857 F.3d 7.