AMERICAN ARBITRATION ASSOCIATION
ARBITRATION

Evans Energy Partners, LLC	)	
	)	
Claimant,	)	**John Bickerman, Esq. (Chair)**
	)	**John T. Blankenship, Esq.**
v.	)	**Taylor Tapley Daly, Esq.**
	)	
Seminole Tribe of Florida, Inc.,	)	**Case No. 01-19-0000-2241**
	)	
Respondent.	)	
	)	

OPINION AND ORDER

Respondent, Seminole Tribe of Florida, Inc. ("STOFI") moved to dismiss Claimant's, Evans Energy Partners, LLC ("Evans Energy"), demand for arbitration, in its entirety, which Evans Energy opposed. The parties submitted memoranda of law to support their positions. The Panel has reviewed all of the parties' submissions, including Claimant's Supplemental Response, and held a hearing on September 9, 2020 to hear the parties' oral arguments by videoconference. Upon due consideration of the parties' submissions and their oral arguments, the Panel has determined that STOFI's motion should be granted. Arbitrator Blankenship concurs with this result, but not with all the reasons cited and, therefore, submits a separate concurring opinion.

The Panel concludes that Evans Energy cannot show that there is clear and unmistakable evidence that the parties intended to empower the Panel with the authority to decide the gateway question of who decides the arbitrability of their dispute. Therefore, until that preliminary issue is resolved by a court of competent jurisdiction,

Exhibit E

the Panel lacks the jurisdiction to decide subject matter jurisdiction in order to proceed. Because the Panel lacks jurisdiction to determine arbitrability, it never considered the merits of the parties' dispute and offers no opinion on whether Evans Energy's claims would be successful. Also, because the threshold issue of arbitrability controls the resolution of STOFI's motion, no opinion is offered on the other issues raised by both parties. Furthermore, the Panel's decision only relates to its own jurisdiction and does not foreclose Evans Energy from seeking a determination on the arbitrability of its dispute in a different forum. Given the amount of time that the parties and the Panel have invested, the Panel does not want to foreclose the possibility of the parties returning for an adjudication on the merits, if they desire to do so.

The touchstone issue in arbitration is to give voice to the parties' contractual agreement to arbitrate. In this analysis, the first order question when the authority to arbitrate is challenged is the gateway question of who should decide this question. While the parties may contract to arbitrate the merits of their dispute, they must also agree separately on who has the authority to decide the question of arbitrability. Absent agreement, the presumption is that the court will have that power.

Federal policy strongly favors arbitration. *See AT & T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011) (Section 2 of the Federal Arbitration Act expresses a "'liberal federal policy favoring arbitration'"). Interpreting arbitration agreements requires the strict application of principles of contract law. *Id.* (courts must place arbitration agreements on an equal footing with other contracts). The difficult challenge for this Panel, and the reason for its split decision, is how to analyze what the parties intended when the agreement carves out a narrow issue for arbitration and

reserves a much broader range of disputed issues for a court. The Panel is keenly aware that the decision of who decides arbitrability "has a certain practical importance." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). A party that has not agreed to arbitration may lose its right to have a court adjudicate its dispute, with all of the attendant protections of judicial review. *Id*. Consequently, Supreme Court precedent teaches that the gateway question of who decides arbitrability is an exception to the general rule to "apply ordinary state-law principles that govern the formation of contracts." *Id.,* at 944. Instead, the Panel should not assume that they have the power to determine arbitrability unless there is "clear and unmistakable evidence" that the parties intended to grant such authority to it. *See First Options of Chicago,* 514 US at 945. The normal presumption favoring arbitrability, in the case of whether a matter should be arbitrated, is reversed when determining *who* should decide arbitrability. *Id.,* at 945-946. The rationale expressed by the Supreme Court is that an unwilling party should not be forced to arbitrate a matter it thought would be decided by a court. Given the possibility that a party might not have considered the "who decides" question, the better path is to assume that absent a clearly articulated intent, devoid of ambiguity, the issue of arbitrability should be reserved for a court not the arbitral panel. *Id; See also, Lamps Plus, Inc. v. Varela,* 139 S.Ct. 1407, 1415 (2019) (an arbitration agreement does not provide the contractual basis for class arbitration when the arbitration agreement merely does not prohibit it). *Lamps Plus* is important because the Supreme Court read into the parties' agreement an assumption that Lamps Plus would not have wanted to arbitrate a class action claim despite the absence of an explicitly worded prohibition.

While the facts regarding the language of the arbitration provision are not in dispute, the language itself is far from clear and unambiguous, as both counsel and the Panel acknowledged during the hearing. Indeed, both counsel disavowed any responsibility for drafting the subject clause.

The arbitration provision in Paragraph 7.13 of the parties Management Agreement contains several distinct and seemingly contradictory terms. The key language in Paragraph 7.13 includes:

- a broadly worded clause stating that "[A]ny dispute, controversy, claim, question or difference arising out of this Agreement shall be finally settled by the Tribal Council of the Seminole Tribe of Florida or as specifically delegated under the provisions of the Amended Constitution and By Laws of the Seminole Tribe of Florida." The delagatee of this power is presumably the Tribal Court;
- a carve out that states:

  > Notwithstanding what is set forth above, the Company through its parent company the Seminole Tribe of Florida, Inc., agrees to a waiver of its Sovereign Immunity in order to allow Evans Energy to initiate a binding arbitration proceeding administered under the rules of the American Arbitration Association for sole and exclusive purpose of terminating the Management Agreement and compelling the payment of the Termination Fee . . . .
  >
  > Management Agreement, ¶ 7.13;

- a clause that precluded naming STOFI "or any of its affiliated entities" in any arbitration or court proceeding; and, lastly,
- declaring that Evans Energy's rights under this provision would be restricted to compelling Seminole Energy to participate in an arbitration.

At the hearing, the parties acknowledged that Seminole Energy, which one can infer that the parties contemplated coming into existence per their agreement, was never

created. Even if it had been created, it is not clear whether it would have been considered an affiliated entity of STOFI. From the language of paragraph 7.13, the Panel's challenge is to determine whether there is clear and unmistakable evidence that the parties intended it to determine the gateway question of arbitrability.

STOFI contends that paragraph 7.13 clearly demonstrates its intention to have the Tribal Court determine this question. In support of its argument, STOFI points to the broad forum selection provision in the first sentence of the paragraph. By referencing that "any" dispute or question arising out of the Management Agreement shall be resolved by the Tribal Court, STOFI contends that this choice of forum must include the interpretation of the arbitration clause too, including the gateway question. STOFI's Omnibus Motion to Dismiss at 4. STOFI also would negate the incorporation of the American Arbitration Association ("AAA") Rules referenced in the second sentence. The applicable Commercial Arbitration Rules ("Rules") of the AAA include Rule 7(a), formerly Rule 8, that grants the arbitrators the power to determine arbitrability.[1] *Id*. In support of its position, STOFI distinguishes between broad and narrow dispute resolution clauses. According to STOFI, a narrowly defined list of issues delegated to arbitration should not be read to incorporate the AAA rule regarding who decides arbitrability. At a minimum, the narrow scope of the delegation clause for issues creates ambiguity, which must be decided in favor of finding no delegation of authority to the Panel.

In its opposition, Evans Energy argues the incorporation of the AAA rules in combination with the "notwithstanding" sentence constitutes a proper delegation of

[1] Rule 7(a) 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 to the arbitrability of any claim or counterclaim." AAA Commercial Arbitration and Mediation Rules (2013).

authority. Evans Energy argues, while recognizing the propriety of the presumption requiring clear and unmistakable evidence in order to delegate authority to the arbitrators to determine the gateway question, the Panel has more than sufficient basis to consider the question of arbitrability. Response to Motion to Dismiss, at 7. The breadth of the delegation of issues to be arbitrated is not a controlling factor in the 11th Circuit and Florida. *Id.*

As a preliminary matter, because arbitration clauses are issues of contract construction, state law principles control the analysis. *Bell v. Cencant Corp.,* F.3d 563, 566 (2d Cir. 2002). Furthermore, an arbitration provision that incorporates procedural rules that empower the arbitrators to determine arbitrability may provide the requisite clarity of the parties' intent to determine who decides. *Temple v. Best Rate Holdings, LLC*, 360 F. Supp. 3d 1289 (M.D.FL. 2018)(applying New York law), *citing Contec Corp. v. Remote Sol., Co., Ltd.,* 398 F.2d 205, 208 (2d Cir. 2005)(where the applicable arbitral rules reserve the power to decide arbitrability to the arbitrator, there is clear and unmistakable evidence of the parties' intent). However, "simple reference" to the AAA rules "is insufficient to constitute 'clear and unmistakable' language evincing an intent to have the arbitrator decide arbitrability where the arbitration provision is 'narrow' rather than 'broad.'" *Temple* at 1299, *citing Zachariou v. Manios,* 68 A.D. 3d 539, 891 N.Y.S.2d 54 (N.Y. App. Div. 2009). When the parties' agreement contains a narrow arbitration provision, the court not the arbitrator should decide arbitrability, despite their agreement's reference to the AAA rules that would otherwise leave that decision to the arbitrator.

The rationale for distinguishing between broad and narrow delegations to arbitration of disputes, for the purpose of determining the power of the arbitral panel to adjudicate its own jurisdiction, seems sensible. In a broad delegation, the parties unmistakably want *all of their* disputes decided in arbitration. Quite logically, that would include the gateway question of arbitrability. Such a conclusion is far less obvious when only a limited number of issues are reserved for arbitration. In these cases, it seems more logical that the parties would not want to risk that an arbitral panel would overstep its authority and conclude that it had the jurisdiction to decide issues that they never intended to be arbitrated. Rather a better conclusion is that, where the parties have directed that a court decide the majority of their disputes, they would also want the court to determine what issues the parties had reserved for arbitration. Indeed, the more reasonable conclusion is that at least one of the parties would want the full panoply of procedural protections of court, including, but not exclusively, the right of appeal.

Evans Energy responds by relying on *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308 (11th Cir. 2014). However, that court quite clearly stated that it did not address the instant issue concerning the adoption of the AAA rules.

> So here, we need not decide whether the adoption of the Association rules clearly and unmistakably invites an arbitrator to decide questions of arbitrability when a contract has a carve-out provision.

Cyanotech Corp., 769 F.3d at 1311. Therefore, Evans Energy's reference to the *Cyanotech* court citing *Terminix Intern. V. Palmer Ranch Ltd Partnership,* 432 F.3d 1327 cannot control this issue. Response to Motion to Dismiss at 9. If *Cyanotech* did not address the narrowness of the delegation, then *Terminix* cannot be dispositive for the

proposition that the incorporation of the AAA rules reflects the clear and unmistakable intent of the parties in the instant case when the delegation of disputes is narrow.

In *Terminix,* the court did conclude that the parties had chosen to be governed by AAA rules and Rule 8 (now Rule 7(a)) which "clearly and unmistakably allow the arbitrator to determine her own jurisdiction." *Id.*, at 1332. But *Terminix* is of no help because its holding does not turn on the breadth of the disputes delegated to arbitration. Indeed, there is no mention of how broadly defined the disputes are that would be arbitrated.

Both *JPay, Inc. v. Kobel*, 904 F.3d 923, 938 (11th Cir. 2018), cert. denied, 139 S. Ct. 1545, 203 L. Ed. 2d 711 (2019) and *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1233 (11th Cir. 2018), cert. denied, 139 S. Ct. 1322, 203 L. Ed. 2d 565 (2019) contain broad language.[2] Neither illuminates the question before the Panel of whether it can infer agreement to delegate to the arbitrators the question of arbitrability when there has been a narrow carve out of issues for arbitration.

Similarly, in *EmbroidMe.com, Inc. v. Pawenski*, 2018 WL 8244276 (S.D. Fla. July 24, 2018), while there is a carve-out for injunctive relief to be referred to a court, it

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[2] The delegation clauses of these two cases is global in their breadth:

"In the event of any dispute, claim or controversy among the parties arising out of or relating to this Agreement that involves a claim by the User for less than $10,000, exclusive of interest, arbitration fees and costs, shall be resolved by and through arbitration administered by the American Arbitration Association ("AAA") under its Arbitration Rules for the Resolution of Consumer Related Disputes. Any other dispute, claim or controversy among the parties arising out of or relating to this Agreement shall be resolved by and through arbitration administered by the AAA under its Commercial Arbitration Rules." *JPay, Inc.* 904 F.3d at 927.

"Any dispute arising between Members and Spirit will be resolved by submission to arbitration in Broward County, State of Florida in accordance with the rules of the American Arbitration Association then in effect." *Spirit Airlines,* 899 F.3d at 1232.

is the mirror opposite of the facts in the instant case. Here, all but "…terminating the Management Agreement and compelling payment of the Termination Fee…" is referred to the Tribal Court for adjudication. *Id*. at *2. The court relied on *Cyanotech* as binding precedent for its decision, but that case never addressed the issue the Panel confronts here. *Id*. at *3.

The argument for not construing a narrow delegation of issues differently is even stronger when considering the language of the parties' arbitration clause. The first sentence declares a strong forum selection preference for the Tribal Council, or Tribal Court. The next sentence that waives sovereign immunity for the arbitration of the disputes related to the termination of the Management Agreement and the payment of the termination fee does not clearly vitiate the choice of forum clause. Indeed, the next clause prohibiting naming STOFI or any of its affiliated parties in any arbitration or court proceeding calls into question the validity of the entire enforcement provision. Certainly, there is enough ambiguity in Paragraph 7.13 to defeat the panel's jurisdiction to decide whether it can decide arbitrability.

Even if one ignores the distinction between the broad and narrow scope of the delegation of issues for arbitration, there is authority under Florida State law principles supporting that the Panel lacks jurisdiction. In *John Doe and Jane Doe v. Wayne Natt and Airbnb, Inc.*, Case No. 2D19-1383 (Fla. 2d DCA, March 25, 2020), a Florida intermediate appellate court confronted this issue and, applying Florida law, concluded that mere reference to the AAA Rules was insufficient evidence to satisfy the clear and unmistakable standard. The *Natt* court observed that the reference to AAA Rules was broad, nonspecific and cursory. The Rules were not attached to the agreement and were

likely not provided to the plaintiffs. "[This] 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." *Id.* Finally, that court examined the language of the rule[3] and found that it lacked direction that the arbitrator would have exclusive jurisdiction or that a court was precluded from ruling on the arbitrability question.

While recognizing that its opinion was an "outlier" and that the majority of the Circuits and sister District Courts of Appeals had ruled differently, the court distinguished these other rulings for failing to analyze the sufficiency of whether "mere 'incorporation' of an arbitration rule . . . 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."[4] *Id.* To the uninitiated, a reference to the AAA Rules would seem to be a neutral reference and not an action that would affect important, practical, and potentially substantive rights. It is difficult to assume informed consent. For these reasons, the majority thinks *Natt* is the more convincing precedent to follow, despite being a minority view.

Given the narrow delegation of issues to arbitration and the overall lack of clarity of Paragraph 7.13, it seems more likely than not that the parties never contemplated the

[3] Rule 7(a): 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 to the arbitrability of any claim or counterclaim.

[4] The majority is not relying on the *Natt* court's analysis of the type of agreement (e.g. clickwrap) or that the AAA Rules are only procedural and inapplicable until an arbitration has commenced. While there is a strong presumption in favor of arbitration of issues, the question of "who decides" should require more than accepting that a cursory reference to rules is sufficient.

issue of who would decide the gateway question of arbitrability, the reference to rules of the AAA notwithstanding. Because of the broad reference of most of the disputes that might arise under the Management Agreement to the Tribal Court, and the narrow reference related to termination to arbitration, it seems more likely than not that STOFI never contemplated that by referencing the AAA rules it would also be consenting to delegate the gateway question to arbitration.

The majority recognizes that there is a strong policy preference in favor of arbitration, even in electronic "click wrap" agreements that doubtless have never been read by the vast majority of parties. However, the presumption for not finding a delegation when deciding who decides arbitrability should apply to these electronic agreements, given the common wisdom that nobody reads the electronic fine print. The majority just cannot conclude that there is clear and unmistakable evidence that STOFI consented to the delegation of authority to the Panel just because the AAA Rules had been referenced in the Management Agreement. In conclusion, Paragraph 7.13 fails to provide the clear and unmistakable evidence necessary to show that STOFI would have consented to granting the power to decide arbitrability to arbitrators.

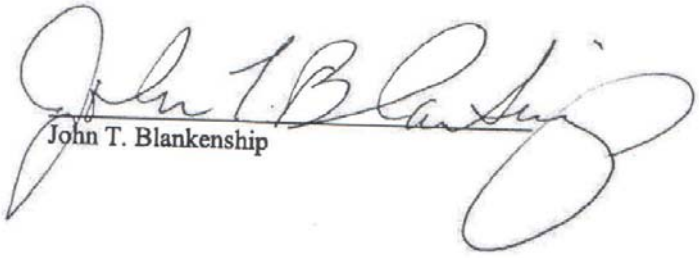
The parties should share the costs of administration by the AAA and arbitrators' fees evenly and bear their own legal fees. The administrative fees and expenses of the American Arbitration Association totaling $7,700.00 shall be borne as incurred, and the compensation and expenses of the arbitrators totaling $63,772.50 shall be borne as incurred.

For the reasons set forth in this opinion it is hereby

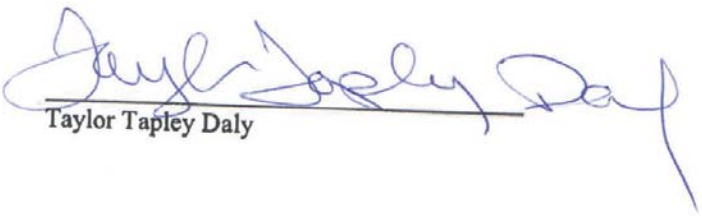
ORDERED that Claimant's motion to dismiss is GRANTED.

[JB1]

John Bickerman, Chair



John T. Blankenship



Taylor Tapley Daly

So Ordered, September 29, 2020