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Federal Court Standing in a Post-*TransUnion* World

Dual Representation in Derivative Litigation: Ever Permissible?

Limitations on the Recovery of Lost Profits

The Impact of Fraud Claims on Contractual Arbitration and Jury Waiver Provisions

By Kevin Schlosser

It is fascinating how the roads we travel in life can lead us to intriguing intersections. Four of the varied professional paths I have navigated during my career inspired this article: (1) as a commercial litigator and commentator, studying and acquiring a wealth of knowledge regarding the law of fraud; (2) as an advocate and arbitrator, traversing the avenue of arbitration for dispute resolution; (3) as a trial lawyer, championing clients' causes before juries and judges; and finally, (4) as general corporate counsel, preparing and negotiating contractual dispute resolution provisions.

It is well known that one of the powerful remedies of establishing a claim for fraud is rescission, that is, wiping out an entire transaction, or contractual agreement.[1] When a party to a contract challenges the existence or validity of the contract based upon fraud, how does that impact provisions agreeing to arbitrate, or waiving a jury trial in connection with any disputes relating to the contract? Although the case law in New York is not a picture of clarity, this article will explain the various considerations the courts apply in an effort to crystalize the concepts.

As explained below, if the court finds the contract is "void" rather than "voidable," the consequences are rather definitive—the entire contract, including any provisions within it, are deemed never to have existed. On the other hand, if a contract is voidable, for example based upon a claim of fraudulent inducement, the court will consider an arbitration clause within the contract apart or "separable" from the rest of the contract (largely because courts favor and support arbitration as a means of resolving disputes)—thus the doctrine of so-called "separability." Yet, undoubtedly in view of the constitutional underpinnings of the right to a jury trial, courts are more inclined to reject jury waiver clauses even before the fraud claim is determined simply if a party seeks to rescind the contract by claiming it was fraudulently induced into signing it. Thus, courts reject the jury waiver provision based on an alleged although not yet established claim of fraudulent inducement.

The rationale for all this is enlightening.

Void and Voidable

First, it is important to understand the distinction between void and voidable contracts, as the means of proving each and the consequences flowing therefrom are different. If the signature on a legal document is a forgery, that document is void from the outset, as though it never existed. Similarly, if the signer executed it thinking it was something other than what it actually was (the rare instance of fraud in the factum), then the document that was so executed is also void. But if the person who executes the document knows what the document is, yet is induced to sign it based upon common law fraudulent misrepresentations, that document must be challenged in order to become ineffective, thus it is "voidable."

In the leading case of *Faison v. Lewis*,[2] the New York Court of Appeals explained these principles and the distinction between legal documents that are deemed to have never existed and those that do have legal effects but are subject to challenge. In *Faison*, the Court of Appeals addressed whether any statute of limitations applied to claims alleging that deeds were void by virtue of some form of fraud. The court explained the doctrines applicable to void and voidable documents as follows:

> A forged deed that contains a fraudulent signature is distinguished from a deed where the signature and authority for conveyance are acquired by fraudulent means. In such latter cases, the deed is voidable. The difference in the nature of the two justifies this different legal status. A deed containing the title holder's actual signature reflects "the assent of the will to the use of the paper or the transfer," although it is assent "induced by fraud, mistake or misplaced confidence". . . Unlike a forged deed, which is void initially, a voidable deed, "until set aside, . . . has the effect of transferring the title to the fraudulent grantee, and . . . being thus clothed with all the evidences of good title, may incumber the property to a party who becomes a purchaser in good faith."[3]

The Court of Appeals went on to hold that no statute of limitations applied to an action to challenge a void deed because "a forged deed is void, not merely voidable. That legal status cannot be changed, regardless of how long it may take for the forgery to be uncovered."[4]

As further explained in a very old, but cogent, decision of the New York Court of Appeals, a document executed by forgery or through false pretenses (fraud in the factum) is void from the outset. So a deed that was either forged, or signed thinking it was not a deed, is void because, as the Court of Appeals neatly observed: "Void things are as no things."[5]

Besides actual forgeries, however, trying to establish "fraud in the factum" by arguing that one did not know what one was signing is challenging. While fraud in the inducement involves some form of misrepresentation that causes one to enter into a contract while fully knowing what the contract is and says, fraud in the factum involves parties seeking to avoid the effect of documents they signed by claiming they were "misled by the defendants to sign certain documents which turned out to be of an entirely different nature and character from what they thought they were signing[.]"[6]

Since those who sign contracts are deemed to have read and understood them by operation of decisional law, this doctrine of fraud in the factum has limited viability today. That is, generally, once a legal document is signed, a party to it cannot avoid its effect by claiming they did not read it or understand the obligations contained in it. The doctrine of fraud in the factum and its limitations were explained by the court in *Ackerman v. Ackerman*,[7] as follows:

> The gravamen of the plaintiff's complaint is fraud in the factum, that the plaintiff was induced to sign something entirely different than what she thought she was signing. However, a party is under an obligation to read a document before signing it, and generally such a cause of action only arises if the signor is illiterate, blind, or not a speaker of the language in which the document is written[.][8]

As this all relates to contracts that contain arbitration provisions or jury waiver clauses, if it is established that the contract is "void" under the above principles, then the contract legally never existed. As such, no agreement was ever reached to subject any dispute relating to the contract to arbitration. The court has authority to decide whether an agreement to arbitrate existed in the first instance. The same is true of waiver of the right to trial by jury.

Rescission Based Upon Fraudulent Inducement

A different analysis is applied to "voidable" contracts. A party claiming it was fraudulently induced to sign a contract—which is thereby "voidable"—must of course establish the elements of the cause of action for fraud; albeit if rescission is sought, the party does not have to allege or prove scienter or intent to defraud.[9] Under traditional common law fraud principles, when a party is induced by fraud to enter into a contract, the fraud is deemed to have permeated the entire contract and subjects the contract as a whole to rescission. Courts do not typically slice and dice the contractual provisions to determine which may or may not have been agreed to in the absence of the fraud. Once fraud is established, rescission of the entire contract is a potential remedy. This is explained rather eloquently in an oldy-but-goody decision of the Court of Appeals:[10]

> The agreement was entire, made upon one occasion and upon a single consideration, so far as there was any. There was but one assent to all its terms, and the minds of the parties met at the same instant as to all its parts. It is impossible to say that the plaintiff would have assented to any part unless he assented to all. The parties did not make three independent agreements. They made but one which embraced three points, all relating to the same subject. If the false statement blotted out one, it blotted out all, for the whole arrangement was tainted with the vice of concealment and misrepresentation. An entire contract, although it may cover several different heads, must stand or fall as one indivisible thing . . . "The effect of partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely and to operate as a personal bar to the party who has practiced it." . . . "If a contract is obtained by fraud, it is for the party defrauded to elect whether he will be bound. He, perhaps, would not have entered into the contract at all if he had known the real facts; it is, therefore, impossible with any degree of justice to enforce the contract against him in any part. * * * It has, therefore, been rightly settled that the party deceived has a right to have the contract wholly set aside."

Enforcing Arbitration Provisions Challenged by Fraud Claims

• New York State Law

Yet, parting ways with this traditional approach of rescinding entire agreements based upon fraudulent inducement, courts now apply a special analysis when it comes to contractual arbitration provisions. Based upon the modern, firmly recognized public policy of encouraging alternative dispute resolution, courts favor preserving agreements to arbitrate even in the face of claims that the contract containing that arbitration clause was fraudulently induced. This is known as the doctrine of "separability" and is discussed more below.

The courts of New York did not always favor agreements to arbitrate disputes. At one time, agreements requiring arbitration of disputes were actually considered unenforceable and against the public policy of the state to provide exclusive jurisdiction to resolve disputes in our courts.[11] Based upon this generally accepted view, the New York Court of Appeals rejected the concept of separability when arbitration agreements were challenged based upon fraudulent inducement and rescission was sought. Thus, in *In re Wrap-Vertiser Corp. (Plotnick)*,[12] the court held that a claim of fraud in the inducement of a contract containing an arbitration provision was an issue for the court and not the arbitrators to decide, reading the arbitration agreement there narrowly. Under the then prevailing view, if a party to a contract containing an arbitration provision was seeking rescission instead of damages under the contract, the claim for rescission was thought to be triable in court and not by arbitration.

Then, in *Weinrott v. Carp*,[13] the Court of Appeals in effect overruled *Wrap* and held more broadly that where parties intend and thereby agree to resolve disputes by arbitration, even claims that the contract was fraudulently induced are to be determined by the arbitrator. The court explained:

> When the parties to a contract have reposed in arbitrators all questions concerning the 'validity, interpretation or enforcement' of their agreement, they have selected their tribunal and no doubt they intend it to determine the contract's 'validity' should the necessity arise. Judicial intervention, based upon a nonseparability contract theory in arbitration matters prolongs litigation, and defeats . . . two of arbitration's primary virtues, speed and finality.[14]

The court in *Weinrott* then laid out an analysis that courts have followed since in determining whether to defer the underlying dispute to arbitration or direct the courts to adjudicate it: If the alleged fraud targeted the arbitration provision itself, or "if the alleged fraud was part of a grand scheme that permeated the entire contract, including the arbitration provision, the arbitration provision should fall with the rest of the contract" and the fraud claim be decided by the court.[15]

The Appellate Division, Second Department, illustrated this analysis rather well in *Markowits v. Friedman*.[16] In Markowits, defendants entered into two agreements with the plaintiff whereby they agreed to sell an interest in the subject companies with an option to purchase the remainder interests. The parties then modified the agreements to provide supplemental payment terms. In connection with the modification, they executed related documents, including a promissory note from plaintiff for a portion of the purchase price, and a confession of judgment in the same sum. They also agreed "to submit to arbitration 'any disputes [which should] arise between them concerning the sale . . . relating directly or indirectly to the aforementioned transaction,'" except for filing and entering of the confession of judgment. Thereafter, plaintiff allegedly failed to make a payment due pursuant to the agreements. The defendants held him in default of the promissory note, accelerated the debt, and filed the confession of judgment.

Plaintiffs thereafter sued alleging, among other things, that the defendants "breached warranties in the contracts of sale by concealing civil actions and government investigations pending against the companies, and that the [defendants'] failure to disclose these actions and investigations fraudulently induced plaintiff to enter into the modification agreements."[17]

Defendants then moved "pursuant to CPLR 7503 to stay all . . . proceedings in the action [that were not subject to a substantive motion to dismiss] and compel arbitration"—relying upon the agreement to arbitrate their disputes regarding the subject transactions. The lower court granted the motion to compel arbitration and the Appellate Division, Second Department affirmed. The Second Department first acknowledged: "Arbitration is a favored method of dispute resolution in New York."[18] The court then instructed that the threshold issue of whether there is a valid agreement to arbitrate is for the court, and that once it determines the parties agreed to arbitrate, the court's role ends without addressing the merits of the particular claims.[19]

Although the plaintiffs contended that the arbitration agreement was invalid because it was fraudulently induced, the court noted that a "broad arbitration provision is separable from the substantive provisions of a contract such that the agreement to arbitrate is valid even if the substantive provisions of the contract were induced by fraud."[20] The court continued: "The issue of fraud in the inducement affects the validity of the arbitration clause only when the fraud relates

to the arbitration provision itself, or was part of a grand scheme that permeated the entire contract" for which the plaintiff "must . . . establish that the agreement was not the result of an arm's length negotiation, or the arbitration clause was inserted into the contract to accomplish a fraudulent scheme."[21]

The court then found that plaintiffs failed to make the required showing to nullify the arbitration provisions, ruling that "the arbitration agreement was not a free-standing contract which was fraudulently induced, but was one of numerous documents executed as part of the . . . modification agreement, which must be 'read together and interpreted as forming part of one and the same transaction.'"[22] The court concluded: "Since the plaintiffs' claim of fraudulent inducement relates to the . . . modification agreement, with all its related documents, and not the arbitration agreement itself, the arbitration agreement is valid and the claim of fraudulent inducement is for the arbitrator" to decide.[23]

Of course, the court must determine that the parties did indeed agree to resolve the dispute in question by arbitration because arbitration is a matter of contract and consent.[24] Courts have interpreted even the most basic arbitration provisions as broad enough to subject fraudulent inducement claims to arbitration. Examples of "broad" arbitration clauses for these purposes are found in *Zafar v. Fast Track Leasing, LLC*,[25]; *Anderson St. Realty Corp. v. New Rochelle Revitalization, LLC*,[26]; *Riverside Capital Advisors, Inc. v. Winchester Global Trust Co. Ltd.*,[27]; and *Ferrarella v. Godt*.[28]

The issue has been effectively eliminated when parties state explicitly in their agreement that the arbitrator has the power and authority to determine the validity of the agreement, including the arbitrability of the claim. This type of language is now commonly incorporated into the rules of the major arbitration forums such as JAMS[29] and the American Arbitration Association (AAA).[30]

Courts have specifically found that designating the AAA (and as such its rules) in the arbitration agreement does indeed signify the requisite intent to submit the issue of fraudulent inducement to the arbitrator.[31]

- **Federal Approach to Separability**

Since the New York courts generally derived their concepts from federal law, the approach taken by federal courts in New York is very similar. As the New York courts previously recognized (as noted above), courts viewed arbitration hostilely before the Federal Arbitration Act (FAA) was enacted.[32] The FAA thereby reversed "centuries of judicial hostility to arbitration agreements" and placed "arbitration agreements upon the same footing as other contracts."[33]

The Second Circuit explained the federal arbitration principles well in *Sphere Drake Ins. v. Clarendon Nat. Ins. Co*.[34] First, the Second Circuit explained that under the severability doctrine "'arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.'"[35] The court then elaborated on how the courts are to decide these issues, distinguishing between claims that a contract is void from those where it is alleged that the contract is voidable:

> If a party alleges that a contract is void and provides some evidence in support, then the party need not specifically allege that the arbitration clause in that contract is void, and the party is entitled to a trial on the arbitrability issue pursuant to [the Federal Arbitration Act] 9 U.S.C.A. § 4 and the rule of *Interocean [Shipping Co. v. Nat'l Shipping Trading Corp*., 462 F.2d 673 (2d Cir. 1972)]. However, under the rule of *Prima Paint [Corp. v. Flood Conklin Mfg. Co*., 388 U.S. 395 (1967)], if a party merely alleges that a contract is voidable, then, for the party to receive a trial on the validity of the arbitration clause, the party must specifically allege that the arbitration clause is itself voidable. Accordingly, to defeat the arbitration clauses in the contracts at issue, Sphere Drake must allege that the contracts as a whole are void or that the arbitration clauses in the contracts are voidable. Of course, it is not enough for Sphere Drake to make allegations — Sphere Drake must also produce some evidence substantiating its claim.[36]

Federal courts make these determinations by applying the same standard used for summary judgment. That is, the party resisting arbitration must submit evidence giving rise to material issues of fact to avoid the dispute from being sent directly to arbitration.[37]

The foregoing analysis does not apply to "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law" accruing after March 3, 2022, by virtue of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 135 Stat. 26, codified at 9 U.S.C. §§ 401-02, which amended the FAA for such claims (a discussion of that law is beyond the scope of this article).

Jury Waiver Challenges

While arbitration provisions are thus afforded a special analysis apart from the traditional rules underlying rescission of contracts as a whole, courts apply a different approach to challenges to jury trial waivers. With contractual jury waiver provisions, courts are willing to disregard the jury waiver based merely upon allegations of fraudulent inducement of the contract as a whole and not particularly concerning the jury waiver.

In fact, interestingly, this approach to disregarding jury waivers essentially originated from the older cases (subsequently overruled by *Weinrott* discussed above) holding that arbitration agreements could be rejected based simply upon a claim of fraudulent inducement. This is evidenced early on by the Appellate Term decision in *Fed. Housecraft, Inc. v. Faria*,[38] in which the court observed:

> [O]ne who disaffirms for fraud a writing which contains a jury waiver clause should not be required to proceed to trial without a jury until there has been a determination as to the validity of the disputed instrument.
>
> The same question frequently arises upon applications to compel arbitration. If an issue is raised as to the making of the contract which provides for arbitration, either party may demand a jury trial on such issue. Thus, where fraud in the inception of the contract is claimed, the court must try this issue or refer it to a jury trial, if one is demanded.
>
> In the instant case, and for the same reasons which obtain in arbitration, I am of the opinion that the defense of fraud in the inception of the contract should be tried on framed issues. Upon a finding that such fraud was practiced herein, the complaint should be dismissed; upon a contrary finding, there should be a trial without a jury on the remaining issues.

Thus, jury waiver provisions in a contract were not viewed separately from the rest of the contract. Even though the analysis changed for arbitration provisions, the courts have refused to apply the separability doctrine to contractual jury waivers.

Although this may seem inconsistent with the analysis applied to arbitration clauses, the different treatment could be explained based upon the courts' propensity to interpret and apply arbitration provisions liberally and broadly to encourage alternative dispute resolution (thus less willing to disregard arbitration provisions), while construing jury waivers strictly so as to avoid depriving a party of its right to trial by jury.

In fact, in *Ambac Assur. Corp. v. Countrywide Home Loans Inc.*,[39] the party seeking to enforce the jury waiver argued that the older arbitration cases should no longer be followed on the question of jury waivers because those old arbitration cases were later overruled, and that the courts should apply the same separability doctrine to jury waivers as they subsequently applied to arbitration clauses.[40] The Appellate Division, First Department, rejected that argument, however, and allowed a jury trial of certain claims there, refusing to apply the separability doctrine to jury waivers.

J.P. Morgan Sec. Inc. v. Ader[41] instructively illustrates how the courts approach the jury waiver question. In that case, the First Department explained that if rescission of the contract is sought rather than simply damages resulting from the alleged fraud, then the jury waiver provision in the contract does not bar a jury trial of all issues in the case, even before the merits of the fraud claim are determined. In effect, the sole allegation of fraudulent inducement seeking rescission renders the jury waiver in the contract ineffective.

The court in *Ader* noted:

> We have previously held that a contractual jury waiver provision is inapplicable to a fraudulent inducement cause of action that challenges the validity of the underlying agreement. Moreover, "[i]t is of no consequence that the [counterclaim] does not contain the word 'rescission' or expressly state that it challenges the validity of the . . . agreement." In cases where the fraudulent inducement allegations, if proved, would void the agreement, including the jury waiver clause, the party is entitled to a jury trial on the claim.[42]

In applying this law to the facts, the court continued:

> Thus, where, as here, a party sufficiently pleads that it was fraudulently induced to enter into a contract, and only relies on the agreement as a basis for its defense against breach of contract allegations and a claim for reformation to recover overpayments, it is not precluded from challenging the validity of the contract for purposes of avoiding the jury waiver clause with respect to the adjudication of its fraudulent inducement claim.[43]

The dissenting justice had an issue with the majority's reasoning when it rendered the jury waiver ineffective because he did not think the fraud claim sought to void the contract altogether, but rather only sought damages: "Here, defendants' primary claims are for reformation and monetary damages, and they did not raise fraudulent inducement as an affirmative defense to plaintiff's breach of contract claim . . . Although defendants do assert a counterclaim based on fraudulent inducement, they seek money damages, not rescission. Whereas rescission is based on a disaffirmance of the contract and seeks to place the parties in the status quo ante the transaction, an award of damages affirms the contract while penalizing the fraudulent party for his breach."[44]

The dissent did have a good point, since it does not appear rescission was sought as a remedy for the alleged fraud. In fact, the Appellate Division, First Department seemed to side with the dissent's reasoning in *Ader*, when it affirmed the Commercial Division's decision to strike the jury request and thereby enforce the contractual jury waiver in *Zohar CDO 2003-1 Ltd. v. Xinhua Sports & Entertainment Ltd.*:

> The court properly granted the motion to strike plaintiffs' demand for a jury trial. While a party alleging fraudulent inducement that elects to bring an action for damages, as opposed to opting for rescission, may, under certain circumstances, still challenge the validity of the underlying agreement in a way that renders the contractual jury waiver provision in that agreement inapplicable to the fraudulent inducement cause of action, such circumstances are not present in this case. Plaintiffs merely seek to enforce the underlying agreements by obtaining damages for fraudulent inducement, rather than rescind the agreements, and do not challenge the validity of the agreements in any manner other than by making factual allegations of fraud in the inducement.[45]

The debate over whether damages or rescission is sought also raises another interesting question. The First Department in *Ambac* was willing to deny a jury trial of a claim it considered equitable but did not consider the claim of fraudulent inducement challenging the contract to raise equitable relief. That is a bit odd. Although there is nondescript case law indicating the claim of fraudulent inducement can be tried by a jury,[46] logic and case law are to the contrary.[47] Even if the jury waiver was ineffective based upon a claim of rescission arising from fraudulent inducement, query whether that claim seeks equitable relief for which no jury is allowed in any event. The courts have not addressed that issue.

Conclusion

The powerful remedy of rescission for fraud has potentially drastic consequences. An entire agreement can be eradicated if the elements of fraud are proven and the court finds it is feasible to "undo" the transaction. When it comes to transactions in which arbitration agreements are entered into, however, courts apply a more restrained approach. Under the separability doctrine, the arbitration provisions themselves are treated separately and can still indeed survive even in the face of a fraudulent inducement claim. On the other hand, contractual agreements to waive a jury trial are not given the same special protection as arbitration provisions, and are usually ineffective in the face of fraud allegations where rescission of the entire agreement is sought.

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Endnotes

1. *Butler v. Prentiss*, 158 N.Y. 49, 62-63, 52 N.E. 652 (1899); *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 70-71, 747 N.Y.S.2d 441 (1st Dep't 2002).
2. 25 N.Y.3d 220, 10 N.Y.S.2d 185 (2015).
3. 25 N.Y.3d at 225 (internal citations omitted).
4. *Id.* at 226.
5. *Marden v. Dorthy*, 160 N.Y. 39, 56, 54 N.E. 726 (1899).
6. *Cash v. Titan Financial Services, Inc.*, 58 A.D.3d 785, 873 N.Y.S.2d 642 (2d Dep't 2009).
7. 120 A.D.3d 1279, 993 N.Y.S.2d 53 (2d Dep't 2014).
8. 120 A.D.3d at 1281.
9. *Bd. of Managers of Soundings Condominium v. Foerster*, 138 A.D.3d 160, 164, 25 N.Y.S.3d 202 (1st Dep't 2016) ("Fraud sufficient to support the rescission requires only a misrepresentation that induces a party to enter into a contract resulting in some detriment, and 'unlike a cause of action in damages on the same ground, proof of scienter and pecuniary loss is not needed.' Even an innocent misrepresentation will support rescission.") (citations omitted). *See also* http://nyfraudclaims.com/intent-to-defraud-not-necessary-to-obtain-rescission-of-contract.
10. *Butler*, 158 N.Y. at 62-63 (citations omitted).
11. *See Meacham v. Jamestown, Franklin & Clearfield R.R. Co.*, 211 N.Y. 346, 351-52, 105 N.E. 653 (1914).
12. 3 N.Y.2d 17, 163 N.Y.S.2d 639 (1957).

13. 32 N.Y.2d 190, 344 N.Y.S.2d 848 (1973).
14. 32 N.Y.2d at 198 (citations omitted).
15. 32 N.Y.2d at 197.
16. 144 A.D.3d 993, 42 N.Y.S.3d 218 (2d Dep't 2016).
17. 144 A.D.3d at 994.
18. 144 A.D.3d at 996.
19. 144 A.D.3d at 996-997.
20. 144 A.D.3d at 997.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Matter of Belzberg v. Verus Investments Holdings Inc.,* 21 N.Y.3d 626, 630, 977 N.Y.S.2d 685 (2013) ("Arbitration is a matter of contract, 'grounded in agreement of the parties.'") (citations omitted); *Inland Shoe Mfg. Co., Inc. v. Pervel Indus., Inc.*, 81 A.D.2d 505, 505, 437 N.Y.S.2d 330 (1st Dep't 1981) ("It is hornbook law that no one may be compelled to arbitrate unless he has agreed to do so. This is true under the Federal Arbitration Law . . . , as it is under the law of this State.").
25. 162 A.D.3d 1100, 79 N.Y.S.3d 280 (2d Dep't 2018) ("any dispute, controversy or claim arising out of or relating to [contract] shall be settled promptly by arbitration").
26. 78 A.D.3d 972, 913 N.Y.S.2d 114 (2d Dep't 2010) ("the arbitration clause was broad, since it applied if 'any disagreement, deadlock, interpretation or dispute shall arise' under the . . . agreement").
27. 21 A.D.3d 887, 800 N.Y.S.2d 754 (2d Dep't 2005) ("An arbitration clause in the severance agreement stated that 'any controversy or claim arising out of or in relation to this Agreement or the breach thereof will, to the fullest extent permitted by law, be settled by arbitration.'").
28. 131 A.D.3d 563, 15 N.Y.S.3d 180 (2d Dep't 2015) ("Stock Purchase Agreement contained an arbitration clause which provided, in pertinent part: 'In the event any dispute shall arise pursuant to any term or provision of this Agreement, the same shall be settled by arbitration in accordance with the rules and regulations of the American Arbitration Association (hereinafter 'AAA') within the County of Queens.'").
29. JAMS Rule 11(b) states: "Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." *See* https://www.jamsadr.com/rules-comprehensive-arbitration/.
30. AAA Commercial Arbitration Rule 7 provides:

    (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. (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause. *See* https://adr.org/sites/default/files/Commercial%20Rules.pdf.
31. *Gol v. TNJ Holdings, Inc.*, 68 Misc.3d 1216(A), 130 N.Y.S.3d 260 (Sup. Ct. N.Y. Cnty. 2020) ("Where there is a broad arbitration clause and the parties' agreement specifically incorporates by reference the AAA rules providing that the arbitration panel shall have the power to rule on its own jurisdiction, courts will leave the question of arbitrability to the arbitrators.") (internal quotation marks and citations omitted).
32. The FAA was enacted to reverse "centuries of judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts." *Scherk v. Alberto- Culver Co.,* 417 U.S. 506, 510-11 (1974) (internal quotation marks omitted).
33. *Id.*
34. 263 F.3d 26 (2d Cir. 2001).
35. *Id*. at 31.
36. *Sphere*, 263 F.3d at 32 (citation omitted).
37. "Under the FAA, '[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.'" *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 118 (2d Cir. 2012) (citing 9 U.S.C. § 4). "But a trial is warranted only if there exists one or more genuine issues of material fact regarding whether the parties have entered into such an agreement." *Schnabel*, 697 F.3d at 118. "Petitions to compel arbitration under the FAA are made and heard in the manner provided by law for the making and hearing of motions. When evaluating a petition to compel, the Court applies a standard similar to that applicable for a motion for summary judgment. The Court must grant the petition if there is no genuine issue of material fact regarding the requirements to compel arbitration." *Natl. Union Fire Ins. Co. of Pittsburg v. Beelman Truck Co.*, 203 F. Supp. 3d 312, 317 (S.D.N.Y. 2016) (internal citations and quotation omitted).
38. 28 Misc.2d 155, 156-57, 216 N.Y.S.2d 113 (2d Dep't App. Term 1961) (citation omitted).
39. 179 A.D.3d 518, 118 N.Y.S.3d 13 (1st Dep't 2020).
40. See my commentary in *Jury Waiver Issues Concerning Fraudulent Inducement Claims*, http://nyfraudclaims.com/jury-waiver-issues-concerning-fraudulent-inducement-claims.
41. 127 A.D.3d 506, 9 N.Y.S.3d 181 (1st Dep't 2015).
42. 127 A.D.3d at 507-508 (internal citations omitted).
43. 127 A.D.3d at 508 (citation omitted).
44. 127 A.D.3d at 511-12.
45. 158 A.D.3d 594, 594-95, 68 N.Y.S.3d 880 (1st Dep't 2018) (citations omitted).
46. *See Poley v. Rochester Community Sav. Bank*, 184 A.D.2d 1027, 1027 (4th Dep't 1992) ("the essence of that cause of action is that plaintiffs were fraudulently induced into making the contract, an issue that is triable by jury.").
47. *See New Media Holding Co., LLC v. Kagalovsky*, 118 A.D.3d 68, 985 N.Y.S.2d 216 (1st Dep't 2014) (defendant waived right to jury trial by joining counterclaims for rescission with those for legal relief).