

Arbitrating Escaping Arbitrability: Challenging Delegation Clauses Based on Cost, Choice of Law and Arbitrator’s Self-Interest

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Introduction

In the last 30 years, the Federal Arbitration Act (FAA) has gone from a rarely used act to a behemoth that increasingly stands to threaten the nature of the legal field.¹ Arbitration clauses

¹ J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015) (discussing how arbitration decisions from the last five years represent a thirty-year expansion of arbitration as an alternative to resolving disputes in virtually every type of claim); see William J. Nissen, *The Federal Takeover of Arbitration Law*, 83 ILL. B.J. 584, 584 (1995) (expanding the Federal Arbitration Act to commercial and consumer transactions through two recent decisions); Joshua R. Welsh, *Has Expansion of the Federal Arbitration Act Gone*

have now become commonplace, habitually excluding regular citizens from the full range of options that would be present in bringing a lawsuit.² Consumer, employment and health care contracts (to name a few) now regularly include arbitration clauses.³

Yet lower courts and state legislatures have continued to resist this trend, attempting to fit a full range of defenses into the FAA's section 2 savings clause.⁴ The savings clause holds arbitration agreements valid unless "grounds . . . exist at law or in equity for the revocation of any contract."⁵ Since the Supreme Court decided the FAA applies to the states, the savings clause has been victim to a slew of varying interpretations, the more liberal of which have allowed general contract law defenses to enforceability and state public policy arguments to act as defenses to arbitration.⁶ States continue to attempt to pass legislation evading arbitration's

Too Far?: Enforcing Arbitration Clauses in Void Ab Initio Contracts, 86 MARQ. L. REV. 581, 581-82 (2002) (binding arbitration agreements entered daily).

² See Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131, 131 (2012) (recognizing the United States' robust view of FAA preemptive power).

³ Neil R. Bardack & Shannon M. Nessier, *The State Of Arbitration Enforcement In Calif.*, LAW360, (Apr. 18, 2014, 3:36 PM ET), <http://www.law360.com/articles/529015/the-state-of-arbitration-enforcement-in-calif> (explaining that mandatory pre-dispute arbitration clauses in adhesion agreements include all standardized contract forms used in consumer, health care and employment contexts); Stephanie Mencimer, *Have You Signed Away Your Right to Sue?*, MOTHER JONES, (Apr. 2008), <http://www.motherjones.com/politics/2008/03/have-you-signed-away-your-right-sue> (signing an agreement meant submitting to an arbitrator hired by the employer for any employment-related disputes under the threat of being fired otherwise); Jessica Silver-Greenberg & Michael Corkery, *Failed by Law and Courts, Troops Come Home to Repossessions*, N.Y. TIMES (Mar. 16, 2015), <http://www.nytimes.com/2015/03/17/business/wronged-troops-are-denied-recourse-by-arbitration-clauses.html> (demonstrating a consumer's lawsuit against an auto-lender being thrown out because of a mandatory arbitration clause in their contract).

⁴ 9 U.S.C.A. § 2 (West 2015); see *Coup v. Scottsdale Plaza Resort, LLC*, 823 F. Supp. 2d 931, 949 (D. Ariz. 2011) (finding that the employment contract arbitration provision was not procedurally unconscionable because the employees failed to show that the provision constituted unfair surprise, was oppressive, or that the employer attempted to hide the provision); *Luna v. Household Fin. Corp. Iii*, 236 F. Supp. 2d 1166, 1183 (W.D. Wash. 2002) (finding that the home loan agreement contract was substantively unconscionable due to one-sided provisions of class actions, the use of court proceedings for ancillary or preliminary remedies, confidentiality, and fee sharing); *Durkin v. CIGNA Prop. & Cas. Corp.*, 942 F. Supp. 481, 484-85 (D. Kan. 1996) (deciding employment contracts fall within FAA section 2's interstate commerce requirement).

⁵ 9 U.S.C.A. § 2 (West 2015).

⁶ *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (deciding FAA's section 2 permits arbitration contracts to be invalidated with generally applicable contract defenses like fraud, duress or unconscionability); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."); see

dominion.⁷ And judicially created doctrines evidence additional attempts to avoid the broadly-interpreted obstacle of FAA preemption of state doctrine, manifesting increasing creativity from state courts and legislatures.⁸

But arbitration can often work as a faster, simpler method of dispute resolution, as intended by the FAA's drafters.⁹ Understanding that arbitration was beneficial in certain situations, they passed the FAA with the intent of placing arbitration on equal footing with other contracts.¹⁰ However, critics argue that this outlook ignores its many serious misgivings, including situations where arbitration is mandatory as well as its unequal bargaining power.¹¹

Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) (declaring the FAA applies to the states through the commerce clause); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1232 (2013) (noting states often have local public policy reasons for invalidating arbitration clauses).

⁷ See e.g., ALA. CODE § 8-1-41 (attempting to preclude the FAA's application to contracts involving intrastate commerce only); CAL. LAB. CODE § 2699 (West) (the 2004 Private Attorney General Act, allowing employees to act as agents of state law enforcement); Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 785-87 (2001) (discussing various state statutes attempting to shield compliance with predispute arbitration agreements); AB 465 Contracts Against Public Policy, CAL. LEGIS. INFO. (Aug. 31, 2015), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB465 (enacting AB 465, voiding employment contracts with certain characteristics as violations of public policy and unenforceable).

⁸ Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991) (preemption may occur either when complying with both state and federal law is physically impossible or if complying with state law presents a conflict to complying with federal law); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989) (noting that even when Congress has not preempted the field in an area, state law can still be preempted if it is an obstacle Congress's accomplishment of its full purposes and objectives); see, e.g., Gentry v. Superior Court, 42 Cal. 4th 443, 450 (2007); Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005), abrogated by AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

⁹ R. Clayton Allen, *Arbitration: Advantages & Disadvantages*, PERSONAL INJURY LEGAL NEWS (Oct. 2, 2009), <http://www.allenandallen.com/blog/arbitration-advantages-and-disadvantages.html>; U.S. CHAMBER INST. FOR LEGAL REFORM, *Arbitration: Simpler, Cheaper and Faster Than Litigation* 4-5, 19-21, 30 (2005), available at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf>. A study of 609 adults who had chosen to participate in arbitration over litigation, and who had reached an arbitration decision, found the following results: 74% of respondents found arbitration to be faster; 63% of respondents found arbitration to be simpler; 51% of respondents found arbitration to be less expensive; 66% percent of respondents said they would likely use arbitration again.

¹⁰ Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 93 (2012).

¹¹ *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration*, PUBLIC CITIZEN (July 2008), [http://www.citizen.org/documents/ArbitrationDebateTrap\(Final\).pdf](http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf) (noting that the U.S. Chamber of Commerce study of arbitration ignored the distinction between mandatory and voluntary arbitration and distorted the results of certain studies).

But a massive amount of jurisprudence has arisen from the many situations where the constraints of arbitration render it unequal to litigation.

Arbitrating Arbitrability

As the body of law encompassing arbitration has grown, so have the creativity of attempts to evade it. Stated lightly, one author described the framework created by the Supreme Court for arbitrating arbitrability as “likely to prove a tad oversubtle for sensible application.”¹² The maze of rules created has made challenging arbitration provisions a “seemingly impossible task given the Court's new requirements.”¹³

Separability

First, the doctrine of separability. The separability doctrine, adopted in *Prima Paint*, is the notion that an arbitration clause in a larger contract must be carved out, severed from the larger contract, and examined separately.¹⁴ Thus, the arbitration clause may be governed by a different law than the container contract, and the invalidity of the main contract has no impact in and of itself on the validity of the agreement to arbitrate contained in it.¹⁵ Despite the Supreme Court’s rhetoric about treating arbitration provisions equally to other provisions in a contract, this concept was explicitly adopted to further a “liberal policy of promoting arbitration.”¹⁶

¹² Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT’L ARB. 435, 519 (2011).

¹³ Jennifer Schulz, *Arbitrating Arbitrability: How the U.S. Supreme Court Empowered the Arbitrator at the Expense of the Judge and the Average Joe*, 44 LOY. L.A. L. REV. 1269, 1270 (2011).

¹⁴ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 411 (1967) (supporting the notion that “federal courts are authorized to fashion a federal rule to make arbitration clauses “separable” and valid” regardless of the remainder of the agreement); See Meredith Goldich, *Throwing Out the Threshold: Analyzing the Severability Conundrum Under Rent-A-Center, West, Inc. v. Jackson*, 60 AM. U. L. REV. 1673, 1682 (2011); Turkey: *The Separability Of An Arbitration Clause From The Underlying Contract*, ERDEM&ERDEM, (Aug. 15, 2013), [http://www.mondaq.com/turkey/x/258196/Arbitration+Dispute+Resolution/The+Separability+Of+An+Arbitration+Clause+From+The+Underlying+Contract](http://www.mondaq.com/turkey/x/258196/Arbitration+Dispute+Resolution/The+Separability+Of+An+Arbitration+Clause+From+The+Underlying+Contract;);

¹⁵ Adam Samuel, *Separability of Arbitration Clauses – Some Awkward Questions About Law on Contracts, Conflict of Laws and the Administration of Justice*, www.biicl.org/files/4243_separabi_updated.doc.

¹⁶ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 421 (1967); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2d Cir. 1959).

Because separability was adopted before the modern refinement of arbitration clauses, early cases required less scrutiny. First was the issue of whether the parties had agreed to arbitration at all.¹⁷ *First Options v. Kaplan* decided that the question of whether the parties agreed to arbitrate the particular dispute is to be decided by the court, not the arbitrator, unless they clearly and unmistakably provide otherwise.¹⁸ This case is somewhat antithetical to arbitrating arbitrability however, since there was no discernable assent to arbitrate.¹⁹ After all, contracts, including contracts to arbitrate, are looked at according to their terms in conjunction with the intent of the parties.²⁰ The court's dicta warned that situations where the arbitrability question itself was in dispute wouldn't so easily be handed over to courts.²¹

What is a Question of Arbitrability?: Procedural vs. Substantive Arbitrability
Following this decision, large companies undoubtedly began including clauses which required manifesting assent to arbitration. Meanwhile, *Howsam v. Dean Witter Reynolds* narrowed the scope of judicial interpretations of the validity of an arbitration dispute.²² Distinguishing substantive arbitrability from procedural arbitrability, the court constructed a doctrine of constructive intent: questions of procedural arbitrability involving the *type* of arbitration proceeding the parties agreed upon are presumptively the arbitrator's territory only.²³ Thus, the only real questions of arbitrability that might warrant a court's opinion would be

¹⁷ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 940 (1995) (noting that because the couple had not clearly agreed to submit the question of arbitrability to arbitration, the arbitrability of the dispute between the firm and the couple was subject to independent review by courts).

¹⁸ *Id.*

¹⁹ *Id.* at 946; *see also* *Equal Employment Opportunity Comm'n v. Waffle House*, 534 U.S. 279 (2002) (refusing to bind a third party who was not a party to the arbitration agreement to its terms, under the reasoning of *First Options*).

²⁰ *First Options of Chi., Inc.*, 514 U.S. at 947; *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985).

²¹ *Id.* at 946; William Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?* 12 *ARBITRATION INTERNATIONAL* 137, 137.

²² *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

²³ *Id.* (noting procedural provisions as time limits, notice, laches, estoppel, etc.); *see e.g.*, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451 (2003).

substantive issues based on defenses to the arbitration clause itself.²⁴ Significantly, the court in *Buckeye Check Cashing* validated the distinction between challenges to the contract versus challenges to the arbitration agreement.²⁵ Defenses that go to the existence of an enforceable contract as a whole are for the arbitrator to decide, while issues concerning the existence of an enforceable arbitration agreement are for the court.²⁶ Thus, even if a contract is challenged as illegal, the arbitrator will be the one to resolve this claim regardless of the merits the argument may have had in court.²⁷

Delegation Clauses: A Provision Within a Clause Within a Contract

In a formalistic move treating contracts with arbitration provisions akin to Russian nesting dolls, the *Rent-A-Center, W Inc.* refined what is considered a “question of arbitrability” for courts.²⁸ Only challenges to delegation provisions, that is, challenges that specifically target the clause within the arbitration contract controlling the agreement to arbitrate ‘gateway’ questions of arbitrability, may be considered by courts.²⁹ Although the court claimed that the case simply fleshed out principles of contract law and conclusions from precedent, the case added a layer of complexity in the road to escaping arbitration.³⁰

²⁴ *Id.*; Jarrod Wong, *Arbitrating in the Ether of Intent*, 40 FLA. ST. U. L. REV. 165, 178 (2012) (explaining substantive arbitrability questions as involving whether the parties are bound by a given arbitration clause and whether an arbitration clause in a concededly binding contract applies to a particular type of controversy).

²⁵ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006).

²⁶ *Id.*

²⁷ ROBINS KAPLAN LLP, *We Agreed to What?! How the Selection of an Arbitration Clause Can Impact a Client's Legal Rights* (May 4, 2007), <http://www.robinskaplan.com/resources/articles/we-agreed-to-what-how-the-selection-of-an-arbitration-clause-can-impact-a-client-s-legal-rights>; QUARLES & BRADY LLP, *Rent-A-Center v. Jackson: Delegation of Unconscionability Challenges to Arbitrators* (July 19, 2010), <http://www.quarles.com/publications/rent-a-center-v-jackson-delegation-of-unconscionability-challenges-to-arbitrators/> (noting that, after *Rent-A-Center v. Jackson*, “precision is critical”).

²⁸ See *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 73 (2010); FOX ROTHSCHILD LLP, *Sometimes When You Win, You Really Lose — Rent-a-Center v. Jackson* (2010), <http://www.foxrothschild.com/publications/sometimes-when-you-win-you-really-lose-%E2%80%94-rent-a-center-v-jackson/>.

²⁹ *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (e.g. whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy).

³⁰ See *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010) (providing arbitrator “exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement”); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S.

Challenges to Arbitrating Arbitrability

It should be noted that the majority of validity challenges, including the ones that meant to challenge the delegation clause but didn't, were based on an unconscionability defense. But the provision governing challenges to enforcement, section 2, does not specifically delineate how the validity of a contract should be challenged.³¹ Instead, the provision allows "such grounds as exist at law or in equity for the revocation of any contract."³² The Supreme Court has mentioned that section 2 applies to general contract defenses such as fraud, duress, or unconscionability, but has not defined the full range of defenses available.³³

Since contract law is state law, each state has discretion in creating their own contract law defenses, with one major caveat.³⁴ A defense created with arbitration in mind is likely to be invalidated if it manifests animosity to arbitration and puts arbitration contracts on unequal footing with other contracts.³⁵ This broad form of conflict preemption has invalidated many well-meaning attempts at reigning in the broadening arbitration jurisprudence.³⁶ A recent notable example is *AT&T v. Concepcion*: although unconscionability is a contract law defense,

938, 938 (1995); SCOTUSBLOG, *Rent-A-Center v. Jackson: Delegating to arbitrator power to determine arbitrability* (Sept. 30, 2011 3:00 PM), <http://www.scotusblog.com/2011/09/rent-a-center-v-jackson-delegating-to-arbitrator-power-to-determine-arbitrability/>.

³¹ 9 U.S.C.A. § 2 (West).

³² *Id.*

³³ *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); see also David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1231 (2013) (discussing the imprecise limits of the stretch of section 2 and its effect on public-policy oriented state statutes).

³⁴ 9 U.S.C.A. § 2 (West); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011) (noting that "nothing in [the FAA's section 2] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives").

³⁵ *Id.* at 341 (noting that "the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration"); see also *Preston v. Ferrer*, 552 U.S. 346, 358 (2008) (noting that although the statute at issue did not directly contradict the FAA, it frustrated one of its objectives: streamlined proceedings and expeditious results). See generally Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption* 67 FL. L. REV. 711 (describing how the FAA jurisprudence has surpassed field preemption to a broader type of 'impact' preemption).

³⁶ See e.g., *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 1203 (2012) (per curiam) (preempting a state law that prohibits the arbitration of claims involving death or personal injury to residents of nursing homes); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

California created a special version, named the “Discover Bank” rule.³⁷ This rule provided that “class waivers in consumer arbitration agreements are unconscionable if the agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud.”³⁸ However, the Supreme Court thought this went too far, finding animosity towards arbitration within the judicially created doctrine.³⁹

Combining these two ideas, a strong contract law defense correctly challenging the delegation clause may provide a narrow escape to an innocent plaintiff attempting to challenge a contract of adhesion, and others. However, the drawback is that because the court is only able to formally consider the defense in conjunction to the delegation clause, regardless of other clauses in the contract that may be manifestly unjust, only the strongest cases will succeed.⁴⁰ To withstand a challenge, the defendant must show both that the language of the delegation clause is clear and unmistakable and that the delegation clause is not revocable under state contract defenses to enforcement.⁴¹

Step 1: “Clear and Unmistakable”

As part of the two-step challenge to delegation clauses, the parties first attempt to show that there was not clear and unmistakable intent to arbitrate arbitrability in the delegation clause,

³⁷ See generally *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).

³⁸ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333-34 (2011); *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162 (2005) abrogated by *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

³⁹ Gary Born, KLUWER ARBITRATION BLOG, *Challenges to the Validity of Agreements to Arbitrate State-Law Claims for the Public Benefit* (Nov. 5, 2013) (“even state laws of general application may be preempted if they disproportionately impair the availability or operation of arbitration procedures”), <http://kluwerarbitrationblog.com/2013/11/05/challenges-to-the-validity-of-agreements-to-arbitrate-state-law-claims-for-the-public-benefit/#ref5>.

⁴⁰ *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 74, 130 S. Ct. 2772, 2780 (2010) (“the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination”).

⁴¹ *Pinela v. Neiman Marcus Grp., Inc.*, 238 Cal. App. 4th 227, 239-40 (2015), reh'g denied (July 29, 2015), review denied (Sept. 16, 2015); *Tiri v. Lucky Chances, Inc.*, 226 Cal. App. 4th 231, 242 (2014).

as instructed in *First Options*.⁴² This is a procedural step, deciding who the delegation of power should go to as far as deciding the validity of the substantive defense. Of course, although not directly outcome determinative, common sense dictates that one outcome may be more preferable.

Interpretations of clear and unmistakable intent are becoming less stringent. The question of arbitrability was intended to be tilted in favor of judicial determination: “where the agreement is silent or ambiguous . . . the court and not the arbitrator should decide arbitrability so as not to force unwilling parties to arbitrate a matter they reasonably thought a judge, not an arbitrator, would decide.”⁴³ So where is the line?

A delegation clause in *Tiri v. Lucky Chances* clearly vested authority in the arbitrator: “[t]he Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement.”⁴⁴ And recently, *Brennan v. Opus Bank* supported precedent that expressly incorporating the AAA arbitration rules fulfills the clear and unmistakable intent threshold.⁴⁵ *Meadows v. Dickey’s Barbeque*’s delegation clause was clear and unmistakable, including arbitrability; and incorporating by reference the commercial rules of the AAA.⁴⁶

⁴² *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“Courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so”).

⁴³ *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 552 (2004), as modified on denial of reh’g (Dec. 28, 2004) (summarizing the *First Options* court’s rationale).

⁴⁴ *Tiri*, 226 Cal. App. 4th at 242.

⁴⁵ *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (noting an AAA provision stating that the “arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the ... validity of the arbitration agreement” manifested the necessary intent); *Fadal Machining Centers, LLC v. Compumachine, Inc.*, 461 F. App’x 630, 632 (9th Cir. 2011); GLOBALARBITRATIONNEWS, *USA: Ninth Circuit Holds Incorporating AAA Rules Shows Parties Agreed to Arbitrate Arbitrability*, <http://globalarbitrationnews.com/usa-ninth-circuit-holds-incorporating-aaa-rules-shows-parties-agreed-to-arbitrate-arbitrability-20160201/>.

⁴⁶ *Meadows v. Dickey’s Barbecue Restaurants Inc.*, No. 15-CV-02139-JST, 2015 WL 7015396, at *4 (N.D. Cal. Nov. 12, 2015).

On the other hand, the delegation clause in *Mohamed v. Uber* was found ambiguous when attempting to reconcile it with other provisions of the contract.⁴⁷ Clauses vesting exclusive jurisdiction in the state and federal courts of San Francisco and enforcing provisions “to the fullest extent under law” brought the language of the delegation provision into question and out of the arbitrator’s control.⁴⁸ Construing the language of the delegation clause in relation to the rest of the contract has allowed various courts to conclude that ambiguity exists.⁴⁹ And clear and unmistakable intent was not found where an arbitration contract only included a broad delegation provision.⁵⁰

Step 2: Unconscionability

Cost-based Challenges

Cost-based challenges to delegation clauses arose out of the use of cost-based arguments to arbitration generally.⁵¹ This challenge was first brought as a type of unconscionability that applies to claims under federal statutes, claiming the cost of the proceeding prevents them from fully extinguishing their claims.⁵² The precedent of this doctrine has developed a few base considerations to bringing a successful challenge. First, the plaintiff must be very specific in demonstrating the cost of the arbitration process (here, the cost of arbitrating arbitrability) and the plaintiff’s ability to pay.⁵³ Next, some courts have also pointed out that only costs of

⁴⁷ *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1199 (N.D. Cal. 2015).

⁴⁸ *Id.*

⁴⁹ *Vargas v. Delivery Outsourcing, LLC*, No. 15-CV-03408-JST, 2016 WL 946112, at *7 (N.D. Cal. Mar. 14, 2016); *Levin v. Caviar, Inc.*, No. 15-CV-01285-EDL, 2016 WL 270619, at *3 (N.D. Cal. Jan. 22, 2016); *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 792 (2012); *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1566 (2009).

⁵⁰ *See Peabody Holding Co., LLC v. United Mine Workers of Am., Int’l Union*, 665 F.3d 96, 101 (4th Cir. 2012).

⁵¹ *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 90, 121 (2000).

⁵² *Dean v. Draughons Jr. Coll., Inc.*, No. 3:12-CV-0157, 2012 WL 5398653, at *5 (M.D. Tenn. Nov. 5, 2012), rev’d on reconsideration, 917 F. Supp. 2d 751 (M.D. Tenn. 2013) (noting that this version of unconscionability has been adopted in Kentucky).

⁵³ *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) (where “a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs”); *Morrison v. Circuit City Stores*, 317 F.3d 646, 658-61 (6th Cir. 2003) (weighing the *Bradford* case-by-case approach against the agreement’s ability to further broader social purposes).

arbitration that do not similarly exist in litigation will really be salient in a cost-based challenge.⁵⁴

Multiple claims challenging delegation provisions based on cost have been dismissed due to unambiguous language in the delegation clause, lack of specificity in targeting the delegation clause and lack of showing of invalidity due to state contract law defenses.⁵⁵ For example, *Madrigal v. AT&T Wireless* saw a failed cost-prohibitiveness challenge under *Rent-A-Center* because the parties' arbitration agreement was clear in delegating authority to the arbitrator to determine the validity of the agreement.⁵⁶ Additionally, they failed to address the delegation provision specifically.⁵⁷ *Dean v. Draughons Jr. College*, on the other hand, found that Kentucky state law did recognize a cost-prohibitiveness defense and that the plaintiffs could not pay the costs to arbitrate arbitrability!⁵⁸ Plaintiffs were foreclosed, however, due to the preemption of their state law claims either as expressly preempted by the FAA or through conflict with the FAA's purpose, as in *AT&T*.⁵⁹

⁵⁴ See *Koridze v. Fannie Mae Corp.*, 593 F. Supp. 2d 863, 871 (E.D. Va. 2009) (comparing attorney's fees in litigation and arbitration); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 411 (S.D.N.Y. 2003) (using *Bradford* factors, including looking at the cost differential between arbitration and litigation in court); Jacob Spencer, *Arbitration, Class Waivers, and Statutory Rights*, 35 HARV. J.L. & PUB. POL'Y 991, 1012 (2012) (excluding *Green Tree's* application where prohibitively expensive costs are imposed by the claim itself).

⁵⁵ See *infra* note 41.

⁵⁶ *Madrigal v. AT & T Wireless Servs., Inc.*, No. 1:09-CV-0033-OWW-MJS, 2010 WL 5343299, at *3 (E.D. Cal. Dec. 20, 2010).

⁵⁷ *Dean*, 917 F. Supp. 2d at 759; *Madrigal v. AT & T Wireless Servs., Inc.*, No. 1:09-CV-0033-OWW-MJS, 2010 WL 5343299, at *5 (E.D. Cal. Dec. 20, 2010) ("It may be that had Jackson challenged the delegation provision by arguing that these common procedures as applied to the delegation provision rendered that provision unconscionable, the challenge should have been considered by the court").

⁵⁸ *Id.* at 757; Liz Kramer, ARBITRATION NATION, *Could Arbitration of Cost-Prohibitive State Law Claims Be Compelled While Similar Federal Claims Stay In Court?*, <http://arbitrationnation.com/could-arbitration-of-cost-prohibitive-state-law-claims-be-compelled-while-similar-federal-claims-stay-in-court/>.

⁵⁹ *Id.* at 763 ("Accordingly, although Rent-A-Center indicated that federal district courts could entertain state law challenges to the enforcement of a delegation clause based on fee-splitting, this court construes *Concepcion* and other relevant precedent as precluding the assertion of a Kentucky cost-prohibitiveness defense to the Delegation Clause here"); Kramer, *supra* note 58.

But cases have shown that demonstrating excessive costs to a delegation provision is not impossible. In *Mohamed v. Uber*, the plaintiff succeeded in showing both that the delegation provision was not clear and unmistakable and that it was unconscionable, in part because of cost.⁶⁰ The court found that the delegation clauses would force drivers to pay exorbitant fees just to arbitrate arbitrability – fees which drivers would not need to pay to litigate arbitrability in Court – and thus substantively unconscionable.⁶¹ *Parada v. Superior Court* found a similar escape chute, first using conflicting language mentioning a ‘trier of fact’ to conclude that the delegation provision’s language was not clear and unmistakable, as required.⁶² Substantive unconscionability due to costs was also shown.⁶³ The arbitration agreement required a panel of three arbitrators to decide the dispute and prohibited joinder of claims, resulting in arbitration costs of at least \$3200 per arbitrator.⁶⁴

Choice of Law Challenges

In a choice-of-law clause, the parties agree that in the event of litigation (or arbitration) arising out of the contract, the lawsuit will be governed by the law of a specified state.⁶⁵ A standard choice-of-law clause is not an agreement to contract out of the FAA and to apply state arbitration law, but is a choice to apply a certain state's law with regard to substantive rights and obligations.⁶⁶

⁶⁰ *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1199 (N.D. Cal. 2015).

⁶¹ *Id.* at 1216.

⁶² *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1566 (2009) (“[i]n the event that any provision of this Agreement shall be determined by a trier of fact of competent jurisdiction to be unenforceable in any jurisdiction, such provision shall be unenforceable in that jurisdiction”).

⁶³ *Id.* at 1584.

⁶⁴ *Id.* at 1574 (also submitting evidence of their income, expenses, and savings to show their inability to pay the required fees at the time they signed the Atlas Account Agreements).

⁶⁵ Jillian R. Camarote, *A Little More Contract Law with My Contracts Please: The Need to Apply Unconscionability Directly to Choice-of-Law Clauses*, 39 SETON HALL L. REV. 605 (2009) (combining choice of law clauses with forum-selection clauses, specifying the state and county of venue).

⁶⁶ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).

The court in *Pinela v. Nieman Marcus Group* addressed a contract with these provisions.⁶⁷ Here, an arbitration agreement was rendered unenforceable where a choice-of-law clause interpreted in conjunction with a delegation clause restricted the arbitrator's power to apply California's rules regarding unconscionability.⁶⁸ Because of the fact that the plaintiff's employment dispute arose under California law, the fact that the arbitrator would be forced to apply Texas law to the dispute was enough for the court to find that this provision was substantively unconscionable and could not be enforceable.⁶⁹ Previously, *Samaniego v. Empire Today, LLC* used a similar choice of law provision to invalidate an arbitration contract.⁷⁰ Although that contract did not have a delegation provision and thus included one less step, the court similarly ruled that Illinois law could not govern a dispute arising under California wage and hour claims.⁷¹ The court found separability unable to fix the contract's validity, as the whole contract was permeated with unconscionability, and invalidated the entire employment agreement.⁷²

However, the state's law chosen under the choice-of-law provision must contravene the statute that underlies the cause of action in order for an unconscionability challenge to be successful.⁷³ *Meadow's v. Dickey's Barbeque* specifically contrasted its decision with that of the *Pineda* court, holding that their decision would not contravene California policy.⁷⁴ A choice-of-

⁶⁷ *Pinela v. Neiman Marcus Grp., Inc.*, 238 Cal. App. 4th 227 (2015).

⁶⁸ LAW360, *A Rare Victory On Arbitration Agreement Enforceability*, (July 13, 2015), http://www.law360.com/articles/678179/a-rare-victory-on-arbitration-agreement-enforceability#_ednref2; Imre Salazai, OUTSOURCING JUSTICE, *Star Trek and Successfully Challenging a Delegation Provision in an Arbitration Clause* (July 2, 2015), <http://www.outsourcingjustice.com/pinela-neiman-marcus-arbitration/>.

⁶⁹ *Pinela*, 238 Cal. App. 4th at 251.

⁷⁰ *Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138 (2012).

⁷¹ *Id.* at 1149.

⁷² *Id.*

⁷³ *Meadows v. Dickey's Barbecue Restaurants Inc.*, No. 15-CV-02139-JST, 2015 WL 7015396, at *11 (N.D. Cal. Nov. 12, 2015).

⁷⁴ *Id.* ("The [*Pineda*] court then held that the delegation clause was substantively unconscionable because the Texas choice-of-law provision would restrict plaintiffs from using California unconscionability arguments in

law provision should be narrowly weighed in regards to the enforceability of the arbitration provision, not in regards to the effect on Plaintiffs' substantive claims.⁷⁵ In considering the outcomes of these cases, it appears as though there is a decent possibility for plaintiff's to successfully challenge a delegation clause based on an incompatible choice of law provision, if present.

Arbitrator's Self Interest in Finding Arbitrability

Another challenge that has been brought to delegation provisions is as honest as it is effectively foreclosed by the FAA. Nonetheless, multiple cases have challenged delegation provisions according to their belief that the arbitrator has a self-interest in finding the agreement arbitrable so that they can be compensated for arbitrating the dispute on the merits and be considered for further arbitration assignments.⁷⁶ Considering the Supreme Court's fierce protection of arbitration over the last 50 years, a challenge like this doesn't even attempt to hide its hostility towards arbitration. However, especially prior to *Concepcion*, plaintiffs continuously pushed the limits of state public policy and substantive unconscionability with these challenges. Amazingly, some of these challenges succeeded, at least temporarily.

Ontiveros v. DHL Exp. Inc. involved an arbitration contract in an employment agreement.⁷⁷ The court refused to allow arbitrability to be decided by the arbitrator, stating that the "integrity of the contractual arbitration procedures requires that the initial threshold determination . . . must be made by an actual neutral, rather than one with a direct financial interest in the matter remaining in arbitration."⁷⁸ *Murphy v. Check N' Go of California* involved

challenging the enforceability of the arbitration provision or from limiting the choice-of-law provision to prevent substantial injustice").

⁷⁵ *Id.* at *9.

⁷⁶ *Malone v. Superior Court*, 226 Cal. App. 4th 1551, 1564 (2014).

⁷⁷ *Ontiveros v. DHL Exp. (USA), Inc.*, 164 Cal. App. 4th 494, 499-500 (2008).

⁷⁸ *Id.* at 500.

a salaried retail manager filing suit against her employer on wage and hour claims – with little analysis, the court concluded the judge was the proper gatekeeper.⁷⁹ Both the *Ontiveros* and *Murphy* courts found what appeared to be the decision as to the provision in the arbitration agreement giving the arbitrator exclusive authority to decide enforceability issues unconscionable and unenforceable.⁸⁰

Of course, *Concepcion* swiftly overruled any hope that these cases had for being good law.⁸¹ Any state law that would have a disproportionate impact on arbitration agreements was no longer allowed, let alone public policy oriented arguments that specifically target the inequalities of arbitration.⁸² That, however did not stop the parties in *Malone* from bringing their claim.⁸³ The plaintiff brought a wage an hour claim in regards to her employment contract, challenging a delegation clause giving authority to an arbitrator as inherently unconscionable according to selective precedent.⁸⁴ With *Concepcion* as precedent, the court confidently ruled that a delegation provision could not be inherently unconscionable just because it delegated the arbitrability decision to a presumptively biased arbitrator; this was a sheer expression of judicial hostility to arbitration barred by the FAA.⁸⁵ Thus, challenges to delegation clauses that rely on

⁷⁹ *Murphy v. Check 'N Go of California, Inc.*, 156 Cal. App. 4th 138, 142 (2007), as modified (Nov. 9, 2007).

⁸⁰ *Ontiveros*, 164 Cal. App. 4th at 505; *Murphy v. Check 'N Go of California, Inc.*, 156 Cal. App. 4th 138, 145 (2007), as modified (Nov. 9, 2007); see also *Bruni v. Didion*, 160 Cal. App. 4th 1272 (2008), as modified (Mar. 24, 2008).

⁸¹ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011).

⁸² *Id.*; Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am. Rev. Int'l Arb. 435, 543 (2011) ("the abstract principle that state law must serve the overriding policy of "promoting," or at least not "detering," the "incentive" to arbitrate, is now on the books, and may one day cut deeply -- even in cases that implicate the mandate of § 2 to a considerably lesser degree").

⁸³ *Malone v. Superior Court*, 226 Cal. App. 4th 1551 (2014).

⁸⁴ See *id.* at 1555-56; SHRM, Jackson Lewis, *Calif.: Arbitrator, Not Court, Decides Arbitration Agreement's Enforceability* (July 1, 2014), <https://www.shrm.org/legalissues/stateandlocalresources/pages/arbitration-agreement-enforceability.aspx>.

⁸⁵ Ben James, *LAW360, Calif. Court Shifts Course On Arbitrator Delegation Clauses* (June 19, 2014) ("This analysis is nothing more than an expression of a judicial hostility to arbitration, based on the assumption that a paid decision-maker cannot be unbiased, and it, therefore, is wholly barred by the [Federal Arbitration Act]").

unconscionability as an expression of hostility to arbitration no longer have any chance of support in current fiercely protective climate towards arbitration, even if implicit.⁸⁶

Conclusion

In many situations, arbitration is a faster, procedurally simpler, method of dispute resolution. And where both parties have a requisite level of legal knowledge and relatively equal bargaining power, they are likely able to take advantage of the system's efficiencies. But where rules for arbitration were carved out, they were carved out indiscriminately. And in the last fifty years, the Supreme Court has manifested an unparalleled protection and expansion of arbitration's principles and provisions of enforcement.⁸⁷ Thus, the resulting body of law has become complicated to the point of being nonsensical, even to those within the legal profession. And with the modern domination of contracts of adhesion, these terms permeate employment, medical and other contracts. The result is a clash of two worlds. Where a party has a true choice as to whether to agree to an arbitration provision, perhaps all of the carved-out distinctions are meaningful. But where a regular person is simply trying to buy a phone, pay a visit to a doctor or begin a much-needed job, choice is an illusion. And it is in these constrictive, yet commonplace situations that access to justice is denied.

⁸⁶ See Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years after Doctor's Associates, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249, 265 (2006) (discussing how *Casarotto* revealed the Court's fierce defensiveness of arbitration contracts and increased creativity of later attempts to avoid arbitration through unconscionability); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1220 (2013) (discussing *Concepcion* as the "death-knell" for public policy oriented defenses to arbitration, including broad uses of substantive unconscionability).

⁸⁷ J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. (June 2015), <http://www.yalelawjournal.org/article/disappearing-claims-and-the-erosion-of-substantive-law>.

