IN DEFENSE OF SEPARABILITY: *PRIMA PAINT*, *BUCKEYE*, AND *RENT-A-CENTER*

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INTRODUCTION

Company *B* purchased Company *A*'s paint business. *A*, while insolvent, made a purchase agreement with *B* where it committed itself to purchase paint from *B*. Later, the parties also entered into a consulting agreement by which *A* further committed itself to provide *B* with advice and consultation on a number of issues for a specific period of time regarding paint manufacturing and the business. Within the consulting agreement, *A* and *B* agreed to a broad arbitration clause by which parties were to settle future disputes by arbitration rather than litigation. *A* failed on both commitments, and *B* contended that *A* fraudulently induced *B* into believing that *A* can fulfill its purchase and consulting promises. *B* further contended that because the consulting contract was induced by fraud, the arbitration clause stipulated within the consulting contract was no longer valid, thus the parties had to litigate rather than arbitrate.[1] Is *B* correct in its contention that the arbitration clause is tainted by fraud, thus invalid, and not enforceable? What if *A* had forged *B*'s signature on the consulting agreement? Is the arbitration clause valid? And who should make that call? A judge in a court, as a default venue for dispute resolution, or an arbitrator pursuant to the parties' arbitration agreement?

Arbitration is contractual, and arbitration agreements provide the basis for arbitration.[2] Contracting parties contract to submit to arbitration—by waiving their right to litigation—all or certain disputes which have arisen or which may arise between them regarding their relationship.[3] The consent of

1. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 397–99 (1967).

2. *See* AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648–49 (1986) (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); *id.* at 648–49 (citing Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 374 (1974)) ("This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (citing *AT & T Techs.*, 475 U.S. at 649) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."); Volt Info. Scis., Inc. v. Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.").

3. *See* K.W. PATCHETT ET AL., THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, art. II(1), at 28 (1981), https://uncitral.un.org/sites/unci

both parties in referring their current or future disputes to arbitration is fundamental to any voluntary system of alternative dispute resolution, including arbitration.[4] An agreement to arbitrate is formed either as a clause located in the body of the main or container contract,[5] or as a separate agreement concluded between parties after a dispute arises over the main agreement.[6]

The doctrine of separability refers to the independence and distinction of the arbitration agreement from the main contract.[7] Separability refers to the idea that "the validity of an arbitration clause is not bound to that of the main contract and vice versa."[8] Some have referred to it as the "separability presumption."[9] The doctrine is supported by national arbitration legislation, case law,[10] and international arbitration rules.[11] It is asserted that even if the doctrine did not have such legal support, the logic behind the doctrine would make it difficult to argue against it.[12] In the international context (mostly in

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tral.un.org/files/media-documents/uncitral/en/new-york-convention-commonwealth.pdf; *see also* GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 198–99 (3d ed. 2010).

4. BORN, *supra* note 3.

5. David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 639 (2020) (the term "container contract" refers to an agreement containing an arbitration provision).

6. Arbitration clause, arbitration agreement, and arbitration contract are used interchangeably in this Article.

7. *See* PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 198–99 (Emmanuel Gallard & John Savage eds. 1999).

8. *See* JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 102 (2003).

9. *See* 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 312–13 (3d ed. 2009).

10. *See* The Federal Arbitration Act (FAA), 9 U.S.C. §§ 2, 4; *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006); CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1447 (Fr.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 1040(1) (Ger.), https://sccinstitute.com/media/29988/german-arbitration-act.pdf; SCHWEIZERISCUES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 18, 1987, SR 178, RS 178(3) (Switz.); Arbitration Act 1996, c. 23, § 7 (UK), https://www.legislation.gov.uk/ukpga/1996/23/section/7; Premium Nafta Prods. v. Fiji Shipping Co. [2007] UKHL 40 [2007] 4 All ER 1053 (Comm) at [19] (appeal taken from Eng.); Oberlandesgericht Koblenz [OLG] [Court of Appeal, Koblenz] July 28, 2005, XXXI Y.B. Comm. Arb. 673 (Ger.).

11. *See* PATCHETT ET AL., *supra* note 3, art. 16(1), at 33; UNITED NATIONS, *United Nations Convention on the International Sale of Goods* § V art. 81(1), at 22 (1980), https://www.jus.uio.no/lm/un.contracts.international.sale.of.goods.convention.1980/portrait.pdf. Regarding the New York Convention (1958), from one point of view, there are "implications" for separability. *See* PATCHETT ET AL., *supra* note 3. A comparison of Articles II and V(1)(a) of the Convention may give an illustration that the New York Convention can also be a basis for separability; however, this illustration is controversial and not explicit. *See* UNITED NATIONS *supra*, at arts. II, V(1)(a), at 29. *Compare* STEPHEN M. SCHWEBEL, THE SEVERABILITY OF THE ARBITRATION AGREEMENT, IN INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 22 (1987) (adopting the separability doctrine "by implication"), *with* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 145–146 (1st ed. 1981) (showing convention is "indifferent" as to existence of separability doctrine).

12. *See* SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 155 (2011); BORN, *supra* note 9, at 348. For an example of critical views of

civil law jurisdictions) autonomy of the arbitration agreement refers to the same concept—independence of the arbitration clause from the main contract.[13] In other words, "the existence, validity and scope of the arbitration agreement is to be evaluated independently from the enforceability of the main contract,"[14] which results in the fact that "the invalidity of the main contract does not automatically extend to the arbitration clause contained therein, unless it is proven that the arbitration agreement itself is vitiated by fraud or initial lack of consent."[15] Therefore, although it is true that an arbitration clause is "an agreement inside an agreement,"[16] the two agreements (clause and the container contract) are considered to be *separate* or *separable*.[17] Separability,[18] or autonomy of the arbitration agreement,[19] is

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separability, see Stephen J. Ware, *Arbitration Law's Separability Doctrine: After* Buckeye Check Cashing, Inc. v. Cardegna, 8 NEV. L.J. 107, 119 (2007) ("[T]he separability doctrine should be repealed because I believe that no dispute should be sent to arbitration unless the parties have formed an *enforceable* contract requiring arbitration of that dispute."); Richard C. Reuben, First Options*, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 845 (2003) ("[S]eparability perverts contract law because it assumes away the fundamental principle of contractual consent . . . ."); David Horton, *Arbitration about Arbitration*, 70 STAN. L. REV. 363, 388–89 (2018) ("[T]he finer points of the separability doctrine were confusing.").

13. *See* FOUCHARD ET. AL., *supra* note 7, at 199.

14. LOUKAS A. MISTELIS, CONCISE INTERNATIONAL ARBITRATION 899 (1st ed. 2010).

15. KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION, DEVENTER 119–21 (1st ed. 1993).

16. Union of India v. McDonnell Douglas Corp., [1993] 2 Lloyd's Rep. 48, 50 (Eng.).

17. *Id.*

18. For commentary on separability in American law, see generally Arthur Nussbaum, *The "Separability Doctrine" in American and Foreign Arbitration*, 17 N.Y.U. L. Q. REV. 609 (1939–1940); Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1 (2003) [hereinafter Rau, "*Separability" in Seventeen Simple Propositions*]; Alan Scott Rau, '*Separability,' 'Illegality,' and Federalism: The* Cardegna *Case in the Supreme Court*, 20 MEALEY'S INT'L ARB. REP. 31 (2005) [hereinafter Rau, *'Separability,' Illegality,' and Federalism*]; Reuben, *supra* note 12; Ware, *supra* note 12; Taylor Payne & Richard Bales, *What a Contract Has Joined Together Let No Court Cast Asunder: Abolishing Separability and Codifying the Scope of the Provisions of Arbitration Agreements*, 120 W. VA. L. REV. 537 (2017).

19. For commentary on autonomy (separability)—mostly referred to in the comparative and international context—see John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115, 1124 (2003); Christian Herrera Petrus, *Spanish Perspectives on the Doctrines of Kompetenz-Kompetenz and Separability: A Comparative Analysis of Spain's 1988 Arbitration Act*, 11 AM. REV. INT'L ARB. 397, 397 (2000); Pierre Mayer, *The Limits of Severability of the Arbitration Clause*, *in* ICCA CONG. SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION (1999); Aam Samuel, *Separability in English Law-Should an Arbitration Clause Be Regarded as an Agreement Separate and Collateral to a Contract in Which it is Contained?*, 3 J. INT'L ARB. 95, 103 (1986); Carl Svernlov, *What Isn't, Ain't: The Current Status of the Doctrine of Separability,* 8 J. INT'L ARB. 37, 38 (1991); Janet A. Rosen, *Arbitration Under Private International Law: The Doctrines of Separability and Competence de la Competence*, 17 FORDHAM INT'L L.J. 599, 609 (1993); Robert Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?*, 13 AM. REV. INT'L ARB. 19, 27 (2002); G. A. Berman, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. OF INT'L L. 1, 10 (2012); Fiona Lakareber, *Critical Assessment of the Separability Doctrine, Its Impact, and Application*, 6 MANCHESTER REV. L. CRIME & ETHICS 148, 149 (2017); Ronán Feehily, *Separability in International Commercial Arbitration; Confluence, Conflict and the Appropriate*

a well-established principle in international arbitration.[20]

In the United States, separability was adopted in the Federal Arbitration Act (FAA),[21] and recognized, reaffirmed, and expanded in three Supreme Court decisions: *Prima Paint*,[22] *Buckeye*,[23] and *Rent-A-Center*.[24] Yet, several decades after its adoption in *Prima Paint*, there are arguments as to the extent of separability adopted in American arbitration.[25] Many scholars, mostly those who find litigation to be the fairer and more accessible dispute resolution process compared to arbitration—in particular, when it comes to parties with weaker bargaining power—have criticized adoption of separability and have argued that it should be repealed.[26]

Separability of the arbitration clause from its container has two effects or functions in American law.[27] The primary effect is that the legal status of the container has no impact on the arbitration clause.[28] And the secondary effect is the "jurisdiction-allocating" function by which the arbitrator has authority to determine her own jurisdiction, which indeed is possible only if there is no challenge to the validity or existence of the arbitration agreement.[29] Although the two functions are interrelated, the focus of this Article is the primary function of separability in American law. However, by taking into account the primary function, most recent developments regarding the secondary function are also addressed.[30]

To lay the foundation and clarify the purpose of this Article, consider the facts stated at the outset of this Article. The primary function of separability mandates that when parties have made no challenge to the arbitration clause and one party has filed the case with a court, the court must refer the parties to arbitration to decide challenges to the container and basically have the arbitrators decide the merits of the parties' disputes.[31] Thus, in the earlier fact pattern, should the court accept Company *B*'s

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Limitations in the Development and Application of the Doctrine, 34 ARB. INT'L 355, 355 (2018); A.M. Steingruber, *The Doctrine of Separability in International Investment Arbitration: Some Reflections*, 18 TRANSNAT'L DISPUTE MGMT. 3 (2021).

20. *See* BERGER, *supra* note 15, at 121; FOUCHARD ET AL., *supra* note 7, at 398; BORN, *supra* note 9, at 312–13. There are two meanings for autonomy in this context, one is the autonomy of the arbitration agreement from the main contract, namely separability, and the second meaning, more recent and controversial, is autonomy of the arbitration agreement from any national laws. *See* FOUCHARD ET AL., *supra* note 7, at 218. The former is the focus of this Article. *See id.*

21. FAA, 9 U.S.C. §§ 2, 4.

22. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967).

23. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448 (2006).

24. Rent-A-Ctr. W., Inc. v. Jackson, 561 U.S. 63, 75 (2010).

25. *See generally* Rau, "*Separability" in Seventeen Simple Propositions*, *supra* note 18; Reuben, *supra* note 12; Ware, *supra* note 12; Payne & Bales, *supra* note 18.

26. *See supra* note 10 and accompanying text (discussing the adoption of separability).

27. *See infra* Part III.A (discussing separability in American Law).

28. *See infra* Part III.A (discussing the primary function of American arbitration's separability).

29. *See infra* Part III.B (discussing the secondary function of separability).

30. *See infra* Part III.B (discussing the secondary function of separability).

31. *See infra* Part III.B (discussing the challenges of deciding disputes).

contention that because the container contract (consulting agreement here) was induced by fraud, that should also taint the arbitration clause with fraud and deny arbitration and decide the case in court? By applying the separability rubric, the answer is no. Because the arbitration clause is separate from its container, legal status of the container would not impact the arbitration agreement. Now, what if Company *A* had forged Company *B*'s signature on the container contract? Courts have disagreed over how to respond and analyze such complex situations under separability. Some have applied separability only to circumstances where the defense only makes the contract unenforceable.[32] Others have applied separability to its full extent (where the defense would make the container contract *void ab initio*).[33] This Article argues that arbitration agreements are inherently separate and independent agreements from their containers, and separability should be applied to its full extent, unless parties contract otherwise. This Article contains four Parts. Part I discusses the interrelation between separability and "competence-competence" (a concept used internationally and a modified version adopted in American law).[34] Part II provides a comparative understanding of separability and establishes that adoption of a true separate and independent arbitration clause is made in other legal systems, in particular in English arbitration law.[35] Part III discusses separability in American law under the FAA and the three cases of *Prima Paint*, *Buckeye*, and *Rent-A-Center*, which have to a great extent adopted separability despite some judicial reluctance and scholarly calls for its abolishment.[36] Finally, in Part IV, three illustrations are made to further support adoption of a true and independent separate arbitration agreement by arguing that arbitration agreements have historically been treated as independent agreements from the underlying contracts; that such treatment is not only based on arbitration's efficacy concerns and policy, but is rooted in contract law severability rules; and finally, that unique characteristics of arbitration agreements profoundly support adoption of separability to its full extent.[37]

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32. *See infra* note 50 and accompanying text (discussing the circumstances in which contracts are unenforceable).

33. *Compare, e.g.*, Spahr v. Secco, 330 F.3d 1266, 1273 (10th Cir. 2003), Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992), Bazemore v. Jefferson Cap. Sys., LLC, 827 F.3d 1325, 1333 (11th Cir. 2016), *and* Jolley v. Welch, 904 F.2d 988, 993–94 (5th Cir. 1990), *with* Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 472 (5th Cir. 2002). The first line of cases in which the defense was mental incapacitation or signature forgery (on the container), the courts decided that because there is no presumptively valid underlying contract, the arbitration clause does not exist and thus cannot be compelled. *Spahr*, 330 F.3d at 1273; *Chastain*, 957 F.2d at 854; *Bazemore*, 827 F.3d at 1333; *Jolley*, 904 F.2d at 993–94. However, in *Primerica*, the court decided that the mental incapacity defense was "a defense to his entire agreement . . . and not a specific challenge to the arbitration clause," and thus, the arbitration clause should be compelled and the defenses to the container decided by the arbitrator. *Primerica*, 304 F.3d at 472.

34. *See infra* Part I (discussing the relationship between separability and competence-competence).

35. *See infra* Part II (comparing separability in arbitration in English Law).

36. *See infra* Part III (discussing separability in American Law).

37. *See infra* Part IV (discussing the need for separate and independent arbitration).

I. SEPARABILITY AND COMPETENCE-COMPETENCE

Competence-competence is considered to be another important and related concept to separability in arbitration.[38] When the arbitration agreement is considered separate from the rest of the contract, internationally understood, this not only authorizes arbitrators to rule on the main contract's validity but also on the validity of the arbitration agreement itself.[39] This inherent independence of the arbitration agreement from the container contract provides us with this illustration that the jurisdictional competence of the tribunal to rule on the challenges to its own jurisdiction is a corollary to the separability doctrine, establishing the autonomy of the arbitration agreement.[40] This is recognized today in the American arbitration landscape as the jurisdictional-allocating function of separability.[41] Therefore, separability implicitly equips the arbitral tribunal to consider and decide its own jurisdiction,[42] which may be referred to as the interrelation between separability and competence-competence.[43] To further elaborate, one could submit that this interrelation has three general consequences.[44]

The first and perhaps most important consequence is that the status of the container contract has no impact on the arbitration agreement. This is to say that the arbitration agreement remains intact "notwithstanding the non-existence, invalidity, or illegality of the parties' underlying contract"[45] and vice versa. There are two issues that have been discussed concerning this point. First is the invalidity *ab initio* of the main contract (i.e., non-existence: no contract was actually concluded); and second, the unenforceability of the

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38. *See* Rosen, *supra* note 19, at 609.

39. *See id.*; Smit, *supra* note 19, at 30–31.

40. *See* Rosen, *supra* note 19, at 609; Smit, *supra* note 19, at 30–31. For the relationship between the two principles, see BORN, *supra* note 9, at 872. The phrase *tribunal* or *arbitral tribunal* in this Article refers to a panel of arbitrators chosen by the parties.

41. *See generally* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). In *Prima Paint*, as discussed later in this Article, the Supreme Court recognized arbitral authority in deciding their own jurisdiction by allowing the tribunal to decide the validity of container contracts. *Id.* at 406; *see also* Horton, *supra* note 12, at 373 ("Although the parameters of this controversial rule have never been clear, separability is generally understood as (1) treating an arbitration clause as a discrete contract within a broader container contract and (2) allowing courts to resolve only claims that target the arbitration clause itself."); Reuben, *supra* note 12, at 849; Berman, *supra* note 19, at 21–24.

42. See Sojuznefteexport v. JOC Oil, Ltd., 15 Y.B. Com. Arb. 384 (1990), where the court well stated this interrelation:

> [V]alidity of the arbitration clause does not depend upon the validity of the remaining parts of the contract in which it is contained [a result of the separability doctrine]. This allows an arbitration tribunal to declare a contract invalid and yet retain its jurisdiction to decide a dispute as to the consequences of such invalidity provided that the arbitration clause is valid as a separate entity and is sufficiently broad in its wording so as to cover non-contractual disputes.

As a consequence, the arbitral tribunal can determine the validity and even existence of the container contract, "without contradicting its own jurisdiction." GREENBERG ET AL., *supra* note 12, at 158.

43. *See* Rosen, *supra* note 19, at 609.

44. *See generally* FOUCHARD ET AL., *supra* note 7, at 209–17; BORN, *supra* note 9, at 354.

45. BORN, *supra* note 9, at 353; *see* FOUCHARD ET AL., *supra* note 7, at 209–17.

main contract, where a contract is legally formed although it becomes unenforceable at a later time.[46] In cases where the validity of the container contract is under attack (e.g., due to lack of capacity, duress, etc.), pro-separability scholars argue that the non-existence of the container agreement shall not invalidate the arbitration agreement,[47] unless the threat is on the arbitration agreement itself.[48] In other words, it is submitted that "[t]he arbitration agreement will remain effective despite allegations that the main contract never came into existence, was avoided, was discharged or was repudiated."[49] Other legal scholars reject this broad application of separability and consider limitations to separability's applicability where no underlying contract was ever formed.[50] The second situation, which is less controversial, is where the contract is concluded legally, but due to impossibility or frustration, the main contract becomes unenforceable later.[51] It is clear and expected that when the non-existence of the main contract does not affect the arbitration agreement, its frustration, impossibility, or subsequent unenforceability will not *a fortiori* affect the arbitration agreement.[52]

Argued in the context of private international law or conflict of laws, and mostly applicable to international arbitration, another consequence is the autonomy of the arbitration clause from *lex loci contractus* and national laws. When an arbitration clause within a contract is considered separate from the container contract, the determination of the law that governs the arbitration clause and that of the container contract may also be separate.[53] It should be

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46. *See* BORN, *supra* note 9, at 353; FOUCHARD ET AL., *supra* note 7, at 209–17.

47. Premium Nafta Prods. Ltd. v. Fili Shipping Co. Ltd. [2007] UKHL 40, [2007] 4 All ER 1053 (Comm) at [17] (Lord Hofmann) (appeal taken from Eng.) ("The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement.").

48. *See generally* Rau, "*Separability" in Seventeen Simple Propositions*, *supra* note 18. The English House of Lords stated: "Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid." *Premium Nafta Prods. Ltd.*, [2007] UKHL 40, [2007] 4 All ER 1053 (Comm) at [17].

49. *See* FOUCHARD ET AL., *supra* note 7, at 210 (citing Navimpex Central Navala v. Wiking Trader, 1989 Rev. Arb. 641) ("[W]here a contract containing an arbitration clause was signed, though did not come into force . . . .").

50. *See* SCHWEBEL, *supra* note 11, at 1 ("[I]f an agreement contains an obligation to arbitrate disputes arising under it, but the agreement is invalid or no longer in force, the obligation to arbitrate disappears with the agreement of which it is a part. If the agreement was never entered into at all, its arbitration clause never came into force. If the agreement was not validly entered into, then, *prima facie*, it is invalid as a whole, as must be all of its parts, including its arbitration clause."); *see generally* Ware, *supra* note 12; Reuben, *supra* note 12 (stating in American Law).

51. *See* FOUCHARD ET AL., *supra* note 7, at 210; GREENBERG ET AL., *supra* note 12, at 158–59; *see also* ICC Award No. 6503 (1990), French Co. v. Spanish Co., 122 J.D.I. 1022 (1995); ICC Award No. 5943 (1990), 123 J.D.I. 1014 (1996); S.A. Minoteries Loch v. Langelands Korn, 1969 Rev. Arb. 59 (Cour de Cass.) (listing situations where the main contract was avoided or discharged, e.g., cases of impossibility, and the arbitration agreement remained enforceable).

52. *See* sources cited *supra* note 51 and accompanying text (discussing situations when the main contract may become unenforceable but not affect the validity of the arbitration agreement).

53. *See* GREENBERG ET AL., *supra* note 12, at 159.

noted that not only the governing law of the container contract may be different, but also the validity of the arbitration agreement will be determined independent of all national laws.[54] In other words, the arbitration agreement will not be governed by any national law under the choice of law method.[55]

Finally, an indirect consequence of separability is that it provides grounds for application of the principle of competence-competence, which allows arbitrators to rule on their own jurisdiction.[56] One issue worth mentioning is the effect of adopting the level of competence-competence in the adjudication process. Under competence-competence, arbitrators are competent enough to rule on their own jurisdiction before any intervention by national courts.[57] When a dispute is filed in a court (where the existence of an arbitration clause is presumed), and one party claims the invalidity of the arbitration clause while the other party asks the court to refer the parties to arbitration, here the question of the extent of judicial scrutiny is at stake. To say how far courts will scrutinize the case at this stage depends on the level of application of competence-competence in national legal systems, based on whether a strong or zero competence-competence is adopted.[58]

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54. For commentary, see GREENBERG ET AL., *supra* note 12, at 163; FOUCHARD ET AL., *supra* note 7, at 218; BORN, *supra* note 9, at 360; Smit, *supra* note 19, at 21.

55. FOUCHARD ET AL., *supra* note 7, at 218.

56. LEW ET AL., *supra* note 8, at 334 ("While competence-competence empowers the arbitration tribunal to decide on its own jurisdiction, separability affects the outcome of this decision. . . . Without the doctrine of separability, a tribunal making use of its competence-competence would potentially be obliged to deny jurisdiction on the merits since the existence of the arbitration clause might be affected by the invalidity of the underlying contract."); *see also* Svernlov, *supra* note 19, at 37–38.

57. *See* BORN, *supra* note 9, at 853; FOUCHARD ET AL., *supra* note 7, at 395–396; *see also* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 88 (2008) (stating that, in other words, competence-competence "empowers[s] [arbitrators] to decide their own jurisdiction to hear and determine the dispute before them.").

58. Because this Article's focus is separability in American law, and to avoid lengthy discussion, competence-competence is not fully discussed. However, for adoption of competence-competence and its different variations in national arbitration laws see, for example, C.P.C. art. 1466 (Fr.); Art. 1053 para. 1 RV (Neth.); ZPO § 1032(2); BUNDESGESETZBLATT [BGBI] [FEDERAL LAW GAZETTE], § 1032(2) (Ger.); ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE STATUTE] § 592 (Austria); SCHWEIZERISCHES BUNDESGESETZ UBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [Switzerland Federal Code on Private International Law] Dec. 18, 1987, art. 186 (Switz.); Spanish Arbitration Act of 1988 art. 23 (Spain); Arbitration Act 1996, Part 1, §§ 30–32 (UK), https://www.legislation.gov.uk/ukpga/1996/23/contents. For the American approach, see generally First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002). *See also* The Federal Arbitration Act, 9 U.S.C § 3; UNIF. ARB. ACT § 6(d), 7 U.L.A. 18 (amended 2000). For commentary on competence-competence, see JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 387 (2007); EMMANUEL GAILLARD & YAS BANIFATEMI, NEGATIVE EFFECT OF COMPETENCE-COMPETENCE: THE RULE OF PRIORITY IN FAVOR OF THE ARBITRATORS, IN ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 257–58 (Gaillard and Di Pietro eds., 2008); BORN, *supra* note 9, at 863; Barceló III, *supra* note 19, at 1124–126; Berman, *supra* note 19, at 15–21.

Long before common law jurisdictions, the arbitration law of major civil law jurisdictions such as France,[59] Germany,[60] and Switzerland[61] established the principles of separability and competence-competence to protect arbitration agreements' independency and arbitrators' competence to rule on their own jurisdiction,[62] discussed below. The principle of separability under English and American laws, however, has evolved under different terms, discussed later.

II. A COMPARATIVE UNDERSTANDING OF SEPARABILITY

Prior to analyzing separability in American arbitration, a discussion of the concept in other arbitration and judicial systems, although a detour, is necessary for understanding its recognition in other legal systems, in particular, that of English law. It would also help in understanding a truly separate and independent arbitration agreement.

A. Separability in English Law

In England, prior to the English Arbitration Act of 1996, English courts were reluctant to accept the doctrine of separability because many found the principle illogical.[63] The arbitrator never had jurisdiction to decide whether the main contract was valid or not.[64] Thus, if the contract was invalid, so was the arbitration clause.[65] In 1942, the House of Lords showed some flexibility on the dependency of the clause to the container in *Overseas Union Insurance v. AA Mutual International Insurance Co*.[66] It held that an arbitration clause may survive within a contract if the latter was terminated or not performed, but would be inoperative in the event of invalidity *ab initio* of the main contract.[67] In 1993, in *Harbour*,[68] the Court of Appeals took another step in recognizing separability by denying the logic of the proposition in *Overseas Union*.[69] The court's position in *Harbour* was that an arbitrator has jurisdiction to decide on the invalidity *ab initio* of a contract on the ground

59. *See* C.P.C. art. 1447 (Fr.).

60. *See* ZPO § 1040(1) (Ger.).

61. *See* IPRG art. 178(3) (Switz.).

62. *See* BORN, *supra* note 9, at 389; POUDRET & BESSON, *supra* note 58, at 133–41.

63. *See* Overseas Union Ins. v. AA Mut. Int'l Ins. Co. [1988] 2 Lloyd's Rep. 63, 66 (UK) (where Evans J. stated that this rule "owes as much to logic as it does to authority.").

64. *Id.*

65. *See* Hirji Mulji v. Cheong Yue Steamship Co Ltd. [1926] AC 497; *see also* Feehily, *supra* note 19, at 365.

66. *See generally Overseas Union Ins.*, [1988] 2 Lloyd's Rep. 63.

67. *See* Heyman v. Darwins, Ltd. [1942] AC 356 (HL). For commentary, see POUDRET & BESSON, *supra* note 58, at 139; Rosen, *supra* note 19, at 630–32.

68. Harbour Assurance Co. v. Kansa General Int'l Ins. Co. [1993] 3 All ER 897 (Eng.).

69. *Overseas Union Ins.*, [1988] 2 Lloyd's Rep. 63; *see also Harbour Assurance Co.*, [1993] 3 All ER 897.

that it does not affect the validity of the arbitration clause.[70] However, today the acceptance of a true separate and independent arbitration agreement is put beyond doubt in § 7 of the English Arbitration Act of 1996, which states:

> Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement . . . shall not be regarded as invalid, non-existence or ineffective because that other agreement is invalid or did not come to existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.[71]

Section 7 was applied in *Premium Nafta Products Ltd v. Fili Shipping Co. Ltd.*, where it was claimed that the agent, acting for the owners, was bribed to sign a charter that included an arbitration clause.[72] The court concluded that the agent was not bribed to sign the arbitral clause, thus the clause remained valid.[73] However, assuming that the agent was actually bribed, Lord Hoffmann stated:

> [S]ection 7 in my opinion means that they [main contract and arbitral clause] must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.[74]

Separability was recognized yet in another English case, *Fiona Trust & Holding Corp. v. Privalov*.[75] The House of Lords echoing prior cases, further expanded application of separability to cases where challenges to the container contract could also taint the validity of the arbitration agreement.[76] For instance, where the arbitration is in form of a clause within the container agreement, in the same document, and one party alleges that she never consented to the contents of the container contract, or that their signature was forged.[77] However, in another case, illegality of the container contract for

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70. *See Harbour Assurance Co. Ltd.*, [1993] 3 All ER at [83]. For commentaries, see generally Peter Gross, *Separability Comes of Age in England:* Harbour v. Kansa *and Clause 3 of the Draft Bill*, 11 ARB. INT'L 85 (1995).

71. *See* Arbitration Act 1996, c. 23, § 7 (UK), https://www.legislation.gov.uk/ukpga/1996/23/section/7; *see also* FOUCHARD ET AL., *supra* note 7, at 205–06.

72. Premium Nafta Products v. Fili Shipping Co. [2007] UKHL 40, [2007] 4 All ER 1053 (Comm) at [1] (appeal taken from Eng.).

73. *Id.* at [19].

74. *Id.*

75. *See* Fiona Trust & Holding Corp. v. Privalov [2007] UKHL, [2007] 1 All ER 891(Comm) (Eng.). For separability in Australia, see Joachim Delaney & Katharina Lewis, *The Presumptive Approach to the Construction of Arbitration Agreements and the Principle of Separability – English Law Post* Fiona Trust *and Australian Law Contrasted*, 31(1) UNSW L. J. 341, 358–63 (2008).

76. *Fiona Trust*, [2007] UKHL 40, [2007] 1 All ER 891 (Comm) at [25].

77. *See id.* at [29]; *see also* John Townsend, *Foreign Law and Uniformity in English Arbitration:* Fiona Trust v. Privalov, 14 UNIF. L. REV. 555, 556 (2009); Feehily, *supra* note 19, at 367–68.

public policy reasons was found not to impact the arbitration clause itself.[78] The decision in these cases follow the basic notion of separability—challenges that relate to the container contract will not taint the arbitration agreement, provided those challenges are not addressed to the arbitration agreement itself.[79] According to Schwebel, separability is based on four theoretical bases: First, that the parties generally do not intend to exclude disputes over validity of the container contract,[80] after all they entered into the arbitration agreement to resolve disputes as to the container. Second, an unwilling party could easily avoid its earlier commitment to arbitrate disputes by merely alleging the invalidity of the container contract,[81] which could deprive arbitration of its efficacy.[82] Third, there are actually two agreements contained in a contract with an arbitration clause and "the arbitral twin . . . survives any birth defect or acquired disability of the principal agreement."[83] Finally, if we do not adopt separability, courts will have to rule on the merits as default venues, which is contrary to the usual and intended practice of making judicial review of the arbitral award.[84] The notion of a true separate and independent arbitration agreement is plausibly adopted in English law. This adoption, although at first glance may seem illogical, the notion of true separate arbitration agreements is "overcome by presumptions and by practice. It has been overcome by necessity. And it has been overcome by the essence of the arbitral process."[85]

78. Beijing Jianlong Heavy Ind. Grp. v. Golden Ocean Grp. Ltd. [2013] EWHC 1063 (Comm) at [40]–[42] (Eng.).

79. *See* Feehily, *supra* note 19, at 368.

80. SCHWEBEL, *supra* note 11, at 3–6.

81. *Id*.

82. *See Beijing Jianlong Heavy Industry Grp.*, [2013] EWHC 1063 (Comm). The case illustrates that English courts enforce arbitration agreements where the container contract is unenforceable and where there is a public policy rule rendering the container void for illegality. *Id.* The decision also reinforces the pro-arbitration stance, which will not allow parties to avoid a valid earlier agreement to arbitrate future disputes. *Id.*

83. SCHWEBEL, *supra* note 11, at 3–6.

84. *Id.*; *see also* Black Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg AG, [1981] 2 Lloyd's Rep. 446, 455 (Q.B.). Regarding the relationship between the arbitration clause and the container contract, the court stated the following:

> [T]here are not one, but two, sets of contractual relations which govern the arbitration of disputes under a substantive contract. . . . First, there is the contract to submit future disputes to arbitration. This comes into existence at the same time as the substantive agreement of which it forms part. Prima facie it will run for the full duration of the substantive agreement, and will then survive for as long as any disputes remain unresolved. Second, there are one or more individual sets of bilateral contractual obligations which are called into existence as and when one party asserts against the other a claim falling within the scope of the initial promise to arbitrate, which they have not been able to settle.

85. Rosen, *supra* note 19, at 606–07 n.45 (first quoting *Black Clawson Int'l Ltd.*, [1981] 2 Lloyd's Rep. at 455; and then quoting SCHWEBEL, *supra* note 11, at 2).

B. Status Quo of Separability in Civil Law Jurisdictions

The French have allocated separability the role it deserves and can deliver. The sole purpose of separability—or more accurately stated autonomy (*autonomie*) in French law—is that "[a]n arbitration agreement is independent of the contract to which it relates. It shall not be affected if such contract is void", codified in Article 1447 of the French Civil Procedure Code.[86] In 1963, the Cour de cassation adopted separability in *Etablissements Raymond Gosset v. Societe Carapelli*.[87] In the landmark opinion, the French Supreme Court held that "[i]n matters of international arbitration, the compromissory clause, whether concluded separately or inserted into the main contract, always presents . . . a complete juridical autonomy, excluding the possibility that it could be affected by the eventual nullity of the main contract."[88] The American and French approaches to separability are distinct by the role and expectation of the arbitration systems from separability.[89] Unlike American law, French arbitration law has limited separability to its "core sense",[90] basically allowing the arbitral tribunal to determine invalidity of the container contract when the container is challenged. In other words, there is no jurisdiction-allocating functions defined for separability under French law—that has been reserved for *compétence de la compétence*.[91]

In Germany, separability is codified in § 1040(1) of the Code of Civil Procedure, which provides that an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract.[92] Therefore, in case of the termination, regardless of rescission or invalidity of the container contract, the arbitration agreement's validity remains intact.[93] Thus, in Germany—unlike the approach taken in France,

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86. C.P.C. art. 1447 (Fr.); s*ee also* Berman, *supra* note 19, at 25 (citing Frédéric-Edouard Klein, *Du caractère autonome de la clause compromissoire, notamment en matière d'arbitrage international*, C.P.C. art. 1447 (Fr.); *see also* Berman, *supra* note 19, at 25 (citing Frédéric-Edouard Klein, *Du caractère autonome de la clause compromissoire, notamment en matière d'arbitrage international*, 50 REVUE CRITIQUE DE DROIT INT'L PRIVÉ 499, 500–08 (1961).

87. Etablissements Raymond Gosset v. Societe Carapelli, Cour de cassation [Cass.] [Supreme Court for Judicial Matters], le civ., May 7, 1963, Ball Civ. 1, No. 246.

88. Thomas E. Carbonneau, Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce, 19 Tex. Int'l L.J. 33, 82 (1984); *see* Berman, *supra* note 19, at 25 (citing *Etablissements Raymond Gosset*, Cour de cassation [Cass.] [Supreme Court for Judicial Matters], le civ., May 7, 1963, Ball Civ. 1, No. 246); *see also* Thomas E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL. L. REV. 1, 31–33 (1980); Serge Gravel & Patricia Peterson, *French Law and Arbitration Clauses— Distinguishing Scope from Validity: Comment on ICC Case No. 6519 Final Award*, 37 MCGILL L.J. 510, 512 (1992).

89. Berman, *supra* note 19, at 25.

90. *Id.*

91. *Id.* at 26. ("[French law] embraces the doctrine of separability in the way it is most widely understood internationally, but rejects it as a basis for allocating authority over issues of arbitral jurisdiction.").

92. ZPO § 1040(1) (Ger.).

93. *Id.*

and somewhat closer to the American approach—separability has the dual function: independency of the arbitration clause from the container and a jurisdiction-allocating principle, in correlation with Kompetenz-Kompetenz.[94]

III. SEPARABILITY IN AMERICAN ARBITRATION LAW

Part III is focused on separability in American law. Separability in American law has a dual function. First, in Part A, there is a discussion on the development and application of separability's first and original function, basically the independency of the arbitration agreement from the container contract.[95] Later, in Part B. the discussion will switch to separability's jurisdiction-allocating function and the contours of the "who decides" question.[96]

A. Separability: Foundation, Development, and Application

Through navigating American arbitration's landscape, one may trace separability's first function being recognized, construed, and applied in four major pieces; namely, the Federal Arbitration Act (FAA) (Sections 2 and 4), and the Supreme Court's decisions in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[97] *Buckeye Check Cashing, Inc. v. Cardegna*,[98] and *Rent-A-Center, West, Inc. v. Jackson*.[99] Two cases of *First Options of Chicago, Inc. v. Kaplan*,[100] and *Howsam v. Dean Witter Reynolds, Inc.*,[101] although not on point with respect to separability's primary function and more on point regarding the 'who decides' question (the separability's secondary function), are addressed for distinction purposes. The following is a discussion and commentary on the FAA and the corresponding precedent.

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94. Berman, *supra* note 19, at 27–28 ("In principle, all issues related to the arbitration agreement's existence, validity, and scope are matters on which courts may rule under either Section 1032(1) or (2); all other threshold issues concerning the arbitration are reserved for the arbitrators. To that extent, German law embraces separability in its second as well as its first sense."); *see also id*. at 19–21; HOSSEIN FAZILATFAR, OVERRIDING MANDATORY RULES IN INTERNATIONAL COMMERCIAL ARBITRATION 50–55 (2019).

95. *See supra* Part III.A (discussing the FAA's development through precedent).

96. *See supra* Part III.A (discussing the public policy behind the who decides question).

97. *See generally* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

98. *See generally* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).

99. *See generally* Rent-a-Ctr. W., Inc. v. Jackson, 561 U.S. 63 (2010).

100. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

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

1. The FAA

Decades of hostility (inherited from the English common law)[102]—towards adjudicating disputes outside the traditional court system,[103] and the heavy burden on courts to resolve countless complex commercial cases lead Congress to adopt the pro-arbitration FAA.[104]

Sections 2[105] and 4[106] of the FAA implicate the separability doctrine. Section 2 titled:

> [v]alidity, irrevocability, and enforcement of agreements to arbitrate:
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[107]

Section 2—considering the fact that courts are default venues for dispute resolution—makes clear that Congress strongly recognizes and enforces agreements to arbitrate by stating such agreements "shall be valid,

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102. *See generally* The FAA, 9 U.S.C. §§ 1–16; *see also*, *e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) (stating that the FAA's "basic purpose . . . is to overcome courts' refusals to enforce agreements to arbitrate."); Jane Byeff Korn, *Changing Our Perspective on Arbitration: A Traditional and a Feminist View*, 1991 U. ILL. L. REV. 67, 74 (1991).

103. *See, e.g.*, Ins. Co. v. Morse, 87 U.S. 445, 457 (1874) ("[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."); *see also* U.S. Asphalt Refin. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1010–11 (S.D.N.Y. 1915) ("The courts will scarcely permit any other body of men to even partially perform judicial work, and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled to such action by statute."). Compare with the attitude of courts after few decades of the FAA's adoption. *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (illustrating refusal by courts to enforce arbitration agreements would frustrate purpose of achieving "orderliness and predictability essential to international business transactions."); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) ("We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."); Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 478 (9th Cir. 1991)(citations omitted)("[T]he clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes.").

104. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) ("To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. Section 2 embodies the national policy favoring arbitration . . . ."). *But see* William F. Fox & Ylli Dautaj, *The Life of Arbitration Law Has Been Experience, Not Logic: Gorsuch, Kavanaugh, and The Federal Arbitration Act*, 21 (1) CARDOZO J. CONFLICT RESOL. 1, 7–12 (2019) (arguing that the Court's construction of the FAA has developed this pro-arbitration policy, and that the precedent "has moved a great distance away from the nearly-deceptive simplicity of the FAA.").

105. The FAA, 9 U.S.C. § 2.

106. *Id.* § 4.

107. *Id.* § 2.

irrevocable, and enforceable . . . ."[108] At the same time, because arbitration is contractual in nature (and not the default), § 2 embraced "the heart of the FAA,"[109] basically consent to arbitration and allocated the duty to determine validity to the courts as gatekeepers if the arbitration agreement itself is challenged (see § 4).[110]

Section 4, titled "[f]ailure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination",[111] is more on point in implicating the separability doctrine. Section 4 reads:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement . . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If 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.[112]

Reading § 4 along with § 2's legislative mandate for enforcing arbitration agreements, Congress implicitly recognized that when an arbitration agreement exists and the initial validity of the arbitration agreement itself is not at issue, a federal court must mandate arbitration pursuant to the terms of the parties' agreement.[113] However, if the court makes the finding that the arbitration agreement's validity is at stake, then the court must proceed with the dispute, as the default venue for dispute resolution.[114]

2. Prima Paint*: Adopting the Separability Presumption Per § 4*

The Supreme Court of the United States made a landmark decision in *Prima Paint* in 1967 by incorporating the doctrine of Separability into

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108. *Id.*

109. Reuben, *supra* note 12, at 831.

110. *Id.*; *see also* Rau, "*Separability" in Seventeen Simple Propositions*, *supra* note 18, at 184 (footnotes omitted) (stating that "[t]he assertion that consent to arbitration is a necessary condition of enforcement is a truism reinforced by the language of both Section 4 and of the savings clause of Section 2 of the FAA.").

111. FAA, 9 U.S.C. § 4.

112. *Id.*

113. *See id.* § 3 ("[T]he court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had . . . .").

114. *Id.* § 4.

American law.[115] Prima Paint (Prima), a Maryland corporation, purchased a paint manufacturing business from Flood & Conklin, a New Jersey corporation (F & C).[116] The two concluded a "consulting agreement" which stated that F & C was to provide advice to Prima in production, manufacturing, sales, and service of paint products over a six-year period.[117] Prima alleged that the execution of the consulting agreement was fraudulently induced by false representations regarding F & C's financial condition.[118] The consulting agreement contained an arbitration clause which provided that "[a]ny controversy or claim arising out of or related to this Agreement . . . shall be settled by arbitration."[119] F & C responded with a notice of intent to arbitrate, and Prima instead responded by filing suit in federal district court seeking to rescind the consulting agreement on formation grounds, basically arguing that F & C had fraudulently induced Prima to enter the contract by misrepresenting its financial condition.[120]

By determining that the interstate commercial case fell under § 4 of the FAA, the Supreme Court held:

> [*E*]*xcept where the parties otherwise intend*[,] arbitration clauses as a matter of federal law are 'separable' from the contract[] 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.[121]

The Court relied on the text of § 4 of the FAA and decided that when the "making*"* of the arbitration clause is in issue,[122] "court[s] may proceed to adjudicate it."[123] The Court also emphasized, however, that "the statutory

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115. *See generally* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (noting that the New York Convention was not applied to *Prima Paint* because it was not codified under U.S. law until three years after the *Prima Paint* decision was rendered, thus the case was not an international one).

116. *Id.* at 395–97.

117. *Id.* at 397.

118. *Id.*

119. *Id.* at 398.

120. *Id.* at 397.

121. *Id.* at 402. Separability was later followed by appellate courts. *See, e.g.*, Sauer-Getriebe KG v. White Hydraulics Inc., 715 F.2d 348 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984); *see also* Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 476 n.9 (9th Cir. 1991). In *Standard Fruit Co.*, the Court of Appeals for the Ninth Circuit approved the analysis in *Sauer-Getriebe*, quoting: "[t]he agreement to arbitrate and the agreement to buy and sell [ ] are separate," and therefore concluded that although the main contract is invalid, the agreement to arbitrate may still be a valid agreement. *Standard Fruit Co.*, 937 F.2d at 477 (quoting *Sauer-Getriebe*, 715 F.2d at 350). For the evolution of separability in U.S. case law prior to *Buckeye Check Cashing, Inc. v. Cardegna*, see Roland C. Peterson, *International Arbitration Agreements in United States Courts*, 55 DISP. RESOL. J. 44, 80–82 (2000).

122. Some scholars have criticized the decision and the Court's construction of § 4 from various perspectives. *See, e.g.*, Reuben, *supra* note 12, at 841–48; Ware, *supra* note 12, 108–10.

123. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967) (footnotes omitted) ("Under § 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration

language does not permit the federal court to consider claims of fraud in the inducement of the contract generally",[124] referring to the consulting agreement. Thus, when there is any challenge to the container contract, the court must send the parties to arbitration pursuant to their unchallenged, valid, irrevocable, and enforceable arbitration agreement.[125] This function of separability intoned in *Prima Paint* is and should be the foundation of every arbitration regime that efficacy and legitimacy of arbitration is of its concern.[126]

3. First Options *and* Howsam*: Actual Consent in Deciding the 'Who Decides' Question*

First Options of Chicago, Inc. (First Options) was a firm that cleared stock trades.[127] Kaplan and his wife traded stocks through their wholly owned investment company, MK Investments, Inc. (MKI).[128] The Kaplans and MKI owed debts to First Options after the 1987 market crash.[129] A work out agreement consisting of four documents and a continuing relationship between MKI and Kaplan was later signed by the parties.[130] A broad arbitration clause was included in one of the four documents.[131] When the parties failed to pay their debt, First Options filed for arbitration according to the workout agreements.[132] MKI, which had signed the only workout document containing an arbitration agreement, accepted arbitration the Kaplans, who had not signed that document, filed objections.[133] The (main) question before the court was "*who should have the primary power to decide* . . . whether they agreed to arbitrate the merits. That disagreement is about

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agreement] is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it."). For commentaries, see generally Rau, "*Separability" in Seventeen Simple Propositions*, *supra* note 18; Barceló III, *supra* note 19, at 1120; Rosen, *supra* note 19, at 622; Berman, *supra* note 19, at 22–24. For critique of the doctrine, see Reuben, *supra* note 12, at 841–48; Ware, *supra* note 12, at 108–10.

124. *Prima Paint*, 388 U.S. at 403–04.

125. *See* William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133, 143 (1997) (asserting that *Prima Paint* is the American version of competence-competence).

126. *See* Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 490 (2011) (submitting that separability is not "the result of any intrigue plotted under cover of darkness by a neo-liberal Court—it is instead taken for granted in every modern regime of arbitration as the 'foundation stone of the entire structure.'").

127. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 940–41 (1995).

128. *Id.*

129. *Id.* at 940.

130. *Id.* at 940–41.

131. *Id.*

132. *Id.*

133. *Id.* at 941.

the *arbitrability* of the dispute."[134] The Court in *Kaplan* stated that if the parties have agreed in their arbitration agreement to have arbitrators decide arbitrability (the "who decides" question), then the court will yield to the arbitrator's decision if the arbitration panel has already decided the case. If not, then the court will send the parties to arbitration.[135] However, if the parties are silent as to the "who decides" question, then the court shall independently make that call, like any other matter not submitted to arbitration.[136]

Later in *Howsam*,[137] the Court further elaborated the "who decides" arbitrability question. Howsam brought a case against a securities broker.[138] Per the parties' arbitration clause, Howsam initiated arbitration before the National Association of Securities Dealers (NASD), which, however, provided that "no dispute 'shall be eligible for submission [to arbitration] . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute.'"[139] The broker, instead, filed the case in federal court, alleging that because more than six years has passed, the agreement to arbitrate was no longer effective.[140] The Court held that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide."[141] The Court further elaborated and drew a distinction over the who decides question:

> [I]n the absence of an agreement to the contrary, issues of substantive arbitrability [matters related to the validity or scope of the arbitration clause] . . . are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits*, notice, laches, estoppel, and

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134. *Id.* at 942. The concept of *arbitrability* refers to "[t]he status of a dispute's being or not being within the jurisdiction of arbitrators to resolve, based on whether the parties entered into an enforceable agreement to arbitrate, whether the dispute is within the scope of the arbitration agreement, whether any procedural prerequisites to arbitration have been satisfied." *Arbitrability*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* FAZILATFAR, *supra* note 94, at 35–44.

135. *First Options*, 514 U.S. at 943.

136. *Id.* The Court submitted that:

> We believe the answer to the 'who' question (i.e., the standard-of-review question) is fairly simple. . . . Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently.

Id. at 943.

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

138. *Id.* at 81–82.

139. *Id.* (citing NASD CODE OF ARB. PROC. § 10304 (1984)).

140. *Howsam*, 537 U.S. at 81–82.

141. *Id.* at 84.

> other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.[142]

Because the time-limit rule is procedural, the issue in the case before the court should be decided by the arbitrators, again, unless parties had agreed otherwise.[143]

What is clear from the precedent in *First Options* and *Howsam* is that the Court requires a showing of actual consent to determine the who decides question.[144] This is while in *Prima Paint* and *Buckeye* (discussed below), the Court adopted a theory of implied consent—the separability presumption—meaning that an arbitration clause is presumably separate from its container, unless parties contract otherwise.[145] Interestingly, neither in *First Options* nor in *Howsam*, the Court mentions, let alone discusses, the separability doctrine.[146] The Court in both cases does not even mention *Prima Paint*.[147] Why? The cases have little to do with separability's primary role, which is independency of the arbitration clause from the container contract.[148] Both cases cover and develop the issue of arbitrability (the who decides question), rather than separability of the arbitration clause from the container, their validity, existence, etc.[149] Also, in a later decision (*Buckeye*, discussed below) which is the Supreme Court's second decision specifically on separability's primary role, there is no mention of *First Options* or *Howsam*.[150]

In American arbitration, arbitrability is a secondary result of separability.[151] Courts have wrestled with arbitrability (and gateway) issues on a case-by-case basis. They have created criteria to address the who decides question, and separability's role in these judicially-created criteria is capped

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142. *Id.* at 85 (quoting REVISED UNIF. ARB. ACT § 6, cmt. 2 (2000)). For commentary on this distinction, see Berman, *supra* note 19, at 36–47.

143. *See Howsam*, 537 U.S. at 85–86.

144. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 940–41 (1995) (quoting AT & T Techs., Inc. v. Comm'cns Workers of Am., 475 U.S. 643, 649 (1986)) ("[C]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."); *see also Howsam*, 537 U.S. at 83 (first quoting *AT & T Techs.*, 475 U.S. at 649; and then quoting *First Options*, 514 U.S. at 944) ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'").

145. *See supra* Part III.A.2 (explaining the Court's decision in *Prima Paint*); *infra* Part III.A.4. (explaining the Court's decision in *Buckeye*).

146. *See generally Howsam*, 537 U.S. 79; *First Options*, 514 U.S. 938 (looking to the cases, the separability doctrine is never discussed).

147. *See generally Howsam*, 537 U.S. 79; *First Options*, 514 U.S. 938.

148. *See generally Howsam*, 537 U.S. 79; *First Options*, 514 U.S. 938.

149. *See generally Howsam*, 537 U.S. 79; *First Options*, 514 U.S. 938.

150. Some anti-separability scholars have attempted to reconcile these four cases (*Prima Paint*, *First Options*, *Howsam*, and *Buckeye*) and have called for repealing separability. *See generally* Reuben, *supra* note 12; Ware, *supra* note 12; *see also* Rau, "*Separability" in Seventeen Simple Propositions*, *supra* note 18 (taking a pro-separability stance).

151. *See infra* Part III.B (explaining the roles of separability in American arbitration).

at separability's primary role in arbitration:[152] arbitration agreements are presumably separate from their containers.[153] Challenges to the container goes to arbitrators, and challenges to the arbitration clause shall be addressed by courts.[154]

4. Buckeye*: Reaffirming Separability Per § 2*

Later in 2006, the Supreme Court, with an overwhelming majority, re-affirmed separability in *Buckeye*. [155] The plaintiffs had cashed checks at Buckeye Check Cashing, and Buckeye provided the plaintiffs with cash in exchange for the checks and a small finance charge with an arbitration clause in each transaction.[156] Cardegna, alleging that the main contract was illegal under Florida law, sued Buckeye in Florida state court.[157] Buckeye, on the other hand, moved to stay the litigation and compel arbitration.[158] The Florida Supreme Court held that, according to state law, the court should determine whether a contract that contains an arbitration clause is void for illegality *ab initio*.[159] The Supreme Court of the United States rejected that conclusion.[160] The Court stated:

> In declining to apply *Prima Paint*'s rule of severability, the Florida Supreme Court relied on the distinction between void and voidable contracts. 'Florida public policy and contract law,' it concluded, permit 'no severable, or salvageable, parts of a contract found illegal and void under Florida law.' *Prima Paint* makes this conclusion irrelevant. That case rejected application of state severability rules to the arbitration agreement *without discussing* whether the challenge at issue would have rendered the contract void or voidable.[161]

Regardless of the distinctions made in contract law about a contract's legal status and their implications under the separability presumption in arbitration

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152. *See infra* Part III.B (explaining the roles of separability in American arbitration).

153. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 447 (2006).

154. *Id.* at 449; *see also* Rent-A-Ctr. W., Inc. v. Jackson, 546 U.S. 440, 71–72 (2016).

155. *See generally Buckeye*, 546 U.S. 440.

156. *Id.* at 442–43.

157. *Id.* at 443. (Cardegna was "alleging that Buckeye charged usurious interest rates and that the Agreement violated various Florida lending and consumer-protection laws, rendering it criminal on its face.").

158. *Id.*

159. The Florida Supreme Court stated:

> [I]n *Prima Paint*, the claim of fraud in the inducement, if true, would have rendered the underlying contract merely *voidable*. In [*Buckeye*], however, the underlying contract at issue would be rendered void from the outset if it were determined that the contract indeed violated Florida's usury laws. Therefore, if the underlying contract is held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well.

Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 863 (Fla. 2005).

160. *Buckeye*, 546 U.S. at 446.

161. *Id.* (citation omitted).

(discussed below), what is notable in *Buckeye*, compared to *Prima Paint*, is that the Court relied on § 2 of the FAA rather than § 4 to reaffirm separability.[162] The Court made three propositions based on *Prima Paint* and *Southland*:[163]

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.[164]

In *Buckeye*, the particular issue before the Court was to decide whether courts or arbitrators should decide if the container contract was void.[165] The Court rejected that distinction between claims under state contract law that find container contracts being void and voidable.[166]

Thus, regardless of the container's legal status, the Court mandates lower courts to refer parties to arbitration when the challenge is not directed at the arbitration clause itself within the container contract.[167] Simply put, as a matter of contract law, contracts can be valid, void *ab initio* (never came into existence), later found void (unenforceable, e.g., due to supervening illegality), and voidable (one party has the option to rescind the contract, e.g., fraudulent educement).[168] One issue that has raised much debate among scholars and in lower courts is, what if the container contract never came into existence? Some courts and scholars are of the opinion that when there is no container, there can be no arbitration provision, and the container and all of its terms and clauses must fail too.[169] The position taken in this Article is that

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162. *Id.* at 445. The Court stated:

> Although § 4, in particular, had much to do with *Prima Paint*'s understanding of the rule of severability, . . . this rule ultimately arises out of § 2, the FAA's substantive command that arbitration agreements be treated like all other contracts. The rule of severability establishes how this equal-footing guarantee for 'a written [arbitration] provision' is to be implemented.

Id. (citation omitted).

163. *See* Southland Corp. v. Keating, 465 U.S. 1, 15 (1984).

164. *Buckeye*, 546 U.S at 447 (citing *Southland*, 465 U.S. at 15)("*Southland* itself refused to 'believe Congress intended to limit the Arbitration Act to disputes subject only to *federal*-court jurisdiction.'").

165. *See id.* at 442.

166. *See id.* at 446.

167. *See id.*

168. *See* RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:1 (4th ed. 1993).

169. *See, e.g.*, Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd., 363 F. Supp. 3d 632, 644 (D.S.C. 2019), *vacated and remanded*, 944 F.3d 225 (4th Cir. 2019) ("From a practical standpoint, it would be quite difficult to view the arbitration clause in isolation from the container contract when determining formation issues, because indicators of mutual assent, such as a party's signature, normally apply to the entire contract, not just an individual clause."); Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 590–91 (7th Cir. 2001) ("Fraud in the inducement does not negate the fact that the parties actually reached an agreement. That [is] what was critical in *Prima Paint*. But whether there was *any* agreement is a distinct question. *Chastain* [*v. Robinson Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992)] sensibly holds a claim of forgery must be resolved by a court. A person whose signature was forged has never agreed to anything. Likewise with a person whose name was written on a contract by a faithless agent who lacked authority

the Supreme Court in *Prima Paint* and *Buckeye* made a simple proposition and answered this question by applying the separability presumption. Drawing distinctions based on the legal status of contracts is a matter of contract law and should be much less up for discussion in arbitration.[170] In fact, the Supreme Court stated that "this rule [separability] ultimately arises out of § 2, the FAA's substantive command that arbitration agreements be treated like all other contracts."[171] Then, the Court goes further to say "[t]he rule of severability establishes how this equal-footing guarantee for 'a written [arbitration] provision' is to be implemented."[172] The distinctions addressed to the container (whether it is void *ab initio*, void/unenforceable, or voidable) should not impact application of the separability presumption.[173] The Court has already submitted that we should take the arbitration clause separate (independent) from the container.[174] One way to articulate the Court's separability presumption is that whenever we have an arbitration clause within a container, consider validity—and even existence—of the clause independently, just as if parties had agreed to arbitrate post-container and post-dispute.[175] Later in this Article, to support this assertion, which is

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to make that commitment. This is not a defense to enforcement, as in *Prima Paint*; it is a situation in which no contract came into being . . . ."). For scholarly debate on the distinction, see, for example, Horton, *supra* note 12, at 424 ("When one has not manifested assent to the container contract, one cannot be bound by a single stitch of its text."); Ware, *supra* note 12, at 115 ("In sum, there is strong support for reading *First Options* as holding that the separability doctrine does not apply to contract-formation arguments. Thus, the two lines of cases (*Prima Paint*/*Buckeye* on the one hand, and *First Options*/*Howsam* on the other) should be read to converge into a coherent whole consisting of the rule that the separability doctrine does not apply to the question whether a particular party *formed* a contract containing an arbitration clause but does apply to questions about *defenses* to the enforcement of that contract."). And for an opposing opinion, see generally Rau, "*Separability" in Seventeen Simple Propositions*, *supra* note 18.

170. *See* RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:1 (4th ed. 1993).

171. *Buckeye*, 546 U.S. at 447.

172. *Id.*

173. *Id.*

174. Some argue that independency should only be applied when the container had some legal effect at some point; however, the author admits that the Court in *Buckeye* made the following statement:

> The issue of the contract's validity is different from the issue [of] whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (C.A.11 1992), whether the signor lacked authority to commit the alleged principal, *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (C.A.3 2000); *Sphere Drake Ins. Ltd. v. All* [*Am.*] *Ins. Co.*, 256 F.3d 587 (C.A.7 2001), and whether the signor lacked the mental capacity to assent, *Spahr v. Secco*, 330 F.3d 1266 (C.A.10 2003).

Id. at 444 n.1.

One should also further admit that the Court concluded its decision by limiting its decision to validity issues and not necessarily matters of formation: "We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449. For commentary, see Ware, *supra* note 12, at 111–17.

175. In 2010, the Supreme Court in *Rent-A-Center*, stated that:

> In some cases the claimed basis of invalidity for the contract as a whole will be much easier to establish than the same basis as applied only to the severable agreement to arbitrate. Thus, in

adopted in English law,[176] an array of arguments are provided in addressing why arbitration agreements should be considered separate and independent agreements from contracts which they are about, whether embedded or not within the latter.[177]

Pursuant to § 2 and § 4 of the FAA and the precedent handed down in *Prima Paint* and *Buckeye*, only courts will have authority to hear challenges to the arbitration agreement itself.[178] If the court finds that those challenges invalidate the clause or find the clause to have been void *ab initio*, then arbitration is out of the picture, and courts will decide the underlying dispute as default forums under the Seventh Amendment of the Constitution.[179]

B. Separability's Jurisdiction-Allocating Function: Status Quo and Recent Developments

As discussed earlier, unlike other advanced arbitration systems across the Atlantic, in American arbitration there are two roles defined for separability. The first—and a more universally adopted role—is that the arbitration clause is an independent agreement, independent and separate from its container contract.[180] This results in the clause surviving any existential or validity challenge to the container, unless the clause itself is invalid or void *ab initio*.[181] The second role, which distinguishes application of the doctrine in American law with some other advanced legal systems,[182]

> an employment contract many elements of alleged unconscionability applicable to the entire contract (outrageously low wages, for example) would not affect the agreement to arbitrate alone. But even where that is not the case—as in *Prima Paint* itself, where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract—we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene.

Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 71 (2010).

176. *See supra* Part II.A (observing separability in English Law).

177. *See infra* Part IV (making the Case for a Separate and an Independent Arbitration Agreement and arguing the need for separate and an independent arbitration agreement).

178. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) ("We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate."). This position was reaffirmed in *Buckeye*, 546 U.S. at 444–45. Despite separability being clearly intoned in *Prima Paint*, some appellate courts opined otherwise. *See, e.g.*, Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140–41 (9th Cir. 1991) (footnote omitted) (citations omitted) ("[B]ecause an 'arbitrator's jurisdiction is rooted in the agreement of the parties,' . . . a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate. Only a court can make that decision.").

179. *See generally supra* text accompanying note 178 (detailing the process for how courts will decide disputes after an arbitration agreement is ruled void).

180. *See supra* Part III (explaining separability within American jurisprudence).

181. *See Prima Paint*, 388 U.S. at 403–04; *Buckeye*, 546 U.S. at 445–46.

182. *See supra* Part I (explaining the difference in the doctrine's application among various countries).

is that it is also applied as a "jurisdiction-allocating device,"[183] meaning that an arbitral panel may decide its own jurisdiction as long as the validity or existence of the arbitration clause has not been challenged, and the challenge is directed to the main contract alone.[184] Otherwise, the power to decide jurisdictional issues, such as the validity of the arbitration clause and arbitrability questions—such as scope of the arbitration clause and the gateway "who decides" question—is reserved for the judiciary, unless parties "clearly and unmistakably" allocate this duty to the arbitrators.[185] As discussed earlier, these two functions are linked to the text of § 4 and § 2 of the FAA[186] as reflected in the Court decisions in *Prima Paint*[187] and *Buckeye*[188] respectively.[189] New boundaries with respect to the who decides arbitrability question are developed and expanded by other Supreme Court decisions.

The Supreme Court of the United States has repeatedly said that arbitration is contractual.[190] This consent to arbitration applies to the who decides jurisdictional issues as well,[191] and thus, parties are free to choose whether they want an arbitrator or a judge to decide those gateway arbitrability questions.[192] Parties' lack of clear and unmistakable contractual agreement over a who decides arbitrability question would instead entitle courts (as the default forum for dispute resolution) to decide the matter.[193] The inquiry before courts goes further to address circumstances in which parties stipulated an arbitration clause but were either silent on the issue of arbitrability, or some ambiguity existed with respect to the question of

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183. Berman, *supra* note 19, at 24; *see also* William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 677 n.101 (1989) (citing *Prima Paint*, 388 U.S. at 402–05) (stating that separability "serves a function related to that of *competénce/competénce*.").

184. *Buckeye*, 546 U.S. at 446 ("[B]ecause respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.").

185. *See* AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 589 (2002).

186. *See supra* Part III.A.1 (explaining the history of the FAA).

187. *See generally Prima Paint*, 388 U.S. 395.

188. *See generally Buckeye*, 546 U.S. 440.

189. For an earlier appellate case, see Robert Lawrence Co. Inc. v. Devonshire Fabrics Inc. 271 F.2d 402 (2d Cir. 1959). *Robert Lawrence* is the Second Circuit decision that applied separability. *Id.* For a recent application of separability in state courts, see, for example, Goffe v. Foulke Mgmt. Corp., 208 A.3d 859, 870–73 (2019).

190. *See, e.g.*, Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68 (2010).

191. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).

192. AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

193. *Howsam*, 537 U.S. at 83 (alteration in original) (quoting *AT & T Techs.*, 475 U.S. at 649) ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'").

arbitrability and the delegation of deciding the arbitrability questions to the arbitrator.[194] The following navigates through the standards developed by the judiciary to address the who decides arbitrability questions—basically the secondary function of separability.

1. Arbitrability Questions and the Role of the Federal Policy Favoring Arbitration

As mentioned earlier, prior to the FAA, courts did not favor arbitration agreements and there was judicial hostility towards arbitration.[195] So, Congress then enacted the FAA to give full force and effect to arbitration agreements.[196] To that end, federal courts also adopted a pro-arbitration policy where "when construing arbitration agreements, every doubt is to be resolved in favor of arbitration."[197] The Supreme Court further expanded this policy and ruled that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]"[198] This is why the pro-arbitration presumption was not meant to be applied to all aspects of the arbitrability question.[199] It was meant to apply merely to the scope of arbitrable issues (the arbitration agreement) and not the who decides questions of arbitrability because courts were not to assume that parties had delegated the who decides question of arbitrability to the arbitrator.[200]

2. Is the Pro-Arbitration Policy Applicable to 'Who Decides' Question of Arbitrability?

The Court in *First Options* stated that "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter,"[201] as parties are free to

194. *Howsam*, 537 U.S. at 79–81.

195. *See supra* Part III.A1 (discussing how courts have been hostile toward arbitration for decades).

196. *See Rent-A-Ctr.*, 561 U.S. at 67; Glass v. Kidder Peabody & Co., 114 F.3d 446, 451 (4th Cir. 1997).

197. Dickinson v. Heinold Secs., Inc., 661 F.2d 638, 643 (7th Cir. 1981).

198. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."); *see also* Hossein Fazilatfar, *Following the Supreme Court in Liberal Construction of Arbitration Agreements under the Federal Pro-Arbitration Policy*, 23 (1) WILLAMETTE J. INT'L L. & DISP. RESOL. 61, 66–69 (2015).

199. *See Howsam*, 537 U.S. at 83 (alteration in original) (first quoting *Moses H. Cone*, 460 U.S. at 24–25; and then quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)) ("Although the Court has also long recognized and enforced a 'liberal federal policy favoring arbitration agreements,' it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'").

200. *See First Options,* 514 U.S. at 944.

201. *Id.* at 943.

make that choice.[202] Otherwise, "the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently."[203]

Unlike the federal policy favoring arbitration over doubts about the scope of an arbitration agreement, the Supreme Court in *First Options* clarified that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[204] In other words:

> [T]he law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'—for in respect to this latter question the law reverses the presumption.[205]

The reason for this reverse presumption is that parties may be inclined to enter into arbitration agreements "if a labor arbitrator had the 'power to determine his own jurisdiction'",[206] and that a "party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers."[207] Therefore, the pro-arbitration policy recognized in multiple Supreme Court decisions does not apply to doubts regarding gateway arbitrability questions, and actual party consent shown via a clear and unmistakable evidence of intent is required.[208] The contours of this test is discussed below in Part III.B.5.

3. Categoric Jurisdiction-Allocating Presumption

The Court has made a distinction between what is presumably considered to be decided by the courts or arbitrators as questions of arbitrability, which is based on parties' likely expectation of the 'who decides' question. Matters "which grow out of the dispute and bear on its

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202. *See* Rent-A-Ctr. W., Inc. v. Jackson, 561 U.S. 63, 68–69 (2010).

203. *First Options*, 514 U.S. at 943; *see also* Peabody Holding Co. v. United Mine Workers of Am., Int'l Union, 665 F.3d 96, 102 (4th Cir. 2012).

204. *First Options*, 514 U.S. at 943 (citing AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)).

205. *Id.* at 944–45; *see also* Carson v. Giant Food, Inc., 175 F.3d 325, 329 (4th Cir. 1999) ("This presumption, however, does not apply to the issue of which claims are arbitrable."); Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 117 (4th Cir.1993) (citation omitted) ("[T]he general policy-based, federal presumption in favor of arbitration . . . is not applied as a rule of contract interpretation to resolve questions of the arbitrability of arbitrability issues themselves."); Horton, *supra* note 12, at 374.

206. *AT & T Techs.*, 475 U.S. at 651 (quoting Archibald Cox*, Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1509 (1959)).

207. *First Options*, 514 U.S. at 945.

208. *See A T & T Techs.*, 475 U.S. at 649; *First Options*, 514 U.S. at 944; Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–84 (2002).

final disposition are presumptively" expected by the parties to be decided by arbitrators.[209] In other words, "parties to an arbitration contract would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters."[210] Examples of procedural arbitrability issues include "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met."[211] Substantive gateway issues, however, absent parties' clear and unmistakable reflection of intent to arbitrate, are to be decided by judges.[212] As noted earlier, however, this is despite the judicially adopted "liberal federal policy favoring arbitration agreements."[213] When it comes to deciding whether a particular dispute has been submitted to arbitration (question of arbitrability), courts are the default venue.[214] Issues of substantive arbitrability generally contain disagreements over the scope of an arbitration clause (e.g., whether non-signatories are bound by the arbitration clause).[215] When it comes to the application of this interpretive rule, however, there is uncertainty regarding how courts may distinguish questions of arbitrability, whether it be of procedural or substantive arbitrability.[216]

4. Separability, Rent-A-Center *and the "Who Decides" Question*

As discussed earlier, in *Prima Paint*[217] the Supreme Court of the United States was confronted with "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators."[218] The Court distinguished between claims

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209. *Howsam,* 537 U.S. at 84 (quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964)).

210. *Id.* at 86.

211. UNIF. ARB. ACT § 6 cmt. 2, 7 U.L.A. 20 (amended 2000); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

212. *Howsam*, 537 U.S. at 85; *see also* UNIF. ARB. ACT § 6(b), 7 U.L.A. 18 (amended 2000); UNIF. ARB. ACT § 6, cmt. 2, 7 U.L.A 20 (amended 2000).

213. *Moses H. Cone*, 460 U.S. at 24–25; *see also* Novic v. Credit One Bank, Nat'l Ass'n, 757 F. App'x 263, 265 (4th Cir. 2019) (first citing Peabody Holding Co. v. United Mineworkers of Am. Int'l Union, 665 F.3d 96, 102 (4th Cir. 2012); and then citing Carson v. Giant Food, Inc., 175 F.3d 325, 329 (4th Cir. 1999)) ("The federal presumption generally favoring arbitration is not applicable when a court determines *who* the parties intended to decide issues of arbitrability."); Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 117 (4th Cir.1993) ("[T]he general policy-based, federal presumption in favor of arbitration . . . is not applied as a rule of contract interpretation to resolve questions of the arbitrability of arbitrability issues themselves.").

214. UNIF. ARB. ACT § 6(b), 7 U.L.A. 18 (amended 2000).

215. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943–46 (1995).

216. See, for example, *NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1012–15 (2d Cir. 2014), where parties had an arbitration agreement that made reference to the NASDAQ rules. The Second Circuit ruled that reference to the rules in the arbitration clause raised an ambiguity as to whether the parties had clearly intended to provide arbitrators authority to determine the arbitrability of the claims. *Id.* at 1020.

217. *See generally* Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

218. *Id.* at 402.

that challenge the validity of the arbitration clause itself and claims that challenge the validity of the main contract (the contract that the arbitration clause forms a part).[219] The Court then adopted separability, meaning "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."[220]

The Court later applied an expanded version of the separability principle pronounced in *Prima Paint*. In *Rent-A-Center,*[221] the arbitration agreement—between the employer and the employee over an employment discrimination dispute—expressly delegated the arbitrator "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of [the arbitration agreement]."[222] This delegation provision was one imbedded in the arbitration agreement.[223] The employee sued the employer in the court claiming that the arbitration agreement was invalid due to unconscionability under Nevada law.[224] Regardless of whether this expanded version of separability is legally suitable and logical,[225] the Court here, by applying the separability principle, along with its reading of § 2 of the FAA, expanded separability and applied it to the arbitration agreement (as the main contract instead of the employment contract) and found the delegation provision separable from the arbitration agreement as a whole—in other words, the Court considered the arbitration clause as the container.[226] The Court noted that "[i]n this case, the underlying contract is itself an arbitration agreement."[227] The Court further noted that "[a]pplication of the severability rule does not depend on the substance of the remainder of the contract. Section 2 operates on the specific 'written provision' to 'settle by arbitration a controversy' that the party seeks to enforce."[228] Thus, because the employee did not challenge the delegation provision and only challenged the arbitration agreement and the employment contract as a whole, the Court

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219. *Id.* at 404.

220. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006) (citing *Prima Paint*, 388 U.S. at 403–404); *see also* Novic v. Credit One Bank, Nat'l Ass'n, 757 F. App'x 263, 265 (4th Cir. 2019).

221. *See generally* Rent-a-Ctr. W., Inc. v. Jackson, 561 U.S. 63 (2010).

222. *Id.* at 65–66.

223. *Id.*

224. *Id.* at 66.

225. *Id.* at 76–88 (Stevens, J., dissenting).

226. *Id.* at 70 ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.") Later, the Court stated:

> In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract. Section 2 operates on the specific 'written provision' to 'settle by arbitration a controversy' that the party seeks to enforce. Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.

Id. at 72 (footnote omitted).

227. *Id.*

228. *Id.*

ruled that the arbitrators have authority under the unchallenged delegation provision to hear the gateway unconscionability claim.[229]

Logically, the result of such conceptual separability between the main contract and its arbitration clause is that the arbitrator may decide a contractual invalidity claim challenging the main contract—and in fact find the main contract invalid—yet still the arbitrator's own authority for such ruling remains intact.[230] As mentioned above, another effect of such conceptual separability, which pertains specifically to the who decides question of arbitrability, is that if the invalidity challenge is on the main contract, arbitrators will have authority to take over the case and rule on the challenge; while if the challenge is on the arbitration clause itself, then courts will have to initially rule on the validity of the arbitration clause and of course, decide the fate of arbitrators' authority.[231]

5. What Is Clear about the "Clear and Unmistakable" Evidence of Intent Standard?

Arbitrability questions are reserved for courts. Arbitrators shall decide arbitrability questions only if there is clear and unmistakable evidence that grants such authority to them.[232] What courts have often struggled with—in providing a framework for gateway arbitrability issues—is what language satisfies and properly grants such authority that reflects their intent and the scope of authority they grant to arbitrators. In addition, in *First Options*, the Court specified that while courts explore such contractual authority in the

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229. *Id.* For lower court rulings calling this "super-separability," see Brennan v. Opus Bank, 796 F.3d 1125, 1133 (9th Cir. 2015); L. Off. of Daniel C. Flint, P.C. v. Bank of Am., N.A., No. 15-13006, 2016 WL 1444505, at *5 (E.D. Mich. Apr. 13, 2016) (stating that "the Supreme Court extended the separability rule advanced in *Prima Paint Corp.* to delegation provisions within arbitration agreements."). *See also* Parks v. Career Educ. Corp., No. 11 CV 999 CDP, 2011 WL 5975936, at *2 (E.D. Mo. Nov. 30, 2011) (submitting that if the plaintiff wants the court to rule on the agreement to arbitrate, it must challenge the delegation clause itself, and not just the arbitration agreement). For commentary, see Horton, *supra* note 12, at 396–98.

230. This effect of the separability principle is more recognized in international arbitration. *See, e.g.*, U.N COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985: WITH AMENDMENTS AS ADOPTED IN 2006 art. 16(1), at 9 (2008) (ebook), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (stating that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract" and thus, "[a] decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."). But in U.S. law, see UNIF. ARB. ACT § 6(d), 7 U.L.A. 18 (amended 2000) ("If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.").

231. For the Court's reading of § 4 of the FAA, see Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967).

232. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (stating that the answer to the question of "'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter.").

parties' agreement, they "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[233] But what really constitutes or satisfies this "clear and unmistakable" evidence of intent standard?

a. Insufficiency of General Contractual Language

General contractual language is not enough to satisfy the clear and unmistakable evidence of intent to arbitrate arbitrability questions.[234] Courts have called for "language specifically and plainly reflecting the parties' intent to delegate disputes regarding arbitrability to an arbitrator."[235] Thus, language such as "'any grievance or dispute aris[ing] between the parties regarding the terms of this Agreement' and any 'controversy, dispute or disagreement . . . concerning the interpretation of the provisions of this Agreement,'"[236] do not clearly and unmistakably delegate questions of arbitrability to arbitrators.[237] Courts have suggested that "[t]hose who wish to let an arbitrator decide which issues are arbitrable need only state that 'all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,' or words to that clear effect."[238]

b. Delegation Provisions: Separable Agreements to Arbitrate Arbitrability

Delegation provisions within arbitration agreements are meant to address arbitrability of threshold issues concerning that arbitration

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233. *Id.* at 944.

234. Carson v. Giant Food, Inc., 175 F.3d 325, 330 (4th Cir. 1999) ("[B]road arbitration clauses that generally commit all interpretive disputes 'relating to' or 'arising out of' the agreement do not satisfy the clear and unmistakable test."); Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 117 (4th Cir.1993) (The precedents indicate that parties must clearly and unmistakably show their intent in regards to the scope of arbitrability itself to arbitration, and that "the typical, broad arbitration clause" is not enough); *see generally* Brown v. Trans World Airlines, 127 F.3d 337 (4th Cir. 1997).

235. Novic v. Credit One Bank, Nat'l Ass'n, 757 F. App'x 263, 265 (4th Cir. 2019) (citing Peabody Holding Co. v. United Mine Workers of Am. Int'l Union, 665 F.3d 96, 103 (4th Cir. 2012)); *Carson*, 175 F.3d at 330–31.

236. *Carson*, 175 F.3d at 330 ("[B]road arbitration clauses that generally commit all interpretive disputes 'relating to' or 'arising out of' the agreement do not satisfy the clear and unmistakable test.").

237. For the same conclusions made by the Fourth Circuit, see *Brown*, 127 F.3d at 338 (concluding the arbitration clause states that all "disputes between the Union, employee, and the Company growing out of the interpretation or application of any of the terms of this Agreement . . . ."). *See also Va. Carolina Tools*, 984 F.2d at 115 (The agreement stated that "[s]hould any dispute arise between the parties they agree to seek resolution through [arbitration].").

238. *Carson*, 175 F.3d at 330–31. Despite some guidance from the Supreme Court of the United States and some appellate courts regarding application of the clear and unmistakable standard, further clarification is necessary to avoid confusion in lower courts. *See id.* For commentary in the Fourth Circuit, see, for example, Hossein Fazilatfar, *Adjudicating "Arbitrability" in the Fourth Circuit*, 71(4) S.C. L. REV. 741, 758 (2020) (concluding that application and analysis of the standard by the Fourth Circuit Court of Appeals falls short of providing adequate and clear guidance for lower courts).

agreement.[239] Such agreements are "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce."[240]

In *Rent-A-Center*, a provision within the arbitration clause an employment contract provided that:

> [t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.[241]

The main issue before the Court was about separability's primary role rather than its jurisdiction-allocating function; basically whether we can consider the arbitration clause as the container and the delegation provision within the clause as a separable agreement, which the Court decided so.[242] But regardless of this expanded adoption and application of the separability presumption, the Court found that the language the parties had stipulated for delegating questions of arbitrability to arbitrators satisfied the clear and unmistakable standard.[243]

When the delegation provision is stipulated within an arbitration agreement, per the Supreme Court's decision in *Rent-A-Center*, an expanded version of the separability presumption should be applied. Under *Rent-A-Center*, an expanded version of the presumption provides that if the validity of the arbitration agreement and the main contract between the parties are challenged on contractual grounds, the arbitrator's authority to rule on questions of arbitrability remains intact, as long as parties have not challenged the delegation provision and delegation is made via clear and unmistakable language, similar to the one in *Rent-A-Center*.[244]

c. Delegation Through Reference or Incorporation of Institutional Rules

In the context of bilateral arbitrations, some circuits have reached the conclusion that delegating the arbitrability question to the arbitrator can be made through the incorporation of institutional rules rather than stipulating it as a delegation provision within the arbitration clause thereby satisfying the

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239. Rent-A-Ctr. W., Inc. v. Jackson, 561 U.S. 63, 68 (2010).

240. *Id.* at 70.

241. *Id.* at 66 (quoting the employment contract).

242. *Id.* at 71–72.

243. *See, e.g.*, Novic v. Credit One Bank, Nat'l Ass'n, 757 F. App'x 263, 264 (4th Cir. 2019). In *Novic*, the parties had stipulated a similar delegation language, and the Fourth Circuit Court of Appeals followed the Supreme Court's decision in *Rent-A-Center*. *Id.* The cardholder agreement had an arbitration clause, within the arbitration clause, the delegation provision read in part: "Claims subject to arbitration include, but are not limited to, disputes relating to . . . the *application, enforceability*[,] *or interpretation* of this Agreement, including this *arbitration provision*." *Id.* at 264.

244. For an example of the same point within the Fourth Circuit, see *id.*

clear and unmistakable requirement.[245] The Supreme Court, however, stated that class-wide arbitrations, in contrast with bilateral arbitrations, fundamentally change the nature of arbitration and, for reasons associated with that distinction, delegation through reference to or incorporation of institutional rules does not satisfy the clear and unmistakable standard.[246] This is an indication that the bar for clear and unmistakable test should be lower with respect to bilateral arbitrations. In other words, delegation of questions of arbitrability through incorporation of institutional rules to arbitrators in bilateral arbitrations should be sufficient to satisfy the standard, or at least most appellate courts have decided so.[247] Worthy to note is that in early 2019, the Supreme Court handed down the *Henry Schein*[248] decision in which the Court addressed whether the "wholly groundless" exception to arbitrators' authority to decide questions of arbitrability is consistent with the FAA.[249] Another issue before the Court, however, was whether the contract between the parties delegated the arbitrability question to an arbitrator in a bilateral arbitration through incorporation of institutional rules.[250] As it was not discussed by the Fifth Circuit Court of Appeals, the Supreme Court expressed no view on the issue and asked the Court of Appeals to address it on remand.[251] On remand, the Fifth Circuit found that "'[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.'"[252] The Fifth Circuit further noted that an arbitration agreement that incorporates institutional rules "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."[253] Thus for bilateral arbitrations, current precedent supports delegating arbitrability questions to the arbitrators via the

245. *See generally* Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069 (9th Cir. 2013); Fallo v. High-Tech Inst., 559 F.3d 874 (8th Cir. 2009); Petrofac, Inc. v. DynMcDermott Petro. Operations Co., 687 F.3d 671 (5th Cir. 2012); Awuah v. Coverall N. Am., Inc., 554 F.3d 7 (1st Cir. 2009); Contec Corp. v. Remote Sol. Co., 398 F.3d 205 (2d Cir. 2005); Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327 (11th Cir. 2005).

246. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010). For commentary on "who decides" questions of arbitrability in class-wide arbitrations, see generally Virginia Stevens Crimmins, *Delegating Questions of Whether a Case Can Be Arbitrated on a Class-Wide Basis – The Fight Over Who Decides Continues*, 74 DISP. RESOL. J. 63 (2019); Alexander Corson, *Who Decides Class Arbitrability?: The Vanishing Class Action Mechanism's Last Stand*, 50 SETON HALL L. REV. 1095 (2020).

247. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995); *see also Oracle*, 724 F.3d at 1069.

248. *See generally* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019).

249. *See infra* Part III.C (discussing the *Henry Schein* decision).

250. For commentary on the *Henry Schein* decision, see generally Tamar Meshel, *"A Doughnut Hole in the Doughnut's Hole": The Henry Schein Saga and Who Decides Arbitrability*, 73 RUTGERS U. L. REV. 83 (2020).

251. *Henry Schein*, 139 S. Ct. at 531.

252. Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 279 (5th Cir. 2019) (quoting AT & T Techs., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 649 (1986)).

253. *Id.* at 279 (quoting Petrofac, Inc. v. DynMcDermott Petro. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012)).

incorporation of institutional rules which satisfies the clear and unmistakable standard.

Much less than bilateral arbitrations, class-wide arbitrations have raised controversial issues regarding arbitrability questions. Like bilateral arbitrations, class-wide arbitrations are to a matter of contract.[254] Thus, parties may, through clear and unmistakable language, determine that arbitrators may decide question of arbitrability.[255] However, because the Court has recognized that class arbitrations are somewhat different in nature than bilateral arbitrations, should courts apply a higher standard of the clear and unmistakable standard to establish the parties' intent in delegating questions of arbitrability to arbitrators? Would there be a requirement for express and clear language to properly delegate gateway arbitrability questions in class-arbitrations? And if so, would delegation through incorporation of institutional arbitration rules satisfy the clear and unmistakable evidence of intent? In *Green Treen Financial Corp. v. Bazzle*, the Court was asked whether parties' agreement to class arbitration was to be decided by courts or arbitrators, but the arbitration clause did not mention class arbitration.[256] The question before the court was "what *kind of arbitration proceeding* the parties agreed to."[257] In a plurality decision, the Court decided that the question is of procedural arbitrability, and not substantive arbitrability, thus presumptively for the arbitrator to decide.[258] In its later decision, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[259] however, the Court emphasized that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[260] The Court further noted that "[a]n implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."[261] Thus, reaffirming that arbitration is a matter of contract and if parties agree to class arbitrations, courts must respect parties' choices.[262] But also, that such contractual choices must be made explicitly by the parties—and without ambiguities.[263] The decision in *Bazzle* was a plurality decision (and non-binding)—basically ruling for class arbitrability gateway issues as procedural matters—thus for the arbitrator to decide.[264]

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254. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684–85 (2010).
255. *Id.*
256. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 444–46 (2003) (plurality opinion).
257. *Id.* at 452.
258. *Id*. at 453. For commentary on this distinction, see Berman, *supra* note 19, at 36–47.
259. *See generally Stolt-Nielsen*, 559 U.S. 662.
260. *Id.* at 684.
261. *Id.* at 685.
262. *Id.*
263. *Id.*
264. *Bazzle*, 539 U.S. at 452; *see also* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964) ("Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute

Circuit courts, however, have parted their analysis with that decision in determining who decides arbitrability questions in regard to class-wide arbitrations.[265] Later Supreme Court decisions effectively disavowed the rationale made in *Bazzel*.[266] Relying on the Supreme Court's more established precedent, questions of arbitrability are for the courts—unless there is clear and unmistakable evidence that parties intended arbitrators to make that call— and courts should not assume that parties waived judicial determination of gateway arbitrability issues.[267] When it comes to arbitrability questions in class arbitrations, some circuit courts have implicitly recognized that the bar to allow arbitrators to decide arbitrability questions is even higher than gateway arbitrability issues with respect to bilateral arbitrations, and they find delegation through incorporation of institutional rules falls short of establishing the clear and unmistakable evidence of intent.[268] These circuits have recognized that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator,"[269] and that parties cannot be forced to arbitrate on

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to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.").

265. *See, e.g.*, Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 598–600 (6th Cir. 2013) (holding that gateway arbitrability questions are reserved for judicial determination unless the parties clearly and unmistakably stipulate otherwise); Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 331–36 (3d Cir. 2014) (holding that availability of class arbitration was a question of arbitrability for district court to decide); Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867 (4th Cir. 2016) (holding that issue of whether purchase agreement for residence authorized class arbitration was a question of arbitrability for court). *But see also* Robinson v. J & K Admin. Mgmt. Servs., Inc., 817 F.3d 193 (5th Cir. 2016) (which adopted the *Bazzle* plurality decision and held that consent to class-wide arbitration is a procedural question of arbitrability, and one for arbitrators to decide).

266. *See* Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 n.2 (2013) (citing *Bazzle*, 539 U.S. at 452) ("We would face a different issue if [the petitioner] had argued below that the availability of class arbitration is a so-called 'question of arbitrability.' Those questions . . . are presumptively for courts to decide."); *Stolt–Nielsen*, 559 U.S. at 680 (citation omitted) ("Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case. . . . [T]he parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration. . . . In fact, however, only the plurality decided that question.").

267. *See Del Webb*, 817 F.3d at 874–77.

268. *See, e.g.*, *id.*; *see also*, *e.g.*, Chesapeake Appalachia, LLC v. Suppa, 91 F. Supp. 3d 853, 864 (N.D. W. Va. 2015); Bird v. Turner, No. 14CV97, 2015 WL 5168575, at *7–9 (N.D. W.Va. Sept. 1, 2015); Herzfeld v. 1416 Chancellor, Inc., No. 14-4966, 2015 WL 4480829, at *5–6 (E.D. Pa. July 22, 2015); Chassen v. Fidelity Nat'l Fin., Inc., No. 09-291, 2014 WL 202763, at *6 (D.N.J. Jan. 17, 2014).

269. *Stolt–Nielsen*, 559 U.S. at 685. The Fourth Circuit goes further and states:

> When parties agree to forgo their right to litigate in the courts and in favor of private dispute resolution, they expect the benefits flowing from that decision: less rigorous procedural formalities, lower costs, privacy and confidentiality, greater efficiency, specialized adjudicators, and—for the most part—finality. These benefits, however, are dramatically upended in class arbitration, which brings with it higher risks for defendants.

Del Webb, 817 F.3d at 875 (citing *Stolt–Nielsen*, 559 U.S. at 686–87). *See also* Cent. W. Va. Energy, Inc. v. Bayer Cropscience, 645 F.3d 267, 274–75 (4th Cir. 2011) (quoting *Stolt–Nielsen*, 559 U.S. at 685–86) (stating that "consent to class arbitration did not fall within [the] category of 'procedural' questions . . . because the class-action construct wreaks 'fundamental changes' on the 'nature of arbitration.'").

a class-wide basis absent "a contractual basis for concluding that the party *agreed* to do so."[270] Some other circuits, however, find that delegation through incorporation of institutional rules satisfies the clear and unmistakable evidence of intent, and it is thus appropriate to allow arbitrators to decide arbitrability questions in class-wide arbitrations.[271]

Following the Supreme Court's precedent in *Stolt–Nielsen*, *Sutter*, and appellate court decisions, the who-decides arbitrability question in class-wide arbitrations is reserved for the judiciary, unless there is clear and unmistakable language that expressly reflects parties' intentions to delegate such authority to arbitrators.[272] Furthermore, unlike bilateral arbitrations, in class-wide arbitrations most circuit courts have rejected delegation of arbitrability questions merely through incorporation of institutional rules.[273]

C. Henry Schein*: Rejecting the "Wholly Groundless" Exception to Questions of Arbitrability*

As noted above, the main issue before the Court in *Henry Schein, Inc. v. Archer & White Sales, Inc.* (which the Court addressed) concerned an arbitration agreement that delegates questions of arbitrability to an arbitrator, and whether the court should stay arbitration and rule on the matter if it determines that arbitrability of the claim at stake is baseless.[274] Archer & White Sales Inc. sued Henry Schein Inc. for violating state and federal antitrust laws and asked for money damages and injunctive relief.[275] The arbitration agreement between the parties called for arbitration of any dispute arising under or related to the agreement, but it expressly excluded injunctive relief and some other issues from arbitration.[276] Henry Schein argued that an arbitrator must hear arbitrability questions while Archer & White petitioned the district court to hear the arbitrability question because Schein's argument for arbitration was wholly groundless (by the fact that, per the arbitration clause, injunctive relief was excluded from arbitration).[277] The district court

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270. *Stolt–Nielsen*, 559 U.S. at 685.

271. *See, e.g.*, Marriott Ownership Resorts, Inc. v. Sterman, No. 14-cv-1400, 2015 WL 11251946, at *5–10 (M.D. Fla. Jan. 16, 2015); Marriott Ownership Resorts, Inc. v. Flynn, No. 14-00372, 2014 WL 7076827, at *7–15 (D. Haw. Dec. 11, 2014); Med. Shoppe Int'l, Inc. v. Edlucy, Inc., No. 12-CV-161 CAS, 2012 WL 1672489, at *1–5 (E.D. Mo. May 14, 2012); Bergman v. Spruce Peak Realty, LLC, No. 11-CV-127, 2011 WL 5523329, at *2–4 (D. Vt. Nov. 14, 2011); Yahoo!, Inc. v. Iversen, 836 F. Supp. 2d 1007, 1010–12 (N.D. Cal. 2011).

272. *See generally Stolt-Nielsen*, 559 U.S. 662 (2010); Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013).

273. *See generally* Robinson v. J & K Admin. Mgmt. Servs., Inc., 817 F.3d 193 (5th Cir. 2016); Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594 (6th Cir. 2013); Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 331–36 (3d Cir. 2014); Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867 (4th Cir. 2016) (offering examples of cases where courts ruled on class-wide arbitration issues).

274. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 527 (2019).

275. *Id.* at 528–29.

276. *Id.*

277. *Id.* at 528.

agreed with Archer & White and denied Henry Schein's motion to compel arbitration.[278] Later, the Fifth Circuit affirmed the district court's decision.[279]

In early 2019, in a unanimous decision, the Supreme Court held that the wholly-groundless exception to arbitrability is inconsistent with the language of the FAA and the Supreme Court's precedent.[280] The Court noted that the exception "confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability"[281] and that the focus should be on the former when there is "clear and unmistakable evidence" that the parties agreed to arbitrate questions of arbitrability.[282] Thus, courts must decide accordingly and refer the parties to arbitration, even if the court believes that the underlying claim is frivolous or wholly groundless.[283]

On remand, the Fifth Circuit found "that the parties [had] not clearly and unmistakably delegated the question of arbitrability to an arbitrator."[284] The contract expressly excluded "actions seeking injunctive relief" from the arbitration agreement, as the Fifth Circuit found that this specific carve-out clause, and the absence of any qualifier, excluded any request for injunctive relief from the arbitration agreement.[285] Eventually, because injunctive relief was sought in addition to damages, the Fifth Circuit concluded that the dispute did not fall within the scope of the arbitration clause and, therefore, the delegation provision did not apply to the specific carve-out provisions.[286] In *Henry Schein*, the Court reaffirmed that if parties have contracted to have arbitrators hear arbitrability questions, courts should stay out of that contractual stipulation and that when one party challenges the arbitration

278. Archer & White Sales, Inc. v. Henry Schein, Inc., No. 12-CV-572, 2016 WL 7157421, at *9 (E.D. Tex. Dec. 7, 2016).

279. Archer & White Sales, Inc. v. Henry Schein, Inc., 878 F.3d 488, 498 (5th Cir. 2017); *see also* Belnap v. Iasis Healthcare, 844 F.3d 1272, 1286–87 (10th Cir. 2017); Jones v. Waffle House, Inc., 866 F.3d 1257, 1269 (11th Cir. 2017) (refusing to adopt the wholly groundless exception).

280. *Henry Schein*, 139 S. Ct. at 528.

281. *Id.* at 531.

282. *Id.* at 531.

283. *Id.* at 529–30. The Court stated that: "We have held that a court may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an arbitrator, 'even if it appears to the court to be frivolous.'" *Id*. (quoting AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649–50 (1986)). The Court further noted that: "A court has 'no business weighing the merits of the grievance' because the 'agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.'" *Id.* (quoting *AT & T Techs.*, 475 U.S. at 650). For commentary on the Henry Schein decision, see Meshel, *supra* note 250.

284. Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 277 (5th Cir. 2019).

285. *Id.* at 277, 283.

286. *Id.* Following what was pronounced by the Supreme Court in *Henry Schein* regarding the wholly groundless exception, it is worthy to explore how circuit courts have applied the ruling. *See id.* In *Metropolitan Life Insurance Co. v. Bucsek*, 919 F.3d 184, 195 (2d Cir. 2019), because the parties did not delegate the question of arbitrability to the arbitrator, the court refused to apply *Henry Schein*. In *Lloyd's Syndicate 457 v. FloaTEC, LLC*, 921 F.3d 508 n.4 (5th Cir. 2019), the Fifth Circuit Court of Appeals' reading of *Henry Schein* was that "[i]t did not change—to the contrary, it reaffirmed—the rule that courts must first decide whether an arbitration agreement exists at all."

clause, the court should refer the parties to arbitration.[287] In this case, the Court goes a step further and finds clear and unmistakable party-consent so sacred that even if the court finds a particular scope issue before the court is wholly groundless, it should refer the parties to arbitration and have arbitrators make that determination.

IV. MAKING THE CASE FOR A SEPARATE AND AN INDEPENDENT ARBITRATION AGREEMENT

What if we lacked the judicially adopted separability doctrine in American jurisprudence and nor could we trace separability implications to the FAA? How would state or federal courts treat an arbitration clause stipulated within the container when the latter is void *ab initio* or voidable (unenforceable)? In this Part, there is an attempt to make the case for an arbitration clause that is truly independent and separate from the transaction which it is about and to root for not repealing arbitration's separability: (1) by making references to the historic treatment of arbitration clauses as separate agreements, (2) by applying common law contract severability rules to arbitration clauses, and (3) by pointing out unique characteristics of arbitration clauses compared to other clauses within contracts. All three propositions made here further establish that the separability doctrine in American arbitration jurisprudence and practice is not so strange to our legal system and has deeper roots than mere adoption under the FAA, and that a fully autonomous arbitration clause, as adopted under the English Arbitration Act, should be adopted in American arbitration. The consequence of adopting a completely separate arbitration agreement, as a default rule of arbitration, would be that arbitration agreements will be treated like any other contract in their creation, enforcement, and legal status, and not dependent on the contract that they are intended to be about. Indeed, adopting complete separability would not impact the secondary function of separability as, in American law under the FAA, courts have created criteria based on parties' actual consent to navigate arbitrability questions, including who-decides jurisdictional issues, scope of the arbitration clause, and other gateway issues, etc.

A. Historic Treatment of Arbitration Clauses as Separate Parts of a Contract

Prior to the enactment of the FAA, courts treated arbitration clauses as separable parts of the main contract.[288] In a more predominant area of

287. *Henry Schein*, 139 S. Ct. at 529.

288. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959) (first citing Hamilton v. Home Ins. Co., 137 U.S. 370 (1890); then citing Gatliff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944); and then citing U.S. Asphalt Refin. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (1915))

insurance agreements, the insurer and the insured usually agreed to have the damages be ascertained by an appraiser mutually appointed by the insured and the company.[289] Then, if the parties were not satisfied with the appraisal, per the insurer's policy or contract, the issue, at the request of either party, would be submitted to arbitrators.[290] In most of these insurance policies, parties would also agree that the award would be binding on the parties as to the amount of loss or damage.[291] However, the arbitrators were not able to decide the liability of the company under the policy.[292] Thus, arbitrators authority was limited only to circumstances where parties mutually recognized the essence of liability but had disagreement as to the amount of damages or loss.[293] Nowadays, premature limitations on arbitral authority is due to the hostility towards arbitration by the judicial system (inherited from the English common law) and invalidated private arrangements that ousted courts of their authority as they were found against public policy.[294]

In the late nineteenth century, the agreements to submit the disputed amount of damage or loss in insurance claims to arbitration was considered to be "collateral and independent" from the main contract (the insurance policy), and breach of the arbitration agreement could not be "pleaded in bar to an action on the principal contract."[295] This was, however, applicable when

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(stating that "[h]istorically arbitration clauses were treated as separable parts of the contract").

289. *See generally Hamilton*, 137 U.S. 370; Crossley v. Conn. Fire Ins. Co., 27 F. 30 (1886).

290. *See generally Hamilton*, 137 U.S. 370; *Crossley*, 27 F. at 30.

291. *See, e.g.*, Reed v. Wash. Fire & Marine Ins. Co., 138 Mass. 572, 576 (1884); Memphis Trust Co. v. Brown-Ketchum Iron Works, 166 F. 398, 1403 (6th Cir. 1909).

292. *See, e.g.*, *Hamilton*, 137 U.S. at 385; *Crossley*, 27 F. at 32; *Reed*, 138 Mass. at 577; *Memphis Trust Co.*, 166 F. at 406.

293. *Hamilton*, 137 U.S. at 385 ("A provision in a contract for the payment of money upon a contingency that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid."); Dugan v. Thomas, 9 A. 354, 354–55 (1887) (citations omitted) ("Parties may by agreement impose conditions precedent with respect to preliminary and collateral matters, such as do not go to the root of the action. But men cannot be compelled, even by their own agreements, to mutually agree upon arbiters whose duties would, as in this case, go to the root of the principal claim or cause of action, and oust [the] courts of their jurisdiction."). For commentary, see Addison C. Burnham, *Arbitration as a Condition Precedent*, 11 HARV. L. REV. 234, 248 (1897), who finds this "to encroach grossly on their freedom of contract."

294. *See, e.g.*, Del. & Hudson Canal Co. v. Penn. Coal Co., 50 N.Y. 250, 258 (1872) ("It appears to be well settled by authority that an agreement to refer all matters of difference or dispute that may arise to arbitration, will not oust a court of law or equity of jurisdiction. The reason of the rule is by some traced to the jealousy of the courts, and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction; and by others to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizens is renounced."). However, for commentary on public policy limitations in arbitration, see generally Hossein Fazilatfar, *Transnational Public Policy: Does it Function from Arbitrability to Enforcement?*, 3(2) CITY U. H.K. L. R. 289 (2012).

295. *Hamilton*, 137 U.S. at 385; *see also* Mut. Fire Ins. Co. of N.Y. v. Alvord, 61 F. 752, 755 (1st Cir. 1894) ("There is nothing in the terms of this policy which expressly or by implication forbids the insured from bringing suit until after the amount of loss has been submitted to arbitration and an award has been made, and therefore we must consider the provisions in the policy relating to this subject as constituting a collateral and independent agreement, and not one which was a condition precedent to the right of maintaining an action."); Gatliff Coal Co. v. Cox, 142 F.2d 876, 1881 (6th Cir. 1944) (citing *Hamilton*, 137 U.S. at 385) ("[I]t also is the law, unless changed by statute, that if there is a condition in

the parties had not further stipulated that arbitration was a condition precedent to litigation.[296] The one authority courts frequently relied on was the rule well-stated by Sir George Jessel, M. R. in *Dawson v. Fitzgerald*,[297] who stated:

> There are two cases where such a plea as the present is successful: first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant . . . to bring an action for not referring, or [under a modern English statute] to stay the action till there has been an arbitration.[298]

Therefore, according to the precedent treating arbitration agreements, even prior to the enactment of the FAA, regardless of limitations over arbitration's reliability and application, and hesitations in fully recognizing such agreements, they were treated as independent covenants from the main contract and other obligations under the main contract.[299] Such independent treatment of arbitration agreements should be recognized in today's advanced arbitration systems as well.

B. Separability Presumption and Common Law Contracts Severability Rules

The Supreme Court has repeatedly said that arbitration is a creature of contract.[300] Another way to recognize arbitration clauses' separate nature from their container contract, apart from their recognition as separate

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a contract, express or implied, that no action can be maintained thereon until after arbitration, then such arbitration provisions are collateral and independent of the other parts of the contract and, while a breach of the arbitration agreement would support a separate action, such a provision is not a bar to an action on the contract.").

296. *See Hamilton*, 137 U.S. at 385; *see also Crossley*, 27 F. at 32 ("A simple agreement inserted in a contract that the parties will refer any dispute arising thereunder to arbitration will not bar a suit at law by either party upon the contract before an offer to arbitrate; but when the contract stipulates that the arbitration is to be a condition precedent to the right to sue upon the contract, or this may be inferred upon construction, no suit can be maintained unless the plaintiff made all reasonable effort to comply with the condition.").

297. *See, e.g.*, Dawson v. Fitzgerald, L.R. 1 Exch. Div. 257, 260 (which was referenced in *Hamilton*, 137 U.S. at 385, and several other state and federal court decisions).

298. *Id.*

299. *See id.*

300. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 64 (1995) (holding that if the parties agreed to arbitration, then they should arbitrate).

agreements under the FAA, is through a contract law analysis.[301] It is established that separability of the arbitration clause from the container contract is equally rooted and situated in contract law as it is legislatively and judicially carved particularly for arbitration with adjustments.[302] A comparison between the notion of separability in arbitration and severability in contract law would establish that separability is not so strange of an idea or theory pertinent to arbitration.[303] Separability has deep roots in common law contract-severability rules with one simple adjustment made in the FAA, and judicial recognition of that adjustment promotes arbitration's efficacy.[304] The adjustment is that separability of the arbitration clause from the container contract is merely a presumption (a default rule) which parties can stipulate otherwise,[305] meanwhile, contract divisibility under common law severability rules is heavily based on parties' intentions.[306]

A severable contract "includes two or more promises which can be acted on separately such that the failure to perform one promise does not necessarily put the promisor in breach of the entire agreement."[307] Severability pertains to a situation where a partially invalid or unenforceable contract has the potential to be divided into two parts to save the enforceable portion and uphold the parties to their obligations made under the contract.[308] But is there a formula or test state courts apply to determine whether a contract is divisible or indivisible? And if so, what are the contours of that

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301. Barceló III, *supra* note 19, at 1120 (citing Rau, "*Separability" in Seventeen Simple Propositions*, *supra* note 18) (noting that separability can be justified "with ordinary contract interpretation reasoning, not sleight of hand or legal legerdemain, and not even proarbitration policy considerations.").

302. *Id.* at 1118.

303. Worthy to note that in the scholarly debates and articles, scholars have a strong preference to use the term separability in arbitration. *See id.* Meanwhile, courts, including the Supreme Court (e.g., the *Buckeye* Court using the term "severability," rather than "separability"), prefer to use severability of the arbitration clause. Buckeye Check Cashing v. Cardegna, 596 U.S. 440, 445 (2006); *see* Ware, *supra* note 12, at 110 n. 24. From this judicial choice of and preference for "severability" one should perhaps make connections between separability of the arbitration clause from the main contract and divisible contracts (severability). *See Buckeye*, 596 U.S. at 445; Ware, supra note 12, at 110 n. 24.

304. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967). In adopting separability, the Court states:

> We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

Id.

305. *See* Rau, "*Separability" in Seventeen Simple Propositions*, *supra* note 18, at 207 ("Nevertheless the rule of *Prima Paint* just like any default rule, can still be reversed by the parties."). For critiques of separability as default, see Ware, *supra* note 12, at 123 n.107.

306. *See infra* Part IV.B (explaining that at common law, severability is based on the parties' intentions).

307. *Severable Contract*, BLACK'S LAW DICTIONARY 1373–74 (6th ed. 1990).

308. *See* Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co., 83 F.3d 735, 739 (5th Cir. 1996).

formula? When navigating severability cases, state courts have stated that "there is no formula or rule which furnishes a test for determining in all cases what contracts are severable and what are entire, and consequently each case must depend very large on the terms and circumstances of the contract involved."[309] One simple rule made clear in all state law severability cases is that whether a contract is divisible or not is contractual. In other words, divisibility of contracts depends on the parties—severability is intent or consent based.[310] Thus, severability is not the default in contract law and parties must opt for it.[311] Such intention is either reflected through a severability clause in the contract[312] and, if not as expressly stated, then courts will have to infer parties' intentions from the "surrounding circumstances."[313]

As mentioned above, severability in contract law depends on parties' intentions.[314] When there is no express stipulation of the intention, to find a contract divisible, state courts take into account the surrounding circumstances of the transaction to see if the parties actually intended for the contract to be divisible but failed to reflect their intentions unambiguously in the contract.[315] Such factors include the language parties have used to reflect their intentions and the subject matter of the transaction—the manner in which parties have allocated the consideration.[316] In other words, one authority has submitted that "where a contract has several undertakings each supported by distinct consideration, it is divisible."[317] For instance, a court has ruled that in a land sales contract "[w]here consideration is a single

309. Greater Okla. City Amends., Inc. v. Moyer, 477 P.2d 73, 75 (Okla. 1970) (quoting 17A C.J.S. *Contracts* § 331 (1962)).

310. Fuelberth v. Heartland Heating & Air Conditioning, Inc., 951 N.W.2d 758, 762–63 (2020) (citations omitted) ("[W]e have indicated that whether a contract is divisible or indivisible is a question of intentions apparent in the instrument. In an unambiguous contract, it is to be determined from the language, the subject matter, and the construction placed upon it by the parties in light of the surrounding circumstances."); *see also* Sheline v. Dun & Bradstreet Corp., 948 F.2d 174, 177 (5th Cir. 1991) (stating that severability "'is governed by the intent of the parties'"); Nat'l Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 333 (5th Cir. 1987) (citations omitted) (stating that "[w]hether [an agreement] is entire or severable turns on the parties' intent at the time the agreement was executed, as determined from the language of the contract and the surrounding circumstances.").

311. *See supra* text accompanying note 310 (concluding that severability is not the default in contract law and must be opted for by parties).

312. *Stewart Title*, 83 F.3d at 739.

313. *Id.*

314. *See infra* Part IV.B (explaining that at common law, severability is based on the parties' intentions).

315. *See, e.g.*, Dunn v. T.J. Cannon Co., 151 P. 1167, 1169 (Okla. 1915) ("Whether or not the contract is entire or divisible depends upon the intention of the parties. The intention is to be ascertained from the language used, the subject-matter of the contract, and from a consideration of all the circumstances."); Greater Okla. City Amusements, Inc. v. Moyer, 477 P.2d 73, 76 (Okla. 1970).

316. *See Dunn*, 151 P. at 1169; Mgmt. Servs. Corp. v. Dev. Assocs., 617 P.2d 406, 408 (Utah 1980).

317. *See Fuelberth*, 951 N.W.2d at 762–63 (citing Burwell & Ord Irrigation & Power Co. v. Wilson, 77 N.W. 762 (Neb. 1899)); *see also* RESTATEMENT OF CONTS. § 266(3) cmt. at 382 (AM. L. INST. 1932) ("Where in a bilateral contract two or more performances are promised by each party, promises of one or more of the performances on each side may be promises for an agreed exchange.").

amount for the whole property, the contract is usually entire."[318] However, apportionment of the consideration to each parcel of land would indicate that the contract is divisible.[319] This does not necessarily grant a contract divisible as courts have further ruled that a contract could by its nature be divisible, but parties' intentions could make it entire.[320] In a case where the contractor was to design and install both an interior system and an exterior system, but evidence showed that the parties intended to enter an agreement in which the customer would pay one sum for all the work to be performed and completed by a particular date, as opposed to several undertakings supported by distinct consideration, the court ruled that the contract was indivisible.[321] Applying this apportionment and allocation of consideration to arbitration agreements within a larger contract, one can say that when parties negotiate a transaction and opt for arbitration, the arbitration is a distinct undertaking compared to other terms and undertakings under the contract. All undertakings within a transaction cover substantive rights of the parties, while the commitment to arbitrate which is given by the same token and identically on both sides,[322] is an undertaking supported by distinct consideration from other undertakings within the transaction, which in fact has little to do with other parts of the transaction.

Another application of severability in contract law pertains to contracts where some parts or terms in a contract are legal and valid, and other parts are illegal and invalid.[323] In these circumstances, courts have, yet again, considered parties' intentions to sever the illegal terms from the legal part of the contract and enforce the latter.[324] Courts have done so, though with one caveat: the illegal term "is not an essential part of the agreed exchange."[325] However, one should admit that, even in these circumstances, there are scenarios where despite having an express severability clause, courts have

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318. *See Mgmt. Servs. Corp*., 617 P.2d at 408.

319. *Id.*

320. *See* Waddell v. White, 78 P.2d 490, 496 (Ariz. 1938) (submitting that "[a] contract may both in its nature and by its terms be severable, and yet rendered entire by the intention of the parties. We think that perhaps the best test is whether all of the things, as a whole, are of the essence of the contract. That is, if it appeared that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable."); Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co., 83 F.3d 735, 739 (5th Cir. 1996) (alteration in original) (stating that "[t]he issue as to severability is whether or not the parties would have entered into the agreement absent the [severed] parts").

321. *See Fuelberth*, 951 N.W.2d at 763–64.

322. *See infra* Part IV.C (explaining that arbitration agreements stipulated as a clause within another contract should be treated as a separate agreement).

323. *See* Mark L. Movsesiana, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 47–48 (1995).

324. *See* Resolution Tr. Corp. v. Sharif-Munir-Davidson Dev. Corp., 992 F.2d 1398, 1407 n.17 (5th Cir. 1993); Zerbetz v. Alaska Energy Ctr., 708 P.2d 1270, 1283 (Alaska 1985); Hargrave v. Canadian Valley Elec. Coop., 792 P.2d 50, 60 (Okla. 1990). For commentary, see Movsesiana, *supra* note 323, at 47–48.

325. RESTATEMENT (SECOND) OF CONTS. § 184(1) (AM. L. INST. 1981). For commentary, see Movsesiana, *supra* note 323, at 48–56.

taken into account surrounding circumstance and have ruled against severability.[326] It is submitted that rather than taking into account common understanding of contract terms, a court would take the meaning for "a person in the position of the parties[,] a person with knowledge of the parties' goals, any prior course of dealing between them, any linguistic usages to which they have customarily held, and, significantly, the positions the parties took during the contract's negotiation."[327] And the operative fact in a contract's creation is the "shared intent, not the adoption of a writing."[328] Thus, when it comes to severability in contracts, one can say that state courts recognize that parties' intentions override other default considerations regardless of how courts have attempted to understand and apply parties' intentions. Such default considerations construing parties' past dealings, contract negotiations, subject-matter of the transaction and its apportionment, or other factors that could be an indicia of party-intent opting for severability.[329] What one could also infer from the notion of severability in contracts and provide that as a logical justification for adopting separability of the arbitration clause from the container contract (including other terms) in arbitration is the idea of upholding parts of the contract that remain enforceable.[330] That notion, although intent-based in contract law severability rules, justifies the idea of separability in arbitration. What the legislator and the courts have adjusted to suit arbitration in America is that they have reversed the presumption when it comes to severability of the arbitration clause from the rest of the contract.[331] It is presumed that parties have opted for separability of the arbitration clause from the rest of the contract unless agreed otherwise.[332] Navigating through state law severability cases in contracts reveals how state courts have unpredictably ruled for or against severability.[333] To uphold parties' commitment to arbitrate future disputes, regardless of what may happen to the underlying transaction, and to avoid unpredictable state court-adjudication of arbitration agreements by applying contract law severability rules, perhaps much of this reverse presumption is sensible and necessary. Indeed, there are other more critical and convincing factors inherent in arbitration agreements compared to other contract terms that favor

326. *See, e.g.*, Eckles v. Sharman, 548 F.2d 905, 908–09 (10th Cir. 1977). In *Eckles*, the trial court by mere reference to the severability clause ruled as a direct verdict that the contract is divisible, but the court of appeals reversed and remanded stating there was insufficient evidence to direct a verdict on severability and that the issue required further factual determination. *Id.*

327. Movsesiana, *supra* note 323, at 53–54.

328. *Id.* at 54.

329. *Id.*

330. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967).

331. *Id.*

332. *Id.* ("[*E*]*xcept where the parties otherwise intend*—arbitration clauses . . . are 'separable' from the contracts in which they are embedded . . . ."); *see also* Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006); Ware, *supra* note 12, at 126–28.

333. *See supra* Part IV.A (providing instances of unpredictable outcomes).

adopting a complete version of separability in arbitration, discussed below.[334]

C. Unique Characteristics of Arbitration Agreements

Apart from the historic judicial treatment of arbitration clauses as separate agreements and the notion of separability being rooted in contract law severability, arbitration agreements also bear unique characteristics compared to other contractual terms that favor a true independent and separate agreement from the contract they are about.[335] Here, this Article takes a step beyond the current notion of separability and submits further that arbitration agreements stipulated as a clause within another contract should be treated the same as if the contract was negotiated, drafted, and concluded after a dispute arose between the parties as a true independent and separate agreement.

Arbitration agreements are stipulated within another contract for the sake of convenience, logic, and subject orientation[336]—meaning that this arbitration agreement is about this contract, and if not stipulated here, then where? And too, almost all pre-dispute arbitration agreements, formality wise, have been customarily stipulated within the transaction they are about, as we express them as arbitration clauses.[337] Meanwhile, when comparing arbitration clause's features compared to other contractual terms and clauses, the former, in legal nature and status, is analogous to its container: a truly independent and separate agreement.[338] One of the critics of separability has contended that "[a]fter all, an arbitration provision is just another term in a contract, which, like any other, can only be enforced if the contract itself is enforceable."[339] Despite that contention, other contractual terms are rather merely an agreed upon contractual term being part of the main contract's element of consideration, such as a force majeure clause, a severability clause, a non-compete clause, liquidated damages clause, a warranty clause, etc.[340] Such other contractual agreements are terms where parties negotiate and consent to but are part of the element of consideration for the main contract.[341] For example, a seller may offer to sell a product to a buyer for a specific dollar amount. The buyer may negotiate and lower that amount and

334. *See infra* Part IV.C (comparing terms in arbitration agreements that favor separability to other contract terms).

335. *See supra* Part IV.C (offering examples of how arbitration agreements bear unique characteristics compared to other contractual terms). \

336. *See generally* The FAA, 9 U.S.C. §§ 1–16 (showing congressional intention that arbitration agreements be stipulated within another contract for the sake of convenience, logic, and subject orientation).

337. *See generally* Berman, *supra* note 19; Reuben, *supra* note 12.

338. *See* Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 350 (7th Cir. 1983).

339. Reuben, *supra* note 12, at 825.

340. *See generally* Berman, *supra* note 19.

341. *See generally id.*

include a particular warranty or an option in the contract. Another example could be an employer and an employee negotiating an employment contract. The employee counters the salary offered by the employer, but the latter may also in exchange for agreeing to the higher salary have the employee sign a non-compete clause. An arbitration agreement, however, requires a separate, unique consideration of its own—one party's promise to arbitrate in exchange for the other party's promise to arbitrate and waive their constitutional right to litigation.[342] In *Sauer-Getriebe KG v. White Hydraulics, Inc.* the Court of Appeals for the Seventh Circuit, while describing separability, recognized that arbitration agreements contracts like any other contract require bargained-for-exchange consideration, which must be agreed upon and consented to by the parties (offer and acceptance).[343] The court stated "[t]he agreement to arbitrate and the agreement to buy and sell motors are separate. Sauer's promise to arbitrate was given in exchange for White's promise to arbitrate and each promise was sufficient consideration for the other."[344] The fact that arbitration clauses not only require consent, but also require a sufficient unique consideration in exchange for the other agreeing to very much the same promise indicates an independent and separate agreement that is not "just another term in a contract, which, like any other, can only be enforced if the contract itself is enforceable."[345]

Another unique characteristic of an arbitration clause, again compared to other contractual terms, is centered around its subject matter. Arbitration agreements are procedural tools intended to resolve often substantive and, at times, procedural disputes.[346] Other contractual terms or clauses, such as the ones mentioned earlier, are substantive, they define parties' substantive rights with respect to the underlying transaction.[347] Consider a seller and a buyer entering a sales transaction where among the terms and clauses in the contract there is some sort of warranty undertaken by the seller, perhaps a force majeure clause among other terms, and an arbitration clause intended for resolving future disputes. It would be proper to contend that substantive contractual terms should fail if the underlying contract was void *ab initio*, not enforceable, or invalid for whatever reason, but the same contention is not,

342. *See* Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 350 (7th Cir. 1983).

343. *Id.*

344. *Id.* at 350; *see also* Republic of Nicaragua v. Standard Fruit Co. 937 F.2d 469, 477 (9th Cir. 1991) (endorsing the Seventh Circuit's stance on separability); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967) ("*[E]xcept where the parties otherwise intend*—arbitration clauses . . . are 'separable' from the contracts in which they are embedded"); Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440, 445–49 (2006).

345. Reuben, *supra* note 12, at 825.

346. *See supra* notes 2–6 and accompanying text (discussing how arbitration agreements are formed and their purpose).

347. *See supra* Part IV.C and accompanying text (discussing various contractual terms that are substantive and differ from arbitration clauses).

and should not be true, with respect to arbitration agreements.[348] What the former encompass are inherently, and by default, interdependent parts of the main contract as they define parties' substantive rights, while the latter is about waiving parties' right to litigation and instead opting for a private procedure in resolving future disputes and should by default be separate and independent from the rest of the contract unless parties contract otherwise.[349]

To further argue that an arbitration agreement should be considered truly separate and independent from the contract which it is stipulated within, one may submit that courts have treated arbitration agreements just like any other independent contract when it boils down to applying state law severability to the arbitration agreement itself.[350] In other words, in the eyes of the judiciary when a provision in the arbitration agreement is invalid, at least some courts have not invalidated the whole agreement, but have severed valid provisions from invalid terms and enforced the valid portion.[351]

Finally, as discussed earlier, the Supreme Court in *Rent-A-Center* takes a step beyond separability of the arbitration clause from its container and applies arbitration's separability presumption to the arbitration agreement itself just as if an arbitration agreement is a contract of its own standing and the arbitrability clause within the arbitration agreement a distinct clause, that if invalid, can be separated from its container (the arbitration agreement).[352] That separate treatment of an arbitration provision within the arbitration agreement in and of itself is further indicia of arbitration contracts being separate and independent from the transactions they are intended by the parties to resolve their substantive disputes.

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348. *See* Berman, *supra* note 19, at 23 ("Defects in the specific clause of a contract from which the arbitrators derive their authority to resolve disputes between the parties are understandably seen as impugning the parties' consent to arbitration more directly than defects in those clauses of the contract that set out the parties' substantive rights and obligations. Accordingly, separability's distinction between the main contract and the arbitration clause, while far from logically compelling, exerts a strong intuitive appeal").

349. *See Prima Paint*, 388 U.S. at 402.

350. *Id.*

351. *See* Payne & Bales, *supra* note 18, at 557–63 (explaining the circuit split regarding treatment of arbitration clauses with invalid terms). The Fifth, Sixth, Eighth and District of Columbia Circuit Courts apply the severance approach, by which invalid terms within the arbitration agreement will be severed from the rest of the clause and the latter enforced. *Id.* The Fourth, Ninth, Tenth and Eleventh Circuit Courts, however, apply the stand and fall together approach, by which either they uphold the clause altogether or find it unenforceable as a whole. *Id.*; *see also* Petition for Writ of Certiorari, MHN Gov't Servs., Inc. v. Zabrowski, 576 U.S. 1095 (2015) (No.14-1458); *Severability of Invalid Arbitration Provisions of Contract*, 90 A.L.R. 1305 (1934).

352. Rent-A-Ctr. W., Inc. v. Jackson, 561 U.S. 63, 72 (2010) ("In this case, the underlying contract is itself an arbitration agreement," and thus, "unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, . . . leaving any challenge to the validity of the [a]greement as a whole for the arbitrator."); *see also* Horton, *supra* note 12, at 396 ("[B]y deeming delegation clauses to be self-contained arbitration clauses, Justice Scalia brought the separability doctrine into play.").

VI. CONCLUSION

Despite FAA's adoption of separability and its recognition in multiple Supreme Court decisions, there have been calls to abolish or limit separability. For the most part, this call goes back to the issue of arbitrability and in particular the "who decides" question and the concern for maintaining court control of arbitral authority to protect parties with weaker bargaining power. Although the law or its interpretation should protect the average Joe, that should not be done through creating a judicial slippery slope and at the cost of ignoring legislator's intent and logical conclusions of law. Those societal concerns—which are absolutely legitimate—should be dealt with elsewhere, perhaps in parties' contracts when there is balance in bargaining power, or in the Congress and to some extent in courts for when the transaction lacks such balance. As this Article illustrates, arbitration agreements are logically and inherently independent and separate from the contract which they are about, and if parties intend otherwise that should be reflected in their contract. Separability is no new or strange concept in arbitration; it is adopted to its full extent in other legal systems. Historic treatment of arbitration clauses as independent agreements, adoption of severability rules in contract law, and more importantly, unique characteristics of arbitration agreements all indicate inherent independence of arbitration agreements. Such agreements should be treated as if parties had entered into one through a new and separate contract-formation process. Thus, the formation, existence, and validity of the transaction which an arbitration agreement is about should be irrelevant in considering the formation, existence, and validity of the latter.