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### Letting the Arbitrator Decide Unconscionability Challenges, 26 Ohio St. J. on Disp. Resol. 1 (2011)

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# Letting the Arbitrator Decide Unconscionability Challenges

KAREN HALVERSON CROSS\*

## ABSTRACT

*This article examines how courts are allocating jurisdictional questions relating to unconscionability to the arbitrator, and assesses the approach of U.S. courts to this issue from a historical and comparative perspective. The U.S. allocation rule is evolving toward one of deference to the arbitrator, allowing the arbitrator to make an initial determination of whether there is an enforceable agreement to arbitrate. As a matter of timing, the U.S. approach is becoming more similar to that of France. Such an approach, especially in the commercial sphere, has the potential to be relatively efficient and consistent. But in the context of mandatory arbitration of employment, franchise, and consumer disputes, such a delegation of authority to the arbitrator effectively removes an important check (the unconscionability doctrine) on the use of one-sided arbitration clauses. Although under French arbitration law, courts defer to the arbitrator's jurisdictional determinations until the award-enforcement stage, French law prohibits pre-dispute arbitration of consumer and employment disputes. Recent U.S. arbitrability decisions may prompt Congress to set similar limits on mandatory arbitration.*

*In a subset of U.S. arbitrability decisions, courts have applied dictum from First Options of Chicago, Inc. v. Kaplan to find that parties to a standard-form, mandatory arbitration agreement contracted for the arbitrator to determine whether the arbitration agreement is unconscionable. The Supreme Court's recent decision in Rent-A-Center West v. Jackson appears to uphold this line of case law. However, since Rent-A-Center is based on the separability rule*

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\* Professor of Law, John Marshall Law School, Chicago, Illinois. The author wishes to thank Hiro Aragaki and Mark Weidemaier for very helpful comments on a previous draft; to participants of the AALS ADR Section Works-in-Progress conference at Harvard Law School; to participants of the 2010 Spring Conference on Contracts at the University of Nevada-Las Vegas William S. Boyd School of Law for their insights; to Anne Skrodzki, Kimberly Wise and reference librarian Ramsey Donnell for excellent research assistance; and to John Marshall Law School for supporting the research and writing of this article.

of *Prima Paint v. Flood & Conklin Manufacturing Co.*, the decision leaves unresolved important questions regarding the scope and implications of the First Options dictum.

I. INTRODUCTION .....	3
II. BACKGROUND .....	7
A. <i>Unconscionability and Arbitration</i> .....	7
B. <i>Historical Approach to the Allocation of Authority Between Courts and Arbitrators</i> .....	12
1. <i>Federal Arbitration Act</i> .....	12
2. <i>Challenges to the Entire Contract: Prima Paint and Buckeye</i> .....	14
3. <i>The AT&amp;T “Canon” as Qualified by Howsam and Bazzle</i> .....	18
4. <i>Contracting to Let the Arbitrator Decide: First Options</i> .....	22
5. <i>Decisions Interpreting First Options Dictum</i> .....	27
C. <i>Comparative Perspective</i> .....	32
1. <i>Timing of Judicial Role in Determining Arbitrability</i> .....	32
2. <i>Arbitration of Consumer and Employment Disputes</i> .....	35
3. <i>Contracting Around the Judicial Review of Jurisdictional Findings</i> .....	36
III. LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES .....	43
A. <i>The Prima Paint Exception and the Rent-A-Center Decision</i> ....	43
1. <i>Applying Prima Paint to Unconscionability challenges</i> .....	44
2. <i>Rent-A-Center’s Expansion of the Prima Paint Doctrine</i> .....	47
B. <i>Challenges to Provisions Treated as Separate from the Arbitration Clause</i> .....	50
C. <i>The First Options Dictum</i> .....	55
1. <i>Cases Interpreting the Dictum</i> .....	55
2. <i>A More Limited Interpretation</i> .....	60
IV. LEGAL AND POLICY IMPLICATIONS .....	64
A. <i>Deferring Judicial Consideration of Arbitrability</i> .....	64
B. <i>Issues Left Open by Rent-A-Center</i> .....	68
V. LEGISLATIVE MEASURES TO LIMIT MANDATORY ARBITRATION.....	72
VI. CONCLUSION.....	77

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

### I. INTRODUCTION

When physical control systems break down—the brakes fail, the thermostat cuts out, or the governor pops—the system may simply stop functioning, go out of control, or destruct. When social and legal control arrangements break down, the decision process does not necessarily fail. But it certainly changes, as more power shifts to the now comparatively less-controlled decision-maker. This is particularly the case in arbitration. With controls it remains a delegated and restricted power. Without controls it becomes absolute.<sup>1</sup>

Rent-A-Center, West, Inc., a national electronics and furniture rent-to-own chain, hired Antonio Jackson, an African-American, as an account representative. As a condition to his employment, Jackson signed a Mutual Agreement to Arbitrate Claims.<sup>2</sup> Believing that other, non-African-American employees with less seniority were repeatedly promoted above him, Jackson complained to the store manager and to Rent-A-Center's human resources department, and finally filed a race discrimination and retaliation suit against Rent-A-Center.<sup>3</sup> Jackson alleged that the arbitration agreement he signed was unconscionable, and therefore he could not be compelled to arbitrate the dispute.<sup>4</sup>

To that point, Jackson's discrimination claim, in particular the ensuing dispute over the enforceability of the arbitration clause, was similar to hundreds of challenges that have been adjudicated over the past decade or so. But Rent-A-Center responded to Jackson's unconscionability challenge with a novel argument—it asserted that the question of whether the arbitration agreement is unconscionable should go to the arbitrator, relying on the following language in the Mutual Agreement to Arbitrate Claims:

[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

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<sup>1</sup> W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR* 2 (1992).

<sup>2</sup> Brief for the Respondent at \*2, *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (No. 09-497).

<sup>3</sup> *Id.* at \*2.

<sup>4</sup> *Id.* at \*3-4.

not limited to any claim that all or any part of this Agreement is void or voidable.<sup>5</sup>

This language purports to delegate the determination of the existence, validity, or enforceability of the arbitration agreement exclusively to the arbitrator (as such, it is referred to as the “delegation clause”). Can Rent-A-Center do this? Can it insert language in its standard-form arbitration agreement affecting the court’s power to determine whether the arbitration agreement was concluded, or whether it is valid and enforceable?

In *Rent-A-Center, West, Inc. v. Jackson*,<sup>6</sup> the Supreme Court issued a 5-4 decision holding that Jackson’s unconscionability challenge should go to the arbitrator. But rather than directly address the enforceability of the delegation clause, the Court decided the case by extending the separability doctrine of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>7</sup> a result that neither party argued to the Court in its briefs or at oral argument.<sup>8</sup> The Court reasoned that since Jackson’s challenge was directed to the entire arbitration agreement, and not specifically to the delegation clause, the unconscionability challenge should go to the arbitrator under *Prima Paint*.<sup>9</sup> As the dissenting opinion characterized it, the majority opinion effectively added “a new layer of severability—something akin to Russian nesting dolls—into the mix.”<sup>10</sup>

*Rent-A-Center* is the first Supreme Court decision to hold that an unconscionability challenge to an arbitration clause must be decided by the arbitrator. For years, however, courts similarly have allocated jurisdictional questions relating to unconscionability to the arbitrator. Courts have used the *Prima Paint* doctrine to reject procedural unconscionability arguments that relate to the entire contract (as opposed to just the arbitration clause).<sup>11</sup>

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<sup>5</sup> *Id.* at \*2.

<sup>6</sup> *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

<sup>7</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). The facts and holding of *Prima Paint* are discussed *infra* at Part II.B.2.

<sup>8</sup> *Prima Paint* and related cases were discussed at oral argument and in the parties’ briefs, but not for the proposition asserted in the *Rent-A-Center* opinion. Ironically, it was Jackson who relied most heavily on the *Prima Paint* decision. Brief for the Respondent, *supra* note 2, at \*14–15 (citing *Prima Paint* for the idea that any challenge to the enforceability of an arbitration clause is a matter for the court to decide).

<sup>9</sup> See *Rent-A-Center*, 130 S. Ct. at 2779–81.

<sup>10</sup> *Id.* at 2786 (Stevens, J., dissenting). *Rent-A-Center*’s treatment of *Prima Paint* is discussed in detail *infra* at Part III.A.

<sup>11</sup> See *infra* Part III.A.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

Similarly, courts have reasoned that, because the enforceability of the allegedly unconscionable provision is separate from that of the arbitration clause, the former issue should go to the arbitrator.<sup>12</sup> Finally, as suggested in *Rent-A-Center*, courts have found that the parties contracted for the arbitrator to determine whether an agreement to arbitrate is unconscionable, either on the basis of a broadly worded arbitration clause or through designating the procedural rules of an arbitral institution such as the American Arbitration Association (AAA).<sup>13</sup>

In a 2008 law review article,<sup>14</sup> Professor Aaron-Andrew Bruhl noted this tendency of courts to let the arbitrator decide unconscionability challenges, asserting that such decisions are a strategic response by federal courts to what they perceive to be manipulative lower court rulings based on unconscionability doctrine—a dynamic he called the “unconscionability game.” He suggested that this tendency is part of an effort to control what some perceive to be an “epidemic” of unconscionability rulings.<sup>15</sup> A pro-arbitrator allocation rule limits the potential for an opaque and indeterminate judicial doctrine (unconscionability) to complicate efforts to enforce lower court adherence to the pro-arbitration policy of the Federal Arbitration Act (FAA).<sup>16</sup> Bruhl’s analysis is directed more at judicial behavior and federal court dynamics than at arbitration doctrine *per se*.

This article examines the ways in which courts are allocating jurisdictional challenges based on unconscionability to the arbitrator, and assesses how U.S. courts have approached this issue from a historical and comparative perspective. The issue of “who decides” is one of the most difficult issues in arbitration law. A successful approach to allocating competence between courts and arbitrators requires a balance between competing policies: on the one hand, freeing arbitration from litigation tactics designed to delay and evade the process, while on the other hand allowing sufficient court intervention to ensure that the arbitration award is legitimate. When the balance tips too far away from court control, the institution of arbitration may be undermined as trust in the institution diminishes.

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<sup>12</sup> See *infra* Part III.B.

<sup>13</sup> See *infra* Part III.C.1.

<sup>14</sup> Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008).

<sup>15</sup> *Id.* at 1479.

<sup>16</sup> *Id.* at 1464–65 (discussing why unconscionability doctrine complicates federal court efforts to monitor judicial compliance with federal pro-arbitration policy).

As the passage quoted at the beginning of this article emphasizes, a traditional feature of arbitration is that the arbitrator's power is not absolute, but rather restricted and delegated. Although private parties generally are free to organize the arbitral process in the manner they see fit, the institution of arbitration ultimately depends on the courts to enforce arbitral awards. Therefore, arbitrator decisions should be subject to a degree of judicial control sufficient to ensure, at a minimum, that the arbitrator acted within his or her powers and that the award is not contrary to public policy. Professor Reisman predicts that when judicial controls on arbitration break down, participants may opt not to resort to arbitration in the future.<sup>17</sup>

The U.S. allocation rule is evolving toward letting the arbitrator decide arbitrability,<sup>18</sup> thereby deferring courts' own assessment of the arbitrator's jurisdictional findings to the award-enforcement stage. This approach supports arbitration by allowing the arbitrator to make the initial determination of whether there is an enforceable agreement to arbitrate. As a matter of timing, the U.S. approach is becoming more similar to that of France. Such an approach, especially in the commercial sphere, has the potential to be relatively efficient and consistent. But in the context of mandatory arbitration of employment, franchise, and consumer disputes, such a delegation of authority to the arbitrator effectively removes an important check (the unconscionability doctrine) on the use of one-sided arbitration clauses. Although under French arbitration law courts defer to the arbitrator's jurisdictional determinations until the award-enforcement stage, French law also prohibits mandatory arbitration of consumer and employment disputes. Recent U.S. arbitrability decisions may prompt Congress to set similar limits on mandatory arbitration.

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<sup>17</sup> REISMAN, *supra* note 1, at 2.

<sup>18</sup> "Arbitrating arbitrability" refers to the power of an arbitrator to determine his or her jurisdiction; however, this terminology is both imprecise and confusing. It is imprecise because "arbitrability" can refer to two distinct issues: (i) whether the dispute falls within the scope of the arbitration agreement; and (ii) whether the arbitration agreement is valid and enforceable. The term "arbitrability" is also confusing because it is used in international commercial arbitration in a narrower context — to determine whether the subject matter of a dispute (such as a matter involving antitrust law, or bankruptcy) may be capable of settlement by arbitration under local law. But because U.S. judicial opinions use the term in the broader jurisdictional sense, this article does so as well.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

However, in a subset of these arbitrability decisions, courts have applied dictum from *First Options of Chicago, Inc. v. Kaplan*<sup>19</sup> to find that parties to a standard-form, mandatory arbitration agreement contracted for the arbitrator to determine whether the arbitration clause is unconscionable.<sup>20</sup> The Supreme Court's decision in *Rent-A-Center* appears to uphold this line of case law, although *Rent-A-Center* sidestepped the question of when such a delegation of authority to the arbitrator is enforceable. Not only does such a delegation of authority to the arbitrator divest courts of the power to rule on the unconscionability issue initially, but according to the reasoning of *First Options*, it also limits the courts' review power over the arbitrator's decision at the award-enforcement stage. By basing its decision on *Prima Paint*, *Rent-A-Center* leaves important questions regarding the scope and implications of the *First Options* dictum unresolved.

Part II of this article provides background to unconscionability doctrine in arbitration and to the development of the law on allocation of authority between courts and arbitrators; it then compares relevant aspects of U.S. arbitration law to that of other developed countries. Part III analyzes the ways in which U.S. courts are delegating the determination of unconscionability to the arbitrator. Part IV discusses the implications of these decisions, including the Supreme Court's recent *Rent-A-Center* decision. Part V describes pending legislative proposals (and recently enacted legislation, such as the Franken Amendment and the Dodd-Frank Act) to limit arbitration of consumer, franchise, and employment disputes. Part VI concludes.

## II. BACKGROUND

### A. Unconscionability and Arbitration

Arbitration is a creature of contract, and therefore the same defenses to the enforceability of any contract may be the basis for avoiding the application of an arbitration clause. Under FAA § 2, an agreement to arbitrate is subject to the same contract law defenses as any other agreement, including the unconscionability doctrine.<sup>21</sup> However, this general proposition

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<sup>19</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). For a discussion of *First Options*, see *infra* Part II.B.4.

<sup>20</sup> See *infra* notes 259–77 and accompanying text.

<sup>21</sup> The saving clause of FAA § 2 provides that an arbitration agreement shall be valid and enforceable “save upon such grounds that exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2006).



is subject to two important limitations. First, any argument that arbitration is per se unconscionable may be preempted by the FAA.<sup>22</sup> To be successful, the unconscionability challenge must relate to some specific feature of the arbitration clause at issue. Second, as is elaborated more fully below, any challenge that is directed to the entire contract is for the arbitrator, and not the court, to decide.<sup>23</sup>

Challenges to the enforceability of an arbitration clause based on statutory policy are analogous to unconscionability challenges. Claimants frequently argue that an agreement to arbitrate statutory claims may not be enforceable because the arbitral forum is inadequate to allow the claimant to obtain the protections afforded under the statute. In *Green Tree Financial Corp.—Alabama v. Randolph*,<sup>24</sup> plaintiff Larketta Randolph argued that arbitrator fees and other costs of arbitration would make arbitration a prohibitively expensive forum and, therefore, would prevent her from vindicating her rights under the Truth in Lending Act. Although the Supreme Court ultimately rejected the plaintiff's argument and compelled arbitration, the Court's opinion in *Randolph* suggests that Ms. Randolph's challenge might have succeeded had she met her burden to demonstrate that the arbitral forum effectively prevented her from vindicating her statutory rights.<sup>25</sup>

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<sup>22</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984). *Southland* is generally interpreted to establish the following anti-discrimination principle for arbitration agreements: state laws or court rulings that treat arbitration agreements less favorably than other contracts will be found to be preempted by the FAA § 2. See, e.g., *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (FAA § 2 prohibits a state from finding a contract to be “fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause.”); *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (finding a Montana statute requiring arbitration clauses to be typed in underlined capital letters on the first page of the contract is preempted by FAA § 2 because it “conditions the enforceability of arbitration agreements on compliance with special notice requirements not applicable to contracts generally”). But see Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 U.C.L.A. L. REV. (forthcoming 2011) (asserting that the anti-discrimination purpose of the FAA is better understood as putting arbitration on par with litigation, as opposed to putting arbitration on par with other contracts).

<sup>23</sup> *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (discussed *infra* at Part II.B.2).

<sup>24</sup> *Green Tree Fin. Corp.—Alabama v. Randolph*, 531 U.S. 79 (2000).

<sup>25</sup> The Court in *Randolph* stated that statutory claims may be subject to compulsory arbitration, but only “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.” *Id.* at 90 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 (1985)). Although the Court acknowledged that high arbitral costs “could preclude a litigant such as Randolph from

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

In cases involving the arbitration of statutory claims, although the legal basis for the challenge to arbitration is directed to the arbitrability of the statutory claim, in substance the nature of the challenge is very similar to the types of arguments made in unconscionability cases. Thus, when a plaintiff brings an action to enforce a statutory right and the defendant moves to compel arbitration, the jurisdictional question arises: should the court address the issue of whether the arbitral forum will prove to be inadequate? Or should the court allow the arbitrator to resolve the issue?

Whether based on unconscionability doctrine or statutory policy, challenges to the enforceability of arbitration clauses have increased dramatically since the 1990s. Although courts remain divided as to how and when to invoke the doctrine, Professor Jeffrey Stempel finds that courts clearly have increased their reliance on unconscionability doctrine to determine whether a dispute may be arbitrated,<sup>26</sup> and he cites numerous court decisions that have found arbitration clauses to be unconscionable.<sup>27</sup> Professor Bruhl conducted a database search of cases dealing with unconscionability, arbitration and the FAA, and found that the annual number of such cases increased from close to none in 1994 to about 85 cases (or about 17% of all arbitration cases) in 2003.<sup>28</sup> Professor Charles Knapp's

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effectively vindicating her federal statutory rights in the arbitral forum," it found that the record was insufficient to conclude that such would be the case. *Id.*

Although the Supreme Court has not yet held that an arbitration provision is unenforceable because it precludes a litigant from vindicating his or her statutory rights, a number of circuit courts have so held. *See, e.g.,* Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054 (11th Cir. 1998) (arbitration clause unenforceable because it limits available remedies and therefore would deny employee "meaningful relief" in pursuing a Title VII claim); *In re* American Express Merchants' Lit. 554 F.3d 300 (2d Cir. 2009), *vacated and remanded*, Am. Express Co. v. Italian Colors Res. No. 08-1473 (U.S. May 3, 2010) (finding an arbitration clause unenforceable because the class action waiver deprived plaintiff class of substantive rights under the antitrust statute by making individual arbitration of claims prohibitively expensive); *cf.* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1179 (9th Cir. 2003) (using unconscionability doctrine to refuse enforcement of an arbitration clause that, among other things, "improperly proscribes available statutory remedies" under Title VII and state law).

<sup>26</sup> Jeffrey W. Stempel, *Arbitration, Unconscionability and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 803 (2004).

<sup>27</sup> *Id.* at 804-07 nn.165-76.

<sup>28</sup> Bruhl, *supra* note 14, at 1440 fig.1. Bruhl ran the following search in the ALLCASES database of Westlaw for each of the included years: di(arbitrat! /s unconscionab!) & ("9 U.S.C." or "Federal Arbitration Act" or "United States Arbitration Act") & da([year]). *Id.* at 1440 n.85. He compiled the aggregate number of annual cases

study confirms this trend: according to his data, the number of unconscionability cases involving an arbitration clause increased from an annual average of one or two between 1990 and 1996 to 115 in 2008.<sup>29</sup> This significant increase, both in the number of challenges and the rate of success of such challenges,<sup>30</sup> is particularly striking because unconscionability challenges very rarely succeed outside of the arbitration context.<sup>31</sup>

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as well as the unconscionability cases as a percentage of all arbitration cases. Both the numbers and the percentages increase significantly until about 2003, at which point the numbers begin to level off.

Running the same search for 2008 and 2009 continues to show a leveling trend. Recent data are as follows (based on searches run on October 8, 2009 and January 11, 2010):

<i>Year</i>	<i>Number of unconscionability-related arbitration cases</i>	<i>Unconscionability-related cases as a percentage of all arbitration cases</i>	<i>Total number of arbitration cases</i>
2004	83	18	463
2005	72	18	394
2006	61	16	387
2007	79	18	429
2008	92	18	505
2009	83	14	597

<sup>29</sup> Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 622 (2009). Unlike Bruhl's search, which involved running a database search without reviewing the decisions, Knapp's study involved collecting and reviewing 750 reported judicial decisions issued between 1990 and 2008. In contrast to the data based on Bruhl's search terms and listed in the preceding note, Knapp's data show a sharper increase in unconscionability cases involving arbitration clauses in 2008: from an average of 38 cases between 2003 and 2007 to 115 cases in 2008. *Id.*

<sup>30</sup> Knapp's study shows that between 2003 and 2007, about 40% of unconscionability challenges to arbitration clauses were successful; this percentage dropped to about one third in 2008. *Id.* at 623 n.70; *see also* Stempel, *supra* note 26, at 803-07 (discussing a long list of recent cases where courts refused to enforce arbitration agreements on unconscionability grounds); Bruhl, *supra* note 14, at 1457 (citing studies showing that unconscionability challenges to arbitration agreements are more successful than unconscionability challenges directed to other types of contracts).

<sup>31</sup> *See* Bruhl, *supra* note 14, at 1442 (observing that the surge of unconscionability cases is "peculiar" in part because "it is well known that unconscionability is generally a loser of an argument" and because the doctrine had been in "intellectual retreat" in recent years).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

As commentators have noted, this so-called “epidemic”<sup>32</sup> of challenges to arbitration clauses, as well as the relative success of such challenges, is a response by some lower courts to pro-arbitration Supreme Court decisions such as *Southland*, *Shearson/American Express v. McMahon*,<sup>33</sup> and *Gilmer v. Interstate/Johnson Lane Corp.*<sup>34</sup> Professor Stempel views this response in a positive light. He describes it as an “incremental effort by lower courts to soften the rough edges of the Supreme Court’s pro-arbitration jurisprudence.”<sup>35</sup> Professor Bruhl, in contrast, suggests that the unconscionability rulings (and the corresponding increase in challenges to arbitration clauses on such grounds) are a function of state hostility to federal pro-arbitration policy, and that state courts are applying unconscionability doctrine in a discriminatory manner.<sup>36</sup> Although observers disagree over whether this increase in unconscionability challenges and rulings is desirable as a policy matter,<sup>37</sup> there is little dispute that: (i) the number of such challenges has increased substantially since the early 1990s, and (ii) whether a given arbitration clause may be found to be unconscionable is often more a function of the judicial disposition of the court considering the challenge than the relative merits of the challenge.<sup>38</sup> In other words, unconscionability as a

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<sup>32</sup> *Id.* at 1465 (referring to a “perceived epidemic of unconscionability rulings” and citing numerous academic commentators, a number of prominent judges, and influential business groups such as the Chamber of Commerce among those who have called for the Supreme Court to respond).

<sup>33</sup> *Shearson/American Express v. McMahon*, 482 U.S. 220, 238, 242 (1987) (holding that the FAA requires enforcement of an agreement to arbitrate consumer fraud claims brought under the Securities Exchange Act of 1934 (1934 Act) and the Racketeer Influenced and Corrupt Organizations Act (RICO)).

<sup>34</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that the FAA requires enforcement of an agreement to arbitrate discrimination claims brought under the Age Discrimination in Employment Act (ADEA)).

<sup>35</sup> Stempel, *supra* note 26, at 765; *see also* Knapp, *supra* note 29, at 617–18.

<sup>36</sup> Bruhl, *supra* note 14, at 1455–63 (discussing the evidence suggesting that arbitration agreements are discriminated against by certain arbitration-resistant courts, especially the Montana Supreme Court, through the use of unconscionability doctrine); *see also* Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 470–71 (arguing that the refusal by many courts to enforce arbitration agreements on grounds of unconscionability is based on judicial hostility to arbitration).

<sup>37</sup> Knapp, *supra* note 29, at 617–18 nn.46–47 (listing academic commentary on both sides of the issue).

<sup>38</sup> For example, in her study of mandatory arbitration of personal injury claims, Elizabeth Thornburg observes that courts that are concerned about the fairness of

basis for refusing enforcement of arbitration agreements is increasingly invoked but inconsistently applied. According to Bruhl, the growing tendency by federal courts to “let the arbitrator decide” arbitrability is a judicial response to what pro-arbitration advocates characterize as a manipulative use of unconscionability doctrine by state courts.<sup>39</sup>

### B. *Historical Approach to the Allocation of Authority Between Courts and Arbitrators*

The allocation of competence between the court and the arbitrator to determine arbitrability raises two distinct issues: a *timing* issue (i.e., whether to allow judicial challenges to the arbitrator’s jurisdiction before the arbitration proceeding or while it is ongoing, as opposed to waiting until the award-enforcement phase), and a *scope of review* issue (whether any deference should be given to an arbitrator’s jurisdictional findings when reviewing the award).<sup>40</sup> Most of the cases discussed below that delegate authority to the arbitrator to determine jurisdiction only affect the timing of judicial review. However, as discussed below, the *First Options* dictum affects not only the timing but also the scope of review at the award-enforcement stage. Set forth below is a discussion of the evolution of federal law governing the allocation of authority to make jurisdictional determinations.

#### 1. *Federal Arbitration Act*

The FAA is silent with respect to an arbitrator’s power to determine his or her jurisdiction. As arbitration expert Gary Born puts it, although nothing in the FAA expressly grants an arbitrator the power to determine as an initial matter whether an arbitration agreement is valid and enforceable, or whether

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arbitration are more likely to manipulate legal rules to reach the desired result, for example, by liberally applying the unconscionability defense. Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253, 260–61 (2004); see also Stempel, *supra* note 26, at 808–09 (quoting a draft of Thornburg’s article). Although Stempel agrees that outcomes are inconsistent, he concludes that it is beneficial to have flexible doctrines such as unconscionability available to help courts decide such cases. *Id.* at 809.

<sup>39</sup> Bruhl, *supra* note 14, at 1488–89.

<sup>40</sup> Alan Scott Rau, *Everything You Need to Know About ‘Separability’ Doctrine in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1, at 54 (2003) (pointing out a tendency to conflate separability doctrine with scope of review issues).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

the dispute falls within the scope of the clause, nothing in the FAA prohibits it either.<sup>41</sup> However, the FAA provides that when a party moves either to compel arbitration, or for a judicial stay of litigation pending arbitration, a court shall grant such motion only after being satisfied that the dispute is subject to an enforceable agreement to arbitrate.<sup>42</sup> In other words, the statute requires a court to make at least a threshold determination of arbitrability before enforcing the arbitration agreement by compelling arbitration or staying litigation.

Once an arbitral award is issued, the FAA permits a court to vacate that award only in limited circumstances, such as when it has been “procured by corruption,” or where it can be shown that the arbitrator was biased in favor of one of the parties.<sup>43</sup> However, FAA § 10(a)(4) permits a court to vacate an arbitral award where the arbitrators have “exceeded their powers.”<sup>44</sup> Since the agreement to arbitrate is the source of an arbitrator’s power, if a court finds that an arbitral award was rendered in the absence of a valid arbitration agreement, or that the subject matter of the award was outside of the scope of that agreement, § 10(a)(4) allows that court to vacate the award. Thus § 10(a)(4), in addition to the saving clause of FAA § 2,<sup>45</sup> seems to allow the court to review de novo any findings of the arbitrator as to the existence or scope of a valid arbitration agreement.<sup>46</sup> In contrast, *First Options* suggests

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<sup>41</sup> 1 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 911 (2009). Although the FAA is silent on the issue, U.S. courts routinely recognize arbitrators’ authority to determine their own jurisdiction. *Id.* at 912 n.316 (citing cases).

<sup>42</sup> 9 U.S.C. §§ 3–4 (2006). Under FAA § 3, when a party moves to stay litigation pending arbitration, the court shall grant the motion “upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement.” *Id.* § 3. Section 4 requires a court to grant a motion to compel arbitration “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.” *Id.* § 4.

<sup>43</sup> *Id.* §§ 10(a)(1)–10(a)(2).

<sup>44</sup> *Id.* § 10(a)(4).

<sup>45</sup> *See supra* note 21.

<sup>46</sup> Courts have interpreted FAA § 10(a)(4) as providing for de novo review. *See BORN, supra* note 41, at 954 n.518 (citing cases). In the international commercial arbitration context, the New York Convention explicitly recognizes that a court may refuse enforcement of a foreign arbitral award if the arbitration agreement “is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made.” Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(a), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

that where the parties have agreed for the arbitrator to determine arbitrability, an arbitrator's jurisdictional findings should be subject to deferential review.

## 2. Challenges to the Entire Contract: *Prima Paint and Buckeye*

*Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>47</sup> declared the "separability doctrine"<sup>48</sup> to be part of U.S. arbitration law, holding that any challenge to the entire contract (as opposed to the arbitration clause) is for the arbitrator to decide. The Supreme Court decided *Prima Paint* over forty years ago, interpreting the FAA in an expansive way, and laying the groundwork for the Court's subsequent decision in *Southland*.<sup>49</sup>

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As Professor Alan Rau has noted, however, even to the extent an award is subject to de novo judicial review, as a practical matter it is likely that a reviewing court will be influenced by the arbitrator's initial findings:

[I]n many cases the qualities for which arbitrators are chosen—their special competence, perhaps, or their sensitivity to values shared by the parties—might be decisive in bringing an effective end to the controversy; their "first look" might demand acquiescence . . . in any event, arbitrators might be expected to deploy their talents or experience to provide useful insight or guidance to the ultimate decisionmaker.

Rau, *supra* note 40, at 57–58; *see also infra* Part IV.

<sup>47</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

<sup>48</sup> Under separability doctrine, the arbitration clause is treated as separate from the rest of the contract, so that the possibility that the entire contract may be found to be unenforceable does not deprive the arbitrator of his or her power to decide the dispute. The doctrine has been described as a "legal fiction" to the effect that the parties have, in addition to the broader contract (such as the consulting agreement at issue in *Prima Paint*), created a second and distinct contract comprised only of the arbitration clause. Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 109 (2007). Professor Ware's article criticizes the separability doctrine on the grounds that it deprives a party challenging an arbitration agreement of otherwise available contract law defenses to enforcement, and suggests that Congress should repeal it.

<sup>49</sup> The Second Circuit had applied the separability doctrine as a matter of "national substantive law," whereas the First Circuit had taken the position that the issue of whether the arbitration clause can be "severed" from the rest of the contract is a matter of state law. *See Prima Paint*, 388 U.S. at 402–03. While it did not expressly endorse the Second Circuit position, the Supreme Court found that the FAA was applicable because the transaction at issue involved interstate commerce. *Id.* at 401. The Court upheld the constitutionality of the FAA, finding it to be based upon "the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" *Id.* at 405

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

The facts of *Prima Paint* pose an interesting dilemma. The buyer and seller entered into a contract for the sale of a business. One of the contracts relating to the sale (a “consulting agreement”) contained an arbitration clause. Shortly after the contract was executed, the buyer refused to convey the purchase price, alleging that seller made fraudulent and misleading statements relating to the financial soundness of the company.<sup>50</sup> The seller sought to compel arbitration of the dispute, and buyer defended on the grounds that the seller’s fraud rendered the contract unenforceable.<sup>51</sup> Although it is not expressly stated in the opinion, presumably the buyer’s argument was that the seller’s fraud rendered the entire contract unenforceable, including the arbitration clause. Thus, the issue presented in *Prima Paint* was whether the Court should uphold the arbitration clause and compel arbitration (notwithstanding the possibility that the entire contract may be tainted by fraud), or whether the Court should determine whether the contract was fraudulently induced before allowing arbitration to proceed (thereby creating a large loophole to the enforceability of arbitration agreements).

The *Prima Paint* Court compelled arbitration, interpreting FAA §§ 3 and 4 as prohibiting a federal court from considering the fraudulent inducement claims that were directed generally to the contract.<sup>52</sup> It reasoned that such an approach is consistent with the FAA’s “unmistakably clear congressional purpose that the arbitration procedure . . . be speedy and not subject to delay and obstruction in the courts.”<sup>53</sup>

Although *Prima Paint* resolved a split in the circuit courts, and though the *Prima Paint* Court itself was split,<sup>54</sup> the basic proposition for which the

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(quoting H.R. REP. No. 96 at 1 (1924)). By finding that the FAA was based on Congress’ power to regulate interstate commerce, the Court’s analysis in *Prima Paint* provided the basis for its later decision in *Southland*.

<sup>50</sup> *Id.* at 397–98.

<sup>51</sup> Buyer’s (*Prima Paint*’s) “principal contention” was that, during the contract negotiations, the seller had fraudulently represented that it was solvent when in fact it was planning to file a petition in bankruptcy. *Prima Paint*, 388 U.S. at 398. This argument was reiterated in response to the seller’s motion to compel arbitration of the dispute. *Id.* at 399.

<sup>52</sup> *Id.* at 403–04.

<sup>53</sup> *Id.* at 404.

<sup>54</sup> Justice Black wrote a lengthy and vigorous dissent, which two other justices joined. He invoked the FAA’s legislative history to argue that the statute does not apply to state courts, and pointed out that the effect of the majority’s holding was to override applicable state law, pursuant to which the fraud issue would have been for the court to decide. *Id.* at 409–23. As for the separability doctrine, he wrote:



case stands is relatively uncontroversial as a matter of international arbitration practice. As Professor Alan Scott Rau has observed, “every modern regime of arbitration—if not indeed every piece of legislation in the civilized world”—has adopted the separability principle as a fundamental and necessary part of its arbitration law.<sup>55</sup> The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which has been incorporated into the laws of over fifty countries,<sup>56</sup> expressly recognizes the separability principle.<sup>57</sup>

Notwithstanding *Prima Paint*, however, there are limited circumstances where the manifest lack of an agreement may call into question whether there is a legitimate basis for subjecting a party to arbitration to determine the existence of a valid agreement. For example, a defense that one’s signature to a contract was forged, although a challenge to the entire contract, also calls into question the existence of an arbitration agreement. In these situations, the question of whether there is a valid contract may be for the court to decide.<sup>58</sup>

In *Buckeye Check Cashing, Inc. v. Cardegna*,<sup>59</sup> the issue presented was whether an allegedly usurious check-cashing agreement containing an arbitration clause fell within this narrow exception to *Prima Paint*. Although

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I had always thought that a person who attacks a contract on the ground of fraud and seeks to rescind it has to seek rescission of the whole, not tidbits, and is not given the option of denying the existence of some clauses and affirming the existence of others.

*Id.* at 423 (Black, J., dissenting).

<sup>55</sup> Rau, *supra* note 40, at 81. He notes the possible exceptions of South Africa and Saudi Arabia. *Id.* at 81 n.193.

<sup>56</sup> The list of Model Law countries includes Canada, Australia, Germany, Japan and Russia. For a current list of Model Law countries, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_stat\\_us.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_stat_us.html) (last visited Dec. 22, 2010).

<sup>57</sup> UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 16(1) (1985), available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf).

<sup>58</sup> See, e.g., *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (whether an agent possessed authority to finalize a reinsurance contract containing an arbitration clause was for the court to decide). *But cf.* *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002) (whether a severely mentally challenged man possessed capacity to enter into a financial contract containing an arbitration clause was for the arbitrator to decide).

<sup>59</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

the Florida Supreme Court found that the contract's illegality rendered the arbitration clause unenforceable,<sup>60</sup> the Supreme Court reversed. The Court distinguished the issue presented (the alleged illegality of the contract) from situations such as the forgery exception alluded to above, where the party was resisting arbitration claims that an agreement was never made.<sup>61</sup> It held that the issue was for the arbitrator to decide, since what was allegedly illegal was not the arbitration clause specifically but rather the usurious interest charged on the loan.<sup>62</sup>

As stated, the allocation of authority between courts and arbitrators at issue in *Prima Paint* and *Buckeye* is an issue of timing. The *Buckeye* decision does not completely divest a court of the power to address the public policy issue, as the court will have an opportunity at the award-enforcement stage to review the award.<sup>63</sup> Although "public policy" is not expressly listed as a ground for vacating an arbitral award under FAA § 10, it is well established that public policy in limited cases may be a basis for invalidating an arbitral award, such as an award that compels a party to sell sophisticated weapons to Iran, to engage in the trafficking of slave labor, or to reinstate a commercial pilot who flew an airplane while intoxicated.<sup>64</sup> Additionally, a party seeking

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<sup>60</sup> *Id.* at 443.

<sup>61</sup> *Id.* at 444 n.1.

<sup>62</sup> The Supreme Court reaffirmed the *Prima Paint* doctrine in *Preston v. Ferrer*, 128 S. Ct. 978 (2008) (holding that a challenge to the validity of talent agency contract under state law is for the arbitrator to decide).

<sup>63</sup> See Rau, *supra* note 40, at 55 (noting that the allocation of the contract validity issue to the arbitrators under the rule in *Prima Paint* does not necessarily give the arbitrator "the final word," because the court may later review the award for compliance with public policy); see also BORN, *supra* note 41, at 943 (suggesting that *Buckeye* should not be interpreted as concluding that the consumers' illegality challenge "did not or could not impeach" the agreement to arbitrate, but rather that such issue should be "resolved in the first instance by the arbitrators, subject to subsequent judicial review").

<sup>64</sup> See *Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988) (setting aside an award compelling Delta to reinstate a pilot who flew while intoxicated). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, a case allowing Sherman Act claims to be submitted to international commercial arbitration, the Supreme Court reasoned that U.S. courts would have an opportunity at the award enforcement stage to ensure that the public's "legitimate interest in enforcement of the antitrust laws" had been addressed. 473 U.S. 614, 638 (1985). Similar reasoning was employed in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

For an example of an arbitral award that was partially refused enforcement under the New York Convention on public policy grounds because of a usurious interest rate, see *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1068-69 (N.D. Ga. 1980). See *Ministry of Def. of the Islamic Republic of Iran v. Gould*,

to set aside an award might plausibly argue at the award-enforcement stage that the arbitrator lacked jurisdiction to issue the award under FAA § 10(a)(4) because the entire contract (including the arbitration clause) was illegal.<sup>65</sup> However, as discussed below,<sup>66</sup> the timing issue is of significant practical importance because once the arbitrator has issued an award, a court will tend to construe the permissible grounds for vacating that award very narrowly.

### 3. The AT&T “Canon” as Qualified by *Howsam* and *Bazzle*

The decisions first establishing that issues of arbitrability are for the court to decide involve not the FAA but § 301(a) of the Labor Management Relations Act.<sup>67</sup> *AT&T Technologies, Inc. v. Communications Workers of America*<sup>68</sup> and its predecessor, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,<sup>69</sup> are labor arbitration decisions.<sup>70</sup> Relying on *Warrior*

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Inc., 969 F.2d 764 (9th Cir. 1992) (remanding the case to determine whether the award compelled the sale of defense technology to Iran). In contrast to the FAA, Article V of the New York Convention expressly includes public policy as a permissible ground on which a court may refuse enforcement of a foreign arbitral award. New York Convention, *supra* note 46, art. V(2)(b).

<sup>65</sup> See BORN, *supra* note 41, at 943 n.465; *cf.* *China Minmetals Materials Imp. and Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.2d 274 (3d Cir. 2003) (vacating the district court’s confirmation of a foreign arbitral award where party resisting confirmation alleged that the entire contract was fraudulent).

<sup>66</sup> See *infra* Part IV.

<sup>67</sup> 29 U.S.C. § 185(a) (2006). In *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957), the Supreme Court held that § 301(a) provided a statutory basis for enforcing grievance arbitration provisions in collective bargaining agreements. This decision has been described as articulating a federal policy supporting labor arbitration as a mechanism for “promot[ing] industrial stabilization through the collective bargaining agreement.” *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577–78 (citing *Lincoln Mills*, 353 U.S. at 456–57).

<sup>68</sup> *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643 (1986).

<sup>69</sup> *Warrior & Gulf*, 363 U.S. at 574. *Warrior & Gulf* is one of the cases making up the famous “Steelworkers Trilogy,” three Supreme Court decisions that provided the foundation for labor arbitration under U.S. law. The other two cases in the Trilogy are *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960) and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>70</sup> Although they raise unique issues, labor arbitration decisions are routinely relied upon outside of the labor context. See Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT’L ARB. 287, 325 n.106 (citing authorities). *AT&T*, in particular, has been

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

& *Gulf*, the Court in *AT&T* held that whether a collective bargaining agreement creates a duty for the parties to arbitrate is “undeniably an issue for judicial determination.”<sup>71</sup> Professor Rau describes the holding in *AT&T* as a “canonical principle” of arbitration law.<sup>72</sup>

*AT&T* involved a dispute between management and a union over the scope of a “management functions” clause in a collective bargaining agreement, pursuant to which the union recognized the right of the company to exercise certain “functions of managing the business.”<sup>73</sup> Because the clause also provided that functions falling within the scope of the clause were “not subject to” arbitration,<sup>74</sup> the issues in *AT&T* boiled down to: (i) whether *AT&T*’s decision to lay off workers fell within the scope of the management functions clause (which would remove it from the scope of the arbitration clause) and (ii) whether interpretation of the scope of matters subject to arbitration should initially be decided by the court or the arbitrator. The Seventh Circuit reasoned that interpretation should fall to the arbitrator because the jurisdictional and substantive issues in the case were intertwined.<sup>75</sup> The Supreme Court reversed, invoking the “canon” that arbitrability is a matter for judicial determination.

At one level, *AT&T* expresses a “relatively conservative view of arbitral authority.”<sup>76</sup> The decision calls for a court, not an arbitrator, to decide an arbitral jurisdiction challenge, whether it relates to the scope, existence, or enforceability of an agreement to arbitrate. But other aspects of the Court’s opinion suggest a relatively narrow judicial inquiry where, as here, the challenge relates to interpreting the scope of arbitrable issues. The *AT&T* opinion articulated a presumption that contracts should be construed in favor of arbitrability: “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”<sup>77</sup>

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cited in countless other arbitration decisions, including, for example, *First Options. First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–44 (1995).

<sup>71</sup> *AT&T*, 475 U.S. at 649 (citing *Warrior & Gulf*, 363 U.S. at 582–83).

<sup>72</sup> Rau, *supra* note 70, at 359.

<sup>73</sup> *AT&T*, 475 U.S. at 645 n.2.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 647.

<sup>76</sup> BORN, *supra* note 41, at 913–14.

<sup>77</sup> *AT&T*, 475 U.S. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582–83).

The opinion framed the issue before the court on remand as limited to determining “whether, because of express exclusion or other forceful evidence,” the dispute over layoffs should be found to fall outside the scope of the arbitration clause.<sup>78</sup> Absent such evidence, the dispute should be held to be arbitrable. In sum, *AT&T* held that the issue of determining the scope of arbitrable matters is vested in the court, but the role of the court in determining arbitrability is quite limited. As Professor Rau observed, the significance of *AT&T* “is not so much that it is the court that ‘decides,’ as it is the highly restricted nature of any judicial inquiry.”<sup>79</sup>

*AT&T* also has been limited by the Supreme Court’s subsequent decisions. In *Howsam v. Dean Witter Reynolds, Inc.*<sup>80</sup> and *Green Tree Financial Corp. v. Bazzle*,<sup>81</sup> the Court held that the arbitrator should resolve issues of arbitral procedure that determined whether arbitration could proceed. In each of these cases, the “who decides” question involved procedural issues of the sort that the Court believed the arbitrator would be better suited to resolve. Notably, the parties did not contest that there was a valid and enforceable arbitration agreement in either case.

*Howsam* addressed whether a court or an arbitrator should apply the limitations rule contained in the arbitration procedural rules of the National Association of Securities Dealers (NASD). While acknowledging that the question of arbitrability generally is for the court to decide, the *Howsam* court observed that the range of issues that actually would qualify as a “question of arbitrability” is quite limited. Specifically, it found that those matters that are presumptively for the court to decide only extended to relatively “narrow” situations “where contracting parties would likely have expected a court to have decided the gateway matter.”<sup>82</sup> It reasoned that an NASD arbitrator has more expertise than a court at interpreting and applying its own procedural rule, and therefore the parties presumably would expect such a matter to go to the arbitrator.<sup>83</sup>

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<sup>78</sup> *Id.* at 652. Justice Brennan’s concurring opinion even more strongly emphasized the narrow scope of the court’s inquiry. *See id.* at 654–55 (Brennan, J., concurring) (stating that the court’s inquiry should be limited to determining whether the contract contains express language excluding layoff disputes from the scope of the arbitration clause, or “the most forceful evidence to that effect from the bargaining history”).

<sup>79</sup> Rau, *supra* note 70, at 360.

<sup>80</sup> *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

<sup>81</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

<sup>82</sup> *Howsam*, 537 U.S. at 83.

<sup>83</sup> *Id.* at 85.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

In *Bazzle*, the arbitrability issue also involved a question of arbitral procedure. Consumers brought class action suits in South Carolina against their lender, Green Tree Financial Corporation. The South Carolina circuit courts compelled arbitration of the claims based on the arbitration clauses contained in the loan contracts.<sup>84</sup> The arbitrator deciding the class action claims, awarded over \$20 million to the consumers.<sup>85</sup> Green Tree then sought to vacate the arbitral awards, arguing that the arbitrator was not authorized under the contracts to conduct a class arbitration. The South Carolina Supreme Court upheld the trial courts' confirmation of the awards.<sup>86</sup> In a plurality decision, the Supreme Court remanded the case, holding that the contract interpretation issue was a matter for the arbitrator, not the court, to decide.<sup>87</sup> Again, the plurality opinion characterized the scope of issues that are for the court to decide as being relatively limited.<sup>88</sup> In particular, the *Bazzle* opinion was careful to point out that what was at issue in the case—whether the parties' agreement permitted class action arbitration—did *not* require determining the existence, validity, or enforceability of the agreement to arbitrate.<sup>89</sup> In sum, both *Bazzle* and *Howsam* were about vesting initial authority to *interpret* the parties' agreement to arbitrate in the arbitrator—whether that meant determining if a contract authorized class actions, or interpreting the NASD limitations rule that was incorporated by reference into the parties' contract.

As a matter of arbitration policy, there is an important difference between arbitrability as it relates to interpreting the scope of the agreement to arbitrate (referred to herein as “scope arbitrability”) and challenges to the existence or enforceability of such agreement. If the dispute involves scope arbitrability, then vesting the arbitrator with authority to resolve such issues would appear to be entirely consistent with the parties' intent as expressed in the agreement to arbitrate, because determining the scope of the arbitration clause is essentially a matter of contract interpretation. However, if the party

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<sup>84</sup> *Bazzle*, 539 U.S. at 449.

<sup>85</sup> The arbitrator (the same arbitrator was appointed to hear both proceedings) awarded approximately \$10.9 million in damages in the first class arbitration and \$9.2 million in the second. *Bazzle*, 539 U.S. at 449.

<sup>86</sup> *Id.* at 450.

<sup>87</sup> *Id.* at 451. Later, in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), the Court emphasized that only a plurality of the *Bazzle* Court had decided that this contract interpretation issue was for the arbitrator. *Id.* at 1772.

<sup>88</sup> *Bazzle*, 539 U.S. at 452.

<sup>89</sup> *Id.*

resisting arbitration is arguing that the arbitration agreement itself is nonexistent, invalid, or unenforceable, then, as Professor William Park would say, to allow the arbitrator to resolve the issue is analogous to “Baron Münchhausen lifting himself up by his own pigtail.”<sup>90</sup> In other words, because the arbitrator’s authority and legitimacy are based on the existence of a valid and enforceable agreement to arbitrate, disputes over the *existence* of such an agreement more directly call into question the arbitrator’s authority than do disputes over the *scope* of such an agreement.<sup>91</sup>

To summarize, although *AT&T* stands for the proposition that questions of arbitrability are “unquestionably” for the court to decide, this rule is circumscribed by the presumption, also stated in *AT&T*, that at least in cases involving “scope arbitrability,” any doubts regarding the scope of arbitrable matters should be resolved in favor of arbitration by the relatively narrow judicial inquiry that the decision appears to require. Additionally, in *Howsam* and *Bazzle* the Supreme Court qualified the *AT&T* rule in another respect: issues of arbitral procedure, even if they are determinative of whether arbitration may proceed, should be resolved by the arbitrator.

#### 4. Contracting to Let the Arbitrator Decide: First Options

Although it has been characterized as mere dictum,<sup>92</sup> *First Options* is widely relied upon for the proposition that parties may contract to authorize

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<sup>90</sup> William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT’L 137, 146 (1996).

<sup>91</sup> Indeed, in a decision involving international commercial arbitration that preceded *AT&T* (and which was authored by now Justice Breyer), the First Circuit found that the issue of whether a dispute fell within the scope of an arbitration clause should be decided initially by the arbitrators and not the court. *Société Générale de Surveillance, S.A. v. Raytheon European Mgmt. and Sys. Co.*, 643 F.2d 863, 869 (1st Cir. 1981). This aspect of *Société Générale* is called into question by the Supreme Court’s subsequent decision in *AT&T*.

Historically, courts have more readily found “clear and unmistakable evidence” of the parties’ intent to vest arbitrability in the arbitrator under the *First Options* rule when the issue is “scope arbitrability,” as opposed to challenges as to the existence or enforceability of the agreement to arbitrate. See *infra* notes 127–31 and accompanying text. In one case, the court went so far as to hold that the *First Options* requirement of “clear and unmistakable” evidence could be dispensed with entirely when the challenge relates to scope arbitrability, holding that these matters were for the arbitrator to decide. *Consol. Rail Corp. v. Metro. Transp. Auth.*, No. 95 Civ. 2142 (LAP), 1996 WL 137587, at \*8 (S.D.N.Y. Mar. 22, 1996) (discussed in Rau, *supra* note 70, at 312–13 n.78).

<sup>92</sup> Park, *supra* note 90; see also Rau, *supra* note 70, at 292–94.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

an arbitrator to determine the existence, validity, or scope of the agreement to arbitrate.<sup>93</sup> *First Options* involved a debt dispute between the defendants (Manuel and Carol Kaplan and Manuel Kaplan's company, M.K. Investments ("MKI")), and First Options, a stock trade-clearing firm.<sup>94</sup> First Options and MKI agreed to submit the dispute to arbitration before the Philadelphia Stock Exchange, but the Kaplans refused on grounds that they did not sign any agreement containing an arbitration clause.<sup>95</sup> Although the Kaplans filed written submissions to the arbitration panel contesting the arbitrators' jurisdiction, they otherwise participated in the arbitral proceeding and even filed a counterclaim.<sup>96</sup> The panel upheld its jurisdiction and subsequently issued an award on the merits against MKI and the Kaplans jointly and severally.<sup>97</sup> The district court rejected the Kaplans' petition to vacate and confirmed the arbitration award. The Third Circuit reversed the

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<sup>93</sup> See, e.g., *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373–74 (Fed. Cir. 2006); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 877–78 (8th Cir. 2009); *Qwest Corp. v. New Access Commc'ns*, No. 03-N-1278, 2004 U.S. Dist LEXIS 28523, at \*17–18 (D. Colo. Mar. 31, 2004); cf. *Apollo v. Berg*, 886 F.2d 469 (1st Cir. 1989) (preceded *First Options*); see also *infra* note 263 (citing cases that rely on *First Options* to find that parties agreed for arbitrator to address unconscionability issue).

The Supreme Court's recent *Rent-A-Center* and *Granite Rock* decisions (discussed *infra* in Part III.C.1) also cite to *First Options* for this idea, although in neither case was the *First Options* dictum the basis for the decision. See *infra* Part III.C.1. *Howsam* cites *First Options* in dictum for the idea that parties can agree for the arbitrator to decide arbitrability. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). *Bazzle* cites *AT&T* in dictum for the same idea. *Bazzle*, 539 U.S. at 422.

<sup>94</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 940 (1995).

<sup>95</sup> Brief for the Petitioner at 4–5, *First Options*, 514 U.S. 938 (1995) (No. 94-560). One of the debt work-out agreements, which was signed by MKI and First Options but not by the Kaplans, contained a clause providing for arbitration pursuant to the rules of the Philadelphia Stock Exchange. *Id.*

<sup>96</sup> *Id.* at 6–7 The parties disputed whether the Kaplans effectively withdrew their jurisdictional objections during a pre-trial discovery conference. *Id.* at 6; Brief for the Respondent Manuel Kaplan at 7, *First Options*, 514 U.S. 938 (1995) (No. 94-560).

<sup>97</sup> Brief for the Respondent Manuel Kaplan at 8, *First Options*, 514 U.S. 938 (1995) (No. 94-560). The panel denied MKI and Manuel Kaplan's counterclaim, entered an award against MKI in the amount of \$5.6 million, held Manuel jointly and severally liable for the award against MKI, and entered an award against Carol and Manuel in the amount of a refund on their joint tax return. *Id.* at 8.



confirmation, finding that the dispute was not arbitrable for lack of jurisdiction.<sup>98</sup>

The Supreme Court granted certiorari to address the standard of review the Court should use to review the arbitrator's jurisdictional findings.<sup>99</sup> First Options argued that the Kaplans' conduct during the course of the arbitral proceeding (arguing the jurisdictional issue, defending against First Options' claims, pursuing the counter-claim, etc.) effectively waived their jurisdictional objections. Similarly, First Options argued that such conduct constituted an agreement that the arbitrator should issue a binding decision on the jurisdictional issue. Because the Kaplans' conduct allegedly manifested agreement to delegate the jurisdictional question to the arbitrator, First Options argued that the arbitrator's jurisdictional findings should be subject to deferential judicial review.<sup>100</sup>

Relying on *AT&T* and *Warrior & Gulf*, Justice Breyer's opinion began by noting that *if* the parties had agreed to arbitrate arbitrability then the arbitrator's decision on whether the Kaplans were bound to an agreement to arbitrate should be subject to deferential review under the FAA:

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.<sup>101</sup>

However, the Court went on to hold that courts should only assume that the parties have agreed to "arbitrate arbitrability" if there is "clear and unmistakable" evidence of such an agreement.<sup>102</sup> The Court found that evidence of such an agreement had not been proven; it concluded that on the record before it, "First Options cannot show that the Kaplans *clearly agreed*

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<sup>98</sup> *First Options*, 514 U.S. at 941.

<sup>99</sup> *Id.* Also on appeal was the standard of review the Third Circuit should apply to the district court's denial of the Kaplans' motion to vacate, which the Court held was to be the same standard as that applicable to any other district court decision. *Id.* at 947-48.

<sup>100</sup> Brief for the Petitioner at 10-12, *First Options*, 514 U.S. 938 (1995) (No. 94-560).

<sup>101</sup> *First Options*, 514 U.S. at 943 (citing *AT&T*, 475 U.S. at 649; *Warrior & Gulf*, 363 U.S. at 583 n.7).

<sup>102</sup> *First Options*, at 944 (citing *AT&T*, 475 U.S. at 649; *Warrior & Gulf*, 363 U.S. at 583 n.7).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

to have the arbitrators decide” arbitrability.<sup>103</sup> In particular, merely arguing the arbitrability issue before arbitrators is insufficient to establish a “clear willingness” to have arbitrators decide the jurisdictional question and to be effectively bound by such decision.<sup>104</sup> Therefore, the *First Options* Court affirmed the Third Circuit’s decision that reversed confirmation of the arbitral award for lack of jurisdiction.

Justice Breyer’s opinion relied on *AT&T* and *Warrior & Gulf*—in particular, footnote 7 of the *Warrior & Gulf* opinion—to suggest that parties can contract to vest the power to determine jurisdiction in the arbitrator and that the arbitrator’s findings in such a case are entitled to judicial deference.<sup>105</sup> As stated,<sup>106</sup> *Warrior & Gulf* is a seminal labor arbitration decision, which like *AT&T* dealt with the scope of the arbitration clause in a collective bargaining agreement. The Court, in footnote 7 of *Warrior & Gulf*, cited a famous law review article by Professor Archibald Cox.<sup>107</sup> The Court observed that where the party seeking to compel arbitration asserts that the parties excluded not only the merits of the dispute but also of its arbitrability from court determination, that party must “bear the burden of a clear demonstration of that purpose.”<sup>108</sup> This footnote was cited in *First Options*’ brief for the proposition that parties “may exclude” from court determination not only the merits of the dispute but also its arbitrability.<sup>109</sup> Although Justice Breyer’s opinion cites footnote 7 of *Warrior & Gulf* for the same idea,<sup>110</sup> a closer look at the footnote suggests that it was only intended to apply to scope arbitrability.

Not only did *Warrior & Gulf* and *AT&T* involve scope arbitrability, but the law review excerpt that was cited in footnote 7, and which appears to have influenced the dictum itself, was directed only to scope arbitrability determinations. In the excerpt below, Professor Cox discusses arbitrability in the context of labor arbitration and suggests that parties to a collective bargaining agreement might wish to vest power to interpret not only the

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<sup>103</sup> *First Options*, 514 U.S. at 946 (emphasis added).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 943–44.

<sup>106</sup> See *supra* note 69 and accompanying text.

<sup>107</sup> Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1508–09 (1959).

<sup>108</sup> *Warrior & Gulf*, 363 U.S. at 583 n.7.

<sup>109</sup> Brief for the Petitioner at 13, *First Options*, 514 U.S. 938 (1995) (No. 94-560).

<sup>110</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

agreement, but also the scope of the arbitration clause in the arbitrator, and that such intent should be upheld:

A specific stipulation giving the arbitrator power to decide all questions of arbitrability is in substance a promise to submit to arbitration all questions *concerning the meaning of the arbitration clause*. There is no doubt about the effectiveness of such a stipulation. . . . Reading the arbitration clause as an undertaking to allow the arbitrator to *interpret that clause among others* would economize time and effort. The evidence bearing upon questions of arbitrability is often relevant to the merits. . . . The principal purpose of an arbitration clause—to provide a specialized tribunal for the relatively informal development of the facts—would be implemented by reading the contract as a delegation of power to *decide what disputes fall within its ambit*.<sup>111</sup>

Professor Cox went on to conclude, however, that the typical arbitration clause in a collective bargaining agreement does not evince intent to vest in the arbitrator such authority, and that determinations of arbitrability ordinarily would fall to the court.<sup>112</sup> His assertion—that parties should be allowed to vest arbitrability determinations in the arbitrator, but only if the agreement contains clear language to that effect—mirrors the footnote 7 dictum, but obviously was meant to apply only to scope arbitrability.

This difference between scope arbitrability and challenges to the existence of a binding agreement to arbitrate also was recognized in the brief filed by respondent Manuel Kaplan.<sup>113</sup> The brief distinguishes between the situation that is relatively common in labor arbitration disputes, where the parties do not dispute the existence of an arbitration agreement and agree to let the arbitrator make a binding determination of arbitrability, and the situation in *First Options*, where the Kaplans, the party contesting arbitration, contended that they “never agreed to arbitrate any dispute.”<sup>114</sup> In the latter scenario, such party “is highly unlikely to be willing to commit the jurisdictional question to the arbitrator for final decision.”<sup>115</sup>

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<sup>111</sup> Cox, *supra* note 107, at 1508–09 (emphasis added).

<sup>112</sup> *Id.* at 1509–10.

<sup>113</sup> Brief for the Respondent Manuel Kaplan at 18, *First Options*, 514 U.S. 938 (1995) (No. 94-560).

<sup>114</sup> *Id.* The brief was co-authored by John Roberts, now Chief Justice of the Supreme Court.

<sup>115</sup> *Id.* The brief also asserts that it would only be appropriate to conclude that parties had submitted the arbitrability issue to the arbitrator in very limited

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

To summarize, a closer look at the labor arbitration authorities on which the *First Options* dictum relies reveals that the only types of delegation clauses to which these authorities referred were those that addressed scope arbitrability. The precedent suggests that delegation clauses should only be enforceable to vest in the arbitrator the power to interpret the scope of the agreement to arbitrate, not determine its existence or enforceability.

### 5. *Decisions Interpreting First Options Dictum*

Although the previous section suggests a narrow interpretation, many courts interpreting the *First Options* dictum have applied it liberally. Courts have found “clear and unmistakable evidence” of intent to let the arbitrator decide his or her jurisdiction, either on the basis of a broadly written arbitration clause, or a reference in the arbitration clause to institutional arbitration rules that expressly grant the arbitrator authority to rule on his or her jurisdiction.<sup>116</sup>

The case law applying the dictum from *First Options* generally falls into three categories. Some courts have found the “clear and unmistakable evidence” requirement was *not* met by the language of an arbitration clause, although almost invariably the party resisting arbitration challenged the existence, validity, or enforceability of the agreement to arbitrate in such

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circumstances, such as where the parties have made a formal stipulation or submission agreement. *Id.* at 17 n.15.

<sup>116</sup> Arbitral institutions typically adopt procedural rules authorizing the arbitrator to determine his or her jurisdiction. *See, e.g.*, Rule 7(a) of the AAA Commercial Arbitration Rules:

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

American Arbitration Association (AAA), *Commercial Arbitration Rule 7(a)* (Effective June 9, 2009), *available at* <http://www.adr.org/sp.asp?id=22440#R7>; *see also* AAA Employment Arbitration Rules and Mediation Procedures Rule 6(a), *available at* <http://www.adr.org/sp.asp?id=32904#6>; International Chamber of Commerce (ICC) Rules of Arbitration arts. 6(2) and 6(4), *available at* [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_arb\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf); JAMS Comprehensive Arbitration Rules and Procedures Rule 11(c) *available at* [http://www.jamsadr.com/files/Uploads/Documents/JAMSRules/JAMS\\_comprehensive\\_arbitration\\_rules-2010.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMSRules/JAMS_comprehensive_arbitration_rules-2010.pdf); National Arbitration Forum (NAF) Code of Procedure Rules 20(E) and (F), *available at* <http://www.adrforum.com/users/nafl/resource/s/CodeofProcedure2008-print2.pdf>.

cases.<sup>117</sup> For example, in *Gregory v. Interstate/Johnson Lane Corp.*,<sup>118</sup> the Fourth Circuit reversed a district court order to compel arbitration of a securities fraud claim where the claimant alleged that her signature on the account agreement was forged. Although the district court reasoned that the arbitration clause encompassed all matters including arbitrability,<sup>119</sup> the Fourth Circuit disagreed: “Mrs. Gregory contends that she never agreed to arbitration . . . [s]he has the right, then, to have a district court, rather than an arbitrator, decide if she has agreed to arbitrate her claim.”<sup>120</sup> Similarly, in *China Minmetals Materials Import and Export Co. v. Chi Mei Corp.*,<sup>121</sup> the Third Circuit refused to confirm a foreign arbitral award where the party contesting confirmation argued that the agreement was forged. The court noted that the contract incorporated the procedural rules of the China International Economic and Trade Arbitration Commission (CIETAC), which expressly grant the arbitrators the power to determine their own jurisdiction.<sup>122</sup> Nonetheless, the court found that “a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction[, i]f the parties never entered into it.”<sup>123</sup> And where an arbitration clause allegedly was superseded by a new agreement that did not contain an arbitration clause, the Tenth Circuit found that the issue of arbitrability was for the court to decide, notwithstanding the broad scope of the arbitration clause.<sup>124</sup> Finally, when the Ninth Circuit considered *Rent-A-Center v. Jackson*, it found that standard-form language in a mandatory arbitration agreement did not constitute “clear and unmistakable” evidence that the parties contracted to let the arbitrator decide whether the agreement was

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<sup>117</sup> See also BORN, *supra* note 41, at 938–40 (observing that most lower courts hold claims involving the existence, legality, or validity of an arbitration agreement to be for judicial determination, even where the alleged agreement incorporates institutional procedural rules that grant the arbitrator the authority to determine jurisdiction).

<sup>118</sup> *Gregory v. Interstate/Johnson Lane Corp.*, No. 98-1840, 1999 U.S. App. LEXIS 20862 (4th Cir. Aug. 31, 1999).

<sup>119</sup> *Id.* at \*6–7.

<sup>120</sup> *Id.* at \*10.

<sup>121</sup> *China Minmetals Materials Imp. and Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003).

<sup>122</sup> *Id.* at 288.

<sup>123</sup> *Id.* at 288.

<sup>124</sup> *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780–81 (10th Cir. 1998).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

unconscionable.<sup>125</sup> As will be discussed,<sup>126</sup> the Supreme Court reversed the Ninth Circuit's decision, reasoning that the unconscionability challenge, which was directed to the entire arbitration agreement and not the delegation clause, should be decided by the arbitrator in the first instance.

In a second category of cases, courts have distinguished between scope arbitrability cases and cases where a party contested the existence or enforceability of an agreement to arbitrate. These courts have cited *First Options* for the idea that where scope arbitrability is at issue, courts are more likely to let the arbitrator decide arbitrability. In several labor arbitration decisions, the Second and Sixth Circuits observed that for purposes of the *First Options* dictum, scope arbitrability cases raise fewer concerns than cases involving disputes over the existence of a valid agreement to arbitrate.<sup>127</sup> The Second, Eighth, and Federal Circuits have allowed a broadly written arbitration clause or the incorporation of institutional arbitration procedural rules to constitute "clear and unmistakable evidence" of the parties' intent in cases involving scope arbitrability.<sup>128</sup> Gary Born notes that,

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<sup>125</sup> *Jackson v. Rent-A-Center, W., Inc.*, 581 F.3d 912 (9th Cir. 2009), *rev'd*, 130 S. Ct. 2772 (2010).

<sup>126</sup> See *infra* Part III.A.2.

<sup>127</sup> In *Abram Landau Real Estate v. Bevona*, 123 F.3d 69 (2d Cir. 1997), the Second Circuit distinguished the two types of arbitrability situations, noting that under *First Options*, the question of whether the parties ever entered into a valid arbitration agreement at all is a question of "basic contract law," and therefore, "it would be unfair to submit that very question to arbitration, absent a clear expression that the parties intended this result." 123 F.3d 69, 73 (2d Cir. 1997). The court found that the arbitrability issue in that case—whether the arbitration clause in the collective bargaining agreement had expired—was for the arbitrator to decide, because resolution of the issue required interpreting the "evergreen clause" in the agreement (providing that the agreement would continue in effect after its expiration date until a new agreement was concluded), and did not raise the same concerns as those present in *First Options*. *Id.* at 74. In *International Ass'n of Bridge, Structural, and Ornamental Iron Workers, Local No. 44 v. J & N Steel and Erection Co.*, No. 99-4075, 2001 U.S. App. LEXIS 7756 (6th Cir. Apr. 13, 2001), another dispute over the continued effectiveness of a collective bargaining agreement containing an evergreen clause, the Sixth Circuit cited *Abram Landau* for the proposition that the two types of arbitrability situations should be treated differently, but found that the continued existence of the arbitration agreement was for the court to decide, distinguishing *Abram Landau* on the grounds that the arbitration clause at issue clearly had expired. *J & N Steel*, 2001 U.S. App. LEXIS 7756, at \*12–15.

<sup>128</sup> *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372–73 (Fed. Cir. 2006) (designation of AAA Commercial Arbitration Rules); *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 124–25 (2d Cir. 2003) (designation of ICC rules); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 877 (8th Cir. 2009) (designation of AAA Commercial

when the issue is scope arbitrability, U.S. courts are likely to find the requisite evidence of the parties' intent through the incorporation of a set of institutional arbitration rules.<sup>129</sup> In contrast, he finds that courts have been significantly less likely to find that the "clear and unmistakable evidence" standard has been met when the arbitrability challenge relates to the existence or validity of the arbitration agreement.<sup>130</sup> He approves of this distinction, reasoning that in scope arbitrability cases the jurisdictional and substantive interpretation issues are often intertwined.<sup>131</sup> This analysis is consistent with that of Professor Cox, as discussed in the previous section.

Finally, a growing number of courts have found that a broadly worded arbitration clause, or the designation of institutional arbitration rules, effectively delegated to the arbitrator the determination of arbitrability, even where the party challenging arbitration alleged that there was no enforceable arbitration agreement. In *Apollo Computer, Inc. v. Berg*,<sup>132</sup> a decision that pre-dates *First Options*, Apollo brought an action seeking to stay an arbitration proceeding on the grounds that the claimants, who allegedly had been assigned rights under the arbitration clause, were not parties to the arbitration agreement. The First Circuit found that the issue of whether claimants could invoke the arbitration clause was for the arbitrator to decide, because the arbitration agreement incorporated ICC procedural rules, which vest the authority to decide its jurisdiction in the arbitration tribunal.<sup>133</sup> However, in *Apollo*, the party challenging arbitration was a party to the

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Arbitration Rules; the court found that the scope of the arbitration clause was for arbitrator to decide but rejected plaintiffs' unconscionability challenge on the merits); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198–1200 (2d Cir. 1996) (broadly written arbitration clause and designation of NASD rules).

<sup>129</sup> BORN, *supra* note 41, at 932–34.

<sup>130</sup> *Id.* at 938–40.

<sup>131</sup> *Id.* at 937.

<sup>132</sup> *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989).

<sup>133</sup> *Id.* at 472–73. The claimants in *Apollo* had been assigned the arbitration rights by a bankruptcy trustee that was liquidating the assets of the original counterparty to the contract; *see also* *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 210–11 (2d Cir. 2005) (following *Apollo v. Berg* in a case where the signatory to an arbitration clause incorporating AAA Commercial Arbitration Rules contested arbitration brought by a successor corporation to the other party). *But cf.* *Celanese Corp. v. The BOC Group PLC*, No. 3:06-CV-1462-P, 2006 U.S. Dist. LEXIS 88191, at \*10–11 (N.D. Tex. Dec. 6, 2006) (refusing to follow *Apollo* and *Contec* where the "equitable considerations" at issue in those cases were not present).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

arbitration agreement and did not dispute its enforceability.<sup>134</sup> Additionally, federal district courts have invoked the *First Options* dictum in cases where the party contesting arbitration challenged the existence of an enforceable arbitration agreement, for example, where the arbitration clause allegedly was superseded by a new contract.<sup>135</sup>

Most significantly, courts are increasingly relying on contractual references to institutional arbitration rules, or on adhesion contract language similar to that at issue in *Rent-A-Center*, to find “clear and unmistakable evidence” of the parties’ intent to grant the arbitrator authority to determine whether the arbitral agreement is unconscionable or unenforceable on grounds of statutory policy.<sup>136</sup> These decisions are discussed at Part III.C below.

To summarize, in *First Options*, the Supreme Court held that the Kaplans’ conduct did *not* constitute an agreement to vest in the arbitration panel the power to determine its jurisdiction. The Court’s dictum acknowledged that any such delegation of authority would require “clear and

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<sup>134</sup> *Apollo*, 886 F.2d at 472–73.

<sup>135</sup> See *Express Scripts, Inc. v. Aegon Direct Mktg.*, No. 4:06-CV-1410 CAS, 2009 U.S. Dist. LEXIS 31905, at \*7–9 (E.D. Mo. Apr. 15, 2009) (designation of AAA Commercial Arbitration Rules; plaintiff alleged that contract was superseded by a subsequent agreement that did not contain an arbitration clause); *Qwest Corp. v. New Access Commc’ns, LLC*, No. 03-N-1278, 2004 U.S. Dist. LEXIS 28523, at \*16–18 (D. Colo. Mar. 31, 2004) (designation of AAA Commercial Arbitration Rules; plaintiff argued that the subject matter of the dispute could not be arbitrated as a matter of policy); cf. *TC Arrowpoint L.P. v. Choate Constr. Co.*, No. 3:05CV267-H, 2006 U.S. Dist. LEXIS 2881, at \*25–27 (W.D.N.C. Jan. 13, 2006) (holding that arguing arbitrability before the arbitrator constituted an agreement that the arbitrator had the authority to determine arbitrability; defendant argued that it was not a signatory to the contract).

<sup>136</sup> See *Auwah v. Coverall N. America, Inc.*, 554 F.3d 7, 10–12 (1st Cir. 2009) (designation of AAA Commercial Arbitration Rules); *Terminix Int’l Co. v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1332–33 (11th Cir. 2005) (designation of AAA Commercial Arbitration Rules); *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003) (broad arbitration clause); *Vidrine v. Balboa Ins. Co.*, 597 F. Supp. 2d 687, 690–91 (S.D. Miss. 2009) (broad arbitration clause); *Pantel v. TMG of Illinois, LLC*, No. 07 C 7252, 2008 U.S. Dist. LEXIS 106745, at \*8–9 (N.D. Ill. Nov. 17, 2008) (broad arbitration clause); *Taylor v. Rent-A-Center*, No. 5:06CV2228, 2007 U.S. Dist. LEXIS 57689, at \*6 (N.D. Ohio Aug. 8, 2007) (broad arbitration clause); *Gill v. World Inspection Network Int’l, Inc.*, No. 06-CV-3187(JFB)(MLO), 2006 U.S. Dist. LEXIS 52426, at \*15–16 (E.D.N.Y. July 31, 2006) (broad arbitration clause); *Anderson v. Pitney Bowes, Inc.*, No. C 04-4808 SBA, 2005 U.S. Dist. LEXIS 37662, at \*9–10 (N.D. Cal. May 4, 2005) (broad arbitration clause); *Citifinancial, Inc. v. Newton*, 359 F. Supp. 2d 545, 552 (S.D. Miss. Mar. 4, 2005) (designation of AAA Commercial Arbitration Rules).



unmistakable evidence” of the parties’ intent. But crucially, the dictum relied on labor arbitration precedents that only addressed agreements to delegate to the arbitrator *scope* arbitrability authority, not the power to determine the existence or enforceability of an arbitration agreement. Although some decisions acknowledge the difference between deciding scope arbitrability and deciding the existence of an enforceable arbitration agreement, the distinction has now been called into question by the *Rent-A-Center* decision.

Finally, the *First Options* dictum suggests that where parties contract for the arbitrator to make jurisdictional findings, those findings should be accorded deference. However, under the FAA a court should have the power to set aside an award that it finds is not based on a valid arbitration agreement, even where the arbitrator has found otherwise.<sup>137</sup> Post-award review is further discussed in Part IV.

### C. Comparative Perspective

[C]ourts in the United States seem happily oblivious to the link between American legal notions and the doctrines elaborated in the rest of the world to meet similar juridical problems.<sup>138</sup>

This section draws on examples of arbitration law in other countries to make three points: (i) the growing tendency of U.S. courts to defer judicial review of arbitrability determinations until the award-enforcement stage (discussed in detail in Part III) is not unusual from a comparative perspective; (ii) many countries, including countries that accord deference to initial arbitral jurisdictional findings, severely restrict or prohibit the pre-dispute arbitration of consumer and employment disputes; and (iii) notwithstanding point (i), judicial review of an arbitrator’s jurisdictional findings is universally recognized as an essential feature of arbitration, and therefore cannot be avoided by contract.

#### 1. Timing of Judicial Role in Determining Arbitrability

Although arbitration law in most countries recognizes an arbitrator’s competence to rule on his or her jurisdiction,<sup>139</sup> legal systems diverge

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<sup>137</sup> See *supra* Part II.B.1.

<sup>138</sup> William W. Park, *The Arbitrator’s Jurisdiction to Determine Jurisdiction*, 13 ICCA CONGRESS SERIES 55, 75 (2007).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

significantly on the issue of when a party contesting arbitral jurisdiction may have access to the courts to make or review jurisdictional findings. One can view the divergent approaches to the timing of court intervention on a spectrum: at one end of the spectrum would be the U.S. approach as expressed in *AT&T*, whereas at the other end of the spectrum would be the French approach, which generally restricts access to the courts to the award-enforcement stage.

As already noted,<sup>140</sup> over 50 countries have adopted the UNCITRAL Model Law on International Commercial Arbitration, which on its face is somewhat ambiguous as to the degree to which a party contesting arbitration may obtain an initial judicial determination of arbitrability. Article 8(1) of the Model Law suggests that a party contesting arbitration may obtain such a determination:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the subject of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.<sup>141</sup>

However, courts in Model Law jurisdictions have taken varying approaches to the level of scrutiny a court should give to the arbitration

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<sup>139</sup> For example, the UNCITRAL Model Law provides that “[t]he arbitral tribunal may rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement.” UNCITRAL MODEL LAW, *supra* note 57 art. 16(1). The FAA, in contrast, is silent as to the arbitrator’s competence to rule on his or her jurisdiction. See *supra* Part II.B.1.

<sup>140</sup> See *supra* note 56 and accompanying text.

<sup>141</sup> UNCITRAL MODEL LAW, *supra* note 57 art. 8(1). During the drafting of Article 8(1), it was proposed that the final clause of the paragraph should read “unless it finds that the agreement is *manifestly* null and void, inoperative or incapable of being performed.” Under the proposed standard, a court would have undertaken only a *prima facie* review of the existence of an enforceable arbitration agreement before referring the parties to arbitration. The Working Group ultimately rejected the proposal, however. The “prevailing view” of the group was that a challenge to the existence of a valid arbitration agreement should be decided by the court. UNCITRAL, Working Group on International Contract Practices, *Report of the Working Group on International Contract Practices on the Work of its Fifth Session*, ¶ 77, U.N. Doc. A/CN.9/233 (Mar. 28, 1983), available at <http://www.uncitral.org/uncitral/en/commission/sessions/16th.html> (click on A/CN.9/233 hyperlink), discussed in HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY at 302–03 (1989).

agreement under article 8(1). Some have held that a court should undertake a *full review* of the existence and validity of the arbitration clause, whereas others have found that only *prima facie* review is appropriate, especially where the issue is scope arbitrability rather than the existence of an enforceable arbitration agreement.<sup>142</sup>

Switzerland and the United Kingdom, two jurisdictions that have not adopted the Model Law, have also adopted an intermediate approach to this issue. Under the Swiss approach, courts will conduct only a *prima facie* review of whether there is an enforceable arbitration agreement, subject to full review at the award-enforcement stage.<sup>143</sup> The English Arbitration Act is even more restrictive, allowing a party contesting jurisdiction to obtain a preliminary judicial determination of arbitrability only if that party does not participate in the arbitral proceeding, or in other limited circumstances.<sup>144</sup>

Finally, under the French approach, the determination of an arbitrator's jurisdiction generally is not addressed by a court until the award-enforcement stage, after the arbitral award is issued. The only exception to this rule is where the party contesting arbitration brings its challenge to a court prior to it being brought before an arbitral tribunal *and* where the arbitration agreement is found to be "manifestly null and void."<sup>145</sup>

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<sup>142</sup> BORN, *supra* note 41, at 885–91 (surveying cases and finding that courts in Germany, Canada, New Zealand, Hong Kong, and Australia have conducted a full review, whereas in a number of decisions from India, Canada, Bermuda, and Hong Kong, courts have conducted only a *prima facie* review; in other words, courts in Hong Kong and Canada have ruled both ways on this issue). Born argues, however, that based on the statutory text and drafting history of the Model Law, the better approach is for the court to conduct a full review when the existence of an enforceable agreement is at issue. *Id.* at 881–85.

<sup>143</sup> Park, *supra* note 138, at 61 (citing Loi Fédéral sur le Droit International Privé [LDIP], [Federal Law on Private International Law], Dec. 18, 1987, RO 1988 1776, arts. 7, 179, ¶3 (Switz.)), available at <http://www.admin.ch/ch/fr/rs/291/index.html>.

<sup>144</sup> *Id.* at 60 (citing Arbitration Act 1996, 1996, c. 23, § 67(1)(a) (Eng.), available at [http://www.opsi.gov.uk/acts/acts1996/ukpga\\_19960023\\_en\\_1](http://www.opsi.gov.uk/acts/acts1996/ukpga_19960023_en_1)). Additionally, § 32 of the Act allows for preliminary judicial determination of jurisdiction, but only if the parties or the tribunal agree and the court determines it to be appropriate. Arbitration Act 1996, 1996, c. 23, § 32 (Eng.).

<sup>145</sup> FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION para. 672 (Emmanuel Gaillard and John Savage, eds. 1999) [hereinafter INTERNATIONAL COMMERCIAL ARBITRATION]; Park, *supra* note 138, at 81; JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION para. 14-55 (2003) (quoting N.C.P.C. [New Civil Procedure Code], art. 1458 (France)).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

Therefore, if one views the U.S. approach to arbitrability through the application of *AT&T*, the U.S. and France stand at opposite ends of the spectrum and of judicial involvement in determining arbitrability. However, as discussed in Part III, the Supreme Court has increasingly deferred initial competence to decide arbitrability to the arbitrator. These decisions, and the lower court decisions applying these principles to unconscionability determinations, represent a move toward the French approach. However, the U.S. approach can be contrasted with that of France and numerous other developed countries. As discussed in the following section, the arbitration of consumer and employment disputes is subject to special rules in many countries, which reflects policy considerations regarding the disparity of bargaining power between parties in the employment and consumer arbitration contexts.

### *2. Arbitration of Consumer and Employment Disputes*

In contrast to U.S. law, the laws of many developed nations prohibit arbitration of consumer and employment disputes.

Since 1994, the 27 countries of the European Union have been obligated to maintain national laws prohibiting the enforcement of standard-form, pre-dispute arbitration clauses in consumer contracts. In 1993, the E.U. Council enacted a Directive on unfair terms in consumer contracts (the Consumer Contract Directive),<sup>146</sup> which provides that any “unfair term” used in a contract concluded by a seller or supplier with a consumer “shall not be binding” under national law.<sup>147</sup> The Directive includes an annex of terms that

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As this article went to press, France adopted a new arbitration law that will go into effect May 1, 2011. The new law, however, retains the deferential approach of N.C.P.C. art. 1458. See Decree No. 2011-48 of Jan. 13, 2011, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Jan. 14, 2011, p. 9, available at [http://www.legifrance.gouv.fr/jopdf/common/jo\\_pdf.jsp?numJO=0&dateJO=20110114&numTexte=9&pageDebut=00777&pageFin=00781](http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20110114&numTexte=9&pageDebut=00777&pageFin=00781) [hereinafter *New French Arbitration Law*].

<sup>146</sup> Council Directive 93/13/EEC O.J. (L095) 29, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML>.

<sup>147</sup> *Id.* art. 6. Although E.U. Council directives require implementation by the E.U. states to become effective, as of 2000, all of the E.U. member states had adopted legislation to implement the Consumer Contracts Directive. See E.U. Commission, *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, Annex I, COM (2000) 248 (Apr. 27, 2000), available at [http://eurlex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=COMfinal&an\\_doc=2000&nu\\_doc=248](http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2000&nu_doc=248). The

“may be regarded as unfair,” including pre-dispute arbitration clauses.<sup>148</sup> The Directive applies to contracts concluded after December 31, 1994,<sup>149</sup> but does not apply to “individually negotiated” contract terms.<sup>150</sup>

A recent decision of the European Court of Justice (ECJ) highlights the significance of the Consumer Contract Directive in protecting European consumers against mandatory arbitration provisions. In *Mostaza Claro v. Centro Movil Milenium SL*,<sup>151</sup> the ECJ found that the Directive required the national court to annul an award that arose out of an “unfair” arbitration clause in a contract between a Spanish consumer and her cell phone provider, even though the consumer participated in the arbitration proceeding without challenging the enforceability of the clause.<sup>152</sup> The consumer only brought an action in Spanish court to challenge the validity of the arbitration clause after the award was issued.<sup>153</sup> The Spanish court found the term to be “unfair,” but referred the question of whether the Consumer Contract Directive required the court to annul the clause, despite the customer’s failure to initially challenge its validity during the arbitration proceeding to the ECJ.<sup>154</sup>

The ECJ found that the purpose of the Directive would be undermined if a court was precluded from finding that arbitration clause was void merely because the consumer failed to challenge the validity of the clause during the arbitration proceeding:

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European Commission has actively enforced the Consumer Contract Directive by bringing infringement actions against certain member states, subsidizing consumer groups to work with the private sector to eliminate unfair terms in consumer contracts, launching informational campaigns for the public, and similar activity. *Id.*

<sup>148</sup> O.J. (L095) 29, *supra* note 146 art. 3. Article 3 provides a definition of “unfair terms,” and references the Annex, which lists the types of terms that “may be regarded as unfair.” *Id.* One of the categories is any term that has the effect of “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration . . .” *Id.* Annex para. (q).

<sup>149</sup> *Id.* art. 10.

<sup>150</sup> *Id.* pmb., art. 3(1).

<sup>151</sup> Case C-168/05, *Mostaza Claro v. Centro Móvil Milenium SL*, 2006 E.C.R. I-10421.

<sup>152</sup> *Id.* paras. 16–18.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* paras. 19–20.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.<sup>155</sup>

The Court emphasized that the Directive's aim to strengthen consumer protection was "essential" to improving the standard of living and quality of life within the E.U.<sup>156</sup>

In addition to the E.U. member countries, other developed countries such as New Zealand<sup>157</sup> and Japan<sup>158</sup> have adopted legislation prohibiting the pre-dispute, mandatory arbitration of consumer disputes. Two of Canada's provinces have also enacted such legislation. Recent amendments to Quebec's Consumer Protection Act prohibit any pre-dispute agreement to arbitrate consumer disputes,<sup>159</sup> but Ontario's legislation only invalidates such agreements when they prevent a consumer from commencing a class action proceeding or otherwise exercising a right given under the Act to commence a proceeding in the Superior Court of Justice.<sup>160</sup>

Although the E.U. Council has not issued a directive or regulation comparable to the Consumer Contract Directive restricting the arbitration of employment disputes,<sup>161</sup> a number of E.U. countries do restrict the pre-dispute arbitration of such disputes. In particular, French law, as previously discussed, is notable for its deference to an arbitrator's jurisdictional findings up until the enforcement of the award. French law also prohibits the arbitration of employment disputes. The French Labor code provides, as a

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<sup>155</sup> *Id.* para. 38.

<sup>156</sup> *Id.* para. 37.

<sup>157</sup> Arbitration Act 1996, Public Act No. 99 (2 Sept. 1996), § 11 (N.Z.), available at <http://www.legislation.govt.nz/act/public/1996/0099/latest/DLM405701.html#DLM405701>.

<sup>158</sup> Chusaihou [Arbitration Law], Law No. 138 of 2003, Supplementary Provisions, art. 3 available at <http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf>.

<sup>159</sup> Consumer Protection Act, R.S.Q., ch. P-40.1, § 11.1 (2010) (Can.), available at <http://www.canlii.org/en/qc/laws/stat/rsq-c-p-40.1/latest/rsq-c-p-40.1.html>.

<sup>160</sup> Consumer Protection Act 2002, 2002 S.O., ch. 30, Sch. A, §§ 7-8 (Can.).

<sup>161</sup> An E.U. Council regulation allows an employee to sue his or her employer in the courts of the place where the employee is domiciled, notwithstanding any pre-dispute agreement to the contrary, but arbitration agreements are expressly excluded from the scope of the regulation. Council Regulation 44/2001, arts. 1(d), 19, 21, 2001 O.J. (L012) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:HTML>.

matter of mandatory law, that a specialized labor court (the *conseil des prud'hommes*) has exclusive jurisdiction to hear employment disputes.<sup>162</sup> Although the French civil code was amended in 2001 to allow for arbitration of certain claims arising out of contracts for “professional activities,”<sup>163</sup> it is doubtful that this provision would be interpreted by French courts as applying to employment contracts.<sup>164</sup>

Other countries whose laws prohibit or restrict arbitration of employment disputes include Belgium,<sup>165</sup> Italy,<sup>166</sup> Japan,<sup>167</sup> Austria,<sup>168</sup> Hungary,<sup>169</sup> Poland,<sup>170</sup> Bulgaria,<sup>171</sup> and Germany.<sup>172</sup>

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<sup>162</sup> C. TRAV. [Labor Code] arts. L1411-1, 4 (France), available at [http://www.legifrance.gouv.fr/affichCode.do;jsessionid=F60F343476E2BFB350CE1B9783BA665E.tpdjo10v\\_2?idSectionTA=LEGISCTA000006177891&cidTexte=LEGITEXT000006072050&dateTexte=20100213](http://www.legifrance.gouv.fr/affichCode.do;jsessionid=F60F343476E2BFB350CE1B9783BA665E.tpdjo10v_2?idSectionTA=LEGISCTA000006177891&cidTexte=LEGITEXT000006072050&dateTexte=20100213); see also Beatrice Castellane, *Arbitration of Employment Relationships in France*, 26 J. INT'L ARB. 293 (2009) (discussing art. L1411).

<sup>163</sup> C. CIV. [Civil Code] art. 2061 (France), available at [http://www.legifrance.gov.fr/affichCode.do;jsessionid=A17EA3499052AFF2E049111818B76C14.tpdjo13v\\_2?idSectionTA=LEGISCTA000006118171&cidTexte=LEGITEXT000006070721&dateTexte=20100213](http://www.legifrance.gov.fr/affichCode.do;jsessionid=A17EA3499052AFF2E049111818B76C14.tpdjo13v_2?idSectionTA=LEGISCTA000006118171&cidTexte=LEGITEXT000006070721&dateTexte=20100213). For a discussion of Civil Code art. 2061 and its amendment, see JEAN-LOUIS DELVOLVÉ, GERALD H. POINTON & JEAN ROUCHE, *FRENCH ARBITRATION LAW AND PRACTICE* (2d ed. 2009) paras. 66, 82–84.

<sup>164</sup> See Phillipe Fouchard, *La laborieuse réforme de la clause compromissoire par la loi du 15 mai 2001* [The Arduous Reform of the *clause compromissoire* by the Law of May 15, 2001], 2001 REVUE DE L'ARBITRAGE 397, 413–15 (2001) (arguing that, notwithstanding the literal wording of the new art. 2061, the provision was not intended to apply to employment contracts and the courts should not construe it as having such effect); Mathieu Maisonneuve, *Le Droit Américain de L'arbitrage et la Théorie de L'unconscionability* [American Arbitration Law and Unconscionability Theory], 2005 REVUE DE L'ARBITRAGE 101, 102–03 (2005) (asserting that labor disputes fall within the exclusive competence of the *conseil des prud'hommes*, notwithstanding art. 2061).

<sup>165</sup> Pre-dispute agreements to arbitrate labor matters are null and void under Belgian law. Marie Canivet, *Arbitration in Belgium*, in CMS GUIDE TO ARBITRATION 87, 90 (Torsten Lörcher & Zannis Mavrogordato eds., 2009) (citing *Gerechtelijk Wetboek* [Judicial Code] art. 1678(2) (Belgium)).

<sup>166</sup> Under Italian law, employment disputes may be arbitrated only if expressly provided for by law or if provided for in a collective bargaining agreement. Maria Letizia Patania, *Arbitration in Italy*, in CMS GUIDE TO ARBITRATION 339, 344 (Torsten Lörcher & Zannis Mavrogordato eds., 2009) (citing *Codice di procedura civile* [Code of Civil Procedure] art. 806 (Italy)).

<sup>167</sup> Any pre-dispute agreement to arbitrate labor-related disputes is null and void under Japanese law. Chusaihou [Arbitration Law], Law No. 138 of 2003, Supplementary Provisions, art. 4, available at <http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf>.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

To summarize, France, like a number of other developed countries, has adopted a deferential approach to judicial review of an arbitrator's jurisdictional findings, deferring almost all review of such findings until the award-enforcement stage. Such an approach allows arbitration to proceed with minimal opportunity for delay or obstruction by the other party. However, rules that are well-suited to arbitration between sophisticated commercial parties may be problematic when parties are of unequal bargaining power. For this reason, a number of developed nations subject the arbitration of employment and consumer disputes to special rules.

### 3. *Contracting Around the Judicial Review of Jurisdictional Findings*

Arbitration is a private form of dispute settlement that is based on contract but still dependent on the courts for its enforcement. It is, therefore, axiomatic that any court asked to enforce an arbitral award must have an

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<sup>168</sup> Zivilprozessordnung [ZPO] [Civil Procedure Code] Schiedsrechts-Änderungsgesetz, as amended, art. 618 (Austria), available at [http://portal.wko.at/wk/dok\\_detail\\_html.wk?AngID=1&DocID=730899&StID=346351](http://portal.wko.at/wk/dok_detail_html.wk?AngID=1&DocID=730899&StID=346351). Austria's Civil Procedure Code establishes special safeguards for the arbitration of labor disputes, including the requirement that the agreement be contained in a separate document that is personally signed by the employee, that the employee receive written legal advice regarding arbitration prior to signing the agreement, the arbitration take place at the state of domicile of the employee and that the award is reviewable for failure to adhere to mandatory law. *Id.*

<sup>169</sup> Employment disputes are not arbitrable under Hungarian law. Peter Mittak & Milan Kohirusz, *Arbitration in Hungary*, in CMS GUIDE TO ARBITRATION § 1.2.

<sup>170</sup> Labor and employment matters may only be arbitrated post-dispute. Pawel Petkiewicz & Sebastian Pabian, *Arbitration in Poland*, in CMS GUIDE TO ARBITRATION § 1.3 (citing Kodeks Postepowania Cywilnego [Civil Procedure Code] § 1164 (Poland)).

<sup>171</sup> Parties cannot avoid the jurisdiction of the Bulgarian courts to resolve employment disputes. Kostadin Sirleshtov & Pavlin Stoyanoff, *Arbitration in Bulgaria*, in CMS GUIDE TO ARBITRATION § 1.4 (citing GPK/ZZD [Code of Civil Procedure] art. 19(1) (Bulgaria)).

<sup>172</sup> Under German law, arbitration of labor and employment disputes is governed by the Labor Court Code, and not the Civil Procedure Code. Under the Labor Court Code, arbitration is permitted with respect to only a very limited number of occupations (such as the film industry, artists, ship-captains and crew), provided that a collective bargaining agreement provides for arbitration of such disputes. Additionally, any resulting award may be reviewed on the merits. Patrick M. Baron & Stefan Liniger, *A Second Look at Arbitrability*, 19 ARB. INT'L 27, 41 (2003) (citing Arbeitsgerichtsgesetz [ArbGG] [Labor Court Code] arts. 101(1), 101(2) (Germany)).



opportunity to: review the award, ensure (at a minimum) that the arbitrator was acting within his or her authority, and ensure that the award does not violate public policy. As a respected French authority on international commercial arbitration describes it,

The existence of review by the courts of arbitral awards, although limited in scope, is arguably one of the essential conditions for the development of arbitration. Indeed, review by the courts is the necessary counterpart of the inherently private nature of the arbitral process. In particular, it is the existence of subsequent court control which makes it acceptable for arbitrators to rule on their own jurisdiction and for disputes involving matters of public policy to be arbitrable.<sup>173</sup>

Accordingly, arbitration statutes and international conventions dealing with the enforcement of foreign arbitral awards invariably provide for limited judicial review of awards, and in particular allow a court to vacate (or refuse enforcement of) an arbitral award if the award is not based on a valid arbitration agreement.<sup>174</sup>

Appropriately, such provisions generally are treated as mandatory rules of law that cannot be derogated from by contract. For example, Article 67 of the U.K. Arbitration Act,<sup>175</sup> which entitles a party to challenge an arbitral award for lack of jurisdiction, is included in a schedule of the Act's mandatory provisions.<sup>176</sup> Although a 1977 decision of Germany's highest court, the *Bundesgerichtshof*, recognized that parties might grant an arbitral tribunal the power to make a final ruling on its jurisdiction (similar to the *First Options* dictum),<sup>177</sup> since Germany adopted the UNCITRAL Model Law on Arbitration in 1998, academic and judicial authority has strongly suggested that such a clause would be invalid under current German law.<sup>178</sup> As international arbitration experts Julian Lew, Loukas Mistelis, and Stefan

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<sup>173</sup> INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 145, para. 688.

<sup>174</sup> See, e.g., 9 U.S.C. §§ 2, 10(a)(4) (2006); UNCITRAL MODEL LAW, *supra* note 57, art. 34(2)(a)(i); New York Convention, *supra* note 46, art. V(1)(a).

<sup>175</sup> Arbitration Act 1996, 1996, c. 23 § 67(1) (Eng.).

<sup>176</sup> *Id.* Sched. 1. Austria's civil procedure code similarly makes court control over arbitration awards mandatory. LEW, MISTELIS & KRÖLL, *supra* note 145, para. 25-67, n.120 (citing Austria CCP art. 598(1)).

<sup>177</sup> Park, *supra* note 138, at 73 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], May 5, 1977, III ZR 177/74).

<sup>178</sup> *Id.* at 114-15, 115 n.245 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 13, 2005, III ZR 265/03).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

Kröll have observed, under the law of most countries, “the courts retain the last word on excluding their jurisdiction.”<sup>179</sup>

Similarly, the U.S. Supreme Court’s decision in *Hall Street Associates, LLC v. Mattel, Inc.*<sup>180</sup> interpreted the FAA’s provisions on confirming, vacating, or modifying an arbitral award as establishing mandatory rules:

On application for an order confirming the arbitration award, the court “must grant” the order “unless the award is vacated, modified or corrected as prescribed in [FAA §§ 10–11].” There is nothing malleable about ‘must grant,’ which unequivocally tells courts to grant confirmation in all cases, except when one of the “prescribed” exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.<sup>181</sup>

The issue in *Hall Street* was whether parties could contract to *expand* the grounds for vacating an arbitral award.<sup>182</sup> But the Court’s interpretation of the FAA suggests that parties similarly cannot contract to *restrict* the scope of judicial review beyond what § 10 of the FAA prescribes.

Countries generally treat rules on judicial review of arbitral awards as mandatory, but there are a few exceptions. These exceptions are exclusive to international commercial arbitration, and have generated controversy and some criticism among commentators. In 1987, Switzerland amended its Private International Law statute to allow parties to waive their right to challenge an arbitral award before the Swiss courts, provided that neither party is domiciled or has its habitual residence in Switzerland.<sup>183</sup> Although commentators have observed that parties generally do not utilize the waiver option,<sup>184</sup> Sweden followed the Swiss approach in 1999 when it enacted a

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<sup>179</sup> LEW, MISTELIS & KRÖLL, *supra* note 145, para. 14-32; *see also* Park, *supra* note 138, at 88 (“In all major legal systems, the ‘last word’ on arbitral jurisdiction will normally be for courts at the time an award is subject to scrutiny in the context of a motion to vacate, confirm or grant recognition.”).

<sup>180</sup> *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

<sup>181</sup> *Id.* at 587.

<sup>182</sup> *Hall Street*, 552 U.S. at 578.

<sup>183</sup> REISMAN, *supra* note 1, at 128 (citing Swiss Private International Law statute art. 192(1)). Professor Reisman observes that the second paragraph of article 192 calls for application of the New York Convention in the event the parties waive recourse against an award and then that award’s enforcement is sought in Switzerland. *Id.* The effect of art. 192, then, is to shift judicial review of the arbitral award to the “secondary enforcement jurisdiction.” *Id.* at 130.

<sup>184</sup> LEW, MISTELIS & KRÖLL, *supra* note 145, para. 25-68.

new Arbitration Act, most likely on the rationale that Swedish courts will not review awards that bear no connection to Sweden apart from the fact that the award was rendered there.<sup>185</sup>

In 1985, Belgium adopted Article 1717 of its Judicial Code, which completely excluded judicial review of international arbitral awards rendered in Belgium, as long as neither party was an individual of Belgian nationality or residence, or a corporation constituted in Belgium or having a subsidiary or other presence there.<sup>186</sup> The Belgian “experiment” attracted significant academic attention, some criticism, and, on balance, “few arbitrations.”<sup>187</sup> As one commentator stated, “the concept of a non-reviewable award attracts the kind of contempt that was felt some years ago for divorces from Las Vegas or Chihuahua.”<sup>188</sup> As a consequence, Belgium amended its judicial code again in 1998, replacing Article 1717 with a provision analogous to the Swiss provision described above.<sup>189</sup>

To summarize, the Swiss and Belgian exceptions are somewhat controversial and are limited to the international commercial arbitration setting. Other major legal systems recognize the fundamental importance of the judicial review of an arbitrator’s jurisdictional findings. Such recognition supports the argument asserted earlier: that the *First Options* dictum, which allows parties to contract to allow an arbitrator to make a *final determination* of his or her jurisdiction, should be construed much more narrowly than it has been interpreted to date by the courts, including the *Rent-A-Center* Court.

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<sup>185</sup> INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 145, para. 1594 (also noting that Belgium and Tunisia have similar statutes but nonetheless referring to the Swiss approach as “somewhat isolated in comparative law”).

<sup>186</sup> *Id.* (citing art 1717(4) of the Belgian Judicial Code).

<sup>187</sup> BORN, *supra* note 41, at 2658.

<sup>188</sup> *Id.* at 2658 n.573 (quoting William Laurence Craig, *Uses and Abuses of Appeal from Awards*, 4 ARB. INT’L 174, 200 (1988)).

<sup>189</sup> LEW, MISTELIS & KRÖLL, *supra* note 145, para. 25-70 (citing art. 1717 of the Belgian Judicial Code). The recently-enacted French arbitration law similarly will allow parties to waive their right to annul an arbitral award in France. The waiver, however, would not affect the parties’ rights to appeal, including on jurisdictional grounds, a decision to enforce the award in France. New French Arbitration Law, *supra* note 145, arts. 1520, 1522.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

### III. LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

As explained in Part II.B.3, *AT&T Technologies, Inc. v. Communications Workers of America*,<sup>190</sup> held that issues of arbitrability—both scope arbitrability determinations and findings as to the existence of a valid agreement to arbitrate—are for the court, not the arbitrator, to decide. *AT&T* has been cited for this basic idea in subsequent decisions of the Court.<sup>191</sup>

Nonetheless, in *Howsam v. Dean Witter Reynolds, Inc.*,<sup>192</sup> *Green Tree Financial Corp. v. Bazzle*,<sup>193</sup> and *PacifiCare Health Systems, Inc. v. Book*,<sup>194</sup> (which will be discussed below) the Supreme Court qualified the notion that jurisdictional questions are for the court to decide. Additionally, in a growing number of cases, courts are finding that unconscionability challenges to the arbitration agreement are for the arbitrator, not the court, to decide. Most of these unconscionability decisions effectively shift the timing of judicial review to the award-enforcement stage. However, decisions that are based on the *First Options* dictum, at least in principle, have the effect of severely restricting judicial review of the award.

These unconscionability decisions can be organized into three categories (the first two of which are based on a similar rationale but nonetheless can be treated as distinct): (i) the *Prima Paint* exception as expanded by the *Rent-A-Center* decision; (ii) challenges to contract provisions that are treated as separate from the arbitration clause; and (iii) the *First Options* dictum. Each of these categories is discussed separately below.

#### A. *The Prima Paint Exception and the Rent-A-Center Decision*

Subject to very limited exceptions (such as a forged signature), under the separability rule of *Prima Paint*, the arbitrator has initial authority to decide a challenge to the enforceability of a contract that contains an arbitration clause. The Supreme Court reaffirmed this principle in *Buckeye Check*

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<sup>190</sup> 475 U.S. 643 (1986).

<sup>191</sup> See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

<sup>192</sup> 537 U.S. 79 (2002).

<sup>193</sup> 539 U.S. 444 (2003).

<sup>194</sup> 538 U.S. 401 (2003).

*Cashing, Inc., v. Cardegna*<sup>195</sup> and in *Preston v. Ferrer*.<sup>196</sup> Although the Court recently addressed the separability doctrine in the unconscionability context when it decided *Rent-A-Center*, the doctrine has also been invoked in numerous lower court decisions.

### 1. *Applying Prima Paint to Unconscionability Challenges*

The rule applied in *Prima Paint* and *Buckeye* does not prevent a court from deciding an unconscionability challenge that relates specifically to the arbitration clause, such as allegations that the agreement requires the payment of excessive arbitration fees, or allows only one party to choose the arbitrator. However, allegations that are directed to the entire contract are for the arbitrator to decide.<sup>197</sup> Courts generally require that both procedural and substantive elements must be established in order to satisfy the test for unconscionability.<sup>198</sup> This two-pronged approach to resolving unconscionability challenges raises the following question: if an unconscionability challenge that is otherwise directed to the arbitration clause involves factors relating to the manner in which the entire contract was concluded, are these procedural unconscionability factors for the court to consider, or should they go to the arbitrator under the reasoning of *Prima Paint*?

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<sup>195</sup> 546 U.S. 440 (2006).

<sup>196</sup> 128 S. Ct. 978 (2008).

<sup>197</sup> *Madol v. Dan Nelson Auto. Group*, 372 F.3d 997 (8th Cir. 2004) (holding that an allegation that vehicle sales contract is invalid is for the arbitrator to decide); *Rojas v. TK Commc'ns, Inc.*, 87 F.3d 745 (5th Cir. 1996) (holding that a claim that an employment agreement is an "unconscionable contract of adhesion" is for the arbitrator to decide); *JLM Indus., Inc. v. Stolt-Nielsen, S.A.*, 387 F.3d 163 (2d Cir. 2004) (holding that the generalized allegation that a shipping contract is "adhesive" is for the arbitrator to decide).

<sup>198</sup> See E. ALLAN FARNSWORTH, *CONTRACTS* 302 (4th ed. 2004) ("Most cases of unconscionability involve a combination of procedural and substantive unconscionability, and it is generally agreed that if more of one is present, then less of the other is required."); M.P. Ellinghaus, *In Defense of Unconscionability*, 78 *YALE L.J.* 757, 777 (1969) (showing that a court may apply U.C.C. § 2-302 to characterize the "overall imbalance" of a contract as unconscionable "even though no single component can be found to deserve this epithet"); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 *CORNELL L. REV.* 1, 2-3 (1981) (observing that "the paradigm case for a finding of unconscionability involves both 'bargaining naughtiness' (procedural unconscionability) and grossly unfair terms (substantive unconscionability)").

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

In several recent decisions,<sup>199</sup> courts have found that allegations of procedural unconscionability related to the contract as a whole and, as such, were for the arbitrator to decide; a few of these decisions were later reversed. In *Nagrampa v. Mailcoups, Inc.*, the Ninth Circuit found that the plaintiff's contract of adhesion argument was for the arbitrator to decide, and then concluded that it, therefore, did not need to reach the plaintiff's argument that the arbitration clause was substantively unconscionable.<sup>200</sup> This ruling was later vacated *en banc*,<sup>201</sup> albeit with a strongly written dissent arguing that the adhesion contract argument should have gone to the arbitrator.<sup>202</sup> In *Jenkins v. First American Cash Advance of Georgia, LLC*, the Eleventh Circuit relied in part on *Prima Paint* to reject an unconscionability challenge based on a class action waiver.<sup>203</sup> However, in a subsequent case involving a

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<sup>199</sup> *Nagrampa v. Mailcoups Inc.*, 401 F.3d 1024, 1030 (9th Cir. 2005), *vacated en banc*, 469 F.3d 1257 (9th Cir. 2006); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir. 2005), *cert. denied*, 2006 U.S. LEXIS 1842 (2006); *Dale v. Comcast Corp.*, 453 F. Supp. 2d 1367, 1376 (N.D. Ga. 2006), *rev'd*, 498 F.3d 1216 (11th Cir. 2007); *Toledano v. O'Connor*, 501 F. Supp. 2d 127, 145–46 (D.D.C. 2007).

The *Prima Paint* rationale has also been employed in the context of statutory policy challenges to the enforceability of arbitration clauses. In *In re Am. Express Merchs.' Litig.*, No. 03 CV 9592 (GBD), 2006 U.S. Dist. LEXIS 11742 (S.D.N.Y. March 15, 2006), a district court used the *Prima Paint* rationale to reject a statutory policy-based challenge to an arbitration clause that contained a class action waiver, finding that enforceability was for the arbitrator to decide. *Id.* at 24. The Second Circuit reversed on grounds that the challenge related specifically to the arbitration clause. *In re Am. Express Merchs.' Litig.*, 554 F.3d 300, 311 (2d Cir. 2009), *vacated and remanded*, 130 S. Ct. 2401 (2010). The Second Circuit also refused to enforce the waiver because the cost of individually bringing an antitrust claim to arbitration would be prohibitively expensive. *Id.* at 315–16. However, the Supreme Court granted certiorari and vacated the decision, remanding the case to the Second Circuit for further consideration in light of its recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

<sup>200</sup> *Nagrampa v. Mailcoups, Inc.*, 401 F.3d 1024, 1030 (9th Cir. 2005).

<sup>201</sup> *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1265 (9th Cir. 2006) (*en banc*). The court found that the agreement was substantively unconscionable because it provided for arbitration in a remote forum and required *Nagrampa* to pay half of the arbitration fees (which effectively prevented her from vindicating her rights under California consumer protection statutes). *Id.* at 1289–90.

<sup>202</sup> In a dissenting opinion joined by Judges Kozinski and Tallman, Judge O'Scannlain stated that the plaintiff's adhesion contract argument "clearly challenged the validity of the contract as a whole" and therefore, under *Prima Paint*, should have been decided by the arbitrator. *Id.* at 1297.

<sup>203</sup> 400 F.3d 868 (11th Cir. 2005). Although the court might have based its decision on its finding that the agreement was not substantively unconscionable, it held that the issue of procedural unconscionability was for the arbitrator to decide. *Id.* at 880.

similar issue,<sup>204</sup> the Eleventh Circuit reversed the district court's finding that procedural unconscionability was for the arbitrator to decide,<sup>205</sup> and held that, based on the "totality of the facts and circumstances," the arbitration clause was unconscionable and unenforceable.<sup>206</sup>

Decisions such as *Jenkins* and the initial decision in *Nagrampa* may be aberrations and appear to be wrongly decided. In both cases, the allegations of procedural unconscionability were made as part of an unconscionability challenge that was directed to the arbitration clause, and therefore should have been for the court to decide.<sup>207</sup> Substantive unconscionability allegations that are directed to the arbitration clause should not be viewed in isolation, but should be considered in conjunction with procedural unconscionability factors. Otherwise, the court would be ruling on the fairness of a contract provision without considering the context in which the contract was made, which contravenes established unconscionability doctrine.<sup>208</sup> In order to determine whether there is an enforceable agreement to arbitrate, the court should be allowed to consider any challenge to that agreement consistent with applicable contract law principles.

The broader point to emphasize is that the *Prima Paint* doctrine substantially limits a plaintiff's ability to challenge an allegedly unconscionable contract containing an arbitration clause, and recent case law

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<sup>204</sup> *Dale v. Comcast*, 498 F.3d 1216, 1219 (11th Cir. 2007). Both *Jenkins* and *Dale* involved a consumer class action claim against a corporate defendant (in *Jenkins*, a "payday loan" company, and in *Dale*, a cable television provider). The plaintiff in each case challenged the enforceability of the class action waiver in the arbitration agreement. *See id.*; *Jenkins v. First Am. Cash Advance of Ga., LLC*, 313 F. Supp. 2d 1370, 1372 (S.D. Ga. 2003).

<sup>205</sup> *Dale v. Comcast*, 453 F. Supp. 2d 1367, 1376 (N.D. Ga. 2006) (citing *Prima Paint* and *Jenkins* for the proposition that plaintiffs' procedural unconscionability claims were for the arbitrator to decide). The Eleventh Circuit did not address this issue on appeal. *Dale*, 498 F.3d at 1216.

<sup>206</sup> *Dale*, 498 F.3d at 1224. The court found that, unlike the plaintiff class in *Jenkins*, the plaintiffs in the instant case would not be able to recoup attorneys' fees under applicable law, and therefore a class action mechanism was the only effective way for them to bring a claim. *Id.* at 1222–23.

<sup>207</sup> If the party challenging arbitration merely alleges that the contract is adhesive, without more, courts have found that under *Prima Paint* such allegation is directed to the contract as a whole and is for the arbitrator to decide. *See supra* note 197. Such a situation is distinguishable from that in *Nagrampa* and *Jenkins*, where allegations of procedural unconscionability were coupled with allegations that the arbitration clause itself was substantively unfair.

<sup>208</sup> *See supra* note 198.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

has reinforced and expanded the scope of the doctrine. As the *Buckeye* Court emphasized, *unless* the “crux of the complaint” is directed specifically to the arbitration clause,<sup>209</sup> any challenge to the contract—including any challenge that the contract violates public policy, or that the contract as a whole is one of adhesion or is unconscionable—is for the arbitrator to decide. With the *Rent-A-Center* decision, however, the Supreme Court applied the rule in *Prima Paint* in an unexpected—and some would say “fantastic”<sup>210</sup>—way.

### 2. *Rent-A-Center’s Expansion of the Prima Paint Doctrine*

At the end of its 2009-2010 term, the Supreme Court decided *Rent-A-Center*, which extended the separability rule of *Prima Paint* to apply to a delegation clause within an arbitration agreement.<sup>211</sup> Using Justice Stevens’ Russian nesting doll analogy,<sup>212</sup> one can visualize three levels of the contractual relationship between Antonio Jackson and Rent-A-Center, moving progressively from broad to specific, one nesting within the other: (i) the employment agreement; (ii) the agreement to arbitrate any disputes arising out of the employment relationship; and (iii) the clause within the arbitration agreement providing for the arbitrator to rule on any challenges to the enforceability of the agreement (the delegation clause). Whereas *Prima Paint* concerned levels (i) and (ii), the holding in *Rent-A-Center* extends the separability rule to levels (ii) and (iii)—in other words, just as *Prima Paint* held that the arbitration agreement is separable from the entire contract, *Rent-A-Center* held that the delegation clause is separable from the arbitration agreement. Because Jackson did not challenge the enforceability of the delegation clause specifically, the Court deemed the delegation clause to be enforceable, notwithstanding Jackson’s more general argument that the entire arbitration agreement was unconscionable.<sup>213</sup>

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<sup>209</sup> *Buckeye Check Cashing, Inc., v. Cardegna*, 546 U.S. 440 (2006).

<sup>210</sup> The word “fantastic” is used here in the sense of being far-fetched or implausible. In concluding his dissent in *Rent-A-Center*, Justice Stevens wrote that while he may have to accept the “fantastic” holding in *Prima Paint* (quoting Justice Black’s dissent from that case), he “most certainly do[es] not accept the Court’s even more fantastic reasoning today.” *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2788 (2010) (Stevens, J., dissenting).

<sup>211</sup> See *supra* Part I (discussing *Rent-A-Center*).

<sup>212</sup> *Rent-A-Center*, 130 S. Ct. at 2786 (2010) (Stevens, J., dissenting).

<sup>213</sup> Jackson argued that the arbitration agreement’s exclusion of certain potential claims by Rent-A-Center from arbitration, the fee and cost-splitting provision, and



Justice Scalia's opinion acknowledged that the facts of the case can be distinguished from those of *Prima Paint* and other prior separability decisions, in that the provision that Rent-A-Center sought to enforce was an arbitration clause contained within a broader arbitration agreement (as opposed to being contained within a contract unrelated to arbitration, such as the "consulting agreement" at issue in *Prima Paint*).<sup>214</sup> He suggested that this was a distinction without significance, and that there was no logical reason for treating the delegation clause at issue in *Rent-A-Center* any differently than the arbitration clause at issue in *Prima Paint*. An arbitration clause within an arbitration agreement may be treated as separable just as any other provision could be.<sup>215</sup>

Notwithstanding the formal logic behind it, the *Rent-A-Center* decision seems inconsistent with both the rationale of the *Prima Paint* decision and that of the FAA. *Prima Paint* held that the FAA does not permit a court to address a fraudulent inducement challenge directed to the entire contract.<sup>216</sup> However, the *Prima Paint* opinion also observed that the purpose behind the FAA was to make arbitration agreements "as enforceable as other contracts, but not more so,"<sup>217</sup> and that "to immunize an arbitration agreement from judicial challenge . . . would be to elevate it over other forms of contract" in contravention § 2 of the FAA.<sup>218</sup> By excluding from judicial consideration any challenge to the arbitration agreement that is not specifically directed to the delegation clause, the effect of *Rent-A-Center* is to elevate any arbitration agreement containing a delegation clause over other forms of contract.<sup>219</sup> The decision sets up an almost insurmountable obstacle to unconscionability challenges because the factors that have been the basis for a successful challenge in the past (one-sided procedure, class action waiver, excessive

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limited discovery rules rendered the agreement unconscionable. Brief for the Respondent, *supra* note 2, at 3–4.

<sup>214</sup> *Rent-A-Center*, 130 S. Ct. at 2779.

<sup>215</sup> *Id.* at 2779 n.3.

<sup>216</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967).

<sup>217</sup> *Id.* at 404 n.12 (emphasis added).

<sup>218</sup> *Id.*

<sup>219</sup> *Rent-A-Center*, 130 S. Ct. at 2785 (Stevens, J., dissenting). Justice Stevens also suggests that the result in *Rent-A-Center* contravenes FAA § 2, noting that the court must address Jackson's unconscionability claim in order to determine whether the parties have a valid arbitration agreement for purposes of FAA § 2, "otherwise, that section's preservation of revocation issues for the court would be meaningless."

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

fees, remote forum) for the most part are either not specifically relevant to the delegation clause or are applicable to the entire arbitration agreement.<sup>220</sup>

Additionally and crucially, *Rent-A-Center*'s analysis is premised on the assumption that delegation clauses themselves are valid. The Court's opinion suggests that the delegation clause at issue in the case is like any other arbitration agreement, observing that "parties can agree to arbitrate 'gateway' issues of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a certain controversy."<sup>221</sup> However, because the *Rent-A-Center* decision was based on separability doctrine, this statement is dictum. A question worth considering, discussed in Part IV below, is why the Court decided *Rent-A-Center* on the basis of the *Prima Paint* doctrine instead of directly addressing the *First Options* dictum. One possible reason is that under *Prima Paint*, the arbitrability question may be delegated to the arbitrator as an *initial* matter, allowing the court to review the arbitrator's jurisdictional findings at the award enforcement stage. In contrast, the *First Options* dictum suggests that the arbitrator's jurisdictional findings should be given deference.<sup>222</sup> Another possibility is that by basing the decision on *Prima Paint*, the Court avoided taking the difficult position that *any* challenge to the delegation clause must be decided initially by the arbitrator. The case law developing the *Prima Paint* doctrine acknowledges limited exceptions to the rule.<sup>223</sup>

*Rent-A-Center* will have a substantial impact on the enforceability of mandatory arbitration agreements. As discussed at Part IV, the decision will make it significantly more difficult for consumers, franchisees, and employees to challenge arbitration clauses on unconscionability grounds. Additionally, the decision is significant because of the assumption underlying it: the premise that delegation clauses, even those that purport to grant the arbitrator exclusive authority to determine the existence of an enforceable arbitration agreement, are inherently valid.

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<sup>220</sup> *Id.* at 2787 (Stevens, J., dissenting). Jackson made one challenge that was directed to the delegation clause. He argued that the quid pro quo he was to receive for his assent to the delegation clause was expanded review of the award, and that provision was rendered invalid by the Court's holding in *Hall Street*. *Id.* The Court did not consider the argument because it was not properly raised. *Id.*

<sup>221</sup> *Id.* at 2782 (citing *Howsam*, 537 U.S. at 83–85; *Bazzle*, 539 U.S. at 452).

<sup>222</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

<sup>223</sup> See *supra* note 58 and accompanying text. The *Rent-A-Center* opinion noted these exceptions to *Prima Paint*. *Rent-A-Center*, 130 S. Ct. at 2778 n.2.

## B. Challenges to Provisions Treated as Separate from the Arbitration Clause

Courts have found unconscionability and related challenges to be for the arbitrator to decide, on the rationale that the challenges were directed at a provision that may be treated as “separate” from the arbitration clause. These cases bear some factual resemblance to the Supreme Court’s decision in *PacifiCare Health Systems v. Book*,<sup>224</sup> although the reasoning of the *PacifiCare* opinion is more explicitly based on a general principle of judicial deference to arbitral authority, analogous to the rule in *Prima Paint*.

In *PacifiCare*, a group of physicians filed suit against a group of managed healthcare organizations, including PacifiCare and UnitedHealth, alleging breach of contract, unjust enrichment, and violations of several federal and state statutes, including RICO.<sup>225</sup> Because the arbitration clauses in the agreements the physicians had signed prohibited the award of punitive damages, the physicians argued that arbitration would prevent them from obtaining “meaningful relief” under the treble damages provision of the RICO statute.<sup>226</sup> The district court and appellate court both agreed with the physicians, finding the arbitration clauses to be unenforceable with respect to the RICO claims.<sup>227</sup>

The Supreme Court reversed and remanded, finding that it would be “premature” for the Court to conclude that the contractual ban on punitive damages acted as a bar to statutory damages,<sup>228</sup> and finding that it therefore should compel arbitration to let the arbitrator to decide the issue as an initial matter. The *PacifiCare* opinion was based on the rationale employed in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,<sup>229</sup> where the Court had found that “mere speculation” that Japanese arbitrators might apply Japanese law, which might reduce the defendant’s legal obligations under the Carriage of Goods by Sea Act, did “not in and of itself lessen liability” under COGSA’s anti-waiver provision.<sup>230</sup> By vesting the arbitrator with the initial authority to resolve the statutory policy challenge, the Court in *PacifiCare*, as

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<sup>224</sup> 538 U.S. 401 (2003).

<sup>225</sup> *Id.* at 402.

<sup>226</sup> *Id.* at 403.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 404.

<sup>229</sup> *Id.* at 404–05 (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995)).

<sup>230</sup> *Sky Reefer*, 515 U.S. at 541.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

in *Sky Reefer*, deferred consideration of whether public policy might taint the enforceability of the arbitration agreement until the award-enforcement stage.

Although the *PacifiCare* opinion emphasized the timing issue, implicit in the Court's analysis was the notion that the arbitration clause was prima facie enforceable, notwithstanding the contractual prohibition on the award of punitive damages. In fact, in footnote 2 of the *PacifiCare* opinion, the Court asserted that "the preliminary question [of] whether the remedial limitations at issue . . . prohibit[ed] an award of RICO treble damages [was] not a question of arbitrability."<sup>231</sup> In other words, the Court, accepting the reasoning argued before it by *PacifiCare* and *UnitedHealth*,<sup>232</sup> took the view that the contractual prohibition on punitive damages had no effect on the enforceability of the arbitration clause. Several earlier circuit court decisions also adopted such reasoning. For example, *Larry's United Super, Inc. v. Werries*<sup>233</sup> involved the same issue as that in *PacifiCare*. A group of retail grocers brought suit against their wholesale supplier, alleging that the supplier had been overcharging them, in violation of state statutes and RICO.<sup>234</sup> The supplier moved to compel arbitration and stay judicial proceedings; in response, the grocers argued that the punitive damages waiver in the arbitration clauses contravened the public policy underlying RICO's treble damages provision.<sup>235</sup> Although the district court agreed and refused to compel arbitration,<sup>236</sup> the Eighth Circuit reversed, finding that the issue should be resolved in the first instance by the arbitrator. The court emphasized that the public policy issue could be raised at the award-enforcement stage<sup>237</sup> and found that the enforceability of the punitive damages limitation was ancillary to the existence of a valid arbitration agreement.<sup>238</sup> Other decisions of the Third and Eighth Circuits employed

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<sup>231</sup> *PacifiCare*, 538 U.S. at 407 n.2.

<sup>232</sup> *Id.* at 403 ("Petitioners argue that whether the remedial limitations render their arbitration agreements unenforceable is not a question of 'arbitrability' . . .").

<sup>233</sup> *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001).

<sup>234</sup> *Id.* at 1084.

<sup>235</sup> *Id.*

<sup>236</sup> *See id.* at 1085.

<sup>237</sup> *Id.* at 1086.

<sup>238</sup> *Id.*; *see also* *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 232 (3d Cir. 1997) ("The availability of punitive damages is not relevant to the nature of the forum in which the complaint will be heard."); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002) ("issues of remedy go to the merits of the dispute and are for the arbitrator to resolve"). *But cf.* *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (finding that a limitation of damages provision rendered an

similar reasoning to allow the arbitrator to decide the enforceability of clauses that incorporated a limitations period<sup>239</sup> and clauses that waived attorneys' fees and costs.<sup>240</sup>

Federal circuit courts have applied similar reasoning to uphold arbitration clauses against challenges brought on unconscionability grounds. In these cases, courts have found that the allegedly unconscionable provisions were unrelated to the arbitration clauses, and therefore the question of their enforceability was for the arbitrators to decide. For example, in *Hawkins v. Aid Ass'n for Lutherans*,<sup>241</sup> the plaintiffs argued that the arbitration clause in a life insurance policy was unconscionable because it prohibited them from recovering punitive damages or attorneys' fees.<sup>242</sup> The Seventh Circuit held that the plaintiffs' challenges should first be heard by the arbitrator, because the limitation of remedies provisions in the contract "had nothing to do with whether the parties agreed to arbitrate or if the claims [were] within the scope of that agreement."<sup>243</sup> The same reasoning was applied to the argument that the agreement prevented the plaintiffs from bringing a class action claim.<sup>244</sup>

Similarly, in *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp. U.S.A.*<sup>245</sup> the Eighth Circuit relied on *Larry's* to uphold an award at the enforcement stage. The arbitrator had found that the cost allocation provision in the arbitration clause, which would have required Schultz to pay all of the

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arbitration clause unenforceable because it denied the employee "the possibility of meaningful relief" under Title VII); *Inv. Partners, L.P. v. Glamour Shots*, 298 F.3d 314, 316 (5th Cir. 2002) (noting that the "question is close," but upholding the court's jurisdiction to hear a challenge to the enforceability of a punitive damages waiver in a contract containing an arbitration clause).

In a case decided several months after *PacifiCare*, the Eleventh Circuit, distinguishing its earlier decision in *Paladino*, found that the possibility that a limitation of remedies provision might contravene statutory policy did not render the arbitration clause unenforceable. *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1032 (11th Cir. 2003).

<sup>239</sup> *Peacock*, 110 F.3d at 231–32.

<sup>240</sup> *Id.*; *Arkcom*, 289 F.3d at 539.

<sup>241</sup> *Hawkins v. Aid Ass'n. for Lutherans*, 338 F.3d 801 (7th Cir. 2003), *cert. denied*, No. 03-677, 2004 U.S. LEXIS 684 (U.S. Jan. 20, 2004).

<sup>242</sup> *Id.* at 807.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721 (8th Cir. 2003); *cert. denied*, No. 03-704, 2004 U.S. LEXIS 687 (U.S. Jan. 20, 2004).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

estimated \$1.7 million fees and costs of the arbitration, was unconscionable.<sup>246</sup> Kawasaki moved to vacate or modify the costs portion of the award, arguing that the District Court, when it compelled arbitration, had already upheld the enforceability of that provision, and removed the arbitrator's authority.<sup>247</sup> The Eighth Circuit upheld the award, relying on *Larry's* for the idea that when the District Court previously compelled arbitration, it did not address, and should not have addressed, the enforceability of the cost allocation provision.<sup>248</sup> The court suggested that any challenge to the enforceability of the costs provision would have been for the arbitrator to decide.<sup>249</sup> Also implicit in the court's reasoning was the notion that, for purposes of reviewing the award's enforceability, the costs provision that the arbitrator found to be unconscionable was effectively severed from the arbitration clause.

The implication of the *PacifiCare/Hawkins/Bob Schultz* line of cases is that almost any contractual provision may be viewed as separate from the arbitration clause itself. The challenged provisions held to be unrelated to the enforceability of the arbitration clause included a punitive damages waiver,<sup>250</sup> a waiver of the right to statutory attorneys' fees and costs,<sup>251</sup> a cost allocation clause,<sup>252</sup> a limitations period,<sup>253</sup> and a class action waiver.<sup>254</sup> If courts continue to embrace this rationale, little will remain for the court to decide, particularly because it is well-established that any judicial finding that an agreement to arbitrate is unconscionable per se would contravene § 2 of the FAA.<sup>255</sup>

As the holding in *Bob Schultz* illustrates, treating the enforceability of a cost allocation clause (or an analogous provision) as unrelated to the

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<sup>246</sup> *Id.* at 724.

<sup>247</sup> *Id.* at 725.

<sup>248</sup> *Id.* at 727.

<sup>249</sup> *Id.*

<sup>250</sup> *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003).

<sup>251</sup> *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 231 (3d Cir. 1997); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 538–39 (8th Cir. 2002); *Hawkins v. Aid Ass'n. for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003).

<sup>252</sup> *Bob Schultz*, 334 F.3d at 723–24.

<sup>253</sup> *Peacock*, 110 F.3d at 231–32.

<sup>254</sup> *Hawkins*, 338 F.3d at 807. *But cf.* *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178–79 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004) (finding that the limitation of remedies provision in an arbitration clause was unconscionable).

<sup>255</sup> *See supra* Part II.A.

enforceability of the arbitration clause might also have the effect of insulating the arbitrator's findings from review at the award-enforcement stage. Just as the enforceability of such a provision may be found not to affect the enforceability of the arbitration clause when determining whether to compel arbitration, it may also insulate the arbitrator's findings at the award-enforcement stage.<sup>256</sup> On the other hand, it is at least theoretically possible that a court reviewing an arbitral award may find that unconscionability tainted the entire contract (including the arbitration clause), or that the arbitrator's award contravened public policy (for example, if the arbitrator in *PacifiCare* found that the punitive damages waiver in the contract was intended to preclude the award of statutory damages).<sup>257</sup> The separability rule of *Prima Paint* does not prevent a court from entertaining an argument at the award-enforcement stage that the unconscionability of the entire contract also rendered the arbitration clause unenforceable.<sup>258</sup> However, as discussed in Part IV, it is unlikely that a court would do so.

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<sup>256</sup> See Rau, *supra* note 40, at 104. However, a court faced with enforcing such an award would still have the authority to determine whether public policy should preclude enforcement. *Id.*

<sup>257</sup> In fact, at oral argument in *PacifiCare*, counsel for PacifiCare and UnitedHealth conceded that if the arbitrator erroneously concluded that the contractual ban on punitive damages precluded it from awarding damages under RICO, the error could be corrected by the court at the award-enforcement stage. Oral Argument of William E. Grauer, Counsel for the Petitioners at \*7-8, *PacifiCare*, 538 U.S. 401 (2003) (No. 02-215), 2003 WL 437315.

<sup>258</sup> See BORN, *supra* note 41, at 943. In the context of *Prima Paint* and *Buckeye*, Born asserted that:

[I]n holding that challenges which impeach both the underlying contract and the arbitration clause should be arbitrated, the Supreme Court should not be understood as concluding that these challenges did not or could not impeach the arbitration clause: such challenges obviously might in fact impeach the arbitration clause (an issue which should be resolved by the arbitrators and then judicially in a subsequent vacatur proceedings).

*Id.*

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

### C. *The First Options Dictum*

#### 1. *Cases Interpreting the Dictum*

As discussed in Part II.B.5, courts have applied the *First Options* dictum to let the arbitrator decide arbitrability where he or she found the requisite evidence of a delegation agreement contained in a broadly written arbitration clause, or in the designation of institutional arbitration rules. The dictum has been applied outside the “scope arbitrability” context, and in recent decisions has even been applied where the party resisting arbitration argued that the arbitration agreement was unconscionable or contravened statutory policy.

*Vidrine v. Balboa Insurance Co.*<sup>259</sup> provides an illustrative example. Robert Vidrine received a home equity line of credit pursuant to an agreement containing an arbitration clause. After Hurricane Katrina struck and destroyed Vidrine’s home, his insurer paid him only a fraction of the value of the claim.<sup>260</sup> Vidrine brought suit against the insurance company and against the lender for failing to purchase adequate insurance. When the lender sought to compel arbitration, Vidrine argued that the arbitration clause was unconscionable because it reserved certain judicial remedies to the lender while denying them to Vidrine.<sup>261</sup> The court compelled arbitration of the unconscionability challenge, invoking the language of the loan agreement, which listed “the validity and enforceability of this Arbitration Agreement” among the issues that would be subject to arbitration.<sup>262</sup> Relying on the *First Options* dictum, the court concluded that this standard-form language “clearly and unmistakably” vested authority to decide whether the arbitration agreement was unconscionable in the arbitrator.<sup>263</sup>

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<sup>259</sup> *Vidrine v. Balboa Ins. Co.*, 597 F. Supp. 2d 687 (S.D. Miss. 2009).

<sup>260</sup> *Id.* at 688. Although Vidrine obtained a \$41,000 line of credit, secured by the equity in his home, the insurer paid Vidrine about \$13,000 on his claim, attributing much of the hurricane damage to water rather than wind. *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 689.

<sup>263</sup> *Id.* at 690–91. Other examples of federal district courts relying on the *First Options* dictum to allow unconscionability or statutory policy challenges to be decided by the arbitrator include: *Pantel v. TMG of Ill.*, No. CIV-07-320-C, 2008 U.S. Dist. LEXIS 7252, at \*8–9 (E.D. Ill. Jan. 30, 2008) (holding that, based on the broad language of the arbitration clause, the policy question of whether the fee-splitting provision in the arbitration clause precluded the plaintiff from vindicating her statutory claim was for the arbitrator to decide); *Taylor v. Rent-A-Center*, No. 5:06CV2228, 2007 U.S. Dist. LEXIS 57689, at \*6 (N.D. Ohio Aug. 8, 2007) (holding that the contract language in the



As discussed, courts have taken divergent approaches to interpreting the *First Options* dictum. In particular, where the party contesting arbitration has challenged the enforceability of the arbitration clause on grounds of unconscionability or statutory policy, the circuits split over how to apply the *First Options* dictum.<sup>264</sup> The Supreme Court's *Rent-A-Center* decision addressed the issue only indirectly.

In *Bailey v. Ameriquest Mortgage Co.*,<sup>265</sup> a 2003 decision, the Eighth Circuit relied in part on the *First Options* dictum to compel arbitration of employee claims under the Fair Labor Standards Act. The Eighth Circuit reversed the district court's invalidation of the arbitration agreement that had been signed by the employees. This reversal was based in part on the finding that the contract language "clearly and unmistakably" vested determination as to the enforceability of the agreement in the arbitrator.<sup>266</sup>

In 2005, the Eleventh Circuit decided *Terminix International Co. v. Palmer Ranch Ltd. Partnership*,<sup>267</sup> which found that incorporation of the AAA Commercial Arbitration Rules in an arbitration clause effectively delegated the question of whether the clause contravened statutory policy to the arbitrator.<sup>268</sup> Although the district court had denied the defendant's motion to compel arbitration on the grounds that the arbitration clause contravened the policy of the Florida Deceptive and Unfair Practices Act,<sup>269</sup> the Eleventh Circuit reversed. Invoking AAA Commercial Arbitration Rule

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employment agreement, which was identical to that in *Jackson v. Rent-A-Center*, expressed the parties' intent to submit the unconscionability question to the arbitrator); *Anderson v. Pitney Bowes, Inc.*, No. C 04-4808 SBA, 2005 U.S. Dist. LEXIS 37662 (N.D. Cal. May 4, 2005) (relying on language granting the arbitrator "exclusive authority" to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement, including a claim that any part of the agreement is void or voidable); *Citifinancial, Inc. v. Newton*, 359 F. Supp. 2d 545, 552 (S.D. Miss. 2005) (invoking AAA Commercial Arbitration Rule 7, which grants the arbitrator power to rule on his or her jurisdiction); cf. *Gill v. World Inspection Network Int'l, Inc.*, No. 06-CV-3187 (JFB)(MLO), 2006 U.S. Dist. LEXIS 52426, at \*15-18 (E.D.N.Y. July 31, 2006) (finding the arbitration clause in a franchise agreement demonstrated "clear and unmistakable evidence" of the parties' intent to let the arbitrator decide the unconscionability issue, but, in "an abundance of caution," finding that the clause was not unconscionable).

<sup>264</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995).

<sup>265</sup> *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003).

<sup>266</sup> *Id.* at 824.

<sup>267</sup> *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327 (11th Cir. 2005).

<sup>268</sup> *Id.* at 1332.

<sup>269</sup> *Id.* at 1329.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

7(a), the court held that the parties had vested the power to address the jurisdictional challenge in the arbitrator, stating that “[b]y incorporating the AAA Rules, including Rule [7(a)], into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid.”<sup>270</sup>

More recently, in *Awuah v. Coverall North America*,<sup>271</sup> the First Circuit extended its earlier holding in *Apollo v. Berg*—an international commercial arbitration decision<sup>272</sup>—to the unconscionability setting. The case involved a class of franchisees bringing breach of contract, misrepresentation, and related claims against Coverall, Inc., a janitorial cleaning service that franchised companies or individuals to do the cleaning work.<sup>273</sup> When Coverall sought to compel arbitration of the claims, the franchisees argued that the arbitration clauses in the franchise agreements were unconscionable.<sup>274</sup> The district court denied the motion to compel, but the First Circuit reversed, finding that the arbitration clauses, which incorporated the AAA Commercial Arbitration rules, evinced “clear and unmistakable” evidence of the parties’ intent to let the arbitrator decide whether the arbitration clauses were unconscionable.<sup>275</sup> However, sensitive to the policy considerations in the case, the court also remanded the case to the district court to decide whether the arbitral forum would render the franchisees’ rights “illusory.”<sup>276</sup> Notwithstanding the public policy caveat, *Awuah* stands for the proposition that the *First Options* dictum may be invoked to allow the arbitrator to decide unconscionability challenges when the arbitration agreement incorporates institutional arbitration rules.<sup>277</sup>

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<sup>270</sup> *Id.* at 1332.

<sup>271</sup> *Awuah v. Coverall N. Am.*, 554 F.3d 7 (1st Cir. 2009).

<sup>272</sup> *See supra* note 133 and accompanying text.

<sup>273</sup> *Awuah*, 554 F.3d at 8.

<sup>274</sup> *Id.* at 9.

<sup>275</sup> *Id.* at 11. Although the court acknowledged that *Apollo* did not involve an unconscionability challenge, it concluded that “the interests of predictability are served by respecting our own prior language unless either the Supreme Court or an *en banc* panel say otherwise.” *Id.*

<sup>276</sup> *Id.* at 12. Specifically, the First Circuit instructed the court on remand to determine whether arbitral fees and other costs of arbitration would effectively prevent plaintiffs from bringing their claim, in light of the potentially modest amounts that each plaintiff would recover. *Id.*

<sup>277</sup> *See supra* note 116. As already noted, most if not all institutional arbitration rules grant the arbitrator the power to determine his or her jurisdiction, including the existence and validity of the arbitration agreement.

In September 2009, the Ninth Circuit issued its decision in *Jackson v. Rent-A-Center, West, Inc.*,<sup>278</sup> which reached a conclusion contrary to that reached in *Bailey, Terminix, and Awuah*. Although the arbitration agreement at issue in *Rent-A-Center* granted the arbitrator “exclusive authority” to resolve a challenge relating to the enforceability of the clause, the Ninth Circuit found that the evidentiary standard required by the *First Options* dictum was not met.<sup>279</sup> The court reasoned that despite language in the delegation clause that clearly stated the unconscionability challenges would go to the arbitrator, because of the imbalance in bargaining power and the fact that the arbitration agreement was presented as a non-negotiable condition of employment, Antonio Jackson did not meaningfully agree to the provision.<sup>280</sup> After concluding that the arbitrability issue should be decided by the court, the Ninth Circuit remanded the case to the district court to complete the unconscionability analysis.<sup>281</sup>

As discussed, while the Supreme Court reversed the Ninth Circuit, its decision was based on the fact that Jackson’s unconscionability challenge was not directed at the delegation clause. Justice Scalia’s majority opinion addressed the *First Options* dictum in a footnote.<sup>282</sup> The Court observed that the Ninth Circuit’s interpretation of the “clear and unmistakable evidence” requirement mistakenly confused the issue of the delegation clause’s *validity* with whether the parties had *manifested intent* to delegate the unconscionability issue to the arbitrator, suggesting that the “clear and unmistakable evidence” requirement only referred to the latter issue.<sup>283</sup> At the same time, the Court acknowledged that the delegation clause’s validity, like that of any arbitration agreement, is governed by the saving clause of § 2 of the FAA.<sup>284</sup>

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<sup>278</sup> *Jackson v. Rent-A-Center, W., Inc.*, 581 F.3d 912 (9th Cir. 2009), *rev’d*, 130 S. Ct. 2772 (2010). The facts of the case are discussed in Part I.

<sup>279</sup> *Id.* at 917.

<sup>280</sup> *Id.* In response to Rent-A-Center’s argument that the clear language of the agreement vested arbitrability determinations in the arbitrator, the court noted that the FAA was enacted to put arbitration agreements “upon the same footing as other contracts.” *Id.* (quoting H.R.REP. NO. 96, at 1, 2 (1924)). It reasoned that “[t]o engage in an artificially contracted review of what the parties agreed to here would contravene this principle and violate the proper role of cooperative federalism.” *Id.*

<sup>281</sup> *Id.* at 920.

<sup>282</sup> *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 n.1 (2010).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*; *see also supra* note 21 (quoting the saving clause).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

Although the *Rent-A-Center* opinion scarcely mentions *First Options*, implicit in the opinion is the premise that the delegation clause is legitimate. By requiring that the issue of the arbitration agreement's validity be decided by the arbitrator, the decision effectively upholds the delegation clause. In other words, the outcome in *Rent-A-Center* hinges on the assumption that parties may contract to delegate arbitrability to the arbitrator. In contrast, *AT&T*, *First Options*, *Howsam*, and *Bazzle* only stated that proposition in dicta.

Decided just three days after *Rent-A-Center*, the Court's opinion in *Granite Rock Co. v. International Brotherhood of Teamsters*<sup>285</sup> sheds additional light on its interpretation of the *First Options* dictum. Ironically, in *Granite Rock*, the Court held that the arbitrability question—whether a collective bargaining agreement containing an arbitration clause had been ratified by a certain date—was for the court and not the arbitrator to decide.<sup>286</sup> Citing *First Options*, the opinion emphasized that the strong federal policy favoring arbitration is not itself a sufficient basis for compelling arbitration of a dispute; the court must first determine the existence of an agreement to arbitrate.<sup>287</sup> The majority opinion cited *First Options* eight times, and referred several times to the idea that, if sufficiently clear language is used, parties can contract to delegate arbitrability to the arbitrator:

[C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is at issue.<sup>288</sup>

However, the placement of the parenthetical in the above-quoted language from *Granite Rock* suggests that the dictum from the opinion draws a distinction between the issue of contract *formation* and the issues of contract *enforceability* and *interpretation*. It would appear from the quoted language that only the latter two issues can be delegated to the arbitrator, and that a delegation clause that purports to vest in the arbitrator exclusive authority to determine a contract's formation would be invalid. This distinction is emphasized with the use of the word "valid" in the

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<sup>285</sup> *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 2859.

<sup>288</sup> *Id.* at 2857 (emphasis in original).

parenthetical, instead of the “clear and unmistakable” language used in *AT&T* and *First Options*. Similar language appears later in the *Granite Rock* opinion, where it emphasized again that the presumption favoring arbitration is only applied after a court concludes that the parties’ arbitration agreement “was validly formed and (absent a provision clearly and validly committing such disputes to an arbitrator) is legally enforceable and best construed to encompass the dispute.”<sup>289</sup>

To summarize, of the circuit courts that have addressed whether the *First Options* dictum allows parties to delegate unconscionability challenges to the arbitrator, only the Ninth Circuit has held that such a delegation was unenforceable. In *Rent-A-Center*, the Supreme Court reversed the Ninth Circuit’s decision, but did so by relying on *Prima Paint*, and not *First Options*. By deciding *Rent-A-Center* in the manner that it did, the Court left important questions regarding the scope and implications of the *First Options* dictum unresolved. These questions include: (i) whether *all* arbitrability issues are contractually delegable to the arbitrator; and (ii) whether, as *First Options* suggests, an arbitrator’s jurisdictional determinations are subject to judicial deference at the award-enforcement stage. The Court’s dictum in *Granite Rock* suggests that the Court may not enforce a delegation clause that purports to vest in the arbitrator exclusive authority to determine whether an arbitration agreement has been *formed*, as opposed to determining whether the contract is *enforceable*.

## 2. A More Limited Interpretation

As discussed in Part II.B.4, the *First Options* dictum relied exclusively on labor arbitration precedent that was clearly meant to apply only to the interpretation of the scope of the arbitration clause. Therefore, as suggested by Justice Stevens’ dissent in *Rent-A-Center*,<sup>290</sup> a compelling argument can be made that the *First Options* dictum should be limited to scope arbitrability determinations, where policy considerations support allowing parties to

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<sup>289</sup> *Id.* at 2859. *But cf. Granite Rock*, 130 S. Ct. at 2866 n.1 (Sotomayor, J., dissenting) (quoting *AT&T* for the idea that “[u]nless the parties clearly and unmistakably provide otherwise,” it is presumed that courts, not arbitrators, are responsible for resolving antecedent questions concerning the *scope* of an arbitration agreement”) (emphasis added).

<sup>290</sup> *Rent-A-Center*, 130 S. Ct. at 2786 (Stevens, J., dissenting) (“I do not think an agreement to arbitrate can ever manifest a clear and unmistakable intent to arbitrate its own validity.”).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

contract to let the arbitrator decide his or her jurisdiction.<sup>291</sup> Because determining scope arbitrability involves contract interpretation, and because it is well established that any doubts regarding the scope of the arbitration clause should be resolved in favor of arbitrability, there is less concern over judicial deference to an arbitrator's jurisdictional findings at the award-enforcement stage when scope arbitrability is at issue.

*Rent-A-Center* implies, however, that a delegation clause validly vests the power to rule on whether the arbitration agreement is unconscionable in the arbitrator. The suggestion that parties can use standard-form contract language to vest such power in the arbitrator is troubling, especially because *First Options* suggests that delegation clauses vest in the arbitrator the power to make a *final* determination of arbitrability.<sup>292</sup> Consider the following example: a borrower signs a standard-form loan agreement containing an arbitration clause that (i) provides for arbitration by a sole arbitrator of the lender's choosing; and (ii) contains a delegation clause similar to the one at issue in *Rent-A-Center*. Such a clause appears to be fundamentally unfair, because it only gives one party the power to select the arbitrator. *Rent-A-Center* and *Granite Rock* seem to suggest, however, that when the arbitration agreement contains a delegation clause, the court's role is limited to determining the existence, not the enforceability, of an arbitration agreement.<sup>293</sup> Moreover, the implication of the *First Options* dictum is that any findings by the arbitrator as to whether the arbitration agreement is unconscionable must be accorded deference at the award-enforcement stage, such that the effect of the delegation clause would be to completely foreclose judicial review of the fairness of the arbitration agreement. However, the precise scope and implications of the *First Options* dictum remain unclear because *Rent-A-Center* did not address these issues.

In addition to the scope arbitrability setting, another situation where a delegation clause would be less troubling is where parties to a dispute governed by an existing arbitration agreement enter into a *post-dispute* agreement to vest the power to decide a jurisdictional question in the arbitrator. For example, the parties might enter into an agreement to have an arbitrator decide whether the original arbitration agreement also applies to one of the parties' affiliated companies. Proof of the second agreement would demonstrate an acknowledgement by both parties of the arbitrator's jurisdiction. In contrast to mandatory arbitration clauses, post-dispute

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<sup>291</sup> See *supra* notes 90–91 and accompanying text.

<sup>292</sup> See *supra* note 101 and accompanying text.

<sup>293</sup> See *supra* notes 288–89 and accompanying text.

submission agreements do not raise the same concerns regarding meaningful assent of the weaker party, and are generally recognized as enforceable, even by nations that otherwise prohibit the enforcement of mandatory arbitration agreements involving consumers or employees.<sup>294</sup> In fact, international arbitration experts who otherwise have been rather critical of the *First Options* dictum suggest that the post-dispute submission scenario might be acceptable.<sup>295</sup>

The idea that sophisticated commercial parties may agree, post-dispute, to submit a jurisdictional question to an arbitrator for final determination has been supported by an English judicial decision. In *LG Caltex Gas Co. Ltd. v. China National Petroleum Corp.*,<sup>296</sup> the English Court of Appeal suggested in dictum that parties to an international energy project agreement containing an arbitration clause could conclude an ad hoc submission to the arbitrator to make binding jurisdictional findings. China National and China Petroleum had challenged arbitral jurisdiction on the grounds that their representative had signed the project agreement while he was intoxicated, but they agreed to the appointment of an arbitrator while reserving their jurisdictional challenge.<sup>297</sup> The arbitrator found that China National and China Petroleum were not bound by the contract.<sup>298</sup> LG Caltex Gas then brought an action in English court, seeking to set aside the jurisdictional findings of the arbitrator.<sup>299</sup> The trial judge held that the parties had made an ad hoc submission to the arbitrator to make a final determination of jurisdiction, and as such, the jurisdictional findings were not susceptible to appeal under the

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<sup>294</sup> For example, the European Council Directive on unfair terms in consumer contracts lists only non-negotiated, pre-dispute arbitration clauses among those contractual provisions that are regarded as per se unfair and unenforceable. *See supra* notes 146–50 and accompanying text.

<sup>295</sup> *See, e.g.,* Park, *supra* note 90, at 144; LEW, MISTELIS & KRÖLL, *supra* note 145, para. 14-32. Lew, Mistelis, and Kröll suggest that an ordinary arbitration clause is “in no way sufficient” to confer the power to make final jurisdictional determinations on arbitrators, and that “at least a second and separate arbitration agreement would be required.” LEW, MISTELIS & KRÖLL, *supra* note 145, para. 14-32. Even in such a case, however, they suggest that any resulting award might not be recognized or enforced by the courts of most countries. *Id.*

<sup>296</sup> *LG Caltex Gas Co. Ltd. v. China Nat’l Petroleum Corp.* [2001] EWCA (Civ) 788, 2001 1 W.L.R. 1892.

<sup>297</sup> *Id.* paras. 24–25.

<sup>298</sup> *See id.* para. 41.

<sup>299</sup> *Id.* para. 5.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

U.K. Arbitration Act.<sup>300</sup> While the Court of Appeal acknowledged that the parties would be entitled to enter into such an ad hoc agreement,<sup>301</sup> it found that if the attorneys for both parties had so intended “they would surely have done so in terms which made the nature of their proposal clear.”<sup>302</sup> There are obvious parallels between *LG Caltex Gas* and *First Options*. In both cases, the court acknowledged in dicta that parties may contract to submit jurisdictional questions to the arbitrator for final determination, where clear evidence of such a submission is demonstrated. In neither case, however, did the court find sufficient evidence to establish such an agreement had been made. The *LG Caltex Gas* opinion makes clear, moreover, that the ability of parties to enter into such an ad hoc submission is particular to the *post-dispute* context.<sup>303</sup>

To summarize, the authority on which the *First Options* dictum is based suggests that the dictum should apply only to scope arbitrability determinations. However, *LG Caltex Gas* provides support, in the international commercial context, for the idea that parties may contract to delegate authority to determine the validity of an arbitration agreement to the arbitrator, but only in a very limited context: where parties to an existing dispute enter into a *post-dispute* agreement delegating authority to the arbitrator to decide a jurisdictional issue.

Unfortunately, in light of the *Rent-A-Center* decision (as elaborated in *Granite Rock*), it appears that the Supreme Court endorses a relatively liberal reading of the *First Options* dictum. It is unclear whether the Court is suggesting that parties should be able to delegate the power to make a *final* determination of its jurisdiction to the arbitrator. The *Rent-A-Center* decision is completely silent on this issue, in part because the parties did not focus on the issue of post-award review in their briefs or at oral argument. The implications of the *Rent-A-Center* decision are discussed in the following section.

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<sup>300</sup> *Id.* para. 47. Specifically, the court interpreted section 67 of the English Arbitration Act, which provides that a party may apply to a court challenging any arbitral award for lack of substantive jurisdiction. English Arbitration Act, *supra* note 144, § 67(1)(a). It is worth noting that section 67 is included in the Act’s schedule of mandatory provisions. *See id.*, Sched. 1.

<sup>301</sup> *LG Caltex Gas*, [2001] EWCA (Civ) 788, para. 50. The Court of Appeal reasoned that, although the English Arbitration Act entitles a party to challenge an award on the basis of jurisdiction, proof of the second agreement would defeat such a challenge. *Id.*

<sup>302</sup> *Id.* para. 53.

<sup>303</sup> *See id.* paras. 55–57.



## IV. LEGAL AND POLICY IMPLICATIONS

A. *Deferring Judicial Consideration of Arbitrability*

As a result of the decisions discussed in Part III, bringing a successful judicial challenge to the enforceability of an arbitration clause on grounds of unconscionability doctrine—already relatively difficult—will be significantly moreso. To illustrate just how difficult such a challenge will be, consider the facts of *AT&T Mobility LLC v. Concepcion*,<sup>304</sup> a case that the Supreme Court heard during the 2010-2011 term. Vincent and Liza Concepcion brought a consumer fraud claim against their cell phone provider in federal district court, and the claim was joined with a putative class action involving the same issues. The district court denied AT&T's motion to compel individual arbitration of the Conceptions' claim, finding that the arbitration clause in the wireless service agreement was unconscionable under California law.<sup>305</sup> The Ninth Circuit affirmed, finding that the class action waiver in the arbitration clause was both procedurally and substantively unconscionable.<sup>306</sup>

There are three ways in which AT&T might have argued that the issue of the class action waiver's enforceability should be decided by the arbitrator. First, AT&T could have argued, along the lines of the *Nagrampa* decision,<sup>307</sup> that the procedural unconscionability issue—i.e., the Ninth Circuit's finding that the wireless services agreement is a contract of adhesion<sup>308</sup>—relates to the entire contract and therefore should have been decided by the arbitrator under the separability rule of *Prima Paint*. Because the *Nagrampa* decision was subsequently vacated en banc, this argument would not likely succeed before the Ninth Circuit, although it could succeed before other courts.<sup>309</sup> Second, in reliance on decisions such as *PacifiCare* and *Hawkins*,<sup>310</sup> AT&T might have argued that the enforceability of the class action waiver is separate from the issue of whether the parties entered into an enforceable agreement to arbitrate their dispute, and therefore the unconscionability challenge should be decided by the arbitrator in the first instance. Third,

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<sup>304</sup> *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), cert. granted, *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010).

<sup>305</sup> See *id.* at 853.

<sup>306</sup> *Id.* at 855.

<sup>307</sup> See *supra* notes 199–202 and accompanying text.

<sup>308</sup> *Laster*, 584 F.3d at 855.

<sup>309</sup> See *supra* note 199.

<sup>310</sup> See *supra* notes 224–55 and accompanying text.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

relying on *Rent-A-Center*, AT&T might have argued that, by agreeing to arbitration pursuant to the AAA institutional rules, the parties “clearly and unmistakably” agreed to delegate resolution of the unconscionability challenge to the arbitrator.<sup>311</sup> Because the Concepcions’ unconscionability challenge is not directed specifically to the delegation clause, the new separability rule established by *Rent-A-Center* suggests that the arbitrator should initially decide the unconscionability challenge.

Indeed, because the principal arbitration institutions in the U.S. all have in place procedural rules authorizing the arbitrator to determine his or her own jurisdiction,<sup>312</sup> in all likelihood, most mandatory arbitration agreements already contain delegation clauses. Those standard-form clauses that do not call for institutional arbitration can easily be re-drafted by corporate employers, franchisors, and suppliers simply by inserting the appropriate language, such as the clause utilized in *Rent-A-Center*. It is therefore just a matter of time before the vast majority of judicial challenges to the existence or enforceability of an arbitration agreement—whether on the grounds of unconscionability or some other grounds—simply disappear, as courts continue to find that the parties contracted to “let the arbitrator decide” the issue.<sup>313</sup>

Yet the decisions referred to above still allow a court at the award-enforcement stage to review whether the arbitrator’s award was based on a valid and enforceable agreement to arbitrate. By resting its decision on the separability rule of *Prima Paint*, even *Rent-A-Center* is a case about deferring, not supplanting, judicial review of an arbitrator’s jurisdictional findings. To a degree, this trend may make arbitration more consistent and

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<sup>311</sup> The Concepcions’ arbitration clause provided for arbitration pursuant to the AAA’s Commercial Rules, as supplemented for consumer disputes. See Petition for Writ of Certiorari at app. C, *AT&T Mobility LLC v. Concepcion*, No. 09-893 (Jan. 25, 2010), 2010 WL 304265. AAA Commercial Rule 7(a) authorizes the arbitrator to rule on his or her jurisdiction, including the existence, enforceability, or validity of the arbitration agreement. See *supra* note 116.

<sup>312</sup> The procedural rules of the ICC (International Chamber of Commerce) International Court of Arbitration, JAMS (Judicial Arbitration and Mediation Services, Inc.), and the National Arbitration Forum each include a provision granting the arbitrator the express authority to rule on his or her jurisdiction, analogous to the AAA Commercial Rule 7(a). See *supra* note 116.

<sup>313</sup> The only cases that may avoid such a result are cases like *Gregory*, see *supra* notes 118–20 and accompanying text; or *Sphere Drake*, see *supra* note 58 and accompanying text, where, due to forgery or lack of authority to contract on behalf of another, the absence of an agreement to arbitrate is manifestly apparent and the delegation clause is therefore invalid.

transparent, at least where the arbitration is between parties of equal bargaining power. Although the FAA directs a court to grant a motion to compel arbitration (or stay litigation pending arbitration) only upon being satisfied that there is an enforceable agreement to arbitrate the dispute,<sup>314</sup> the argument can be made that the court's role at such a stage should be limited to verifying the prima facie existence of an arbitration agreement, leaving other arbitrability issues to be handled initially by the arbitrator. As discussed in Part II.C, a number of countries, particularly France, have adopted such a deferential approach to arbitrability.

Deferring review to the award-enforcement stage has consequences. Historically, courts have given great deference to the arbitrator's decisionmaking and have construed the permissible grounds to vacate an award very narrowly. The development of the "second look" doctrine in the aftermath of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*<sup>315</sup> provides an analogous example. In *Mitsubishi*, the Supreme Court compelled a Sherman Act claim to be submitted to arbitration in Japan, reasoning that a U.S. court would have the opportunity "to ensure that the legitimate interest in the enforcement of the antitrust laws had been addressed" at the award-enforcement stage.<sup>316</sup> However, over the decades since *Mitsubishi* was decided, courts have vacated or refused enforcement of an arbitral award on the policy ground referred to in *Mitsubishi* only in very limited cases,<sup>317</sup> and

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<sup>314</sup> See *supra* note 42 and accompanying text.

<sup>315</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 638 (1985).

<sup>316</sup> *Id.* The Court also observed that "in the event the choice-of-forum and choice-of-law clauses acted in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19.

<sup>317</sup> One of the few decisions that has addressed the "second look" doctrine is *Baxter Int'l, Inc. v. Abbott Labs.*, where the Seventh Circuit refused to set aside an arbitral award on the ground that it allegedly contravened the Sherman Act. 315 F.3d 829 (7th Cir. 2003). Judge Easterbrook's opinion characterized the court's scope of review extremely narrowly. *Id.* at 832. Quoting *Mitsubishi*, the court noted that the arbitral tribunal "'took cognizance of the antitrust claims and actually decided them.' Ensuring this is as far as our review legitimately goes." *Id.*

Courts have also invoked the "manifest disregard" doctrine as a way to conduct a "second look" at arbitral awards involving statutory law. See *infra* note 318. However, despite this, courts very rarely vacate an arbitral award on the ground that it contravenes mandatory law. Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 719–25 (1999). Professor Andrew Guzman has noted that arbitrators have insufficient incentives to apply mandatory rules, and

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

the Supreme Court's decision in *Hall Street* may further constrain reviewing courts.<sup>318</sup>

In other words, the practical effect of such cases as *Rent-A-Center*, which defer most unconscionability challenges to the award-enforcement stage, is to significantly dilute the unconscionability safeguard in the mandatory arbitration context. It weakens an important protection for consumers, franchisees, and employees against one-sided arbitration agreements. Because arbitral awards have been subject to extremely deferential review at the award-enforcement stage, it is unlikely that post-award review will have the same effect as cases such as *Armendariz v. Foundation Health Psychcare Services, Inc.*<sup>319</sup> in terms of policing arbitration clauses for unfairness. Another consequence is that, in the mandatory arbitration context, deferring judicial review makes it more likely that a consumer or an employee may be forced to endure the costs of an arbitration proceeding, even if it turns out that the arbitration clause was unconscionable. Deferring judicial review makes it more difficult for the weaker party to challenge a one-sided clause, and therefore enhances the potential for abuse of mandatory arbitration clauses.

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suggested that liability be imposed on arbitrators for failure to apply mandatory law in order to align arbitrator incentives with the public interest. Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE. L.J. 1279, 1281 (2000).

<sup>318</sup> A few courts have invoked the “manifest disregard” doctrine as a basis for vacating an arbitral award where the arbitrator failed to apply mandatory rules. According to the Second Circuit’s formulation of the doctrine, a court may vacate an arbitral award where the arbitrator (i) knew of a governing legal principle but refused to apply it or ignored it altogether; and (ii) the law ignored by the arbitrator was explicit, well-defined and clearly applicable to the case. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998) (vacating an award for failure to apply the Age Discrimination in Employment Act); *see also* *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997) (vacating an award on the basis of the manifest disregard doctrine for failure to apply the Fair Labor Standards Act); *cf.* *George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 581 (7th Cir. 2001) (holding that manifest disregard is limited to two situations: where the arbitrator ordered the parties to violate the law, and where the arbitrator exceeded his or her authority). In *Hall Street*, the Supreme Court seemed to call into question the continued validity of the manifest disregard doctrine. *See* *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 585 (2008). *But see infra* note 327 (discussing *Stolt-Nielsen*).

<sup>319</sup> *Armendariz v. Found. Health Psychcare Serv’s, Inc.*, 6 P.3d 669 (2000). *Armendariz* is a well-known decision of the California Supreme Court, which held that a mandatory arbitration clause in an employment agreement was unconscionable under California law. *Id.* at 696–99.

## B. *Issues Left Open by Rent-A-Center*

*First Options* was not about the mere timing of judicial review. The issue presented in *First Options* was whether the court should accord deference to the arbitrator's jurisdictional findings where it was alleged that the parties had delegated to the arbitrator authority to make these findings. Therefore, the dictum implies that where there is clear and unmistakable evidence of their intent to do so, parties may delegate the power to make a *final* determination of jurisdiction to an arbitrator, such that arbitral findings that ordinarily would be subject to de novo review at the award-enforcement stage would not be.<sup>320</sup> If, in the aftermath of *Rent-A-Center*, courts continue to find "clear and unmistakable" evidence of an agreement to let the arbitrator decide whether an arbitration agreement is unconscionable, the implication of *First Options* is that such delegation also effectively precludes *post-award* substantive review of the arbitrator's findings as to the potential unfairness of an arbitration clause—subject, perhaps, only to very limited public policy considerations, such as those raised in *Awuah*.<sup>321</sup>

However, the implications of the *First Options* dictum with respect to post-award review are frequently disregarded. *First Options* is sometimes cited for the proposition that parties can delegate arbitrability to the arbitrator *as an initial matter*.<sup>322</sup> In its brief before the Supreme Court, *Rent-A-Center*

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<sup>320</sup> Courts have relied on *First Options* for the idea that, where parties have contracted to let the arbitrator decide his or her jurisdiction, courts should accord deference to the arbitrator's jurisdictional findings. *See, e.g.*, *Starling Endeavors Ltd. v. Crescendo Ventures IV, LLC*, No. C 06-1250 PJH, 2006 U.S. Dist. LEXIS 20161, at \*19-25 (N.D. Cal. March 31, 2006) (finding "clear and unmistakable evidence" that the parties agreed to arbitrate arbitrability, such that the court should apply a deferential standard of review); *Katz v. Feinberg*, 167 F. Supp. 2d 556, 564 (S.D.N.Y. 2001) (holding that "no deference is due an arbitrator's decision as to the scope of arbitrability unless the arbitrability question itself has been submitted to the arbitrator"); *DMS Properties-First, Inc. v. P.W. Scott Assocs., Inc.*, 748 A.2d 389, 391-92 (Del. 2000) (reversing the Chancery Court's application of a deferential standard of review, but citing *First Options* for the idea that the standard of review is "deferential" where the parties have agreed to submit the issue of arbitrability to arbitration).

<sup>321</sup> *Awuah v. Coverall N. Am.*, 554 F.3d 7, 12 (1st Cir. 2009).

<sup>322</sup> *See, e.g.*, *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 824 (8th Cir. 2003) (holding that "the Arbitration Agreement clearly and unmistakably left the issue . . . to the arbitrators in the first instance"); *Anderson v. Pitney Bowes, Inc.*, No. C 04-4808 SBA, 2005 U.S. Dist. LEXIS 37662, at \*19 (N.D. Cal. May 4, 2005) (suggesting that

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

repeatedly asserted that the delegation clause at issue “‘clearly and unmistakably’ referred the issue of contract enforceability to the arbitrator *in the first instance.*”<sup>323</sup> Similarly, Jackson’s brief before the Court failed to fully address the implications of *First Options* with respect to post-award review, instead focusing its argument on why *deferring* judicial review until the award-enforcement stage would be insufficient to ensure the legitimacy and fairness of the arbitral process.<sup>324</sup>

It is possible that the Court based the *Rent-A-Center* decision on the separability doctrine in order to avoid the implications of *First Options* for post-award review. A majority of the Court may not have been willing to hold that a delegation clause empowers the arbitrator to make a *final* determination of his or her jurisdiction. Consider an exchange that occurred at oral argument between Justice Scalia, author of the *Rent-A-Center* opinion, and counsel for the Respondent. When counsel argued that the effect of decisions like *Awuah* was to preempt state unconscionability law, Justice Scalia disagreed, emphasizing the availability of post-award judicial review of the arbitrator’s jurisdictional findings. He questioned whether the arbitrator could simply disregard applicable law.<sup>325</sup> Although Justice Scalia did not suggest that the arbitrator’s jurisdictional findings should be subject

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parties will have an opportunity to request judicial review at the award-enforcement stage).

<sup>323</sup> Brief for the Petitioner, *Rent-A-Center*, 130 S. Ct. 2772 (No. 09-497) at \*3, 12 (emphasis added).

<sup>324</sup> Brief for the Respondent, *supra* note 2, at \*44.

<sup>325</sup> Justice Scalia posed the following hypothetical to counsel: assume a “Shylock contract,” whereby the lender can extract a pound of flesh as security in the event of debtor default. Transcript of Oral Argument of Ian E. Silverberg on behalf of Respondent at \*31, *Rent-A-Center*, 130 S. Ct. 2772 (2010) (No. 09-497), 2010 WL 1654083. If applicable state law invalidates contracts to maim, can an arbitrator ignore that law and enforce the contract? Set forth below is the exchange that followed:

JUSTICE SCALIA: Is that right? You don’t think a State court would in the blink of an eye set aside an arbitration award that allowed a—a pound of flesh?

MR. SILVERBERG: Your Honor, I would hope they would. But I—in reading the narrow review of section 9, 10, and 11 [of the FAA], I don’t think we have that guarantee.

JUSTICE SCALIA: I think you have a misunderstanding of the law, then, if that’s what you believe. I—I think there is no doubt what would happen in that case.

*Id.* at \*31–32.

to de novo review,<sup>326</sup> he outright rejected the possibility that an arbitrator could ignore applicable unconscionability law without having the award set aside by a reviewing court.<sup>327</sup>

In sum, *Rent-A-Center* did not resolve the effect of a delegation clause on a court's post-award review of the arbitrator's jurisdictional findings. Although under *First Options* it is clear that such findings should be accorded judicial deference, the Court in *Rent-A-Center* based its decision not on *First Options*, but on the separability doctrine, pursuant to which the arbitrator's findings are subject to post-award review. The Court might have based its decision on *Prima Paint* and not *First Options* in order to sidestep the post-award review issue because, as discussed in Part II.C.3, allowing parties to contract around the judicial review of an award would contravene a fundamental principle of arbitration.

A second issue unresolved by *Rent-A-Center* is whether there is any limit to the jurisdictional issues that parties may delegate to the arbitrator, and if so, how to draw the line between valid and invalid delegation clauses. As discussed, there is dictum in *Granite Rock* that seems to distinguish between delegation clauses that purport to vest authority in the arbitrator to determine the *existence*, versus the enforceability or scope, of an arbitration agreement. This suggests that parties cannot contractually delegate the power to determine the existence or formation of the arbitration agreement to the arbitrator. This distinction was also made by the petitioner in its reply brief, in the *Rent-A-Center* case. It highlighted § 4 of the FAA's reference to a court's obligation to compel arbitration upon being satisfied that the

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<sup>326</sup> *Id.* at \*29.

<sup>327</sup> Similarly, the Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds Intl. Corp.*, 130 S. Ct. 1758 (2010), seems to imply that the manifest disregard doctrine is a legitimate basis on which to set aside an arbitral award. In *Stolt-Nielsen*, the Supreme Court upheld a district court order vacating an arbitral award because the arbitrators exceeded their powers in ordering class arbitration. *Id.* at 1776–77. The Court's lack of deference to the arbitrators' interpretation of the arbitration clause is striking. Instead of framing the issue as whether the arbitrators were authorized to interpret the contract to determine whether class arbitration was permissible, the decision appears to take issue with the manner in which the arbitrators interpreted the clause, which suggests that the Court reviewed the arbitrators' decision de novo. *See id.* at 1780 (Ginsburg, J., dissenting) (asserting that the majority reviewed the arbitrators' interpretation of the contract de novo, in contravention of § 10 of the FAA). Additionally, the majority opinion stated that it was not deciding whether manifest disregard of the law survives as a ground for judicial review of an award, but, "[a]ssuming, *arguendo*" that the doctrine is applicable, the Court found that the standard was satisfied based on the facts of the case. *Id.* at 1768 n.3.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

“making” of an arbitration agreement is not in issue. Rent-A-Center argued that issues going to the “very existence” of an arbitration agreement should fall within the ambit of “making,” whereas issues of validity or enforceability of an arbitration agreement should not.<sup>328</sup> In particular, it asserted that the unconscionability doctrine involves a public policy decision regarding the substantive fairness of an agreement whose “making” is not at issue, and therefore falls outside the ambit of § 4 of the FAA.<sup>329</sup>

One difficulty with this argument is its suggestion that courts can draw a bright line between issues that would call into question the “making” of the arbitration agreement and those that relate to an agreement’s enforceability. One could characterize the fact that Antonio Jackson did not meaningfully assent to the standard-form language in the arbitration agreement as relating to the “making” of the agreement to arbitrate. The standard test for unconscionability involves not only an assessment of the substantive fairness of the contract but also consideration of the manner in which the contract was created.<sup>330</sup> Additionally, it is questionable whether the FAA’s drafters truly intended that certain contract defenses relate to an arbitration clause’s formation, and therefore must be resolved by the court even if the parties contract otherwise, while other contract defenses would not.

On the other hand, the “making” language of § 4 could be construed to require only that a court determine the prima facie existence of an arbitration agreement before enforcing a delegation clause and compelling arbitration of a jurisdictional question. But even so, there are certain arbitration clauses whose unfairness may be manifest, therefore calling into question the prima facie existence of an arbitration agreement. The example referred to earlier, an arbitration clause providing that only one of the parties may appoint the arbitrator, could fall into this category. Another example is an arbitration clause containing a class action waiver. The public policy concern regarding class action waivers was recognized by the court in *Awuah*.<sup>331</sup> There the court found that the parties had validly entered into a delegation clause under the *First Options* standard but remanded the case to the district court to determine as a matter of public policy whether individual arbitration of plaintiffs’ claims rendered their rights “illusory.”<sup>332</sup>

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<sup>328</sup> Reply Brief for the Petitioner at \*10, *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (No. 09-497).

<sup>329</sup> *Id.* at \*12.

<sup>330</sup> See *supra* note 198.

<sup>331</sup> *Awuah v. Coverall N. Am.*, 554 F.3d 7 (1st Cir. 2009).

<sup>332</sup> See *supra* notes 271–77 and accompanying text.



In any event, *Rent-A-Center* did not resolve this issue. By resting its decision on the separability doctrine, the Supreme Court failed to resolve whether certain types of delegation clauses are inherently invalid.

## V. LEGISLATIVE MEASURES TO LIMIT MANDATORY ARBITRATION

*Rent-A-Center* is only the most recent Supreme Court decision to defer initially to an arbitrator to make jurisdictional findings. Even where unobjectionable as a matter of commercial arbitration practice, such deference is questionable in the mandatory arbitration context, where bargaining power is often skewed in favor of one side to the contract. As Professor Reisman observed, arbitration is a “delegated and restricted power” to resolve disputes.<sup>333</sup> If legal controls in arbitration break down, this delegated and restricted power can become absolute.<sup>334</sup> Such an erosion of judicial control over the arbitral process could exacerbate public sentiment against mandatory arbitration and fuel pressure on Congress to adopt statutory restrictions on mandatory arbitration.

In fact, just weeks after the Court announced its decision in *Rent-A-Center*, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>335</sup> which expressly authorizes the Consumer Financial Protection Bureau and the Securities and Exchange Commission to restrict mandatory arbitration of financial disputes involving consumers.<sup>336</sup> This section discusses the Dodd-Frank Act and other recently adopted measures, and also describes a broader legislative proposal to amend the FAA to limit mandatory arbitration of consumer, employment, and franchise disputes.

As for the proposal to generally prohibit mandatory arbitration, one should keep in mind that such proposals have been introduced in Congress for well over a decade without success. The proposed Civil Rights Procedures Protection Act, which would have prohibited pre-dispute

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<sup>333</sup> REISMAN, *supra* note 1, at 1.

<sup>334</sup> *Id.*

<sup>335</sup> Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. No. 111-203 (2010) [Dodd-Frank Act].

<sup>336</sup> The *Rent-A-Center* decision was issued June 21, 2010, whereas the conference report resolving differences between the House and Senate versions of the Dodd-Frank Act passed the Senate on July 15, 2010 (after having previously passed the House). For an overview of the history of the bill, see <http://www.govtrack.us/congress/bill.xpd?bill=h111-4173> (last visited Jul. 18, 2010). The provisions of the Dodd-Frank Act that relate to mandatory arbitration are discussed below.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

agreements to arbitrate claims under the federal anti-discrimination statutes, was introduced in Congress in 1994,<sup>337</sup> 1995,<sup>338</sup> 1996,<sup>339</sup> 1997,<sup>340</sup> 1999,<sup>341</sup> and 2001,<sup>342</sup> without ever being voted out of committee. Subsequently, the proposed Arbitration Fairness Act of 2002<sup>343</sup> suffered a similar fate, as did the proposed Arbitration Fairness Act of 2007.<sup>344</sup> The interests lobbying in favor of the status quo are powerful, including the Chamber of Commerce's Institute for Legal Reform.<sup>345</sup>

On the other hand, recent developments have focused public attention on some of the abuses involving mandatory arbitration, and may signal a greater willingness in Congress to take action in this area, as evidenced by the recently enacted financial reform bill.<sup>346</sup> In July 2009, the Minnesota Attorney General filed a civil suit against the National Arbitration Forum (NAF), one of the largest arbitration institutions in the U.S. and the most active institution in the area of consumer debt arbitration.<sup>347</sup> The suit alleged that the NAF hid from the public the fact that it was owned by a hedge fund that also held interests in the nation's largest debt-collection firms.<sup>348</sup> Three days later, the NAF entered into a consent decree with the attorney general's office, agreeing to completely divest itself of any business related to consumer arbitration, including, but not limited to, consumer debt disputes.<sup>349</sup> At around the same time, the AAA announced it would impose a moratorium on the administration of consumer debt collection arbitration

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<sup>337</sup> H.R. 4981, 103d Cong. (1994); S. 2405, 103d Cong. (1994).

<sup>338</sup> S. 366, 104th Cong. (1995).

<sup>339</sup> H.R. 3748, 104th Cong. (1996); H.R. 983, 105th Cong. (1997).

<sup>340</sup> S. 63, 105th Cong. (1997).

<sup>341</sup> H.R. 872, 106th Cong. (1999); S. 121, 106th Cong. (1999).

<sup>342</sup> H.R. 1489, 107th Cong. (2001); S. 163, 107th Cong. (2001).

<sup>343</sup> S. 3026, 107th Cong. (2002).

<sup>344</sup> H.R. 3010, 110th Cong. (2007); S. 1782, 110th Cong. (2007).

<sup>345</sup> See U.S. Chamber Institute for Legal Reform, *Anti-Arbitration Bill Will Wipe Out Benefits, Burden Courts, and Limit Recourse for Many Consumers*, available at [http://www.instituteforlegalreform.com/component/ylr\\_issues/29/item/ADR](http://www.instituteforlegalreform.com/component/ylr_issues/29/item/ADR).

<sup>346</sup> Dodd-Frank Act, *supra* note 335.

<sup>347</sup> Robert Berner, *Minnesota Sues a Credit Arbitrator, Citing Bias*, BLOOMBERG BUSINESSWEEK, Jul. 14, 2009, [http://www.businessweek.com/print/bwdaily/dnflash/content/jul2009/db20090714\\_952766.htm](http://www.businessweek.com/print/bwdaily/dnflash/content/jul2009/db20090714_952766.htm) (last visited Feb. 11, 2010).

<sup>348</sup> *Id.*

<sup>349</sup> Consent Judgment, *State of Minn. v. National Arbitration Forum, Inc.* (No. 27-CV-09-18550) (Minn. 4th Jud. Dist., Jul. 17, 2009), available at <http://pubcit.typepad.com/files/nafconsentdecree.pdf>.

programs until the fairness and due process problems it had observed in the administration of these programs had been addressed.<sup>350</sup> The AAA's announcement, the Minnesota Attorney General's suit against NAF, and the resulting consent decree were discussed at the July 2009 hearing on the misuse of mandatory arbitration by the consumer debt industry, which was held by the House Oversight and Government Reform Committee's Subcommittee on Domestic Policy. The testimony provided at this hearing revealed troubling abuses of the arbitral process by debt collection agencies to extract awards against consumer debtors who had been placed in distress by the recent financial crisis.<sup>351</sup>

Another recent development that signals greater willingness by Congress to restrict mandatory arbitration is the adoption of the Franken Amendment to the 2010 Department of Defense Appropriations Act.<sup>352</sup> The amendment, which was added to the Senate bill in October 2009, denies federal funding to defense contractors who mandate the use of arbitration to resolve Title VII claims or certain tort claims brought by their employees.<sup>353</sup> Although the amendment was later revised to insert a grandfather period and allow the Secretary of Defense to intervene to exempt certain cases,<sup>354</sup> the fact that the amendment was passed into law signals that attitudes towards mandatory arbitration are shifting. The events that prompted Senator Franken's amendment—the rape of Jamie Leigh Jones, an employee of defense contractor KBR, KBR's handling of the event, and the ensuing attempts by KBR to compel arbitration of Jones' legal claims—aroused a great deal of public sympathy in favor of Jones and against mandatory arbitration.<sup>355</sup>

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<sup>350</sup> *Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing before the Domestic Policy Subcomm. of the House Comm. On Oversight and Government Reform, 111th Cong. (2009)* (statement of Richard W. Naimark on behalf of the AAA), available at <http://oversight.house.gov/> (click on "Hearings," then "Subcommittee on Domestic Policy," then "July 22, 2009 Arbitration or Arbitrary The Misuse of Mandatory Arbitration to Collect Consumer Debts").

<sup>351</sup> See *id.* (statement of F. Paul Bland, Jr., staff attorney, Public Justice).

<sup>352</sup> Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118 (2009).

<sup>353</sup> *Id.* § 8116.

<sup>354</sup> *Id.*

<sup>355</sup> See, e.g., Dahlia Lithwick, *Open the Shut Case: Why is KBR so afraid of letting Jamie Leigh Jones Have Her Day in Court?*, SLATE (Jan. 28, 2010), <http://www.slate.com/id/2242792/> (last visited Feb. 12, 2010) (describing the public "blowback" certain Republican senators have suffered after voting against the Franken amendment).

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

Most significantly, the Dodd-Frank Act prohibits pre-dispute arbitration clauses in residential mortgage loan agreements.<sup>356</sup> More generally, the Act provides the Securities and Exchange Commission (SEC) and the newly created Consumer Financial Protection Bureau (Bureau) express authorization to “prohibit or impose conditions or limitations on the use of” pre-dispute arbitration clauses in financial contracts with consumers. Section 1028 of the Act authorizes the Bureau to limit or ban agreements to arbitrate future disputes between consumers and financial services providers,<sup>357</sup> and § 921 of the Act amends the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 to give similar authority to the SEC.<sup>358</sup> If and when such authority is exercised by the Bureau or the SEC, the Act could potentially affect arbitration clauses in any agreement for a financial service or product provided to consumers, including credit card agreements, banking account agreements, check cashing services, and securities brokerage contracts.

All of these events—the enactment of the Dodd-Frank Act, the passage of the Franken amendment, and the congressional inquiry into mandatory arbitration of consumer debt disputes—are indicative of a broad concern regarding mandatory arbitration. While it is unclear whether Congress may at some future point amend the FAA to generally ban mandatory arbitration, the events described above indicate that the political environment is more receptive to change in this area than it was in the past.

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<sup>356</sup> Dodd-Frank Act, *supra* note 335, § 1414(a).

<sup>357</sup> Section 1028(b) provides that the Bureau

may prohibit or impose conditions or limitations on the use of any agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.

*Id.* § 1028(b). “Covered person,” in turn, is defined to include any individual or entity who “engages in offering or providing a consumer financial product or service.” *Id.* § 1002(6). There is a grandfather provision, so that any such regulation adopted by the Bureau would apply only to arbitration agreements entered into 180 days after the effective date of the regulation. *Id.* § 1028(d).

<sup>358</sup> *Id.* §§ 921(a), 921(b). Section 921 authorizes the SEC to prohibit or limit pre-dispute arbitration agreements between a broker, dealer, municipal securities dealer, or investment adviser and its customers or clients, with respect to the arbitration of disputes arising under the federal securities laws or the rules of a self-regulatory organization.

A bill currently pending in Congress would invalidate mandatory arbitration agreements. The proposed Arbitration Fairness Act of 2009<sup>359</sup> would amend the FAA to provide that no pre-dispute arbitration agreement is valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute.<sup>360</sup> Additionally, the Arbitration Fairness Act would overrule *Prima Paint* by providing that the applicability of the FAA, as well as the validity and enforceability of an arbitration agreement, would be determined by the court, not the arbitrator, “irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.”<sup>361</sup> Whereas the Senate version of the bill would overrule *Prima Paint* only as to arbitration agreements falling within the scope of the FAA, the House version of the bill would overrule it with respect to *all* arbitration agreements.<sup>362</sup> To date, neither bill has been referred out of committee.<sup>363</sup>

After years of legislative inactivity, the political climate towards mandatory arbitration of consumer, franchise, and employment disputes appears to be shifting. As unconscionability challenges to arbitration clauses increasingly become a matter for arbitral resolution, the power imbalance between the parties to these agreements will become more pronounced, and may induce Congress to amend the FAA, or induce the SEC or the Bureau to exercise their newly-conferred authority to restrict mandatory arbitration of financial disputes involving consumers.

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<sup>359</sup> H.R. 1020, 111th Cong. (2009); S. 931, 111th Cong. (2009).

<sup>360</sup> H.R. 1020, *supra* note 359, § 4; S. 931, *supra* note 359, § 3. Similarly, the Consumer Fairness Act of 2009 would prohibit pre-dispute arbitration clauses in consumer contracts. H.R. 991, 111th Cong. (2009).

<sup>361</sup> H.R. 1020, *supra* note 359; S. 931, *supra* note 359.

<sup>362</sup> The Senate bill would amend the FAA by adding a Chapter 4, applicable to the arbitration of employment, consumer, franchise, and civil rights disputes. The provision of the bill that would overrule *Prima Paint* would be limited to arbitration agreements “to which this chapter applies.” S. 931, *supra* note 359, § 3. In contrast, the House bill would amend § 2 of the FAA, such that the provision that would overrule *Prima Paint* would be applicable to all arbitration agreements. H.R. 1020, *supra* note 359, § 4.

<sup>363</sup> See H.R. 1020, *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h111-1020> and S. 931, *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s111-931>.

## LETTING THE ARBITRATOR DECIDE UNCONSCIONABILITY CHALLENGES

### VI. CONCLUSION

U.S. case law on whether courts or arbitrators should decide unconscionability challenges is somewhat schizophrenic. In part this is a function of the divisive debate over mandatory arbitration. But it is also due to the fact that the law has been shifting inexorably towards “letting the arbitrator decide” jurisdictional questions, in spite of Supreme Court decisions such as *AT&T*, which hold that arbitrability questions are for the court to decide. Decisions that qualify the basic rule in *AT&T*, such as *Buckeye*, *PacifiCare*, and *Rent-A-Center*, and the lower court decisions that have applied the reasoning in these cases to unconscionability challenges, have the effect of deferring judicial review of unconscionability determinations to the award-enforcement stage.

This shift in approach may promote efficiency and consistency in arbitration, but it also eliminates an important check on one-sided arbitration agreements. An approach that initially defers to the arbitrator’s power to determine his or her jurisdiction, while adopting special safeguards for consumer and employment contracts, finds support in the practice of other countries (such as France). As the federal courts continue to defer initial jurisdictional determinations to the arbitrator, pressure is building on Congress to amend the FAA to prohibit pre-dispute agreements to arbitrate consumer, franchise, and employment disputes. Such a move may be appropriate, as U.S. arbitration law continues to evolve according to rules that have been developed in the context of, and seem to be better suited for, the resolution of disputes between sophisticated commercial parties.

Regardless of whether Congress limits mandatory arbitration, the *First Options* dictum, which suggests that parties may submit jurisdictional questions for final determination by an arbitrator, should be interpreted much more narrowly than the courts have interpreted it. This article has argued that the *First Options* dictum should apply only in two situations: when scope arbitrability is at issue; or where parties to an existing dispute agree to submit an issue with respect to the existence or enforceability of the arbitration clause to the arbitrator. The Supreme Court’s *Rent-A-Center* decision is premised on the assumption that standard-form language in an arbitration agreement is sufficient to delegate authority to the arbitrator to rule on an unconscionability challenge, which suggests a relatively broad interpretation of the *First Options* dictum. But the Court’s holding in *Rent-A-Center* is based primarily on the separability rule of *Prima Paint*, and not on the *First Options* dictum. *Rent-A-Center* therefore does not answer important questions about delegation clauses—in particular, the scope of possible

exceptions to the rule, and the degree of judicial deference that should be given to an arbitrator's jurisdictional findings when they are made pursuant to a delegation clause.