CASUALLY FINDING THE CLEAR AND UNMISTAKABLE: A RE-EVALUATION OF *FIRST OPTIONS* IN LIGHT OF RECENT LOWER COURT DECISIONS

by
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This Comment discusses how an increasing number of courts have misapplied First Options of Chicago, Inc. v. Kaplan*'s "clear and unmistakable" evidence standard when deciding who has the authority to determine the arbitrability of parties' disputes. Further, this Comment suggests that the misapplication threatens to force parties to arbitrate disputes that they did not agree to resolve by arbitration. First, this Comment briefly reviews developments leading up to the Court's decision in* First Options *and then discusses the potential harm that may result from a casual finding of the requisite "clear and unmistakable" evidence, since such a finding forecloses independent judicial review. This Comment asserts that arbitrability determinations in consumer and employment contracts should always be the subject of independent judicial determination, proposes a standard for determining when parties have clearly and unmistakably evidenced an intent to have an arbitrator decide whether any disputes are arbitrable, and proposes a framework that courts may use in addressing challenges to the arbitrability of disputes.*

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I. INTRODUCTION

"The parties to this contract agree that all disputes or controversies will be settled solely by arbitration pursuant to the Commercial Rules of the American Arbitration Association."[1] By signing a contract containing the preceding

[1] The American Arbitration Association Commercial Rule 7 provides that an arbitrator may rule on his or her own jurisdiction, including any objections regarding the existence,

sentence, an individual may well have signed away the right to a jury trial, the right to resolve disputes before a judge,[2] and the right to any meaningful judicial oversight of the arbitral process.[3] This may be the case notwithstanding the fact that the person signing the contract did not see or read[4] the arbitration clause. The same result would follow if the individual read the arbitration clause but did not understand what it meant, or if the individual was unfamiliar with the AAA's Commercial Arbitration Rules.[5] Welcome to modern U.S. arbitration law.

The possibility of such a potentially inequitable result has been justified by the notion that private parties have the freedom to order their relationships by contract, and that parties may be forced to arbitrate only if they have agreed to do so.[6] Business people or consumers unfamiliar with the legal underpinnings of contract doctrine might suspect that "agreement" means knowing and

scope or validity of an arbitration agreement and the contract in which it is contained. *See* AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES, *available at* http://www.adr.org/sp.asp?id=22440#R7 (last visited Feb. 6, 2006). This is the author's own hypothetical arbitration clause. The author used the AAA rules as an example because those were the arbitral rules most frequently referenced in the case law that was the subject of the author's research. The author recognizes that in the area of consumer and employment arbitration, the AAA has taken steps toward improving the fairness of arbitration. *See generally,* American Arbitration Association, *Fair Play: Perspective from American Arbitration Association on Consumer and Employment Arbitration, available at* http://www.adr.org/si.asp?id=1843 (last visited Mar. 1, 2006) (listing many of the AAA's efforts to improve the fairness of employment and consumer arbitration. Such improvements include the development of specialized rules and protocols for employment and consumer arbitration.).

[2] *See generally* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669 (2001) (discussing the development of U.S. arbitration law, and providing a compelling argument for application of traditional Seventh Amendment jury waiver standards to arbitration agreements).

[3] As will be discussed *infra*, if reference to the AAA Commercial Arbitration Rules is considered to be clear and unmistakable evidence that parties intended for an arbitrator rather than a court to decide whether they have a valid arbitration agreement and whether their dispute falls within its scope, then, under United States Supreme Court precedent, courts will employ a highly deferential standard of review if asked to vacate an award on grounds that the arbitrator lacked jurisdiction. Such a result would allow an arbitrator to essentially have the first and final say as to his or her jurisdiction and would largely oust the courts from their traditional gatekeeping role. *See generally* Natasha Wyss, First Options of Chicago, Inc. v. Kaplan*: A Perilous Approach To Kompetenz-Kompetenz*, 72 TUL. L. REV. 351, 377 (1997) ("Allowing for deferential review, as provided for in *First Options*, has the practical effect of permitting the arbitral tribunal to have the final word on arbitrability.").

[4] *See generally* Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 171–72 (2004) ("The nondrafting party (a consumer, for example) consents to arbitration by signing the form or by manifesting assent in another way, such as by performance of the contract. That the consumer did not read or understand the arbitration clause does not prevent the consumer from consenting to it.").

[5] *Id*.

[6] AT&T Technologies, Inc., v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.").

informed assent. That simply is not the case.[7] Contract doctrine merely requires an objective mutual manifestation of assent. So if a party signs a ten page agreement containing the hypothetical arbitration clause, that means the party agreed to the clause.[8] The same is true if the signatory knew about the clause but had no practical choice but to agree because the product or service being contracted for is offered only by individuals or business entities that include such a clause in all of their contracts.[9] In fact, the Seventh Circuit has held that a party "agreed" to arbitrate merely because an item purchased on line was delivered with an arbitration agreement in the shipping container.[10] "Agreement" in the contractual arbitration context is a low threshold. So at the outset, much of the solace one might take in the idea that one cannot be forced to arbitrate unless one has agreed to do so, is lost.

Traditionally, a party who purportedly agreed to arbitrate a particular dispute, and who wished to avoid arbitration, has been able to seek independent judicial determination as to the dispute's "arbitrability." As a general proposition, questions of arbitrability for a court are limited to: 1) whether parties made a valid agreement to arbitrate, and 2) whether a particular dispute fits within the scope of that arbitration agreement.[11] In answering both questions, courts utilize generally applicable principles of state contract law, but also apply default rules that greatly favor arbitration. In answering the first question, courts will only consider challenges that put the making of the arbitration agreement itself in issue, as opposed to challenges that go to the validity or enforceability of the contract in general.[12] This is known as the "separability" doctrine, and it is profoundly pro-arbitration in that it drastically limits the contract defenses a court will entertain.[13] In answering the second

[7] Ware, *supra* note 4, at 171–72.

[8] *Id*.

[9] IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 19.3.3.2 (Supp. 1999) ("The prevailing law gives scant comfort to adherers to contracts objecting to arbitration clauses in contracts of adhesion. Without more, the fact than an arbitration clause is contained in a contract of adhesion does not constitute a defense against its enforcement.").

[10] *See generally* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997). The Hills purchased a Gateway brand computer on line. Included in the box used for shipment were a list of terms and conditions that purported to become effective if the Hills did not return the computer within 30 days. Included in those terms and conditions was an arbitration clause. On these facts the Seventh Circuit Court of Appeals determined that the Hills had consented to arbitrate any disputes between themselves and Gateway. *Id.*

[11] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003) Although not formally called questions of "arbitrability," the Court cited its decision in *Howsam v. Dean Witter Reynolds, Inc.* which referred to them in terms of "arbitrability."; *see* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002).

[12] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

[13] MACNEIL ET AL., *supra* note 9, at § 19.1.2 (indicating that application of the doctrine of separability requires that consensual defenses to contract formation such as fraud, duress, undue influence, mistake and incapacity will normally be determined by an arbitrator. Only if it is alleged that the arbitration clause itself was induced by fraud, procured by duress or as the result of undue influence, or through mistake or incapacity would a court hear the defense.) This of course means that issues of arbitrability for a court are narrow indeed.

question, courts apply a pro-arbitration presumption so that if there is any doubt about whether a particular dispute is within the scope of an arbitration clause, the dispute will be referred to arbitration.[14] The lesson is this: once parties ostensibly agree to arbitrate something, judicial oversight will be quite limited.

Traditionally, parties have had ample opportunity for judicial review of the arbitrability of their disputes.[15] If a party resists arbitration, the other party may petition a court to compel arbitration.[16] Or, either before or during an arbitration proceeding, the resisting party may petition a court to enjoin or stay arbitration.[17]

After an arbitration proceeding has concluded, the parties may seek to confirm, amend, or vacate an arbitration award.[18] A party may also seek to vacate an award on grounds that the dispute was not arbitrable at all.[19] When evaluating the former, courts employ a highly deferential standard of review, and as a result, arbitration awards are confirmed in the vast majority of cases.[20] Regarding the latter, a question of "arbitrability," courts review those questions independently.[21] Such an approach is sensible because if parties did not agree to arbitrate a particular dispute, then the so-called "arbitrators" that render an "award" are bereft of even the slightest authority.[22]

Under the traditional judicial/arbitral dichotomy, courts are the ultimate guardians of the parties' rights to judicial versus arbitral resolution of disputes.

Although questions of arbitrability are narrow, they are profoundly important, because the answers to those questions will determine whether parties resolve their disputes before a judge or an arbitrator.

[14] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995) (reiterating that any doubts regarding the scope or arbitrable issues should be resolved in favor of arbitration).

[15] *See generally* Alan Scott Rau, *"The Arbitrability Question Itself,"* 10 AM. REV. INT'L. ARB. 287, 288 (1999) ("American procedure has been exceptionally generous in providing an abundance of devices through which challenges to arbitral authority can be raised: A judicial determination is possible not only on review after an award has been rendered, but also by means of a motion to stay an arbitration that has been initiated or threatened, or, before any proceedings at all, by a motion to stay litigation, or to compel arbitration.").

[16] *Id.*

[17] *Id.*

[18] 9 U.S.C. §§ 9−11 (2000) (providing for the confirmation, modification, and vacation of arbitration awards).

[19] *First Options of Chicago, Inc.*, 514 U.S. at 941 (petitioning a district court to vacate an adverse arbitration award on the grounds that the disputes decided were not arbitrable).

[20] MACNEIL ET AL., *supra* note 9, at § 40.1.4 (finding that "[h]owever they may articulate the results, courts generally refuse to second guess the arbitrator's determination"); *First Options of Chicago, Inc.*, 514 U.S. at 943 (a court should give considerable leeway to an arbitrator's decision upon matters that the parties have agreed to arbitrate).

[21] *First Options of Chicago, Inc.*, 514 U.S. at 943.

[22] *See generally* William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators,* 8 AM. REV. INT'L ARB. 133, 134 (1997) (describing arbitrators who consider matters outside of their authority as "officious intermeddlers" who "would be no more arbitrators than any of the thousands of men and women who pass through New York's Grand Central Station each morning").

If a court decides that the parties validly agreed to arbitrate, then they must do so, and the arbitrator's award will be shown great deference. If, however, the parties have not validly agreed to arbitrate a particular dispute, then an arbitrator has no authority whatsoever. Although the judicial gatekeeping role discussed above is narrow, it is of crucial importance in safeguarding the rights of individuals and businesses alike.[23] Without such a role, parties could be divested of their rights to judicial resolution of disputes by common citizens purporting to be arbitrators.[24] With its decision in *First Options of Chicago, Inc., v. Kaplan*, the U.S. Supreme Court created a rule that threatens to undermine this vital judicial role.[25]

The Court's decision in *First Options* has engendered confusion in lower courts[26] and is beginning to be interpreted in a way that has the potential to undermine already limited judicial oversight of the arbitral process. In *First Options*, the Court adapted a rule from the labor arbitration context indicating that parties can agree to have arbitrators decide questions of arbitrability traditionally reserved for judicial determination.[27] In effect, the Court found that parties could agree to allow an arbitrator to determine his or her own jurisdiction—that is, to decide whether the parties made a valid agreement to arbitrate and whether their dispute was within the scope of that agreement. As a corollary, the Court also found that when parties agree to allow an arbitrator determine arbitrability, such a decision would be allowed great deference in any post-arbitration challenge to the arbitrator's jurisdiction.[28] Realizing that the conferral of arbitral jurisdiction to determine arbitrability was sufficiently at

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[23] *First Options of Chicago, Inc*., 514 U.S. at 942 (stating that the question of who decides arbitrability is of practical importance because "a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute").

[24] Park, *supra* note 22, at 144 ("Without a grant of authority from the litigants, a would-be arbitrator is no more than a shameless volunteer.").

[25] Author Natasha Wyss summarizes the Court's faulty reasoning in *First Options*:

> [T]he majority failed to appreciate that these very inequities will likely result from its own ruling in *First Options*. A good example is in the case of an uninformed consumer who, unbeknownst to herself, signs a contract with a boilerplate clause that confers jurisdiction on the tribunal to rule on the arbitrability of the dispute. As previously mentioned, after *First Options* this will likely be a permissible submission of the arbitrability question to arbitration, as it is a 'clear and unmistakable' delegation of this question to the tribunal itself. Therefore, in practice, by providing for the 'narrow' review of section 10 of the FAA where there is a valid and enforceable *kompetenz-kompetenz* clause, the Court has endangered the very fundamental rights it claimed to protect.

Wyss, *supra* note 3, 367−68.

[26] Rau, *supra* note 15, at 304 (finding in his excellent review of the *First Options* decision, that courts and scholars alike have had difficulty understanding and applying the decision).

[27] *First Options of Chicago, Inc.*, 514 U.S. at 943 (citing *AT&T Technologies Inc.*, a labor arbitration case, for the proposition that parties may agree to have an arbitrator determine questions of arbitrability).

[28] *Id*. at 943 (stating that if parties agree to allow an arbitrator determine a matter, a "court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances").

odds with domestic arbitration practice and expectations, the Court emphasized that a court should not reach such a conclusion in the absence of "clear and unmistakable" evidence of the parties' intent to do so.[29] The heightened standard would preserve freedom of contract for parties that genuinely intended to allow arbitral determination of arbitrability, but would in the vast majority of cases insulate the judicial process and contracting parties from arbitrators who would confer jurisdiction upon themselves.

In the wake of *First Options*, federal and state courts have inconsistently defined under what circumstances the "clear and unmistakable" standard is met, and have likewise struggled to create an analytical framework for the rule.[30] That having been said, an increasing number of courts addressing the issue seem to have set a low threshold for finding the "clear and unmistakable" evidence required by the Court in *First Options*. Such a result is contrary to parties' reasonable expectations and threatens to divest parties of the traditional judicial safeguard of their right to proceed in court.[31] That is because when parties are found to have clearly and unmistakably entrusted such decisions to arbitrators, a court reviewing an arbitrator's decision will apply a highly deferential standard.[32] In essence, the rule allows arbitrators to have the first and last word regarding their jurisdiction to decide people's disputes.[33]

This Comment suggests that an increasing number of courts are applying *First Options* in a way that threatens to force parties to arbitrate when they did not agree to do so, and suggests ways to remedy the problem. Part II places the current controversy in context by briefly reviewing the development of the Supreme Court's jurisprudence concerning the Federal Arbitration Act (FAA), with an emphasis on how that jurisprudence has expanded the scope of the FAA's coverage while gradually minimizing judicial oversight of the arbitral process. Part III discusses *First Options* and the Court's subsequent FAA decisions as they relate to the question of who should decide arbitrability. Part IV discusses the dangers of finding *First Options* "clear and unmistakable" evidence lightly. Part V reviews federal and state cases that have addressed whether a broadly worded arbitration clause or extrinsic arbitral rules satisfy the *First Options* "clear and unmistakable" evidence standard and suggests that an increasing number of courts are finding such evidence too readily. Part VI proposes that courts should always independently review the arbitrability of consumer and employment disputes; that only in the rarest of circumstances

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[29] *Id*. at 944.

[30] *See generally* Stuart M. Widman, *What's Certain Is the Lack of Certainty About Who Decides the Existence of the Arbitration Agreement*, 59 DISP. RESOL. J. 54, 55 (2004) (stating that "[t]here is little uniformity in the courts as to when an arbitration clearly and unmistakably calls for the arbitrator to determine the existence of an arbitration agreement").

[31] *First Options of Chicago, Inc*., 514 U.S. at 945 (stating that the reason for requiring "clear and unmistakable evidence" is that "one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide").

[32] *Id*.

[33] Wyss, *supra* note 3, at 377.

should federal and state courts conclude that parties intended to arbitrate questions of arbitrability; and provides a framework for addressing challenges to the arbitrability of a dispute. Part VII concludes.

II. THE FAA AND ITS TRANSFORMATION

A. FAA's Enactment & Original Scope

Prior to the enactment of the Federal Arbitration Act (FAA) in 1925, contracting parties faced strong and embedded judicial hostility to arbitration.[34] Courts at the state and federal level applied a doctrine dating back to the English common law which disfavored arbitration agreements for a variety of reasons.[35] The common law disdain for arbitration meant that parties' contractual expectations were frequently disregarded.[36] Shortly after the beginning of the twentieth century, the State of New York, and then the United States Congress took steps to remedy the problem.

In 1920, New York passed a pro-arbitration statute that served as the foundation for what has become known as the FAA.[37] Five years later, Congress passed the FAA with the purpose of making arbitration agreements relating to commerce or maritime transactions valid and enforceable except upon such grounds existing at law or equity for the revocation of any contract.[38]

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[34] Legislative history provides an excellent historic snap-shot of the evolution of arbitration law:

> But it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action: nor would such an agreement be ground for a stay of proceedings until arbitration was had. Further, the agreement was subject to revocation by either of the parties at any time before the award. With this as the state of the law, such agreements were in large part ineffectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy.

S. REP. NO. 536-68, at 2 (1924).

[35] H. REP. NO. 96-68, at 2 (1924) ("[B]ecause of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate . . . This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts."); S. REP. NO. 536-68 at 2 (finding in addition to jealousy of jurisdiction, that the English common law courts were concerned that arbitration tribunals could not or would not do justice between the parties).

[36] S. REP. NO. 536-68, at 2 ("With this as the state of the law, such agreements were in large part ineffectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy.").

[37] *Id*. at 3 (indicating the New York arbitration law was passed in 1920); Southland Corp. v. Keating, 465 U.S. 1, 25 n.8 (1984) (indicating that the FAA was patterned after the New York arbitration act).

[38] Pertinent text of the FAA reads:

> [A] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such

In doing so, Congress unquestionably intended to eliminate *federal* judicial hostility toward arbitration. It is equally clear that Congress did not intend for the FAA to apply in state court.[39]

B. The FAA Was a Procedural Act Applicable in Federal Court

Notwithstanding the United States Supreme Court's pronouncements to the contrary, Congress did not intend for the FAA to apply in state court.[40] In the last twenty-five years, at least three Supreme Court justices have found the FAA, in its entirety, inapplicable to state court proceedings.[41] Their well-reasoned dissents are comprehensive, and there is no reason to agonize over them here. It will suffice to review a few fundamental points. As an initial matter, the Act lacks any express preemptive language.[42] In addition, sections 3 and 4 of the Act reinforce the idea that its provisions were intended to apply in federal court.[43] That the Act was intended to apply only in federal court is supported by the complete absence of its application in state courts for the first four decades following its enactment.[44] Finally, a review of the FAA's legislative history belies the notion that Congress intended the Act to apply in state courts.[45] Indeed, the Act declares simply that agreements for arbitration

> a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

United States Arbitration Act, 9 U.S.C. § 2 (2000).

[39] Some scholars have also suggested that the FAA was not intended to apply in consumer disputes, but rather, its application was to be limited to merchants of relatively equal bargaining power. *See, e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 641 (1996) (finding that Congress passed the FAA so that parties of equal bargaining power in arms-length transactions would enforce contracts for arbitration: "Congress did not intend to enforce arbitration agreements that had been foisted on ignorant consumers, and it did not intend to prevent states from protecting weaker parties").

[40] *Id*. at 649 (finding that most commentators have concluded that the FAA was intended to apply only in federal court).

[41] *Southland Corp*., 465 U.S. at 21−36 (1984) (O'Connor, J., dissenting); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 284−97 (1995) (Scalia, J., dissenting; Thomas, J., dissenting).

[42] Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989) (finding that the FAA contains no express preemptive provision).

[43] 9 U.S.C. § 3 (2000) (referring specifically to "courts of the United States"); 9 U.S.C. § 4 (2000) (providing a party may, under appropriate circumstances, compel arbitration by petitioning "any United States district court" and that service upon the recalcitrant party shall be made "in the manner provided by the Federal Rules of Civil Procedure")

[44] *Allied-Bruce Terminix Cos*., 513 U.S. at 286 (Thomas, J. dissenting) ("On its face, and considered out of context, § 2 draws no apparent distinction between federal courts and state courts. But not until 1959—nearly 35 years after Congress enacted the FAA—did any court suggest that § 2 applied in state courts.").

[45] *Southland Corp*., 465 U.S. at 25 (O'Connor, J., dissenting) (finding that the legislative history of the FAA conclusively establishes that Congress believed it was enacting a procedural statute applicable to federal courts only).

shall be enforced, and provides a procedure in the federal courts for their enforcement.[46]

C. FAA at a Crossroads: Expand or Contract?

Following the decision in *Erie Railroad v. Tompkins*, and in light of subsequent Supreme Court FAA jurisprudence, the Court had to choose between recasting the FAA as a statute enacted by Congress pursuant to its commerce powers and capable of preempting state law in diversity cases, or—contrary to Congressional intent—finding it inapplicable to federal diversity cases. The problem stemmed from the combined reasoning of three United States Supreme Court cases.[47] The combination of *Erie* and *Guaranty Trust Co. v. York* meant that a litigant should be able to achieve the same outcome in a state law action whether it proceeded in state court or in a federal court sitting in diversity.[48] This was to be achieved by applying state "substantive" law and federal "procedural" law in diversity actions. For purposes of *Erie* and *Guaranty Trust Co.*, whether law is substantive or procedural turns on whether application of federal general or procedural law will result in a different outcome in federal court than it would have in state court.[49] In *Bernhardt v. Polygraphic Co.*, the Court found that applying the FAA in a diversity case may well be outcome determinative.[50] Because under *Erie* and *Guaranty Trust Co.*, the substantive law of the state must apply in diversity cases, the Court was concerned that the Act may no longer apply in federal diversity cases.[51] Faced with this possibility, the Supreme Court decided in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*. to re-cast the Federal Arbitration Act as an exercise of Congress's power to regulate interstate commerce, rather than as merely procedural or general law applicable only to federal courts.

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[46] H. REP. NO. 96-68, at 2 (1924).

[47] Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956).

[48] *Guaranty Trust Co*., 326 U.S. at 109 (citing and elaborating upon the Court's holding in *Erie*: "The nub of the policy that underlies *Erie R. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.").

[49] *Id*.

[50] *Bernhardt*, 350 U.S. at 203 ("For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.").

[51] *Southland Corp*., 465 U.S. at 23 (1984) ("*Bernhardt* gave rise to concern that the FAA could thereafter constitutionally be applied only in federal-court cases arising under federal law, not in diversity cases.").

D. The Court's Decision in Prima Paint *Expanded the Scope of the FAA While Dramatically Limiting Judicial Oversight*

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the Court was faced with primarily two questions. The first of these questions was whether the FAA remained applicable in federal diversity actions in light of *Erie* and its progeny.[52] The second question was whether a party that had assented to a contract with an arbitration clause could later avoid arbitration by claiming that the entire contract was induced by fraud.[53] In answering the first question in the affirmative, the Court re-cast the FAA as a substantive federal law enacted pursuant to Congress's commerce power. That decision served as the foundation for what would ultimately become broad FAA preemption of state law.[54] In answering the second question in the negative, the Court created what has become known as the doctrine of "separability" which, among other things, dramatically limited judicial oversight of the arbitration process.[55]

1. Separability Doctrine Dramatically Limits Judicial Involvement

In *Prima Paint*, the Court was faced with the question whether an agreement to arbitrate contained in a contract may be avoided based upon an allegation that the entire contract was induced by fraud.[56] Based upon the express language of FAA section 4,[57] the Court determined that a judge must compel arbitration,[58] so long as the "making" of the agreement to arbitrate is not in issue. Applying the language of section 4, the Court reasoned that a party seeking to avoid arbitration has not placed the agreement to arbitrate in issue if the party attacks the contract generally rather than the arbitration agreement in particular.[59] As a result, if a party has entered into an agreement containing an arbitration clause and wishes to avoid arbitration, that party will not succeed merely by attacking the validity of the contract generally.[60] Thus, the allegation in *Prima Paint* that the contract was voidable for fraudulent inducement was not sufficient to put the making of the agreement to arbitrate in issue.[61] The making of the agreement to arbitrate would only have been in issue if the arbitration agreement itself was separately challenged as having been fraudulently induced.[62] The doctrine is profoundly pro-arbitration, since it

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[52] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404−05 (1967).

[53] *Id*. at 402.

[54] MACNEIL ET AL., *supra* note 9, at § 10.5.1 (indicating that *Prima Paint* had "nationalized American arbitration law").

[55] *Id*. at § 15:24 (describing the impact of the Prima Paint separability doctrine as "immense"); *id*. at § 15:26−15:27 (discussing the enormous array of contract defenses to which the courts have applied the separability doctrine).

[56] *Prima Paint Corp.*, 388 U.S. at 396−97.

[57] *Id*. at 403−04.

[58] This is the case as long as the scope of the arbitration clause is sufficiently broad to suggest the parties intended to arbitrate the particular dispute.

[59] *Prima Paint Corp*., 388 U.S. at 403−04.

[60] *Id*. at 404.

[61] *Id*.

[62] *Id*.

allows a wide range of challenges to the contract containing the arbitration clause to be heard by an arbitrator, rather than by a judge.[63] An example may help show the breadth of questions that are arbitrable under the separability doctrine, and the truly limited questions courts may address.

For example, A is in the interstate business of selling used cars, and B is in the market for a used car. B selects a car to purchase and signs a contract containing an arbitration clause. As is typical, the arbitration clause covers a broad array of disputes but is otherwise unremarkable. As it turns out, B's cognition is impaired due to dementia,[64] he is illiterate,[65] the contract contains unconscionable terms,[66] financing is at an usurious and illegal interest rate,[67] and the entire deal was fraudulently induced because A told B the car had 20,000 miles of use when indeed it had been driven for 200,000 miles.[68] B ultimately realizes he has been taken advantage of and files a lawsuit for rescission and damages based upon a state consumer protection statute. A makes a motion to stay the litigation and compel arbitration. Because B's allegations are not directed specifically at the arbitration clause—meaning he does not allege that the arbitration clause *itself* has unconscionable terms, is illegal, was fraudulently induced, etc.—the court will almost certainly require B to arbitrate his claims.[69] That is so despite the fact that the very contract containing the arbitration clause—the arbitrator's only source of authority—may later be found to be void. After *Prima Paint*, a court may consider only whether there is a "valid" arbitration agreement—separate and distinct from the rest of the contract—and whether a particular dispute is within the scope of that agreement.

2. Expansion of the FAA's Scope: Preemption of State Law

As discussed above, following its decision in *Bernhardt*, the Court was faced with the possibility that the FAA would no longer apply in federal

[63] MACNEIL ET AL., *supra* note 9, at § 15.3.2 (describing the wide variety of contract challenges that courts have applied the separability doctrine to, including fraud, illegality, consensual requirements, mutual mistake, frustration of purpose, ultra vires, duress, overreaching, and unconscionability).

[64] *See* Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 472 (5th Cir. 2002) (finding that the *Prima Paint* separability rule required the contract defense of incapacity to be decided by an arbitrator rather than a court, despite the fact that plaintiff had been "profoundly retarded since birth").

[65] *Id*. (the plaintiff could not even sign his name without assistance); Washington Mutual Fin. Group, LLC v. Bailey, 364 F.3d 260, 262 (5th Cir. 2004) (finding that illiteracy and a lack of disclosure regarding the arbitration agreement did not allow the plaintiff to avoid arbitration).

[66] MACNEIL ET AL., *supra* note 9, at § 15.3.2 (indicating courts have found allegations of unconscionability are for an arbitrator under the separability rule).

[67] *See generally* Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 1209 (2006) (finding, in the Court's first separability decision since *Prima Paint*, that an allegation that a contract is usurious and illegal in violation of consumer protection laws is for an arbitrator, not a court to decide).

[68] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403−04 (1967).

[69] *Buckeye Check Cashing, Inc.*, 126 S. Ct. at 1209.

diversity actions—an outcome contrary to Congressional intent.[70] The court dealt with this concern by re-casting the FAA as a substantive federal statute enacted pursuant to Congress's power to regulate in the fields of admiralty and interstate commerce. The Court held that to the degree Congress believed it was enacting general federal law arising in diversity cases, it did so only as a supplement to its admiralty and interstate commerce powers "which formed the principal bases of the legislation."[71] By holding that the FAA was enacted pursuant to Congress's power to regulate interstate commerce, the Court laid the foundation for subsequent decisions finding that the substantive provisions of the FAA preempted conflicting state law.[72]

Building upon the holding in *Prima Paint*, the Court's first proclamation regarding FAA preemption of state law was a bold one. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court found that the arbitrability of a dispute, whether in state or federal court, is governed by the FAA.[73] The Court found that section 2 of the Act is "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[74] In its next arbitration federalism case, the Court built upon its holding in *Moses H. Cone* and made an explicit statement regarding FAA preemption.

In *Southland*, a seven-justice majority held that the FAA preempts state law and state public policy to the extent that it conflicts with Section 2 of the FAA.[75] The Court reaffirmed that the FAA creates a body of substantive federal law that applies equally in state or federal court. The Court found that issues of arbitrability were to be decided under federal substantive law, of course with the caveat that arbitration provisions may be avoided on grounds that exist at law or equity for the revocation of any contract.[76] The Court found that the California franchise investment law at issue was not a ground for the revocation of *any* contract, but rather a ground for revoking arbitration agreements subject to the law. The Court made this determination despite the

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[70] *Prima Paint Corp.*, 388 U.S. at 417−18 (Black, J., dissenting) (finding that the *Prima Paint* majority's statutory rationalization was based upon the Second Circuit's reasoning in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (1959). In light of *Bernhardt*, the *Robert Lawrence* court had the choice of either holding the statute inapplicable to federal diversity actions contrary to Congressional intent, or hold that the FAA was passed pursuant to Congress's commerce powers and thus preserve the FAA's application in diversity cases.).

[71] *Id*. at 405.

[72] Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) (holding that the FAA preempts inconsistent state law, even as applied in state courts. In doing so, the Court relied upon the *Prima Paint* Court's reasoning).

[73] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 21, 26 (1983).

[74] *Id*.

[75] *Southland Corp.*, 465 U.S. at 10.

[76] *Id*. at 10−11.

fact that the California law did not, by its terms, single out arbitration agreements.[77]

In the years since its decision in *Southland*, the Supreme Court has not departed from the notion that the FAA, when applicable,[78] preempts state law to the extent that it conflicts with the express terms of FAA Section 2,[79] to the extent that it stands as an obstacle to accomplishing the full purposes and objectives of Congress,[80] and if applying state law would "undermine the goals and policies of the FAA."[81]

Applying the foregoing principles, the Court has found the FAA preempts state law in a variety of contexts. The FAA preempts state laws that as a matter of public policy require the judicial resolution of specific classes of claims.[82] The FAA likewise preempts state arbitration law when its application would foreclose arbitral determination of a dispute the parties agreed to resolve by arbitration.[83] Also preempted was a Montana consumer protection statute which mandated certain notice requirements before a party could be required to arbitrate a claim.[84] The recurring theme is that state law will be preempted to the extent it either delays, or requires the judicial resolution of, a claim that under the FAA would be sent to arbitration.

3. A Diminished Role for Courts Before First Options

Prima Paint and Supreme Court decisions based upon its reasoning essentially federalized U.S. arbitration law, since with few exceptions, the FAA applies and preempts contrary state law whenever interstate commerce is affected.[85] In federalizing U.S. arbitration law, the Court also federalized a

[77] *Id*. at 10.

[78] The parties to an arbitration agreement may contractually limit the application of the FAA, and may in fact choose the application of state law to the exclusion of the FAA. When the parties agree that the FAA is inapplicable, it will not preempt state law. *See* Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476−79 (1989) (finding that when parties expressly agree to be bound by state law, the FAA will not preempt otherwise conflicting state law).

[79] *Southland Corp*., 465 U.S. at 10.

[80] *Volt Info. Sciences, Inc*., 489 U.S. at 477.

[81] Doctor's Assoc. v. Casarotto, 517 U.S. 681, 685 (1996).

[82] *Southland Corp*., 465 U.S. at 10 (preempting California investment law which rendered certain claims non-arbitrable); Perry v. Thomas, 482 U.S. 483, 492 (1987) (preempting California labor law which allowed a party to bring an action in court for the collection of wages).

[83] Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58 (1995) (finding New York state arbitration law preempted to the extent that it prohibited arbitral claims for punitive damages when the parties agreement provided for the arbitration of punitive damages claims).

[84] *Doctor's Assoc*., 517 U.S. at 683.

[85] MACNEIL ET AL., *supra* note 9, at § 10.5.1 (indicating that *Prima Paint* had "nationalized American arbitration law"); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995) (extending the FAA's reach to the full extent of Congress's Commerce Clause power).

strong policy favoring the enforcement of arbitration agreements.[86] This favored policy found expression in the separability doctrine, and in the requirement that any uncertainties regarding whether a particular dispute falls within the scope of an arbitration agreement are to be resolved in favor of arbitration. Further narrowing judicial oversight into the arbitration process is the highly deferential standard of review courts apply to arbitrators' decisions.[87] The lone province of courts was the power to decide, independently, questions regarding the "arbitrability" of disputes. "Arbitrability" questions are of the most fundamental importance, since these questions concern whether a party validly agreed to arbitrate a dispute at all. It would be the most gross violation of a party's rights to deny access to the courts, and to require arbitral determination of a dispute the party had not agreed to arbitrate. The Supreme Court, keenly aware of that fact, warned that courts rather than arbitrators should answer such fundamental questions unless the parties to a contract clearly and unmistakably provided otherwise.[88] If parties did clearly and unmistakably manifest such an intention, then a court would be required to review an arbitrator's decision on the arbitrability of a dispute with great deference. Unfortunately, the Court's warning was seen as permitting the very evil it warned against.[89]

III. THE WARNING THAT BECAME PERMISSION

A. AT&T Technologies, Inc. v. Communications Workers of America

In *AT&T Technologies, Inc. v. Communications Workers of America*, the Court squarely faced the question whether a party may contractually provide for an arbitrator rather than a judge to determine if parties validly agreed to arbitrate a particular dispute.[90] Although the dispute arose in the context of labor arbitration, *AT&T Technologies*'s principles were later extended to commercial arbitration in *First Options*.[91] The dispute concerned whether AT&T violated the terms of a collective bargaining agreement (CBA) when it laid off a substantial number of its workers. The CBA contained a broad arbitration clause[92] that provided for arbitral resolution of disputes related to

[86] Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 21, 24 (1983) ("Section 2 is a Congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").

[87] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (finding that a court will set aside the decision of an arbitrator only in very unusual circumstances); MACNEIL ET AL., *supra* note 9, at § 40.1.4 (finding that "[h]owever they may articulate the results, courts generally refuse to second guess the arbitrator's determination").

[88] *First Options of Chicago, Inc.*, 514 U.S. at 944.

[89] Wyss, *supra* note 3, 367.

[90] AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 644 (1986).

[91] *First Options of Chicago, Inc.*, 514 U.S. at 944.

[92] The arbitration clause in *AT&T Technologies* read as follows:

the interpretation of the CBA, or the performance of any of the contract's obligations, unless a particular dispute was declared non-arbitrable by another section of the CBA.[93] Since questions of "arbitrability"—whether the agreement contains a valid arbitration clause and the scope of that clause—are certainly questions regarding the interpretation of the agreement, one plausible interpretation is that the parties had agreed to arbitrate questions of arbitrability. Such an interpretation is reinforced by the fact that *only* those matters specifically exempted from arbitration by another provision of the contract were not arbitrable. Since the validity and scope of the arbitration agreement were not explicitly exempted from arbitration, then one interpretation is that the parties agreed to arbitrate those matters.

Another section of the CBA exempted from arbitration certain managerial decisions regarding the hiring and firing of employees. Still another section appeared to limit the circumstances under which AT&T could permissibly lay off workers, and that section was not explicitly exempted from arbitration.[94] AT&T's position was that issues regarding the hiring and firing of employees were not arbitrable, and not surprisingly, the Union's position was that the section limiting the circumstances for layoff were arbitrable.[95] The district court found that the issues of arbitrability and the issues on the merits were essentially the same. Not wanting to decide the merits of an issue that the parties may have agreed to arbitrate, the district court ordered arbitration of the merits without first determining if the disputes were actually arbitrable. The Seventh Circuit Court of Appeals affirmed.[96]

The Supreme Court reversed, holding that questions of arbitrability are undeniably for judicial determination unless the parties clearly and unmistakably provide otherwise.[97] The Court found that if allowed to determine his own jurisdiction, the arbitrator "would be empowered to impose obligations outside the contract limited only by his understanding and conscience."[98] Of considerable importance was the fact that the CBA's broad arbitration clause unquestionably did not satisfy the "clear and unmistakable" evidence standard despite its breadth. The Court had no difficulty concluding that such a clause did not reflect the clear and unmistakable evidence necessary to bargain away the judicial determination of whether a party validly agreed to arbitrate a particular dispute. In *First Options*, the Court reaffirmed and strengthened the

> If the National and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties.

475 U.S. at 645 n.1.

[93] *Id*. at 645.

[94] *Id*.

[95] *Id*. at 646.

[96] *Id*. at 647.

[97] *Id*. at 649.

[98] *Id*. at 651.

rule that questions of arbitrability are for judicial determination absent clear and unmistakable evidence to the contrary.

B. First Options of Chicago v. Kaplan

In *First Options of Chicago v. Kaplan*, the Court endorsed the idea that under the FAA, parties may agree to have an arbitrator rather than a judge determine the arbitrator's jurisdiction, that is, whether a particular dispute is subject to arbitration.[99] Because the case came to the judicial system only after arbitration and the issuance of an award, the Court's true question was what standard of review to employ in a circumstance where an arbitrator had already made the determination that a dispute was arbitrable.[100]

The dispute arose between a firm that cleared trades on the Philadelphia Stock Exchange, First Options of Chicago, and three somewhat interrelated parties, Manuel Kaplan, Carol Kaplan, and their wholly owned investment company MKI.[101] MKI and the Kaplans owed First Options a substantial amount of money and their agreement to pay it back was reflected by a series of four separate documents. Only one of the documents contained an arbitration clause, and it was signed on behalf of MKI, although not personally signed by the Kaplans. The Kaplans and MKI did not repay the money to First Options's satisfaction, and as a result, First Options took control of MKI's assets and demanded payment personally from the Kaplans.[102] When the Kaplans did not pay, First Options sought to arbitrate the dispute. Although the Kaplans denied the dispute was arbitrable, a panel of arbitrators decided that they had jurisdiction over the Kaplans despite the fact that they were not parties to a contract containing an arbitration clause.[103] Ultimately the arbitration panel awarded First Options damages against the Kaplans and the Kaplans petitioned a federal district court to vacate the arbitration award. The district court confirmed the award, but the Third Circuit Court of Appeals reversed, finding the dispute was not arbitrable.[104]

The Court began its discussion by recognizing that the question of *who* decides whether disputes are arbitrable is a narrow, but critically important question.[105] The importance of the question is underscored because if an arbitrator may decide such questions, then a court may set aside the arbitrator's decision "only in very unusual circumstances."[106] Perhaps in recognition that a

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[99] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

[100] *Id*. at 941.

[101] *Id*. at 940−41.

[102] *Id*.

[103] *Id*.

[104] *Id*. at 941.

[105] *Id*. at 942 (recognizing the question is a narrow one but finding that "who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration").

[106] *Id*. at 942−43 (finding that a court will set aside an arbitrator's decision only in very narrow circumstances, and indicating such a standard of review would apply if parties agreed to allow an arbitrator to decide questions of arbitrability).

deferential scope of review with respect to an arbitrator's decisions regarding arbitrability would in effect deprive courts of any independent judicial review of arbitration proceedings, the Court made an important qualification to the general rule that in deciding whether certain matters are subject to arbitration, courts should apply ordinary principles of state contract law.[107]

The Court's qualification was that a finding that parties agreed to arbitrate questions of arbitrability under ordinary principles of state contract law is insufficient.[108] The court created a presumption *against* finding that parties agreed to allow an arbitrator to decide whether particular disputes were subject to arbitration. Because even sophisticated parties (such as the Kaplans) may not have contemplated the question of *who* should decide whether a particular matter is arbitrable, the Court required that the entrusting of such decisions to an arbitrator must be shown by "clear and unmistakable evidence."[109] The Court justified the rule because the question of "who should decide arbitrability" is an arcane question, and parties were not likely to focus on the "significance of having arbitrators decide the scope of their own powers."[110] Forcing parties to arbitrate the question of arbitrability under circumstances where the agreement was either silent or ambiguous as to that issue "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator would decide."[111] So far, so good. But what is this "clear and unmistakable evidence?"

The Court did not provide any guidance regarding what would satisfy the "clear and unmistakable" evidence standard. Because First Options alleged that the Kaplans had submitted to arbitration, not through a pre-arbitration written agreement, but by their conduct before an arbitration panel, the Court did not have the opportunity to demonstrate what evidence of an intent to arbitrate questions of arbitrability would be "clear and unmistakable" in the context of a pre-dispute arbitration agreement. The holding in *First Options* is simply that one may appear before an arbitration panel and argue that a dispute is not arbitrable without submitting to that panel's decision regarding arbitrability.[112]

C. Howsam v. Dean Witter Reynolds, Inc.

In *Howsam v. Dean Witter Reynolds, Inc*., the Court was asked to decide whether it was for a court or an arbitrator to apply a National Association of Securities Dealers arbitration rule that provided disputes would not be eligible for submission to arbitration if six or more years had elapsed since the occurrence giving rise to the claim had occurred.[113] The Court found that not every "potentially dispositive gateway question" was a question of arbitrability.

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[107] *Id*. at 944.
[108] *Id*. at 944−45.
[109] *Id*. at 945.
[110] *Id*.
[111] *Id*.
[112] *Id*. at 946.
[113] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 81 (2002).

Questions of arbitrability are limited to whether parties are bound by an arbitration clause and whether a particular dispute is within the scope of that clause.[114] The court determined that the NASD rule was a procedural rule that parties would have expected an arbitrator rather than a court would apply.[115]

As Professor Reuben has pointed out, the *Howsam* decision is important for the arguments that the Court refused to accept.[116] The petitioner in *Howsam* argued that a broad arbitration clause, either by itself or in combination with documents that incorporated NASD rules into the arbitration agreement by reference, constituted the "clear and unmistakable" evidence required by *First Options.*[117] The Court did not address the arguments in its opinion.[118] Professor Reuben argues that the Court's silence on these matters "speaks volumes."[119] At a minimum, the Court's decision not to accept such arguments is consistent with the idea that a broad clause or incorporation by reference falls short of the "clear and unmistakable" evidence standard.

IV. *FIRST OPTIONS*' POTENTIAL TO UNDERMINE RIGHTS TO JUDICIAL ACCESS

A. First Options*' Folly: Requiring Deferential Review*

There may be certain advantages to allowing an arbitrator to determine his or her own jurisdiction as a matter of timing, so long as courts maintain independent judicial review of such decisions.[120] *First Options* allows an individual to attend an arbitration proceeding, contest the arbitrator's jurisdiction, and participate in the proceeding without being considered to have submitted to the arbitrator's arbitrability determination. Unfortunately,[121] the *First Options* Court went one step further, and in dicta, indicated that parties may agree to submit questions of arbitrability to an arbitrator, and that if the parties did so, then a court would be required to review the arbitrator's decision deferentially.[122] Deferential review is the danger presented by *First Options*.[123]

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[114] *Id*. at 84.

[115] *Id*. at 85.

[116] *See generally* Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, at 866 (2003).

[117] *Id*.

[118] *See generally Howsam*, 537 U.S. 79.

[119] Reuben, *supra* note 116, 866.

[120] Wyss, *supra* note 3, at 378 (recommending legislation that would allow arbitrators to determine their own jurisdiction for purposes of timing, but also providing for independent judicial review).

[121] Rau, *supra* note 15, at 306 (finding that the Court's strategy was aimed at ensuring that parties could contest liability before an arbitrator without losing the right to contest jurisdiction, also indicating that it was unfortunate the Court's opinion was drafted broadly in terms of arbitrability).

[122] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

By requiring courts to defer to an arbitrator's arbitrability determination, *First Options* allows arbitrators to have the first and last word on their jurisdiction.[124] This presents a genuine risk that parties may be stripped of their rights to judicial access without any practical remedy. For example, assume that two parties signed a contract that contained an arbitration provision that was fraudulently induced, but that a court found demonstrated "clear and unmistakable" evidence of an intent to arbitrate questions of arbitrability. The court would not decide the question whether the arbitration clause had been fraudulently induced, rather, that would be a question for the arbitrator. Should the arbitrator decide that the clause was not fraudulently induced, a reviewing court would almost certainly uphold the arbitrator's decision.[125] Thus, by including the correct catch phrase in an arbitration clause, the fraudulent party could avoid meaningful judicial review and force a party to arbitrate who did not validly agree to do so.[126]

B. The Less Sophisticated Are Most at Risk

The idea that sophisticated parties of relatively equal bargaining power who are represented by counsel in an arms-length transaction should be able to structure their arbitration agreement as they please is not the least bit controversial.[127] Presumably those parties will have considered the benefits and risks of allowing an arbitrator to determine all aspects of a dispute, including the prospect of deferential judicial review regarding the arbitrator's jurisdiction to hear a particular dispute.

Concerns arise, however, when one considers the predicament of those with little or no bargaining power, or those with little legal understanding or sophistication who often have little choice but to sign contracts of adhesion.[128]

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[123] Wyss, *supra* note 3, at 368 ("[B]y providing for the 'narrow' review of section 10 of the FAA where there is a valid and enforceable *kompetenz-kompetenz* clause, the Court has endangered the very fundamental rights it claimed to protect.").

[124] *Id*. at 377.

[125] *See First Options of Chicago, Inc.*, 514 U.S. at 942 (finding that a court will set aside the decision of an arbitrator only in very unusual circumstances); MACNEIL ET AL., *supra* note 9, at § 40.1.4 (finding that "[h]owever they may articulate the results, courts generally refuse to second guess [an] arbitrator's determination").

[126] If courts review an arbitrator's arbitrability determination under a deferential standard, there is a significant risk that parties who in fact did not agree to arbitrate a matter will be forced to accept an arbitrator's decision. Under a deferential standard of review, that decision will rarely be upset.

[127] Rau, *supra* note 15, at 303 (finding that "[t]he notion that an arbitrator may determine with finality his own jurisdiction should, then, have no disturbing implications—at least when coupled with the assurance that the parties must be shown to have consented to his power to do so")

[128] *See* Sternlight, *supra* note 2, at 674 (finding it difficult to reconcile protection of individuals' rights to jury trials "with arbitration decisions approving clauses contained in hidden fine print, imposed on persons not required to sign or even initial the clause, and particularly when the persons upon whom the clauses are imposed may be uneducated and sorely lacking in bargaining power"). Authors David H. Taylor and Sara M. Cliffe

Traditionally, such parties have at least had the right to an independent judicial review regarding the question of whether they had validly agreed to arbitrate a particular dispute. That right may be jeopardized to the extent that merchants and other businesses insert canned arbitration clauses that deprive courts of the jurisdiction to independently review questions of arbitrability.[129] In that way, the merchant or business may determine in advance an advantageous forum for any disputes, and ensure that the resolution of those disputes are, as a practical matter, insulated from challenge in the courts.

It will make little difference whether a low standard for *First Options* clear and unmistakable evidence develops in case law regarding contracts between highly sophisticated multinational corporations, small mom and pop business, consumer contracts or employment contracts. If a low standard is established when courts are dealing with sophisticated parties, then that same low standard will likely be applied with equal force when courts are dealing with the less sophisticated. The U.S. Supreme Court has been quite clear that the FAA applies with equal force not only to small businesses, but to consumers and employees as well. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court found that the presence of bargaining inequality between an employee and its employer is not sufficient to invalidate an arbitration agreement.[130] In its most recent arbitration decision, the Court found that under the separability doctrine, arbitrators rather than courts should hear allegations that a consumer payday

summarize the predicament when the bargaining power between parties subject to arbitration is unequal:

> It is one thing for arbitration clauses to be enforced between parties of relatively equal bargaining power, who directly benefit by the reduction in delay, cost, and amount of technicalities, which results in a benefit to the business relationship. It is quite another for an arbitration clause to bar from court a party who merely purchased a single product or gained employment and was unaware of the ramifications of an arbitration clause. These people are often far less sophisticated and may be faced with the choice of signing the agreement or foregoing the benefit.

David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1149−50 (2002). *See also* Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1192 (2001) (indicating that arbitration clauses, often drafted by sophisticated businesses, are imposed upon consumers through adhesion contracts.).

[129] Author Natasha Wyss has identified serious problems stemming from the *First Options* decision:

> [O]ne can anticipate most industries interpreting *First Options* broadly and inserting boilerplate *kompetenz-kompetenz* clauses into all of their contracts. In this situation, the 'parties' agreement' is not likely to be that of the 'parties' at all, but instead the intention of *one*, usually corporate, actor. For example, one party to the agreement may include a clause which states: 'The parties agree that all disputes, whether statutory or contractual, including questions as to the arbitrability of disputes, shall be submitted to arbitration.' After *First Options*, this method of submitting the arbitrability question to arbitration will likely be upheld, as long as the clause is 'clear and unmistakable,' and not against the 'ordinary state-law principles that govern the formation of contracts.'

Wyss, *supra* note 3, at 366.

[130] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

loan contract was usurious.[131] With these cases, the Supreme Court has signaled to lower courts that the application of the FAA to contracts will not be made to depend on the level of equality or sophistication of contracting parties. To the extent a low standard for finding *First Options* "clear and unmistakable" evidence is established in cases concerning sophisticated commercial parties, that low standard will apply with equal force to the less sophisticated.

V. DOCTRINAL DEVELOPMENT IN LOWER COURTS & THE TREND TOWARD A CASUAL FINDING OF *FIRST OPTIONS*' CLEAR AND UNMISTAKABLE EVIDENCE

While lower court decisions since *First Options* have been inconsistent, many courts have been all too willing to find that parties have agreed to arbitrate questions of arbitrability under circumstances that are neither clear nor unmistakable. Of course, plain language in an arbitration agreement allocating to an arbitrator the power to decide whether disputes about the arbitration clause itself are subject to arbitration will nearly always suffice.[132] Such a result should be obvious, [133] and is not explored here. The question becomes murkier, however, when an arbitration clause is quite broad but still falls short of such clarity. It is in such cases the *First Options* presumption should require judicial determination of arbitrability.

Contrary to the guidance provided by the U.S. Supreme Court, some courts consider a broad arbitration clause sufficient to submit questions of arbitrability to an arbitrator.[134] In some ways even more unsettling, many courts have found the clear and unmistakable evidence standard met when an arbitral body's rules are referenced in a contract, and those rules indicate that an arbitrator will determine questions of arbitrability. In most cases, absolutely no inquiry is made into whether the parties even had the faintest idea what the rules said about arbitral jurisdiction. A few courts seem to have taken the Supreme Court's admonition in *First Options* more seriously, and reject the notion that a broad arbitration clause or reference to an arbitral forum's rules demonstrate the clarity needed to divest the courts of their fundamental role as gatekeepers to the arbitration process.

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[131] Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 1210 (2006).

[132] *See generally* Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 BAYLOR L. REV. 753, 789−90 (2004) (finding that where the language of the agreement is explicit there should be no doubt that the parties considered the issue and agreed to an arbitral resolution of the arbitrability question). Of course, such reasoning would not necessarily hold up in the context of many consumer and employment contracts of adhesion. Legally they would be found to have agreed, but in such a circumstance it would be a stretch to say they had "considered" the issue.

[133] Courts have recognized that agreements to arbitrate questions regarding the validity or scope of the arbitration agreement are sufficient. *See, e.g.* Galbraith v. Clark, 122 P.3d 1061, 1064 (Colo. Ct. App. 2005); Copeland v. Katz, No. 05-73370, 2005 WL 3163296, at *1−2 (E.D. Mich. Nov. 28, 2005).

[134] Berger, *supra* note 132, at 790−91 (summarizing some of the case law that has developed regarding whether a broad arbitration clause or incorporation by reference will satisfy the *First Options* "clear and unmistakable" standard).

A The Broad Arbitration Clause as "Clear and Unmistakable" Evidence

1. Federal Cases

Although the Supreme Court's decision in *AT&T Technologies* supports the idea that a broad arbitration clause is insufficient evidence of a clear and unmistakable intent to arbitrate arbitrability, the Second Circuit has nevertheless concluded that a broad arbitration clause is sufficient. In *PaineWebber Inc. v. Bybyk*, the Second Circuit Court of Appeals found that a broad arbitration clause that indicated "any and all controversies" between the parties would be arbitrated, including the "construction, performance, or breach of this or any other agreement" was clear and unmistakable evidence that the parties agreed to arbitrate questions of arbitrability.[135] Such a conclusion is plainly at odds with the Supreme Court's narrow construction of the broad arbitration clause in *AT&T Technologies* and the Court's concern in *First Options* that parties to the typical broad arbitration clause may not have considered the arcane question of arbitrability. To make matters worse, the court construed the agreement against Paine Webber as the drafter to the extent it was ambiguous, when in *First Options* the Supreme Court made clear that questions of arbitrability are for the courts to the extent an arbitration clause is ambiguous.[136] The Second Circuit re-affirmed *PaineWebber's* holding in *Bell v. Cendant Corp*. Relying in part on its decision in *PaineWebber* and in part upon a Supreme Court of Connecticut decision that predated *First Options* by nearly 15 years, the Second Circuit found that the language "any controversy arising in connection with or relating to this Agreement . . . or any other matter or thing" was evidence of a clear and unmistakable intent to arbitrate issues of arbitrability.[137] Fortunately, it seems that a majority of federal courts confronting this question have rejected the notion that a broadly phrased arbitration clause is clear and unmistakable evidence of a party's intent to arbitrate questions of arbitrability.

The Fourth, Eighth, Tenth and Eleventh Circuits have rejected arguments that a broadly worded arbitration clause is sufficient evidence of an intent to arbitrate questions of arbitrability. In a case that pre-dates *First Options*, but which relies upon *AT&T Technologies*, the Fourth Circuit found that broad language in an arbitration clause did not meet the clear and unmistakable evidence standard.[138] Likewise, the Eighth Circuit found that arbitration agreements to arbitrate "any controversy" or "all differences" did not evidence

[135] PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1199 (2d Cir. 1996).

[136] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

[137] Bell v. Cendant Corp., 293 F.3d 563, 568 (2d Cir. 2002).

[138] Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 117 (4th Cir. 1993) (regarding an arbitration clause that vested an arbitrator with exclusive jurisdiction to decide any disputes, stating "[w]e need not decide if anything short of a specific, express provision, such as 'all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,' would meet this test. It suffices to say that the typical, broad arbitration clause in the option agreement at issue here—which contains nothing approaching such a provision—does not.").

a clear and unmistakable intent to arbitrate questions of arbitrability.[139] The Tenth Circuit rejected the idea that a broad arbitration clause providing for arbitration of "'any and all disputes arising out of or relating to' the contract" provided clear and unmistakable evidence of the parties' intent to submit the question of the arbitration agreement's existence to an arbitrator.[140] The Eleventh Circuit determined that a National Future Trading Association rule indicating that "disputes between and among Members and Associates shall be arbitrated under these Rules," although susceptible to the construction that the parties intended to arbitrate arbitrability, still fell short of the *First Options* clear and unmistakable standard.[141]

2. State Cases

There is little state case law dealing with the question whether a broad arbitration clause is sufficient to refer questions of arbitrability to an arbitrator rather than a court. The case law is in conflict, with some jurisdictions finding a broad clause is sufficient, and others finding that it is not. A close reading of the arbitration provisions at issue reveals that subtle differences in the breadth of the clauses may account for the different results. Clauses that specifically confer general arbitral jurisdiction over the applicability or construction of the contract are more likely to be considered clear and unmistakable evidence that the parties agreed to arbitrate questions of arbitrability.[142] But where an arbitration clause merely provides for the blanket arbitration of "any" or "all" controversies or claims, some state courts are appropriately reluctant to conclude the parties entrusted the arbitrator with the power to decide whether disputes are arbitrable.[143]

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[139] Lebanon Chem. Corp. v. United Farmers Plant Food, Inc., 179 F.3d 1095, 1100 (8th Cir. 1999).

[140] Riley Mfg. Co. v. Anchor Glass Container Corp., 157 F.3d 775, 780 (10th Cir. 1998).

[141] Scott v. Prudential Sec., Inc., 141 F.3d 1007, 1012 (11th Cir. 1998).

[142] Galbraith v. Clark, 122 P.3d 1061, 1064 (Colo. Ct. App. 2005) (finding clear and unmistakable evidence to arbitrate arbitrability in an arbitration clause that provided "[a]ny dispute concerning this Agreement—the way it was formed, its applicability, meaning, enforceability, or any claim that all or part of this Agreement is void or voidable"); Stitak v. Royal Alliance Assoc., No. 97CA006723, 1998 WL 332930, at *3 (Ohio Ct. App. 1998) (citing *PaineWebber* for the proposition that "all controversies * * * concerning any transaction arising out of or relating to any account maintained by the undersigned, or the construction, performance, or breach of this or any other agreement between [the parties] * * * shall be submitted to arbitration[.]" is sufficiently broad to vest an arbitrator with the power to decide whether a dispute is arbitrable).

[143] Romano v. Goodlette Office Park, Ltd., 700 So. 2d 62, 64 (Fla. Dist. Ct. App. 1997) (finding that an arbitration clause does not satisfy the *First Options* standard when it does not specifically authorize an arbitrator to determine arbitrability or contain broad "all-inclusive" language that would implicitly authorize an arbitration panel to decide arbitrability, but rather provides "[i]n the event of any disputes over the terms of this agreement the dispute shall be submitted to arbitration under the rules of the American Arbitration Society. . ."); N. Augusta Assoc. Ltd. P'ship v. 1815 Exch., Inc., 469 S.E.2d 759, 762 (Ga. Ct. App. 1996) (finding that questions of arbitrability were not arbitrable under the language of the parties' arbitration agreement providing "Any controversy or claim arising out of or related to the contract, or the breach thereof, shall be settled by arbitration in

B. Incorporation by Reference as "Clear and Unmistakable" Evidence

A significant majority of federal and state courts confronting the issue have found that when the rules of an arbitral forum are referenced in an arbitration agreement, and those rules allow an arbitrator to determine issues of arbitrability, then those rules are incorporated by reference and reflect the "clear and unmistakable" evidence required by the Supreme Court in *First Options*. In considering the notion of incorporating the "clear and unmistakable" evidence standard by reference, Professor Rueben has aptly pointed out that such purported incorporation is even less clear and unmistakable evidence than a broad arbitration clause because "an incorporated expression of intent is one step removed from the arbitration provision itself, mere boilerplate referenced by more boilerplate."[144] Nevertheless, the majority of courts have allowed *First Options* clear and unmistakable evidence of the parties' intent to be incorporated by reference.

1. Federal Cases

Several circuit courts of appeals have found the *First Options* clear and unmistakable evidence standard met when an arbitral body's rules are referenced in the party's contract, and those rules indicate that an arbitrator will determine questions of arbitrability. An early and influential case was decided before *First Options*, but nevertheless applied the clear and unmistakable evidence standard that the *AT&T Technologies* court articulated in the collective bargaining arbitration context. In *Apollo Computer, Inc. v. Berg*, the First Circuit determined that an arbitration provision referencing the ICC rules

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accordance with the Construction Industry Arbitration Rules of the American Arbitration Association"); Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 692 N.E.2d 1167, 1168, 1173 (Ill. 1998) (regarding an arbitration clause that provided "it is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration," stating that "[t]he mere use of the word 'any' cannot suffice to establish the 'clear and unmistakable' evidence required by *First Options*"); Williams v. Litton, 865 So. 2d 838, 843−44 (La. Ct. App. 2003) (finding an arbitration agreement that provided that "[a]ny controversy or claim arising out of or relating to this Agreement shall be submitted to arbitration" did not meet the *First Options* requirement of clear and unmistakable evidence); *but see* Smith Barney Shearson Inc. v. Sachrow, 689 N.E.2d 884, 887 (N.Y. 1997) (favorably citing *PaineWebber* for the proposition that the words "any and all" are expansive enough to be clear and unmistakable evidence of an intent to arbitrate at least some questions of arbitrability concerning scope and timing).

[144] Author Richard C. Reuben discussing rationales the Supreme Court chose not to accept when it decided *Howsam*:

> [T]he purported incorporated agreement to arbitrate arbitrability provides even less evidence of a 'clear and unmistakable intent' to waive judicial access than may be found in a broad arbitration provision. After all, an incorporated expression of intent is one step removed from the arbitration provision itself, mere boilerplate referenced by more boilerplate. While such a procedure would clearly be more efficient for brokers and the courts, *First Options* was quite clear in rejecting efficiency rationales in favor of what appears to be a more specific case-by-case analysis 'to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms.'

Reuben, *supra* note 116, at 869; *accord* Rau, *supra* note 15, 304 (finding that "attempts to find a source of arbitral power in the rules of arbitral institutions alone must be circular").

required Apollo and Berg to arbitrate questions of arbitrability, despite an allegation that no contract or arbitration agreement existed between the parties.[145] Apollo and Dico entered into an agreement with an arbitration clause providing that the ICC rules would apply to any arbitration between the parties.[146] A dispute arose, Dico filed for bankruptcy under Swedish law and the bankruptcy trustee assigned Dico's contract rights to Berg. Berg sought arbitration and Apollo resisted on the ground that a non-assignment clause prevented Berg from being a party to the contract with Apollo.[147] The court found that because the disputed contract referenced the ICC rules, and because the ICC rules allowed for an arbitrator to determine arbitrability upon the showing of a prima facie agreement between two parties, the court's task was simply to determine if there appeared to be a prima facie agreement between them. The court concluded that Apollo's agreement to have all disputes resolved in arbitration according to the ICC rules "clearly and unmistakably" allowed an arbitrator to determine his or her own jurisdiction and determine if a valid arbitration agreement existed between Apollo and Berg. [148]

More recently, the Second and Eleventh Circuits have weighed in with their interpretations of AAA Commercial Arbitration Rule 7. Rule 7 provides that an arbitrator has 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."[149] In *Contec Corp. v. Remote Solution Co.,* the arbitration agreement in question provided that "[i]n the event of a controversy arising with respect to this Agreement . . . such controversy shall in the City of Albany, New York in accordance with the Commercial Rules of the American Arbitration Association."[150] From that statement, the court concluded that the parties had expressed a clear and unmistakable intent to delegate issues of arbitrability to an arbitrator.[151] Similarly, in *Terminix International Co. v. Palmer Ranch Ltd. Partnership*, the court did not address allegations that an

[145] Apollo Computer, Inc. v. Berg, 886 F.2d 469, 470−74 (1st Cir. 1989).

[146] *Id*. at 470.

[147] *Id*.

[148] *Id*. at 473.

[149] R-7. Jurisdiction:

> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
>
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
>
> (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

COMMERCIAL ARBITRATION RULES, *supra* note 1.

[150] Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208−09 (2d Cir. 2005).

[151] *Id*.

arbitration clause was illegal and deprived one of the parties of statutory rights.[152] Citing *Apollo Computer* and *Contec Corp.*, the court determined that because the parties agreed to arbitrate in accordance with the AAA Commercial Arbitration Rules, "the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid."[153] In contrast to the cases cited above, two circuit court of appeals cases have recently addressed the arbitrability of certain disputes without uttering a word about the ICC or AAA rules.

Much like the situations in *Contec Corp.* and *Apollo Computer*, one of the litigants in *Microchip Technology, Inc. v. U.S. Phillips Corp*. disputed the very existence of an arbitration agreement between itself and the other litigant.[154] Without any mention whether the ICC Rules could provide an arbitrator with jurisdiction over the litigants' arbitrability questions, the court of appeals decided it was for a court to decide whether an agreement to arbitrate existed between the parties.[155] Unfortunately the opinion does not reveal whether the court did not address the potential effect of the ICC rules because the issue was not briefed or because the court quietly rejected the incorporation by reference argument.

In *Marie v. Allied Home Mortgage Corp.*, the First Circuit Court of Appeals did not mention whether reference to the AAA rules might endow an arbitrator with the ability to rule on her or his own jurisdiction.[156] It is possible that the parties may not have raised the issue since the AAA's rules for employment disputes do not explicitly allow an arbitrator to rule on his or her jurisdiction as clearly as the Commercial Rules do; although, the rules for employment disputes might be susceptible to such a construction.[157] So without more information, it would be a stretch to say that this case or *Microchip Technology* stood in opposition to *Apollo Computer*, *Contec Corp.*, and *Terminix*.

In step with the U.S. Circuit Courts that explicitly addressed the incorporation by reference argument, the significant majority of lower federal courts that have considered the question since *First Options* have likewise concluded that a party's clear and unmistakable intent to provide for arbitral

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[152] Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332−33 (11th Cir. 2005).

[153] *Id*. at 1332.

[154] Microchip Tech., Inc. v. U.S. Phillips Corp., 367 F.3d 1350, 1358 (Fed. Cir. 2004).

[155] *Id*.

[156] *See generally* Marie v. Allied Home Mortgage Corp., 402 F.3d 1 (2005).

[157] National Rules for the Resolution of Employment Disputes, Rule 8 provides that shortly after arbitration proceedings are initiated, the arbitrator shall decide *inter alia* "which issues are to be arbitrated." Which issues are to be arbitrated is the essence of arbitrability. Because any attempted grant of arbitral jurisdiction is far less clear than that used in the Commercial Rules, the author speculates that far fewer, if any, courts would find a grant of jurisdiction to decide the arbitrability of disputes in such language. *See* AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, http://www.adr.org/sp.asp?id=22075 (last visited Mar. 1, 2006).

determination of arbitrability may be incorporated by reference.[158] Although most of these cases concern disputes between commercial parties of varying sophistication, it is evident that courts will also extend the fiction of an incorporated "clear and unmistakable" intent in the context of consumer transactions.[159] In contrast the author found only two, unpublished, post-*First Options* federal decisions that reject the idea of incorporating the clear and unmistakable intent required to submit questions of arbitrability to arbitration.[160]

2 State Cases

Few state courts have considered the question whether parties to a contract may incorporate by reference the clear and unmistakable evidence of intent to arbitrate questions of arbitrability. Recent state court cases have largely dealt with the question whether referencing the AAA's Commercial Arbitration Rules in a contract evidences *First Options* clear and unmistakable intent to arbitrate the existence, validity and scope of an arbitration clause.[161] The few states confronting the issue seem to be evenly split on the question. Decisions from state appellate courts in Arizona and California support the idea that the

[158] *See* Cong. Const. Co. v. Geer Woods, Inc., No. 3:105CV1665 (MRK), 2005 WL 3657933, at *2 (D. Conn. Dec. 29, 2005); Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc., 203 F.R.D. 677, 684 (S.D. Fla. 2001); Bayer CropScience, Inc. v. Limagrain Genetics Corp., No. 04-C-5-5820, 2004 WL 2931284, at *4 (N.D. Ill. Dec. 9, 2004); Sleeper Farms v. Agway, Inc., 211 F. Supp. 2d 197, 200 (D. Me. 2002); Johnson v. Polaris Sales, Inc., 257 F. Supp. 2d 300, 309 (D. Me. 2003) (finding incorporation of AAA rules as additional evidence of an intent to arbitrate arbitrability, but relied primarily on express terms of the clause which required the arbitration of the "arbitrability" of any matter); JSC Surgutneftegaz v. President of Harvard Coll., No. 04 Civ. 6069 (RCC), 2005 WL 1863676, at *6 (S.D.N.Y. Aug. 3, 2005); Prof'l Sports Tickets & Tours, Inc. v. Bridgeview Bank Group, No. CIV. A. 01-991, 2001 WL 1090148, at *5 (E.D. Pa. Sept. 13, 2001); Book Depot P'ship v. Am. Book Co., No. 3:05-CV-163, 2005 WL 1513155, at *3 (E.D. Tenn. June 24, 2005).

[159] Citifinancial, Inc. v. Newton, 359 F. Supp. 2d 545, 551−52 (S.D. Miss. 2005) (stating that the plaintiff's complaint was a consumer fraud action, and finding that incorporation of the AAA Commercial Arbitration Rules provided clear and unmistakable evidence of an intent to arbitrate questions of arbitrability, including whether plaintiff agreed to arbitrate her disputes).

[160] The author found only two post-*First Options* federal cases that rejected the incorporation by reference argument. Both cases arose from the United States District Court for the District of Maryland and both were decided by the same judge. *See* Diesselhorst v. Munsey Bldg., L.L.L.P., No. Civ. AMD 04-33302, 2005 WL 327532, at *4 (D. Md. Feb. 9, 2005) (finding "[s]imply by agreeing that any matters sent to arbitration would be governed by the AAA Rules, Diesselhorst and Munsey did not clearly and unmistakably demonstrate an intent to have an arbitrator determine the question of arbitrability"); Martek Biosciences Corp. v. Zuccaro, No. Civ. AMD 04-3349, 2004 WL 2980741, at *3 (D. Md. Dec. 23, 2004).

[161] *But see* Smith Barney Shearson Inc. v. Sacharow, 689 N.E.2d 884, 887 (N.Y. 1997) (addressing whether incorporation of the National Association of Securities Dealers rules into an arbitration clause reflects a clear and unmistakable intent to arbitrate questions of arbitrability).

First Options standard may be satisfied by referencing the AAA Commercial Arbitration Rules.[162]

The Arizona Court of Appeals' decision in *Brake Masters Sys., Inc. v. Gabbay* deserves close attention because it is an excellent example of the misapplication of *First Options'* principles. In *Brake Masters*, the parties' broad arbitration clause named their arbitrator of first choice and indicated that the arbitration would proceed according to the standard rules used by him.[163] The arbitration clause did not indicate what those standard rules were, if they were his own rules, or if they were the standard rules of an arbitral organization.[164] If the named arbitrator was unavailable, then the parties would attempt to agree on a replacement. The clause was silent regarding which rules an agreed upon replacement might use. Finally, if the named individual arbitrator was unavailable, *and* the parties did not mutually agree upon a replacement, *then* the parties would select an arbitrator and arbitrate in accordance with the AAA Commercial Arbitration Rules.[165] At the very most, the parties agreed to arbitrate in one of three ways: if the named arbitrator was available, according to his rules (whatever they were); according to no particular set of rules if the named arbitrator was unavailable and the parties mutually agreed upon a different arbitrator; or, according to the AAA rules in the event the first two ways were not applicable.[166] Under such an agreement, it would seem clear that if the named arbitrator were available, he would use his standard rules, but in that case, the actual rules to be used were not specified. It would make sense then that the parties did not give the named arbitrator authority to decide matters of arbitrability based upon his "standard rules" since those rules were not identified, and the parties consequently could not have known at the time the agreement was signed that whatever unnamed set of rules would be used had a provision allowing him to decide matters of arbitrability.

After a dispute arose between the parties, Brake Masters informed Gabbay of its intention to arbitrate the dispute. Gabbay resisted arbitration on the ground that he had not agreed to arbitrate the particular dispute, and refused to attend the arbitration.[167] At the arbitration, the named arbitrator decided that his

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[162] *See generally* Brake Masters Sys., Inc. v. Gabbay, 78 P.3d 1081 (Ariz. Ct. App. 2003); Dream Theater, Inc. v. Dream Theater, 21 Cal. Rptr. 3d 322 (Cal. Ct. App. 2004).

[163] *Brake Masters Sys., Inc.*, 78 P.3d at 1083.

[164] The arbitration clause in *Brake Masters Sys., Inc*. read as follows:

> Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by binding arbitration in Tucson, Arizona, before Lawrence H. Fleischman, Esq., in accordance with the standard rules of arbitration utilized by him. If Mr. Fleischman is unable or unwilling to serve as arbitrator, the parties will attempt to mutually agree upon a replacement. If they cannot agree within 10 days, then the arbitration will be conducted in Tucson, Arizona pursuant to, and by a single arbitrator selected in accordance with, the Commercial Arbitration Rules of the American Arbitration Association. Judgment upon the decision of the arbitrator may be entered in any court of competent jurisdiction.

Id.

[165] *Id*.

[166] *Id*.

[167] *Id*.

standard rules were the AAA rules and that he therefore was able to decide if the parties' dispute was arbitrable. Finding the dispute was arbitrable, the arbitrator ruled in favor of Brake Masters, and a Florida trial court affirmed the award over Gabbay's objection.[168] On appeal, the court found that there was substantial evidence that the arbitrator's standard rules were indeed the AAA rules, that the parties chose the AAA rules would apply in *some* situations, and that to incorporate those rules the parties did not need to use "magic words."[169] To arrive at the conclusion that the *First Options* clear and unmistakable evidence standard did not require "that the arbitration agreement specifically state that the arbitrator has the primary power to decide the arbitrability of the issues," the court cited three U.S. Circuit Court opinions, two of which were decided before *First Options*, and none of which dealt with the allocation of power to decide arbitrability.[170] Having concluded that the parties clearly and unmistakably entrusted questions of arbitrability to an arbitrator, the court was required to give the arbitrator's arbitrability determinations considerable deference.[171]

Delaware, Florida and South Dakota courts have taken a contrary position. In *Willie Gary LLC v. James & Jackson LLC*, the Delaware Court of Chancery determined that the mere reference to the AAA Commercial Arbitration Rules in an arbitration clause does not express clear and unmistakable evidence consistent with *First Options*.[172] Although the court recognized that its decision was contrary to the "weight of federal authority," it nevertheless found reference to the AAA rules insufficient.[173] In deciding there was not clear and unmistakable evidence that the parties entrusted the arbitrator with such powers, the court noted that since the AAA Rules were amended to allow an

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[168] *Id*.

[169] *Id*. at 1087.

[170] *Id*. at 1087−88; *see generally* Bryson v. Gere, 268 F.Supp. 2d 46 (D.D.C. 2003); Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263 (7th Cir. 1976); Rainwater v. Nat'l Home Ins. Co., 944 F.2d 190 (4th Cir. 1991).

[171] *Brake Masters Sys., Inc.*, 78 P.3d at 1088.

[172] The judge's reasoning was as follows:

> Although I concede that this line of cases has a rational basis, I do not believe they are persuasive exercises in contractual interpretation. They are instead illustrative of the continuing policy preference, even after *First Options*, of federal courts with burgeoning dockets to refer even the question of arbitrability to arbitration. In essence, these decisions hold that, irrespective of *First Options*, if parties to a contract want an organization like the AAA to arbitrate some, but not necessarily all, disputes, they must expressly indicate that the arbitrator may not determine questions of arbitrability but must only decide those substantive claims within her jurisdiction as determined by a court. In other words, if parties wish that a certain class of disputes be arbitrated by an organization whose arbitration rules permit an arbitrator to rule on arbitrability, they must explicitly indicate that disputes about arbitrability are reserved to the judiciary. That appears to reverse the command of *First Options*, which required a clear and unmistakable expression of the intent to divest the judiciary of the power to decide arbitrability.

Willie Gary LLC v. James & Jackson LLC, No. Civ. A. 1781, 2006 WL 75309, at *7−8 (Del. Ch. Jan. 10, 2006).

[173] *Id*. at *7.

arbitrator to rule upon questions of arbitrability, numerous cases where parties had incorporated the AAA rules had been heard in the Delaware courts and yet none of those parties believed their issues of arbitrability were for the arbitrator to decide. "In other words, it was not obvious to those parties, who were represented by sophisticated counsel, that they had procured an arbitral forum already, simply by inserting a clause mentioning the AAA rules in the contract."[174]

State courts in Florida and South Dakota have likewise rejected the notion of incorporating *First Options* clear and unmistakable intent by reference, albeit for somewhat different reasons. The Florida Court of Appeals seems to have concluded that in order to demonstrate the evidence of intent required by *First Options*, a party must explicitly use language that expressly allocates jurisdiction over questions of arbitrability to the arbitrator.[175] The parties to the contract in *Morton v. Polivchak* signed a contract that called for arbitration according to the AAA Mediation and Arbitration Rules for the Commercial Arbitration and Mediation Center for the Americas.[176] Those rules have a provision granting the arbitrator jurisdiction to decide arbitrability that is nearly identical to the provision in Rule 7 of the Commercial Rules.[177] Despite that fact, the court seems to have concluded that because the rules did not explicitly say the arbitrator could rule upon "arbitrability," that there was not *First Options* clear and unmistakable evidence.[178] The contract in *Flandreau Public School Dist. #50-3 v. G.A. Johnson Const., Inc*., required arbitration to be conducted according to the AAA's Construction Industry Arbitration Rules which, just like the Commercial Rules, provide the arbitrator the power to rule on whether a dispute is arbitrable.[179] The court first entertained an argument that the clause was broad enough to grant the arbitrator such authority. The

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[174] *Id*. at *7−8.

[175] Morton v. Polivchak, No. 2005-215, 2006 WL 335042, at *5 (Fla. Dist. Ct. App. Feb. 15, 2006).

[176] *Id*. at *1.

[177] *See* Rule 16 of the AAA Mediation and Arbitration Rules for the Commercial Arbitration and Mediation Center for the Americas:

> Article 16: 1. The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. 2. The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. 3. Objections to the arbitrability of a claim must be raised no later than thirty (30) days after notice to the parties of the commencement of the arbitration by CAMCA and, in respect to a counterclaim, no later than thirty (30) days after filing the counterclaim.

AMERICAN ARBITRATION ASSOCIATION, CAMCA MEDIATION AND ARBITRATION RULES, http://www.adr.org/sp.asp?id=22092 (last visited Feb. 19, 2006).

[178] *Morton*, 2006 WL 335042, at *2.

[179] Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Constr., Inc., 701 N.W.2d 430, 432 (S.D. 2005) ("The agreement finally provided that mediation and arbitration were to be conducted in compliance with the Construction Industry Arbitration Rules of the American Arbitration Association (AAA). Those arbitration rules provided that the arbitrator had '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.'").

court rejected that argument, finding that the clause did not explicitly reference "arbitrability."[180] The court also found that reference to the AAA rules, in the absence of an arbitration clause that explicitly referenced "arbitrability," fell short of the clear and unmistakable evidence required by *First Options*.[181]

C. Summary of Lower Court Decisions

Since the *First Options* Court gave lower courts no guidance regarding what would constitute clear and unmistakable evidence to arbitrate questions of arbitrability in the context of a pre-dispute arbitration agreement, it is unsurprising that lower court case law has been inconsistent in defining the standard. But despite the inconsistency in the case law, there is an emerging trend toward finding *First Options* clear and unmistakable evidence under circumstances that are questionable at best.

The idea that a broad arbitration clause meets the *First Options* standard is undermined by the Supreme Court's decision in *AT&T Technologies*,[182] and seems to be foreclosed by *First Options* and *Howsam*.[183] While it appears the majority of jurisdictions addressing the question have rejected the idea that a broad clause is sufficient to satisfy the clear and unmistakable standard, the influential Second Circuit Court of Appeals, as well as New York state courts, hold to the contrary.[184] To the extent that the Second Circuit remains isolated among circuit courts of appeals there is hope that it will change course and fall in line with other circuit courts of appeal. Of much greater concern is the increasing frequency with which courts are finding that *First Options* "clear and unmistakable" evidence may be incorporated by reference.

The last two years alone have seen a significant increase in the number of courts accepting the incorporation argument when the rules of an arbitral forum such as the AAA have been referenced in an arbitration clause.[185] The trend is

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[180] *Id*. at 437.

[181] *Id*. at 437 n.6.

[182] Finding that the parties had not clearly and unmistakably agreed to arbitrate arbitrability despite the following broad arbitration clause:

> If the National and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties.

AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 645 n.1 (1986).

[183] Reuben, *supra* note 116, at 867 (finding that in *First Options* and *Howsam* the Court rejected the idea that a broad arbitration clause was sufficiently clear and unmistakable evidence of intent to arbitrate questions of arbitrability.)

[184] PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1199 (2d Cir. 1996); Bell v. Cendant Corp., 293 F.3d 563, 568 (2d Cir. 2002); Smith Barney Shearson Inc. v. Sacharow, 689 N.E.2d 884, 887 (N.Y. 1997).

[185] In the last two years, no fewer than two circuit courts of appeals, five federal district courts and one state court found that referencing the AAA rules in an arbitration clause was sufficient to incorporate *First Options* clear and unmistakable evidence. *See* Contec Corp. v. Remote Solution, Co., 398 F.3d 205, 208−09 (2d Cir. 2005); Terminix Int'l Co. v. Palmer

significant for a number of reasons. It may be that the last two years have seen the first major waive of disputes since the AAA amended its rules to provide arbitrators with the jurisdiction to determine if disputes are arbitrable.[186] Additionally, courts will be much more likely to consider *First Options*' standard to be met by incorporation in light of the two circuit courts of appeals decisions in 2005 endorsing that approach.[187] Perhaps most disturbing is the reflexive manner in which courts conclude that such evidence meets *First Options'* clear and unmistakable evidence standard.[188] Although perhaps these decisions may be accounted for on the basis that courts are more willing to hold large sophisticated businesses to the letter of their agreements, that is an insufficient explanation in light of the fact that the Court developed the high standard elucidated in *First Options* in the context of a dispute between sophisticated business people. It seems obvious that maintaining a high standard is more important when dealing with less sophisticated parties who are even less likely to have considered the arcane question posed in *First Options*, but as already mentioned, to the extent a lower standard is developed between sophisticated parties who maybe should have known better, courts will likely apply that standard to the less sophisticated as well.[189]

To the extent this trend continues, parties who did not agree to arbitrate may be forced to arbitrate questions of arbitrability simply because their agreement references some extrinsic standard. As Professor Reuben has observed, an incorporated intent is even less "clear and unmistakable" than the intent found in a broad arbitration clause.[190] It would seem that courts that

Ranch Ltd. P'ship, 432 F.3d 1327, 1332−33 (11th Cir. 2005); Cong. Const. Co. v. Geer Woods, Inc., No. 3:105CV1665 (MRK), 2005 WL 3657933, at *2 (D. Conn. Dec. 29, 2005); Bayer CropScience, Inc. v. Limagrain Genetics Corp., No. 04-C-5-5820, 2004 WL 2931284, at *4 (N.D. Ill. Dec. 9, 2004); JSC Surgutneftegaz v. President of Harvard Coll., No. 04 Civ. 6069 (RCC), 2005 WL 1863676, at *6 (S.D.N.Y. Aug. 3, 2005); Book Depot P'ship v. American Book Co., No.3:05-CV-163, 2005 WL 1513155 at *3 (E.D. Tenn. June 24, 2005); Citifinancial, Inc. v. Newton, 359 F. Supp. 2d 545, 551−52 (S.D. Miss. 2005); Dream Theater, Inc. v. Dream Theater, 21 Cal. Rptr. 3d 322, 329 (Cal. Ct. App. 2004). It is evident that these decisions represent an emerging trend when compared to decisions taking a contrary position. see Diesselhorst v. Munsey Bldg., L.L.L.P., No. Civ. AMD 04-33302, 2005 WL 327532, at *4 (D. Md. Feb. 9, 2005); Willie Gary LLC v. James & Jackson LLC, No. Civ. A. 1781, 2006 WL 75309, at *7−8 (Del. Ch. Jan. 10, 2006); Morton v. Polivchak, No. 2005-215, 2006 WL 335042, at *2−3 (Fla. Dist. Ct. App. Feb. 15, 2006); *Flandreau Pub. Sch. Dist. No. 50-3*, 701 N.W.2d at 436−37.

[186] Reuben, *supra* note 116, at 869.

[187] *Contec Corp.*, 398 F.3d at 208; *Terminix Int'l Co.*, 432 F.3d at 1332−33.

[188] *E.g.*, *Terminix Int'l Co.*, 432 F.3d at 1332−33 (without any independent analysis of the standard, the court cited *Apollo Computer v. Berg* and *Contec Corp.* to determine that reference to the AAA Rules incorporates the required "clear and unmistakable" evidence by reference).

[189] Ware, *supra* note 4, at 171−72 ("That the consumer did not read or understand the arbitration clause does not prevent the consumer from consenting to it. Nor does the consumer's ignorance that an arbitration clause is included on the form . . . They are not statements of law peculiar to arbitration clauses . . . The norm in contract law is consent to the unknown.").

[190] Reuben, *supra* note 116, at 869 (finding that the addition of an arbitration clause referencing the intent to arbitrate "surely would give little comfort to courts that require

increasingly find the incorporation by reference argument persuasive, are applying a pro-arbitration presumption regarding who decides arbitrability despite the Supreme Court's instructions to the contrary.[191]

To round out the discussion of the recent lower court case law, a word should be mentioned about what if any effect the liberalized standard is having on individuals with little or no bargaining power, such as small relatively unsophisticated businesses, employees and consumers. Although it is difficult to tell to what degree the case law that has developed under *First Options* is adversely affecting small businesses that may lack sophistication or bargaining power, the recent increase in the number of cases contesting whether incorporating an arbitral forum's rules by reference satisfies the *First Options* standard suggests that many commercial parties did not believe they had allocated arbitrability questions to an arbitrator. Because much of the case law has developed in the context of pre-arbitration judicial proceedings, it is difficult to say how often deferential review is forcing parties to arbitrate matters that the parties did not agree to arbitrate. What is clear, however, is that courts will not hesitate to apply *First Options*' deferential standard of review when they conclude that parties agreed to arbitrate questions of arbitrability—even if that means forcing parties to arbitrate claims that would otherwise would have been decided in court.[192] Furthermore, there is no reason to assume that consumers or employees will receive more favorable treatment.[193]

'clear and unmistakable' evidence of such waiver because they are 'understandably' concerned about 'forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.'"); Rau, *supra* note 15, at 304 (finding that "attempts to find a source of arbitral power in the rules of arbitral institutions alone must be circular").

[191] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944−45 (1995) (indicating that with regard to questions of arbitrability, the usual pro-arbitration policy should be reversed).

[192] Brake Masters Sys., Inc. v. Gabbay, 78 P.3d 1081, 1088 (Ariz. Ct. App. 2003) (rejecting the argument that the court should have passed judgment on issues not connected to the settlement agreement because they were not subject to arbitration: "[T]he arbitrator decided that the issues were, in fact, subject to arbitration. As we have concluded above, the trial court correctly found that the arbitrator had authority to make that decision. Once the trial court made that finding, it was required to defer to the arbitrator's ruling on arbitrability, as it would on any other ruling. . .Arguing that the decision on the arbitrability issue was incorrect is not a proper ground. . .to object to a court's confirmation of an arbitration award.").

[193] Citifinancial, Inc. v. Newton, 359 F. Supp. 2d 545, 546 (S.D. Miss. 2005) (finding consumer agreed to arbitrate arbitrability in the context of a consumer fraud action); Galbraith v. Clark, 122 P.3d 1061, 1063 (Colo. Ct. App. 2005) (finding that an employee who attempted to bring claims in court against her former supervisors for harassment and gender discrimination clearly and unmistakably agreed to arbitrate questions of arbitrability).

VI. RECOMMENDATIONS

A. First Options*' Deferential Review Should Not Find Its Source in Pre-Dispute Consumer and Employment Arbitration Agreements*

Many consumer and employment contracts are offered by parties with superior bargaining power on a "take it or leave it" basis to parties that have little or no bargaining power or sophistication.[194] The ability of the superior party to insulate the arbitral process from any meaningful judicial review through the application of the Court's rule in *Kaplan* cannot be reconciled with the Court's concern that unwilling parties should not be forced to arbitrate "a matter they reasonably would have thought a judge, not an arbitrator, would decide."[195] It is even less consistent with the Court's concern expressed in *Gilmer* that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"[196] Indeed, as so-called "*First Options"* clauses appear with greater frequency in employment and consumer contracts, courts likely will have little to say about whether an arbitration agreement should be revoked due to fraud or overwhelming economic bargaining power because, following the rule in *First Options,* whether an arbitration clause should be invalidated will be a matter of "arbitrability" for an arbitrator that a court will allow great deference to.[197]

It should be obvious that when it comes to most consumer and employee contracts, the *real* threat is not the misapplication of the AAA rules or other arbitral rules, or the misreading of broad arbitration clauses. No doubt, such rulings will make it easier for large companies to deprive these parties of an independent judicial determination regarding the arbitrability of their disputes. While that is problematic, the root of the problem is that because consumers and employees often have little to no bargaining power, they are often compelled by economic realities to sign adhesion contracts. I suggest that the primary threat to consumers and employees is deferential review of an arbitrator's arbitrability determination *regardless* of how courts define *First Options'* clear and unmistakable evidence standard.

When parties have severely diminished bargaining power it makes little practical difference whether an arbitration clause confers jurisdiction to decide arbitrability in an explicit manner, or more subtly. That is because the prospective employee or consumer *is* going to sign a contract containing an arbitration clause due to a lack of meaningful choice in the matter. When a

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[194] *See* Sternlight, *supra* note 2, at 674; Taylor & Cliffe, *supra* note 128, at 1149−50; Smith, *supra* note 128, at 1192.

[195] *First Options of Chicago, Inc.*, 514 U.S. at 942.

[196] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

[197] *First Options of Chicago, Inc.*, 514 U.S. at 942 (finding that a court will set aside the decision of an arbitrator only in very unusual circumstances).

person truly needs a job, and a prospective employer requires that all employees sign an arbitration clause as a condition of employment, prospective employees are going to sign the clause. When a consumer needs to purchase a product, and that product, as well as similar products from other manufacturers, cannot be purchased without agreeing to arbitration, the consumer is simply going to sign the contract containing the clause.[198] The idea that people genuinely agree to arbitrate at all in many consumer and employment contracts is itself a fiction, when either those parties are often unaware that a contract has an arbitration clause, and/or that party has no practical choice but to agree to it.[199] The idea that in such an instance an individual thought of, understood and "clearly and unmistakably" agreed to the "arcane" question of whether an arbitrator may pass on his or her own jurisdiction is sheer comedy.

To protect this class of individuals, Congress should amend the Federal Arbitration Act to ensure employee and consumer rights to have a judge independently decide if they validly agreed to arbitrate their disputes. The call for legislative action in this area of consumer and employment arbitration is not a new one. A number of commentators have called upon Congress to enact legislation to protect consumers from the arbitration process[200] or to inject clarity into the process of determining when parties have agreed to let arbitrators decide questions of arbitrability.[201] The legislative action called for here is much narrower than that called for by others. Congress should simply preserve consumers' and employees' resort to independent judicial determination of arbitrability questions.

B. The "Clear and Unmistakable" Standard Should Require Plain Language

For those who do have some bargaining power, such as merchants and business persons, the misinterpretation of broad arbitration clauses and incorporation by reference begins to work its mischief. Because many of these

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[198] An excellent example of the lengths a consumer might have to go to in order to refuse arbitration appears in an Alabama Supreme Court case. The plaintiff had previously purchased an automobile from a dealer that required her to sign three arbitration agreements, one of which unquestionably required her to arbitrate questions of arbitrability: "Any claim or dispute, whether in contract, tort or otherwise (including the interpretation and scope of this clause and the arbitrability of any issue), between you and us or our employees, agents, successors or assigns, which arise out of or relate to this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election (or the election of any such third party), be resolved by a neutral, binding arbitration and not by a court action." The plaintiff wanted to trade in the automobile and purchase a new one. The plaintiff, not wanting to be forced to sign another arbitration agreement as a condition to the transaction, approached no fewer than 21 other dealerships, all of which would not transact business without a signed arbitration agreement. *See* Jim Burke Auto. Inc. v. McGrue, 826 So. 2d 122, 124−27 (Ala. 2002).

[199] Sternlight, *supra* note 2, at 674; Taylor & Cliffe, *supra* note 128, at 1149−50; Smith, *supra* note 128, at 1192.

[200] Taylor & Cliffe, *supra* note 128, at 1088; Smith, *supra* note 128, at 1195; Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 268 (1995).

[201] Wyss, *supra* note 3, at 378.

parties do have the ability to control what language appears in an arbitration agreement, courts do these parties and the arbitration process a disservice when they casually find that parties clearly and unmistakably agreed to arbitrate questions of arbitrability. To avoid such a result, and consistent with the high standard called for in *First Options*, courts should require plain language delegating to the arbitrator the task of determining whether any dispute may be arbitrated. Given that when parties agree to such an arrangement, courts will upset an arbitrator's decisions concerning arbitrability only in the rarest of circumstances, the drafter of such an arbitration clause will have succeeded in insulating the arbitration process from any meaningful judicial review.[202]

Considering what is at stake, at a minimum, the drafter of an arbitration clause should be required to use plain language that can be understood by a layman of minimal sophistication. Such a result might be accomplished by inserting the following language into an arbitration agreement: "An arbitrator and not a court will decide if any dispute or controversy will be decided by arbitration. An arbitrator will determine: 1) whether this contract is valid and enforceable, 2) whether this arbitration clause is valid and enforceable, and 3) whether any matter, dispute or controversy is within the scope of this arbitration clause." Mentioning the word "arbitrability" will add nothing since few individuals will have the slightest idea what that word means. So long as the arbitration clause makes clear that an arbitrator will decide the validity and scope of the agreement to arbitrate, the word "arbitrability" is unnecessary. If a party wished also to incorporate the AAA Commercial Arbitration Rules, or similar rules, explicit incorporation would provide additional evidence that the parties intended to entrust an arbitrator with the task of determining which, if any, disputes were arbitrable.

1. The Use of Plain Language Is Consistent with First Options

Perhaps in recognition that consenting to arbitrate the question of whether a dispute is arbitrable impinges upon an area of arbitration law that has from the beginning been a matter for the courts, the US Supreme Court's arbitrability decisions tell us that lower courts should look at such claims with a skeptical eye. In *AT&T Technologies*, the Court required clear and unmistakable evidence of an intent to arbitrate arbitrability—and found that a broad arbitration clause did not provide the requisite evidence.[203] In *First Options*, the Court warned lower courts that it was unlikely even for sophisticated business people to have considered the "arcane" question of whether an arbitrator should have jurisdiction to rule on his or her own jurisdiction to hear a particular dispute.[204] As such, the Court created a presumption that such matters were not arbitrable, separate and apart from the application of state contract law.[205] The Court created a presumption *against* finding that parties had agreed to delegate

[202] *First Options of Chicago, Inc.*, 514 U.S. at 942 (finding that a court will set aside the decision of an arbitrator only in very unusual circumstances).

[203] AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 651−52 (1986).

[204] *First Options of Chicago, Inc.*, 514 U.S. at 945.

[205] *Id*. at 945.

such questions to an arbitrator rather than a court. For such a finding, clear and unmistakable evidence is required.[206] The use of plain language is the best and most certain way to overcome the presumption against arbitral determinations of arbitrability. It is perplexing that a party who has thought about this issue would not spell it out in such a way that would put all doubts to rest. Courts should be satisfied with nothing less.

2. Plain Language Will Enhance Certainty and Decrease Litigation

Among the FAA's chief policies is the "rapid and unobstructed" resolution of disputes.[207] Despite that goal, and somewhat ironically, substantial litigation is generated every year by parties disputing whether they agreed to arbitrate a particular matter.[208] Clarity of language in arbitration agreements would enhance the drafting party's certainty that disputes will indeed be resolved by arbitration, and consequently should in many cases reduce the need for litigation. Non-drafting parties to a broad arbitration clause or to a clause that incorporates the rules of an arbitral body can reasonably claim that the language of the clause is ambiguous or at least lacks the "clear and unmistakable" evidence required by the *First Options* Court. Because many jurisdictions still have not developed a body of case law on this subject, the drafter of an arbitration agreement should provide the utmost clarity, or otherwise risk financing the development of case law through costly litigation.

C. A Role for State Courts

For the last twenty years state law has become increasingly marginalized as the U.S. Supreme Court took upon itself the task of re-writing and expanding the coverage of the FAA.[209] The FAA's scope now extends to the full breadth of the Commerce Clause of the U.S. Constitution. To the extent a contract affects interstate commerce, it will fall under the rubric of the FAA which preempts all conflicting state law.[210] This expansion has come at a heavy price to the states. It is clear, for instance, that state laws designed to protect citizens from arbitrating when they have not agreed to do so will be preempted by the FAA to the extent those laws would withhold a claim from arbitration that the FAA would allow.[211]

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[206] *Id*.

[207] Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 21, 23 (1983).

[208] Frank Z. LaForge, *Inequitable Estoppel: Arbitrating With Nonsignatory Defendants Under* Grigson V. Creative Artists, 84 TEX. L. REV. 225 (2005) (finding that "the single most litigated contractual issue is whether to enforce a written arbitration term in an apparently binding agreement").

[209] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 282−84 (1995) (O'Connor, J., concurring) (arguing that "over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation." Justice O'Connor also found that the Court's decision that section 2 of the FAA extends to the full limits of Congress's Commerce Power displaces many state statutes designed to protect consumers.).

[210] *Id*. at 282.

[211] *Id*.

In *Doctor's Associates v. Casarotto*, the U.S. Supreme Court made clear that state laws designed to protect citizens from unintentionally entering arbitration agreements would take a back seat to the FAA. The Montana legislature enacted a law which required an arbitration clause to be typed in underlined capital letters on the first page of any contract in order to be enforceable.[212] The law did not disfavor arbitration, it merely disfavored its citizens' agreeing to arbitration without their knowledge. Nevertheless, the U.S. Supreme Court found the law preempted by the FAA because it required the judicial resolution of a dispute the parties had "agreed" to resolve by arbitration.[213] Given such decisions, it is understandable that many states are distressed at the idea they cannot enforce consumer protection laws whenever the FAA is implicated.[214]

State courts should see the Court's decision in *First Options* as an invitation to set a high standard, and an opportunity to preserve independent judicial review of arbitrability in all but the most extraordinary cases. There is absolutely nothing in the Supreme Court's opinion to counsel against rejecting arguments that a broad arbitration clause, or the incorporation of an arbitral body's rules by reference, is clear and unmistakable evidence of an intent to arbitrate questions of arbitrability.

Thus far only a handful of state courts have explicitly considered the level of evidence required to meet the *First Options* clear and unmistakable standard. Most of those decisions are either unpublished or from intermediate appellate courts.[215] For the vast majority of state courts that have yet to decide this question, it must be kept in mind that state courts applying the FAA usually will not be required to follow lower federal court decisions interpreting *First Options*.[216] In this regard, state courts are free to protect their citizens' rights, consistent with the U.S. Supreme Court's decision in *First Options*, by preserving independent judicial review of arbitrability determinations in all but the most exceptional circumstances.

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[212] Doctor's Assoc. v. Casarotto, 517 U.S. 681, 683 (1996).

[213] *Id*.

[214] Leading up to the U.S. Supreme Court's recent decision in *Buckeye Check Cashing, Inc.*, an astounding 43 state attorneys general asked the Court to overrule its decision in *Southland* which explicitly applied FAA preemption to the states. *See* Petition for Writ of Certiorari, Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204 (2006) (No. 04-1264).

[215] N. Augusta Assoc. Ltd. P'ship v. 1815 Exch., Inc., 469 S.E.2d 759, 762−63 (Ga. Ct. App. 1996); Romano v. Goodlette Office Park, Ltd., 700 So. 2d 62, 64 (Fla. Dist. Ct. App. 1997); Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 692 N.E.2d 1167, 1173 (Ill. 1998); Stitak v. Royal Alliance Assoc., No. 97CA006723, 1998 WL 332930, at *3 (Ohio Ct. App. 1998); Williams v. Litton, 865 So. 2d 838, 843−44 (La. Ct. App. 2003); Brake Masters Sys., Inc. v. Gabbay, 78 P.3d 1081, 1087 (Ariz. Ct. App. 2003); Dream Theater, Inc. v. Dream Theater, 21 Cal. Rptr. 3d 322, 329 (Cal. Ct. App. 2004). Galbraith v. Clark, 122 P.3d 1061, 1064 (Colo. Ct. App. 2005); Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Constr., Inc., 701 N.W.2d 430, 437 (S.D. 2005); Willie Gary LLC v. James & Jackson LLC, No. Civ. A. 1781, 2006 WL 75309, at *7−8 (Del. Ch. Jan. 10, 2006); Morton v. Polivchak, No. 2005-215, 2006 WL 335042, at *2 (Fla. Dist. Ct. App. Feb. 15, 2006).

[216] AM. JUR. 2D. *Courts* § 148 (2005) (indicating some state jurisdictions consider federal court decisions on federal issues persuasive authority).

D. Analysis When a Party Challenges the "Arbitrability" of a Dispute

1. The Analysis Begins When a Party Challenges the Making or Validity of an Arbitration Clause

As other commentators that have recognized,[217] the starting point must be whether the parties have attacked the arbitration clause itself, or whether the parties attack the contract generally. Because courts independently consider only those questions that are considered questions of arbitrability—that is, whether the parties have a valid arbitration agreement and whether their dispute falls within the ambit of that agreement—courts need begin this analysis only when such a question is raised. Under the separability doctrine, any general contract challenges must be heard by an arbitrator and not a court.[218]

2. If One of the Parties Argues that an Arbitrator Should Decide Arbitrability, the Court's Inquiry Must Be Narrow

First Options referred to three distinct types of disagreement; the merits of the dispute, *whether* the parties validly agreed to arbitrate the merits of the dispute (the arbitrability of the dispute), and whether the parties reached an agreement about *who* decides arbitrability (court or arbitrator).[219] *First Options* presumes that the parties did not consider the third question, and that in such an event a court by default would answer the second question.[220] If there is some indication the parties did consider the arcane third question, then it is still for a court to decide the second question unless the parties *clearly and unmistakably* agreed that an arbitrator would decide it.[221]

At this stage a court should only inquire into the narrow third question of who decides questions of arbitrability. If the court goes any further afield, then in the event the court ultimately determines the parties intended for an arbitrator to decide the arbitrability of disputes, to the degree a court has departed from the narrow third question, it may upset the legitimate contractual expectations of sophisticated parties.[222]

For example, assume that a party concedes it entered into a contract, but alleges that the arbitration clause is unconscionable because it requires that the parties pay enormous arbitral fees. The arbitration clause also says something to the effect of: "the parties agree that should a dispute of any kind arise, only an arbitrator and not a court will decide whether any disputes are arbitrable." The parties do not dispute that they entered into the contract. In such a case, a court's inquiry should stop completely. The parties do not dispute entering into

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[217] *E.g.,* Robert H. Smit, *Separability and Competence-Competence in International Arbitration:* Ex Nihilo Nihil Fit*? Or Can Something Indeed Come From Nothing*?, 13 AM. REV. INT'L ARB. 19, 40 (2002) (finding the separability doctrine to be a "first tier" question).

[218] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403−04 (1967).

[219] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

[220] Rau, *supra* note 15, at 293 (interpreting *First Options* to say that as a staring point we should presume that parties to an arbitration agreement did not agree to allow an arbitrator rather than a court "determine the validity of their consent to arbitrate").

[221] *First Options of Chicago, Inc.*, 514 U.S. at 944.

[222] Widman, *supra* note 30, at 55.

the agreement, unconscionability attacks the validity of the arbitration agreement and is therefore a question of arbitrability, and, using plain language, the parties have clearly and unmistakably agreed to entrust such matters to an arbitrator.

3. A Court Should Always Decide Arguments Concerning Lack of Assent to an Arbitration Agreement

In the absence of some agreement, nothing may be arbitrated, neither the merits nor the arbitrability of a dispute.[223] The absence of any agreement should be distinguished from a question regarding the *validity* of an arbitration agreement on grounds of illegality, fraudulent inducement, unconscionability, etc.[224] These, after all, are questions concerning the validity of the agreement to arbitrate that parties may agree to have an arbitrator decide. The question of contractual assent will likely arise in few circumstances. Such a circumstance may arise when Party A agreed to arbitrate with Party B, and where subsequently Party C, a non-signatory, attempts to enforce the arbitration clause against Party A as Party B's purported successor in interest.[225] Since A did not assent to arbitrate anything with C, a court should determine if the arbitration agreement should be enforced for some reason against A. Another circumstance may arise when a party is incapable of giving contractual assent under generally applicable state law such as one who has been adjudicated mentally ill, or one who has been placed under guardianship.[226] Yet another example arises when a party's signature is forged. In such cases, contractual assent may not exist, and in the absence of assent there can be no agreement. Only after a court has resolved assent questions,[227] and only then where the requisite clear and unmistakable evidence has been shown, should courts defer to an arbitrator's determination regarding the arbitrability of disputes.

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[223] Rau, *supra* note 15, at 303 ("Even the most superficial reading of *Kaplan* requires a true 'agreement.'").

[224] Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 1208 n.1 (2006). In the context of the separability doctrine, distinguishing between questions regarding a contract's validity, and questions such as whether an alleged obligor ever signed a contract, whether the signor possessed authority to bind its principal, and whether a signor lacked mental capacity to assent to a contract.

[225] This example roughly follows the facts of *Apollo Computer, Inc., v. Berg*. *See* Apollo Computer, Inc. v. Berg, 886 F.2d 469, 470−74 (1st Cir. 1989).

[226] Contract law does not bind a person lacking legal capacity:

> No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances . . . A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is (a) under guardianship, or (b) an infant, or (c) mentally ill or defective, or (d) intoxicated.

RESTATEMENT (SECOND) CONTRACTS § 12 (1981).

[227] *But see* Smit, *supra* note 217, at 41−42 (arguing that existence questions are for an arbitrator to decide if there is a plausible argument that an arbitration agreement may exist); Widman, *supra* note 30, at 60 (arguing that the AAA rules are "clear and unmistakable" evidence of an intent to arbitrate questions of arbitrability and that arbitrators should decide matters regarding the existence of an arbitration agreement).

4. Courts Should Zealously Guard Litigant's Rights to Independent Judicial Review Regarding the Arbitrability of Their Disputes

Whether the allegation is that a party agreed to arbitrate arbitrability by conduct, or through the wording of a pre-dispute arbitration clause, courts should find *First Options* clear and unmistakable evidence in only the rarest of circumstances. *First Options*' holding tells us that arguing the question of arbitrability to an arbitrator is insufficient evidence of an agreement to arbitrate the arbitrator's jurisdiction. As mentioned above, the *First Options* Court did not provide guidance regarding what sort of evidence would meet the "clear and unmistakable" standard in the context of a pre-dispute arbitration agreement. Given the presumption against finding such evidence, and in light of the consequences of deferential review, courts should require nothing less than plain and explicit language entrusting arbitrators with the power to decide whether parties validly agreed to arbitrate particular disputes. Interpreting the generic broad arbitration clause or incorporation by reference as meeting the clear and unmistakable evidence standard "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."[228]

VII. CONCLUSION

When the U.S. Supreme Court decided *First Options*, it did so out of concern that parties should not be forced to arbitrate disputes unless they have agreed to do so. As a consequence, the Court required something above and beyond the usual contractual finding of assent: it required clear and unmistakable evidence that parties agreed to let an arbitrator oust the judiciary from its traditional role in determining the arbitrability of disputes. Unfortunately, the Court also provided for deferential review whenever the clear and unmistakable evidence standard is met. In doing so, the Court created the potential for sophisticated parties to draft arbitration clauses that remove all aspects of the arbitration process from independent judicial review. To make matters worse, courts have satisfied themselves with evidence that is far from clear or unmistakable. In doing so, these courts risk divesting parties of their right to judicial determination of disputes they did not agree to arbitrate. While this risk may pose a threat to sophisticated parties, it poses a potentially greater threat in the context of consumer and employment contracts, where parties often have little choice but to sign contracts of adhesion. In the context of consumer and employment adhesion contracts, courts should find that parties simply cannot manifest the clear and unmistakable evidence required by *First Options.*

In order to preserve the spirit of the Court's decision in *First Options*, courts should find that the "clear and unmistakable" evidence standard has been met in only the rarest of circumstances. Certainly a broad arbitration clause or extrinsic arbitral rules will not do—nothing less than plain language entrusting

[228] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995).

the arbitrator with the power to decide the validity and scope of the parties arbitration agreement will suffice. Finally, when wrestling with such questions, courts should take care to answer the question of *who* decides arbitrability—the court or an arbitrator—before engaging in any other analysis. That way, in the rare instance when parties truly agree to let an arbitrator decide arbitrability, the court will honor their agreement.