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"A DOUGHNUT HOLE IN THE DOUGHNUT'S HOLE"[1]: THE HENRY SCHEIN SAGA AND WHO DECIDES ARBITRABILITY

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I. INTRODUCTION

Consider the following 'doughnut'-like scenario: Company A enters into a contract with company B. The contract contains an arbitration clause[3] that refers some, but not all, claims to arbitration. When a

1. KNIVES OUT (Lionsgate 2019).
2. Assistant Professor, University of Alberta Faculty of Law. The author thanks Profs. David Hoffman and Alan Scott Rau for their helpful comments on earlier drafts of this article.
3. The terms "arbitration agreement" and "arbitration clause" are used in this article interchangeably.

dispute arises, company A sues company B in court. Relying on the arbitration clause, company B files a motion to stay company A's action and to compel arbitration. This is our doughnut—a dispute that company A wishes to resolve in the courts and company B wishes to resolve in arbitration pursuant to the contract's arbitration clause. According to the United States Federal Arbitration Act ("FAA"),[4] which embodies a liberal federal policy favoring the enforcement of arbitration agreements,[5] the court[6] should grant company B's motion and enforce the parties' arbitration clause once it finds that "a valid arbitration agreement exists."[7] Granting company B's motion would mean that an arbitrator, rather than the court, would decide the merits of the parties' dispute.

But there is a hole in our doughnut, that is, in the arbitration clause referring the merits of the parties' dispute to arbitration. As noted above, the parties agreed to refer some, but not all, claims to arbitration. In other words, they 'carved-out' some claims from arbitration and reserved them for the courts.[8] Therefore, rather than arguing the merits of their dispute before an arbitrator, the parties are now arguing before the court whether company A's claims are of the type included within the arbitration clause—and should therefore be heard by the arbitrator, or excluded from it—and should therefore be heard by the court. This is the hole in our doughnut—the question of 'arbitrability.'[9] The concept of

4. 9 U.S.C. §§ 1–16.

5. *E.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

6. The liberal federal policy favoring the enforcement of arbitration agreements applies in both federal and state courts. *See, e.g.*, Perry v. Thomas, 482 U.S. 483, 489 (1987); Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 627 (1985); Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

7. Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 530 (2019). Pursuant to § 2 of the FAA, "[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 . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A court can stay proceedings in favor of arbitration pursuant to § 3 of the FAA and compel arbitration pursuant to § 4. 9 U.S.C. §§ 3–4.

8. On "carve outs" in contracts generally, see, for example, Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945 (2014).

9. In the present article, the concept of "arbitrability" is used to describe "[t]he status of a dispute's being or not being within the jurisdiction of arbitrators to resolve, based on whether the parties entered into an enforceable agreement to arbitrate, whether the dispute is within the scope of the arbitration agreement, whether any procedural prerequisites to arbitration have been satisfied . . ." *Arbitrability*, BLACK'S LAW DICTIONARY (11th ed. 2019). This issue can also be viewed as a contractual "gap," to be filled by the court or the arbitrator. On the "gap filling" function of arbitrators, see, for example, Alan Scott Rau, *"Gap Filling" by Arbitrators*, (Univ. Tex. at Austin Sch. L., Ctr. for Glob. Energy, Int'l Arb. and Env't L., Research Paper No. 2014-03, 2014) [hereinafter Rau, *Gap Filling*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435232.

arbitrability encompasses challenges to both the enforceability (i.e., validity)[10] and the application (i.e., scope)[11] of an arbitration agreement with respect to particular parties or disputes. In our scenario, the arbitrability question (the doughnut's hole) pertains to whether company A's claims fall within the parties' arbitration agreement (i.e., the scope of the agreement). Such an arbitrability challenge is in effect a challenge to the jurisdiction of the arbitrator to determine the merits of company A's claims.

If company A's claims are indeed arbitrable (i.e., they fall within the scope of the parties' arbitration clause), then their merits must be resolved by the arbitrator. If they are not arbitrable or are partially arbitrable, the court is to determine the merits of those claims that are non-arbitrable. One may think that this arbitrability determination would make our doughnut whole—the parties agreed to arbitrate some claims, and they will indeed arbitrate those claims that they have agreed

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"Arbitrability" has also been used to describe "[t]he status, under applicable law, of a dispute's being or not being resolvable by arbitrators because of the subject matter." *Arbitrability*, BLACK'S LAW DICTIONARY (11th ed. 2019). In other words, the term "arbitrability" has often been used to describe the question of whether a particular dispute is legally capable of being arbitrated under the applicable law. George A. Bermann, *The Enforceability of the Arbitration Agreement: Who Decides and Under Whose Law?, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 4, 154 (Arthur W. Rovine ed., 2010). The Supreme Court has opined on this aspect of arbitrability in: *Mitsubishi Motors*, 473 U.S. 614 (concerning anti-trust claims); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (concerning securities and claims under the Racketeer Influenced and Corrupt Organizations Act); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012) (concerning personal injury or wrongful-death claims); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (concerning federal statutory claims under the Credit Repair Organizations Act). A detailed discussion of this meaning of "arbitrability" is beyond the scope of this article. In this regard see, for example, ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 943–1045 (2d ed. 2014).

10. There seems to be some confusion as to what kind of validity challenges to an arbitration agreement should be considered as "arbitrability questions." While it is for courts to determine whether "a valid arbitration agreement exists" pursuant to § 2 of the FAA, this meaning of "validity" concerns whether any agreement "was ever concluded," rather than whether an existing agreement is invalid, for instance, on grounds of unconscionability. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 70 n.2 (2010); *see also* Arnold v. HomeAway, Inc., 890 F.3d 546, 550 (5th Cir. 2018) (distinguishing between "'validity' or 'enforceability' challenges and 'formation' or 'existence' challenges," with the latter falling within the authority of the courts to decide); Alan Scott Rau, *The Allocation of Power Between Arbitral Tribunals and State Courts, in* 390 COLLECTED COURSES OF THE HAGUE ACAD. OF INT'L L. 46–49 (2018) [hereinafter Rau, *Allocation of Power*]. For present purposes, for the sake of clarity and without taking a position on this issue, "arbitrability questions" does not include challenges to the existence of an arbitration agreement.

11. Questions such as "whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Cente*r, 561 U.S. at 69.

to arbitrate. "But we must look a little closer. And when we do, we see that the doughnut hole has a hole in its center—it is not a doughnut hole at all but a smaller doughnut with its own hole, and our doughnut is not whole at all!"[12] The hole in the center of our doughnut's hole concerns *who* is to decide the arbitrability question—whether company A's claims are arbitrable and should therefore be resolved in arbitration—the court or the arbitrator? [13] Our doughnut therefore looks as follows:

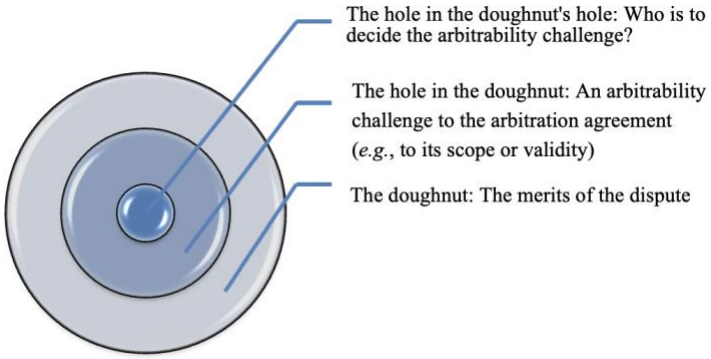

Figure 1: The arbitrability doughnut

The doughnut itself (i.e., the outer ring) is clear enough: when parties agree to arbitrate future disputes, courts are to enforce this agreement and refer the merits of a dispute to arbitration. If the parties challenge the enforceability of the arbitration agreement, the question becomes one of arbitrability—the hole in the doughnut—which must be answered before the merits of the underlying dispute may be resolved by the court or the arbitrator.[14] Who is to answer this arbitrability question—the

12. KNIVES OUT (Lionsgate 2019), https://www.imdb.com/title/tt8946378/quotes. The quote is by Detective Benoit Blanc, played by Daniel Craig.

13. Another useful metaphor is that of a "Russian nesting doll." *Rent-A-Center*, 561 U.S. at 85 (Stevens, J., dissenting); *see also*, *Ex parte* Perry, 744 So.2d 859, 866 n.5 (Ala. 1999) ("It is the dilemma of the box within a box or, in the case of arbitration, the authority as to the decision as to the authority to make the decision."); Rau, *Allocation of Power*, *supra* note 10, at 252 (referring to "three separate levels of inquiry:" "How should a particular substantive issue be decided? . . . Who is to decide the level No. (i) issue? . . . [and] just who is to decide the level No. (ii) issue?").

14. *See Mitsubishi Motors*, 473 U.S. at 626. The Supreme Court has held that such arbitrability questions must be addressed "with a healthy regard for the federal policy favoring arbitration," and that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983). In deciding on the scope of an arbitration agreement, courts must first "determine whether the parties agreed to arbitrate

court or the arbitrator—then becomes the hole in the doughnut's hole, and the question that must be addressed before all others.[15] There are two basic approaches to answering it.

On the one hand, it may be argued that the arbitrator, whose authority is derived solely from the parties' arbitration clause,[16] has no place deciding *any* dispute unless the parties agreed to submit that dispute to arbitration. After all, arbitration agreements prevent courts from deciding the *merits* of disputes,[17] but the courts retain "ultimate authority over a case despite the referral to arbitration" precisely in order to decide such challenges to the jurisdiction of an arbitrator.[18] According to this line of argument, therefore, arbitrability questions should be for the court to determine and not the arbitrator.[19] On the other hand, it may be argued that since arbitrability questions go to the scope of the arbitration agreement—a matter of contract interpretation—they should be viewed as an aspect of the merits of the dispute that is for the arbitrator, not the court, to resolve.[20] As will be explained below, the

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that dispute" by applying the "federal substantive law of arbitrability" through the regular "process of contract interpretation." *Mitsubishi Motors*, 473 U.S. at 626–28 (citations omitted). Courts must then consider "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims" by examining "congressional policy" and "intention" concerning waiver of the right to a judicial forum. *Id.* at 627–28. Therefore, "the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Id.* at 626.

15. *See Rent-A-Center,* 561 U.S. at 71. The "who decides" question exists also outside of the arbitration context. *See, e.g.*, Ned Snow, *Who Decides Fair Use - Judge or Jury*, 94 WASH. L. REV. 275, 280 (2019); Andrew B. Ayers, *Federalism and the Right to Decide Who Decides*, 63 VILL. L. REV. 567, 567 (2018).

16. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.").

17. *See* DiMercurio v. Sphere Drake Ins., PLC, 202 F.3d 71, 77 (1st Cir. 2000).

18. *Id.* In other words, a valid arbitration agreement does not implicate "jurisdiction in the basic sense." *Id.* at 78 (citing *Morales Rivera*, 418 F.2d at 726).

19. BG Grp., PLC v. Republic of Argentina, 572 U.S. 25, 60 (2014) (Roberts, C.J., dissenting) ("Because an arbitrator's authority depends on the consent of the parties, the arbitrator should not as a rule be able to decide for himself whether the parties have in fact consented. Where the consent of the parties is in question, 'reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.'" (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–84 (2002))).

20. Bermann, *supra* note 9, at 159; Alan Scott Rau, *Everything You Really Need To Know About "Separability" In Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 115-116 (2003) [hereinafter Rau, *"Separability" in Seventeen Simple Propositions*] ("[Q]uestions of scope and questions going 'to the merits' are often so intertwined that we can expect similar arbitral competence to be relevant, and similar factual considerations to come into play."). This line of argument engages what is commonly known in international arbitration as the "competence-competence" principle, which provides that arbitrators have jurisdiction to determine their own jurisdiction. A detailed discussion of this principle as it is

Supreme Court of the United States ("Supreme Court") has not fully adopted either of these positions, but rather has devised a middle ground that combines aspects of both.

This question of who decides arbitrability (i.e., the hole in the doughnut's hole) does not present a mere narrow jurisdictional question, but rather has "practical importance."[21] First, it determines whether a party has in fact relinquished its right to a judicial decision by consenting to arbitration.[22] Second, if such a determination is made by an arbitrator, it will only be subject to a limited review by the courts rather than a *de novo* review of questions of law by an appellate court.[23] Third, if such a determination is made by a court, it risks allowing parties to defer or evade their commitment to arbitrate, resulting in needless and costly litigation.[24]

In this article, I aim to shed light on the jurisdictional question of who—the court or the arbitrator—should decide whether a particular claim or dispute is arbitrable (the hole in the doughnut's hole).[25] I identify a complex, yet reasonably clear, path paved by the Supreme Court for

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understood in international arbitration and in other jurisdictions is beyond the scope of this article. In this regard, see, for example, BORN, *supra* note 9, at 1076–1252.

21. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

22. *Id.* ("[A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute. . . . But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. . . . Hence, 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."); *see also* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 87 (2010) (Stevens, J., dissenting) ("[W]hen questions of arbitrability are bound up in an underlying dispute. . . . there is actually no gateway matter at all: The question 'Who decides' is the entire ball game." (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967))).

23. Sections 10 and 11 of the FAA provide only limited grounds for vacating, modifying, or correcting an arbitral award. 9 U.S.C. §§ 10–11; *see, e.g.*, Cleveland Elec. Illuminating Co. v. Util. Workers Union of Am., Local 270, 440 F.3d 809, 812 (6th Cir. 2006) ("The question of who, the court or the arbitrator, has the authority in a particular case to decide the arbitrability of a grievance determines the standard of review of the arbitrator's decision. If the parties have agreed to allow the arbitrator to decide arbitrability, the district 'court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.'" (quoting *First Options*, 514 U.S. at 943)).

24. Bermann, *supra* note 9, at 155.

25. Therefore, this article does not address the two subsequent questions referred to above concerning the arbitrability of a particular dispute, and its merits. For more on the question of who decides arbitrability, see, for example, Jennifer Schulz, *Arbitrating Arbitrability: How the U.S. Supreme Court Empowered the Arbitrator at the Expense of the Judge and the Average Joe*, 44 LOY. L.A. L. REV. 1269 (2011); Marcus Shand, *"Who Decides?" The Third Circuit: Class Action Availability is a Question of Arbitrability?*, 7 Y.B. ON ARB. AND MEDIATION 226 (2015); John J. Barcelo III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115 (2003); Alan Scott Rau, *Arbitrating 'Arbitrability'*, 7 WORLD ARB. AND MEDIATION REP. 487 (2013) [hereinafter Rau, *Arbitrating 'Arbitrability'*].

determining this question, and argue that this path creates complementary jurisdictional spheres as between courts and arbitrators in this regard. In other words, the Supreme Court has drawn a reasonably clear line between what falls within courts' and arbitrators' respective jurisdictions when it comes to answering the hole in the doughnut's hole question of who decides arbitrability.

Nevertheless, some lower courts have blurred this carefully drawn line between their own jurisdiction and that of arbitrators, in a manner that resembles old judicial hostility to arbitration. Indeed, arbitration and court litigation have had a complicated and not always harmonious relationship in the United States. Historically, American courts were quite hostile to arbitration and refused to enforce arbitration agreements, concerned they would be ousted of their jurisdiction.[26] In 1925, Congress enacted the FAA in order to dispel courts' animosity to arbitration and to place arbitration agreements "upon the same footing as other contracts."[27] The FAA has indeed swung the judicial pendulum in favor of arbitration, and the Supreme Court, as well as most lower courts, have now recognized that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[28] Moreover, courts retain the authority to enforce arbitration agreements and review arbitral awards.[29] In other words, a valid arbitration agreement does not implicate the courts' "jurisdiction in the basic sense."[30] However, where the jurisdictional line should be drawn, i.e., where the authority of the court ends and that of the arbitrator begins, remains contested.

Most recently, the Supreme Court has granted certiorari twice in *Henry Schein, Inc. v. Archer and White Sales, Inc.* (*Schein*),[31] a case that presents facts similar to the doughnut-like scenario described above.

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26. DiMercurio v. Sphere Drake Ins., PLC, 202 F.3d 71, 75 (1st Cir. 2000); *see also* Am. Sugar Refining Co. v. Anaconda, 138 F.2d 765, 766 (5th Cir. 1943) (noting that, historically, an agreement to arbitrate would not be enforced in United States courts because "parties may not by private agreement oust the jurisdiction of the courts").

27. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 (2009) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

28. Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 626–27 (1985); *see also* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) (quoting *Volt*, 489 U.S. at 476) (noting that the FAA aims "to ensure the enforceability, according to their terms, of private agreements to arbitrate"); Morales Rivera v. Sea Land of P.R. Inc., 418 F.2d 725, 726 (1st Cir. 1969) ("[Arbitration agreements] are not destructive of jurisdiction. They are, precisely, agreements, and as such may be pleaded as a personal defense.").

29. *DiMercurio*, 202 F.3d at 77.

30. *Id.* at 78 (quoting *Morales Rivera*, 418 F.2d at 726).

31. 139 S. Ct. 524, 527 (2019).

Both appeals focused on the Court of Appeals for the Fifth Circuit's determination of the hole in the doughnut's hole question of who is to decide a challenge to the scope of the parties' arbitration agreement (i.e., the arbitrability question, or the doughnut's hole).[32] In its first unanimous decision in this case, rendered in 2019, the Supreme Court overturned the Fifth Circuit's finding that this challenge should be resolved by the court, rather than the arbitrator, and remanded the case back for further consideration.[33] In 2020, the Court granted certiorari once more[34] to review the Fifth Circuit's decision on remand, in which the Fifth Circuit again found (on different grounds) that the court was to decide the arbitrability challenge rather than the arbitrator.[35] However, the Supreme Court dismissed the certiorari as improvidently granted after the oral argument.[36]

In Part II of the article, I trace the evolution of the Supreme Court's jurisprudence on the hole in the doughnut's hole question of who decides arbitrability, and identify a framework of complementary jurisdictional spheres that the Court has created for courts and arbitrators in this regard.[37] In Part III, I introduce the *Schein* case and discuss the two decisions of the Fifth Circuit, as well as the Supreme Court's 2019 decision. In Part IV, I focus on the new question that was before the Supreme Court in *Schein II*, examine the jurisprudence of other circuit courts on this question,[38] and argue that the Fifth Circuit continued to blur the complementary jurisdictional spheres that the Supreme Court has established regarding the hole in the doughnut's hole question of who decides arbitrability. Finally, I offer concluding remarks in Part V.

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32. *See generally* Archer & White Sales, Inc. v. Henry Schein, Inc. (*Schein I*), 878 F.3d 488 (5th Cir. 2017).

33. *Schein,* 139 S. Ct. at 527. For commentary on the decision, see, for example, Charles B. Rosenberg, Henry Schein v. Archer & White*: A Lesson in the Importance of Carefully Drafting an Arbitration Clause*, 8 AM. U. BUS. L. REV. 381 (2020), David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633 (2020), and Adam Samuel, *The US Supreme Court Does* Kompetenz-Kompetenz, 35 ARB. INT'L 263 (2019).

34. Henry Schein, Inc. v. Archer & White Sales, Inc., 207 L. Ed. 2d 1050 (June 15, 2020).

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

36. Henry Schein, Inc. v. Archer & White Sales, Inc., 141 S. Ct. 656 (2021).

37. This section is limited to some of the more recent, or seminal, decisions of the Supreme Court on this issue and is not intended to be exhaustive. Cases not addressed here include, for example, *International Union of Operating Engineers, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972), *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960).

38. While there have also been relevant state court decisions on the matter, these are beyond the scope of the present article. For a review of some of these decisions, see Petition for Writ of Certiorari, *Schein II*, 935 F.3d 274 (No. 19-963), 2020 WL 529195, at *12–18.

II. THE SUPREME COURT'S FRAMEWORK FOR WHO DECIDES ARBITRABILITY

The Supreme Court has paved a relatively clear path with respect to the hole in the doughnut's hole question of who decides arbitrability. This path creates complementary jurisdictional spheres for courts and arbitrators on the basis of three basic principles: the severability principle, the clear and unmistakable principle, and the delegation principle. In the remainder of this Part, I set out and explain each of these principles and their interrelationship.

A. The Severability Principle

The severability principle is one of the early principles established by the Supreme Court to guide lower courts in deciding who is to decide parties' arbitrability challenges (the hole in the doughnut's hole)—courts or arbitrators. It was set out by the Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,[39] a case involving an arbitrability challenge based on the alleged fraudulent inducement of the contract containing the arbitration clause. The Court held that, according to the severability principle, if a party challenges directly the scope or validity of the arbitration clause itself, the court is presumptively to decide the challenge.[40] In contrast, if such a challenge is directed at the underlying contract that contains the arbitration clause, rather than at the arbitration clause specifically, it is for the arbitrator to resolve.[41]

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39. 388 U.S. 395 (1967).

40. *Id.* at 403–04, 404 n.12.

41. *Id.* at 402–04. On the Court's decision in *Prima Paint* and the severability principle see, for example, Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 490 (2011) [hereinafter Rau, *Arbitral Power*], noting that the severability principle set out in *Prima Paint* is not "the result of any intrigue plotted under cover of darkness by a neo-liberal Court—it is instead taken for granted in every modern regime of arbitration as the 'foundation stone of the entire structure.'" *See also* Gerald Aksen, Prima Paint v. Flood & Conklin – *What Does It Mean*, 43 ST. JOHN'S L. REV. 1 (1968); Robert Coulson, Prima Paint*: An Arbitration Milestone*, 23 BUS. LAW. 241 (1967); 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 (2003); Jeffrey W. Stempel, *Better Approach to Arbitrability*, 65 TUL. L. REV. 1377 (1990–1991).

The alleged fraudulent inducement of the contract was also Prima Paint's cause of action, i.e., the merits of the dispute or the "doughnut" itself (Figure 1 (*see supra* p. 86)). Therefore, the Court's decision that the claim of fraudulent inducement should be referred to arbitration may be viewed as relating to the doughnut hole question of whether such a claim is arbitrable (in the Court's words, "the central issue in this case" was "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators." Prima Paint Corp. Flood &

In *Buckeye Check Cashing, Inc. v. Cardegna*,[42] one of the parties challenged a contract containing an arbitration clause on the ground that the contract was void for illegality.[43] In deciding that an arbitrator should resolve this challenge, the Court reiterated that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."[44] The Court recognized that this rule permitted "a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void."[45] The contrary approach, however, would permit "a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable."[46] The Court therefore concluded that the severability principle was an appropriate compromise—if the arbitrability challenge is directed at the arbitration clause, it is for the court to resolve, whereas if the challenge is directed at the contract as a whole, it is for the arbitrator to resolve.[47]

The Supreme Court had occasion to apply the severability principle also in *Nitro-Lift Technologies, L.L.C. v. Howard*,[48] a case involving a challenge to an employment noncompetition agreement containing an arbitration clause on the ground that the noncompetition agreement was null and void.[49] The Court again found that this challenge was to be resolved by the arbitrator.[50] Overturning the lower court, the Supreme

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Conklin Mfg. Co., 388 U.S. 395, 402 (1967)). Pursuant to this interpretation, the Court did not address the hole in the doughnut's hole question of *who* should decide arbitrability at all, assuming instead that it was for the court to decide (and then deciding that the fraudulent inducement claim was arbitrable). *Id.* at 403–04. However, for present purposes, I view Prima Paint's fraudulent inducement claim as an arbitrability challenge (the doughnut hole) and the Court's determination that this question should be referred to arbitration as deciding the hole in the doughnut's hole question of who should decide this arbitrability challenge. This also seems to be the Supreme Court's interpretation of *Prima Paint*. *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444–46 (2006) (where the Court referred to *Prima Paint* as concerning "the question of who—court or arbitrator—decides . . . challenges" to the validity of arbitration agreements and as establishing that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 71 (2010) ("In *Prima Paint*, for example, if the claim had been 'fraud in the inducement of the arbitration clause itself,' then the court would have considered it.").

42. 546 U.S. 440 (2006).
43. *Id.* at 442.
44. *Id.* at 445–46.
45. *Id.* at 448.
46. *Id.* at 448–49.
47. *Id.* at 449.
48. 568 U.S. 17 (2012).
49. *Id.* at 18.
50. *Id.*

Court held that by failing to so decide, the lower court had "ignored a basic tenet of the [FAA]'s substantive arbitration law"[51] that foreclosed precisely this type of "judicial hostility towards arbitration."[52]

In *Howsam v. Dean Witter Reynolds, Inc.*,[53] the Supreme Court added an exception to the principle that challenges to the arbitration agreement itself are for the courts to resolve.[54] This exception provides that where a challenge to an arbitration agreement (which is normally for the court to decide) concerns "dispositive gateway question[s]," it is presumptively for the arbitrator to resolve.[55] *Howsam* involved a challenge to the enforceability of an arbitration agreement on the basis of a National Association of Securities Dealers rule that imposed a six-year time limit for arbitration.[56] In finding that the arbitrator was to decide whether the time limit prevented plaintiff from proceeding with its claims in arbitration, the Supreme Court noted that the category of challenges to arbitration agreements ("arbitrability questions," or the doughnut's hole) that were presumptively for the courts to resolve pursuant to the severability principle had a "far more limited scope" than the category of "dispositive gateway question[s]."[57] The latter "gateway" category included, for instance, "'procedural' questions which grow out of the dispute and bear on its final disposition" or "allegation[s] of waiver, delay, or a like defense to arbitrability."[58] According to the Court, these were the types of questions that the parties would likely expect an arbitrator, rather than a court to decide.[59] Therefore, such challenges fall within the

51. *Id.*

52. *Id.* at 21 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011)).

53. 537 U.S. 79 (2002).

54. *Id.* at 84–85.

55. *Id.* at 83. For a discussion of such questions and why arbitrators, rather than courts, should decide them, see, for example, Alan Scott Rau, *"Consent" to Arbitral Jurisdiction: Disputes with Non-Signatories*, *in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 135–40 (Permanent Court of Arbitration ed., 2009) [hereinafter Rau, *"Consent" to Arbitral Jurisdiction*] and Rau, *Allocation of Power, supra* note 10, at 225–32.

56. *Howsam*, 537 U.S. at 81.

57. *Id.* at 83. The Court noted that the category of challenges that the courts are to resolve applied in the "narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83–84.

58. *Id.* at 84.

59. *Id.* at 84–85. The Supreme Court applied the distinction between "arbitrability questions" (that are presumptively for the courts to resolve) and "dispositive gateway questions" (that are presumptively for the arbitrators to resolve) in at least two other cases.

In *BG Group, PLC v. Republic of Argentina*, the Supreme Court applied the "dispositive gateway questions" category in the international arbitration context. 572 U.S. 25 (2014). The Court reiterated that "the parties intend arbitrators, not courts, to decide

jurisdiction of the arbitrator despite being aimed directly at the arbitration agreement rather than the underlying contract.

B. The Clear and Unmistakable Principle

The clear and unmistakable principle is engaged once a party raises an arbitrability challenge directly to the arbitration clause, rather than to the underlying contract as a whole. Pursuant to the severability principle, such a challenge is presumptively for the court to resolve.[60] However, the clear and unmistakable principle provides a rebuttal to this presumption: if the parties clearly and unmistakably intended to "arbitrate arbitrability," i.e., to have the arbitrator decide arbitrability challenges directed at the arbitration clause, then it is the arbitrator who should resolve such challenges rather than the court.[61]

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disputes about the meaning and application of particular procedural preconditions for the use of arbitration." *Id.* at 34. In that case, Argentina challenged an arbitral award on the ground that BG Group had failed to comply with the applicable treaty's local litigation requirement, which required BG to litigate its claim in Argentinean courts prior to commencing arbitration. *Id.* at 30. The Court found that the treaty provision at issue in this case was of the "procedural[] variety." *Id.* at 35. The Court thus concluded that where "the provision resembles a claims-processing requirement and is not a requirement that affects the arbitration contract's validity or scope, we presume that the parties (even if they are sovereigns) intended to give that authority to the arbitrators." *Id.* at 43.

In *Green Tree Financial Corp. v. Bazzle*, the plurality of the Supreme Court found that the category of 'dispositive gateway questions' for the arbitrator to decide also included the question of whether the parties' arbitration clause prohibited class arbitration. 539 U.S. 444 (2003). The plurality found that this question was not an 'arbitrability question' since it concerned "neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." *Id.* at 452. Rather, it concerned "contract interpretation and arbitration procedures." *Id.* at 453. Justice Stevens concurred in the judgment and dissented in part. *See Id.* at 454–55 (Stevens, J., concurring in the judgment and dissenting in part). He noted that "[a]rguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court," but did not decide this question because "petitioner has merely challenged the merits of that decision without claiming that it was made by the wrong decisionmaker." *Id.* at 455. He concurred with the plurality's judgment since otherwise there would have been "no controlling judgment of the Court." *Id.* In a dissenting opinion, Chief Justice Rehnquist and Justices O'Connor and Kennedy found that the parties' agreement as to class arbitration was "akin to the agreement as to what shall be arbitrated, a question for the courts . . . ." *Id.* at 457 (Rehnquist, J., dissenting). In light of the split in the Supreme Court's judgment, the Court has since noted that "no single rationale commanded a majority" in the *Bazzle* decision, and that the Court has not yet decided whether the availability of class arbitration is a question of arbitrability to be presumptively decided by the court or a 'gateway question' for the arbitrator to decide. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 678–79 (2010). *See also*, Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 n.2 (2013).

60. Unless the challenge concerns a "dispositive gateway question" as explained above.

61. AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."). *See also,* United

The Supreme Court elaborated on the clear and unmistakable principle in *First Options of Chicago, Inc. v. Kaplan*.[62] In this case, the parties' contractual dispute had been determined by the arbitral tribunal to be arbitrable.[63] In deciding whether the arbitral tribunal had the authority to make this determination, the Court noted several important aspects of this principle.[64] First, the Court reiterated that "the question 'who has

Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960); *AT & T Techs.*, 475 U.S. at 647; John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964); *see also Green Tree*, 539 U.S. at 445, 452 (quoting *AT & T Techs.*, 475 U.S. at 649) (stating that in certain "limited circumstances," such as "in the absence of 'clea[r] and unmistakabl[e]' evidence to the contrary… courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter.").

As noted above, *supra* note 10, the "arbitrability questions" that the clear and unmistakable principle applies to concern the validity or scope of the arbitration agreement, rather than its existence or formation. *See, e.g.*, Granite Rock Co. v. Int'l Brotherhood of Teamsters, 561 U.S. 287, 299 (2010) ("[C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue." *Id.*).

The rationale for the clear and unmistakable principle and its emphasis on the parties' intentions can be traced back to state court decisions in the Nineteenth and early Twentieth centuries. In an 1858 decision, for instance, the Supreme Court of Pennsylvania required that the parties' intention to submit a particular subject-matter to arbitration be "clearly apparent" from their contract. Lauman v. Young, 31 Pa. 306, 310 (1858). This was because "[t]he right of trial by jury will not be taken away by implication merely, in any case. It must appear in all cases that the parties have agreed to dispense with it." *Id.* The same court opined in 1901 that if the contracting parties had agreed that an arbitrator was to decide a particular dispute, "they are bound by it, if it was properly made. But it must clearly appear that such power was given to him. The terms of the agreement are not to be strained to discover it. They must be clear and unmistakable to oust the jurisdiction of the courts." Chandley v. Borough of Cambridge Springs, 200 Pa. 230, 233 (1901). *See, e.g.*, B. Fernandez & Hnos, S. En C. v. Rickert Rice Mills, 119 F.2d 809, 814 (1st Cir. 1941); Continental Milling & Feed Co. v. Doughnut Corp. of Am., 48 A.2d 447, 450 (Md. App. 1946) ("Sound policy demands that the terms of an arbitration agreement must not be strained to discover power to pass upon matters in dispute, but the terms must be clear and unmistakable to oust the jurisdiction of the court, for trial by jury cannot be taken away in any case merely by implication."); Jacob v. Weisser, 56 A. 1065, 1067 (Pa. 1904).

62. 514 U.S. 938, 944 (1995). For commentary on this case, see, for example, Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287 (1999). The "clear and unmistakable" principle has been criticized as "just 'one big overblown latke.' It really does not have much to do with the scope problem." Rau, *Arbitrating 'Arbitrability'*, *supra* note 25, at 31; *see also* Rau, *Allocation of Power*, *supra* note 10, at 269–75; George Bermann & Alan Scott Rau, *Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau*, 43 PEPP. L. REV. 469, 480 (2016) (citing Rachel L. Swarns, *Washington Fuss Over White House Hanukkah Party*, N.Y. TIMES, Dec. 11, 2009, at A28).

63. *First Options*, 514 U.S. at 941.

64. *Id.* at 943–47.

the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter,"[65] i.e., the parties' intentions.[66]

Second, the Supreme Court recognized the liberal federal policy favoring the enforcement of arbitration agreements, which dictates that when arbitrability questions (i.e., the doughnut's hole) are decided by the court, they are to be presumptively resolved in favor of arbitration. However, the Court found that this presumption did not extend to the hole in the doughnut's hole question of "who (primarily) should decide arbitrability."[67] Therefore, the Court held that "silence or ambiguity" by the parties on who should decide arbitrability did not suffice to show that they had clearly and unmistakably intended the arbitrator to have this power.[68] Similarly, arguing the arbitrability issue before an arbitrator would not in itself "indicate a clear . . . willingness to be effectively bound by the arbitrator's decision on that point."[69]

Third, the Supreme Court held that courts should generally apply "ordinary state-law principles that govern the formation of contracts" to determine whether the parties intended to arbitrate arbitrability, and should not assume such agreement absent "clear and unmistakable evidence."[70] Where there is such evidence, however, "a court must defer to an arbitrator's arbitrability decision."[71] The Supreme Court has yet to specify what kind of evidence is required to show that parties clearly and unmistakably intended to arbitrate arbitrability.[72]

C. The Delegation Principle

The delegation principle links the severability principle and the clear and unmistakable principle explained above. It applies where the parties

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65. *Id.* at 943.

66. *Id.* at 946–47.

67. *Id.* at 944–45. ("[Arbitrability questions arise] when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter.")

68. *Id.* at 944–45. ("A party often might not focus upon [the arbitrability] question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration . . . 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.").

69. *Id.* at 946.

70. *Id.* at 943–44.

71. *Id.* at 943.

72. This question is also not directly before the Court in *Schein II* even though it may be indirectly implicated, as will be explained below.

include a delegation clause in their arbitration agreement, that is, "an agreement to arbitrate threshold issues concerning the arbitration agreement."[73] Essentially, a delegation clause is a provision contained in the parties' arbitration agreement that fills the hole in the doughnut's hole by providing clearly and unmistakably that the arbitrator is to resolve arbitrability challenges if they arise.[74] As with the arbitration agreement in which it is contained, the delegation clause must in itself be valid in order to be enforced.[75]

To make this validity determination, the delegation principle takes the severability principle one step further. Recall that according to the latter principle, a challenge to the arbitration clause itself is to be resolved by the court while a challenge to the contract in which the arbitration clause is contained is to be resolved by the arbitrator.[76] According to the delegation principle, the same goes for a delegation clause contained within an arbitration agreement—a challenge to the validity of the delegation clause itself is to be resolved by the court while a challenge to the arbitration agreement in which the delegation clause is contained is to be resolved by the arbitrator.[77]

This complex delegation principle was set out by the Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*,[78] an employment discrimination case.[79] The plaintiff employee asserted that his arbitration agreement with the defendant employer was unconscionable and therefore invalid (the arbitrability question, or the doughnut's hole in Figure 1).[80] The arbitration agreement was a stand-alone document, which the plaintiff had signed as a condition of his employment.[81] It included the following delegation clause:

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

74. *See Id.* at 86 (Stevens, J., dissenting) (explaining that a delegation clause "assign[s] to the arbitrator any disputes related to the validity of the arbitration provision" (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, at 442 (2006))).

75. *See Id.* at 70.

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

77. *See Rent-A-Center,* 561 U.S. at 71.

78. *Id.* at 63.

79. *Id.* For a critique of this case, see David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 374 (2018) (arguing that "*Rent-A-Center*'s approach is historically inaccurate and normatively undesirable"). For a contrary view, see Rau, *Arbitral Power*, *supra* note 41, at 489–90 ("[T]he analysis prescribed by the Court may, over time, wind up posing real challenges of practical administration in the working out of our law of arbitration . . . . But to posture that the Court's ruling is in any way 'inexplicable' or 'baffling'—let alone 'fantastic,' 'dizzying' or 'bizarre'—nevertheless strikes me as really, rather extravagant.").

80. *Rent-A-Center*, 561 U.S. at 66. *See also supra* p. 86.

81. *Id.* at 65.

> [T]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.[82]

The question before the Supreme Court was whether the court or the arbitrator should determine the unconscionability claim (the hole in the doughnut's hole in Figure 1)[83] in light of this delegation clause.[84] The Court first found (and the parties did not dispute) that the delegation clause clearly and unmistakably evidenced the parties' intention to arbitrate arbitrability.[85] The question then became whether that delegation clause was in itself valid.[86] This was a crucial question because "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement" that must be valid under the FAA in order for a court to enforce.[87]

According to the delegation principle devised by the Court, the validity of the delegation clause was separate from the arbitration agreement in which it was contained.[88] Therefore, the Court held that unless the plaintiff employee challenged the delegation provision specifically, it must be considered as valid and enforceable under the FAA, "leaving any challenge to the validity of the [arbitration] [a]greement as a whole for the arbitrator."[89] Since the plaintiff in this case had challenged only the validity of the entire arbitration agreement, the Court referred his unconscionability challenge to the arbitrator.[90] The fact that the parties' underlying contract was itself an arbitration agreement was of no consequence, according to the Court, since "[a]pplication of the severability rule does not depend on the substance of the remainder of the contract."[91]

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82. *Id.* at 66.

83. *See supra* p. 86.

84. *See Rent-A-Center*, 561 U.S. at 66.

85. *Id.* at 69 n.1.

86. *Id.* at 70.

87. *Id.* at 70. It is important to note that the clear and unmistakable principle does not apply to this validity question. Rather, it is to be determined in accordance with (9 U.S.C.) § 2 of the FAA, which provides that "[a] written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

88. *Id.* at 70–71.

89. *Id.* at 72.

89. *Id.*

91. *Id.* In a strongly worded dissenting opinion, Justices Stevens, Ginsburg, Breyer, and Sotomayor found that "questions of arbitrability" "remain within the province of

In sum, the Supreme Court has set out three basic principles that together operate to fill the hole in the doughnut's hole and create complementary jurisdictional spheres for courts and arbitrators in deciding who should decide arbitrability questions.

The first principle is the severability principle, which operates to broadly distinguish between who decides an arbitrability challenge directed at the contract containing the arbitration agreement (the arbitrator) and who, at least presumptively, decides an arbitrability challenge directed at the arbitration agreement itself (the court, unless the challenge concerns dispositive "gateway questions").[92] The severability principle can be visualized as follows:

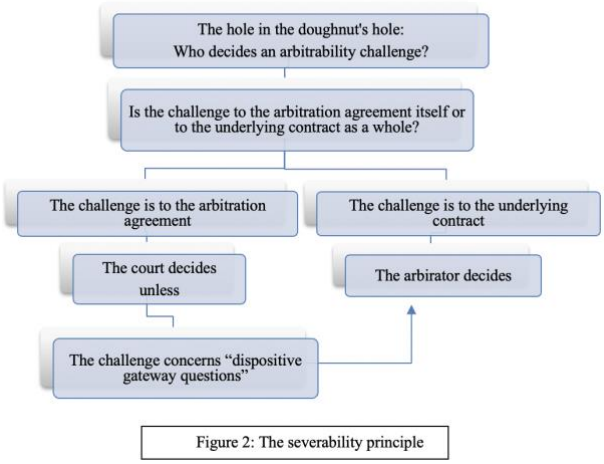

Figure 2: The severability principle

The second principle is the clear and unmistakable principle, which operates to rebut the presumption that an arbitrability challenge to the arbitration agreement itself is to be resolved by the courts. Pursuant to

judicial review . . . because they are necessary antecedents to enforcement of an arbitration agreement." *Id.* at 77, 78 n.1 (dissenting opinion). According to the dissent, questions of arbitrability may go to the arbitrator "in two instances: (1) when the parties have demonstrated, clearly and unmistakably, that it is their intent to do so; or (2) when the validity of an arbitration agreement depends exclusively on the validity of the substantive contract of which it is a part." *Id.* at 80. A claim that the arbitration agreement is unconscionable, however, "undermines any suggestion that [the party] 'clearly' and 'unmistakably' assented to submit questions of arbitrability to the arbitrator." *Id.* at 81.

92. *Id.* at 70–72, 75. This is a broad and not always accurate dichotomy between a challenge to the underlying contract and to the arbitration agreement. There may be situations where a challenge to the former encompasses a challenge to the latter. *See Id.* at 71. Even in such situations, however, the Supreme Court has required "the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene." *Id.*

this principle, where the parties have clearly and unmistakably intended to arbitrate such arbitrability challenges, the arbitrator is to resolve them and not the courts. Building on Figure 2,[93] this principle can be visualized as follows:

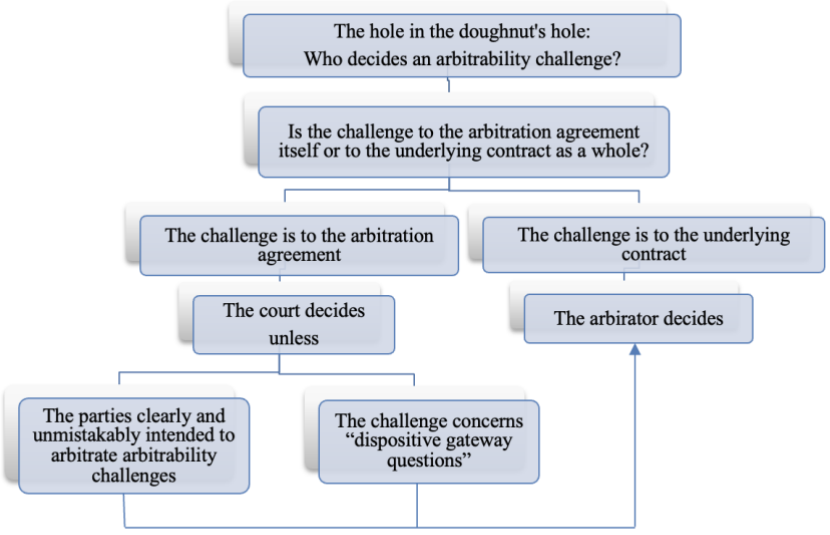

Figure 3: The clear and unmistakable principle

The third principle is the delegation principle, which links the severability principle and the clear and unmistakable principle. It provides that parties can express their clear and unmistakable intention to arbitrate arbitrability (and thereby fill the hole in the doughnut's hole) by including a provision to that effect—a delegation clause—in their arbitration agreement. Such a provision would then constitute a separate "antecedent agreement" that is severable from the rest of the arbitration agreement and therefore must in itself be valid.[94] The validity of a delegation clause is presumed unless challenged directly—a challenge that is to be resolved by the court. If a party challenges only the arbitration agreement in which the delegation clause is contained, be it a stand-alone arbitration agreement or an arbitration agreement that is itself contained in an underlying contract—that challenge is for the

93. *See supra* p. 99.
94. *Rent-A-Center*, 561 U.S. at 70.

arbitrator to resolve. Building again on Figure 2,[95] the delegation principle can be visualized as follows:

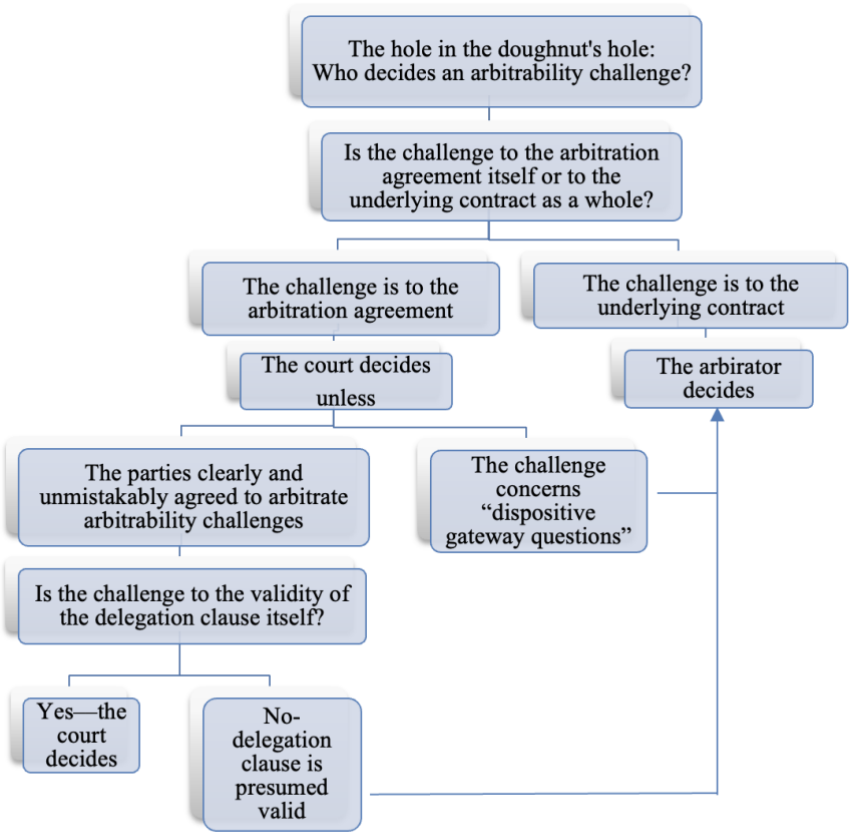

Figure 4: The delegation principle

95. *See supra* p. 99.

These three principles operate together to create complementary jurisdictional spheres as between courts and arbitrators concerning the hole in the doughnut's hole question of who decides arbitrability:

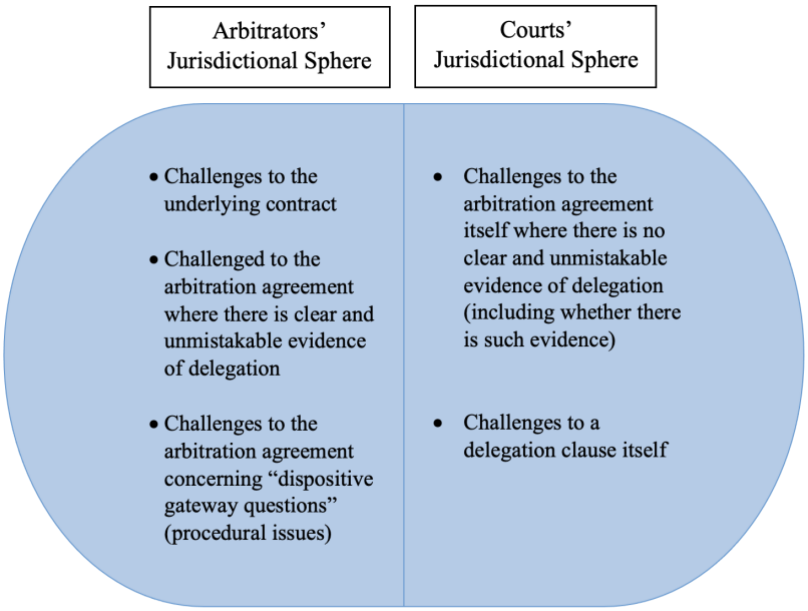

Figure 5: Courts' and arbitrators' complementary jurisdictional spheres

The three principles set out above—the severability principle, the clear and unmistakable principle, and the delegation principle—serve to operationalize the complementary jurisdictional spheres created by the Supreme Court. Although complex, this framework could and should have guided the Fifth Circuit in *Schein I*.[96] However, as I discuss in the next section, the Fifth Circuit did not apply this framework. Furthermore, *Schein II*[97] raised a new aspect of the hole in the doughnut's hole question of who decides arbitrability—namely the relationship between a delegation clause and a carve-out clause.[98]

96. Archer & White Sales, Inc. v. Henry Schein, Inc. (*Schein I*), 878 F.3d 488 (5th Cir. 2017).

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

98. As noted in the Introduction, a carve-out clause excludes specific claims from the scope of the arbitration clause.

III. THE *SCHEIN* SAGA

In this section, I set out the basic facts of the *Schein* case and examine the evolution of the case in the Fifth Circuit and the Supreme Court. I first briefly discuss the Fifth Circuit's decision in *Schein I*,[99] which I argue deviated from the framework established by the Supreme Court and set out above. While this decision has been overturned by the Supreme Court, it is useful to examine the Fifth Circuit's approach to arbitrability and who should decide it, which was replicated in its decision *Schein II*.[100] I then turn to *Schein II* and focus on the new aspect that it introduced to the hole in the doughnut's hole question of who decides arbitrability—namely the relationship between a delegation clause and a carve-out clause—and how this new aspect relates to the principles and complementary jurisdictional spheres established by the Supreme Court.

A. Background

Archer and White Sales, Inc. ("Archer")—a distributor, seller, and servicer for dental equipment manufacturers—and Henry Schein, Inc. ("Schein")—a distributor and manufacturer of dental equipment—entered into a contract that included the following arbitration clause:

> Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief…), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.[101]

Archer sued Schein in Texas, alleging violations of federal and state antitrust laws and seeking both money damages "estimated to be in the tens of millions of dollars" and injunctive relief.[102] Schein filed a motion

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99. 878 F.3d 488.

100. 935 F.3d 274.

101. Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 528 (2019).

102. *Schein I*, 878 F.3d at 491. The action included other corporate defendants operating in the dental equipment business, some of whom had signed the arbitration agreement with Archer & White and others who did not. *Id.* The non-signatory defendants nonetheless sought a stay of Archer & White's claims against them on the basis of equitable estoppel. *Id.* Neither the district court nor the Fifth Circuit addressed this issue. *Id.* In its action, Archer & White alleged, *inter alia*, that the defendants conspired "to fix prices and refuse to compete with each other" and "carried out their conspiracy" through a series of unlawful

to compel arbitration pursuant to the contract's arbitration clause (the doughnut in Figure 1).[103] Archer objected, challenging the enforcement of the arbitration clause on the ground that it 'carved-out,' i.e., excluded from the scope of the arbitration, actions in which the plaintiff seeks injunctive relief (the doughnut's hole in Figure 1).[104]

Schein argued in response that the arbitration clause's incorporation of the Arbitration Rules of the American Arbitration Association ("AAA") constituted a delegation clause that clearly and unmistakably evidenced the parties' intention to arbitrate arbitrability questions such as whether Archer's claim for injunctive relief fell within the scope of the arbitration clause.[105] Since the AAA rules explicitly empowered arbitrators to decide such arbitrability questions, Schein maintained that it was for the arbitrator, and not the court, to resolve Archer's challenge to the enforcement of the arbitration clause (the hole in the doughnut's hole in Figure 1).[106]

Archer, in contrast, asserted that the arbitration clause's carve-out provision excluded from arbitration not only actions seeking injunctive relief, but also the delegation provision that referred this scope question to the arbitrator.[107] In other words, Archer submitted that the carve-out provision in the arbitration clause negated the delegation provision, rendering the latter inapplicable to the question of whether Archer's action for injunctive relief was arbitrable.[108] Absent a delegation provision, this question, according to Archer, was for the court to determine.[109]

The dispute between the parties thus became not about Archer's antitrust claims (the doughnut), nor about whether its claim for injunctive relief was arbitrable (the doughnut's hole), but rather *who* was to decide whether its claim for injunctive relief was arbitrable (the hole

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activities, including, but not limited to agreements not to compete, agreements to fix prices, and boycotts." *Id.* at 491 n.1.

103. *Id. See also supra* p. 86.

104. *Id.* at 494. *See also supra* p. 86.

105. *Id.* at 493–94; AM. ARB. ASS'N, COM. ARB. RULES AND MEDIATION PROCS. R-7(a) (2013), ("[t]he 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.").

106. AM. ARB. ASS'N, COM. ARB. RULES AND MEDIATION PROCS. R-7(a); *Schein I*, 878 F.3d at 493–94. *See also supra* p. 86.

107. *Schein I*, 878 F.3d at 497.

108. *See id.*

109. *See Id.* at 493–94.

in the doughnut's hole).[110] Neither party disputed the validity of the delegation clause, the arbitration clause, or the underlying contract.[111]

Before turning to the Fifth Circuit's decisions in *Schein I* (section B below) and *Schein II* (section C below), it may be useful to summarize the parties' dispute. Building on the relevant parts of Figure 4[112] and modifying it to account for the additional element of the carve-out provision, Archer and Schein's dispute can be visualized as follows:

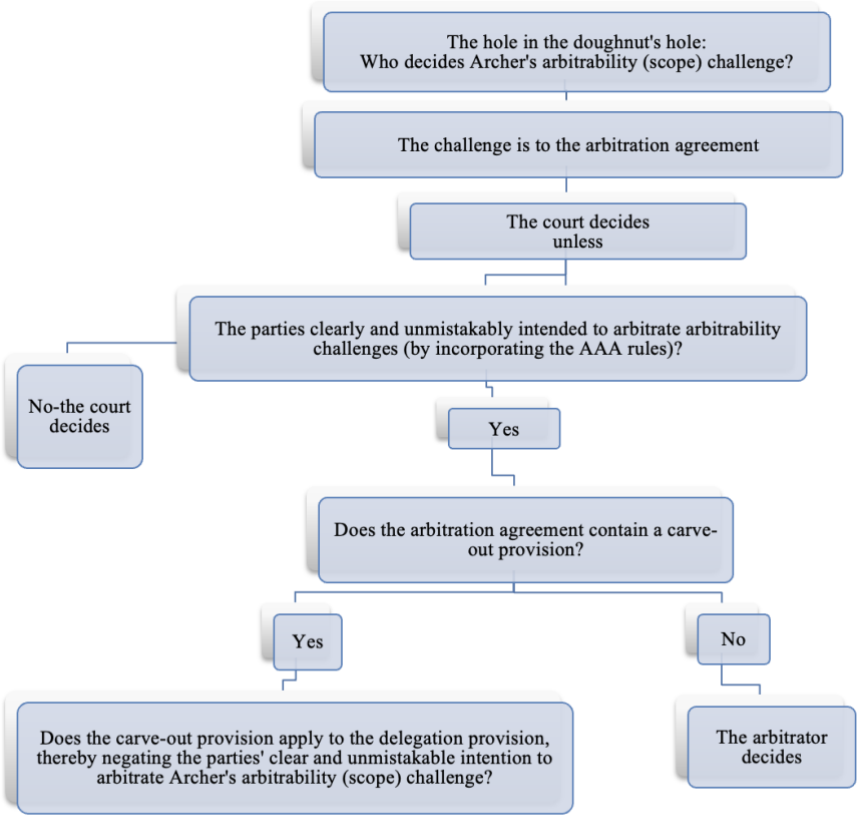

Figure 6: The *Schein* dispute

110. *See Id.* at 492.
111. *See Id.* at 491–92.
112. *See supra* p. 101.

B. Schein I

The Fifth Circuit recognized that in order to determine who should decide the arbitrability question (i.e., whether Archer's action for injunctive relief fell within the scope of the arbitration clause) it must decide whether the parties' delegation provision evinced a clear and unmistakable intention to delegate the question of arbitrability to an arbitrator (Figure 3).[113] The court noted that a contract need not contain an express delegation clause to meet the clear and unmistakable standard.[114] Rather, "[a]n arbitration agreement that expressly incorporates the AAA Rules 'presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'"[115]

However, the Fifth Circuit further found that "[i]t is not the case that any mention in the parties' contract of the AAA Rules trumps all other contract language."[116] Rather, the court recognized as a "strong argument" that the AAA Rules did not apply in this case to actions seeking injunctive relief, which the parties' arbitration clause arguably carved-out.[117] In other words, the Fifth Circuit found that the parties' carve-out provision *might* negate their delegation provision with respect to Archer's claim for injunctive relief, thereby leaving the arbitrability of this claim for the court to determine (Figure 6).[118]

The court concluded that it did not need to determine whether the parties' carve-out provision negated their delegation provision, since it was unnecessary for it to decide whether the parties clearly and unmistakably intended to arbitrate arbitrability questions.[119] Even if they did, according to the Fifth Circuit, Schein's motion to compel arbitration should not be granted since its argument that Archer's claim for injunctive relief is arbitrable was "wholly groundless."[120] This "wholly groundless" exception to the clear and unmistakable principle had been applied by the Fifth Circuit in previous cases,[121] as well as by other circuit courts.[122] According to this exception, where there is no "plausible argument for the arbitrability of the dispute," the court may decide the

113. *Id.* at 492. *See also supra* p. 100.
114. *Id.* at 493.
115. *Id.*
116. *Id.* at 494.
117. *Id.*
118. *See Id.* at 494–95; *see also supra* p. 105.
119. *Id.* at 495.
120. *Id.* at 495–97.
121. *See, e.g.*, Douglas v. Regions Bank, 757 F.3d 460, 464 (5th Cir. 2014).
122. *See, e.g.*, Simply Wireless, Inc. v. T-Mobile U.S., Inc., 877 F.3d 522, 528–29 (4th Cir. 2017), *abrogated by* Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 529 (2019); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373–74 (Fed. Cir. 2006).

arbitrability question "despite a valid delegation clause."[123] Noting that the parties' arbitration clause broadly carved-out all "actions seeking injunctive relief," the Fifth Circuit found that there was no plausible argument that Archer's action, as a whole, fell within the scope of the parties' arbitration agreement. It thus denied Schein's motion to compel arbitration.[124]

However, the "wholly groundless" exception relied on by the Fifth Circuit was nowhere to be found in the Supreme Court's jurisprudence concerning the clear and unmistakable principle (Figure 3)[125] and the delegation principle (Figure 4).[126] In fact, this exception seemed to contradict the complementary jurisdictional spheres of courts and arbitrators established by the Supreme Court (Figure 5).[127] Pursuant to this jurisdictional division of power, once a court determines that the parties clearly and unmistakably intended to arbitrate arbitrability questions (thereby filling the hole in the doughnut's hole), it is for the arbitrator to determine such questions regardless of how frivolous a party's claim of arbitrability might be.[128]

Schein appealed the Fifth Circuit's judgment to the Supreme Court and, unsurprisingly, the Court overturned the Fifth Circuit's application of the "wholly groundless" exception.[129]

The Supreme Court's decision in *Schein I* did not address the content of the clear and unmistakable principle (Figure 3)[130] or the disputed relationship between the carve-out provision and the delegation provision in the parties' arbitration clause (Figure 6).[131] Rather, the Court focused on the "wholly groundless" exception relied on by the Fifth Circuit, concluding that it was inconsistent with the FAA and with the Court's precedent.[132]

The Court reiterated that the question of who decides arbitrability questions (the hole in the doughnut's hole) was a question of contract that a court could not decide where the parties had clearly and unmistakably

123. Archer & White Sales, Inc. v. Henry Schein, Inc. (*Schein I*), 878 F.3d 488, 492 (5th Cir. 2017) (quoting IQ Prods. Co. v. WD–40 Co., 871 F.3d 344, 349 (5th Cir. 2017)).
124. *Id.* at 497–98.
125. *See supra* p. 100.
126. *See, e.g.*, Rent-A-Center, W., Inc. v. Jackson, 561 U. S. 63 (2010); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995); *see also supra* p. 102.
127. *See* Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 529 (2019); *see also supra* 103.
128. *See Id.* at 529–31.
129. *See Id.* at 528–29.
130. *See supra* p. 100.
131. *See supra* p. 105.
132. *Id.* at 529.

delegated it to an arbitrator.[133] While lower courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so,"[134] the presence of such evidence required referring the arbitrability question to the arbitrator "even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless."[135] According to the Court, "[w]hen the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous. So, too, with arbitrability."[136]

In its decision, the Supreme Court disagreed with Archer's argument that "as a practical and policy matter, it would be a waste of the parties' time and money to send the arbitrability question to an arbitrator if the argument for arbitration is wholly groundless."[137] The Court doubted whether a "wholly groundless" exception

> would save time and money systemically even if it might do so in some individual cases. . . . The exception would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is *wholly* groundless, as opposed to groundless. We see no reason to create such a time-consuming sideshow.[138]

The Court also rejected Archer's argument that the "wholly groundless" exception was "necessary to deter frivolous motions to compel arbitration."[139] The Court found that "[a]rbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable," and may also impose "fee-shifting and cost-shifting sanctions, which in turn will help deter and remedy frivolous motions to compel arbitration."[140]

The Supreme Court therefore concluded that the "wholly groundless" exception "confuses the question of who decides arbitrability [the hole in the doughnut's hole] with the separate question of who prevails on arbitrability [the doughnut's hole]. When the parties' contract delegates

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133. *Id.* at 531.
134. *Id.* (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).
135. *Id.* at 529. As the Court noted, in addition to the Fifth Circuit, the Courts of Appeals for the Fourth, Sixth, Tenth, and Elevenths Circuits had similarly applied the "wholly groundless" exception. *See Id.* at 528–529.
136. *Id.* at 530 (citing AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649–50 (1986)).
137. *Id.*
138. *Id.* at 530–31.
139. *Id.* at 531.
140. *Id.*

the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."[141]

Since the Fifth Circuit had not decided whether the contract in this case in fact clearly and unmistakably delegated the arbitrability question to the arbitrator by incorporating the AAA rules (Figure 3),[142] the Supreme Court did not express a view on the matter and left it for the Fifth Circuit to address on remand.[143]

C. Schein II

On remand, the Fifth Circuit noted that the first question before it was whether the parties' arbitration clause clearly and unmistakably evidenced their intention to delegate arbitrability questions to the arbitrator (the hole in the doughnut's hole).[144] If the answer to this question was yes—the arbitrator would decide whether Archer's action fell within the scope of the arbitration clause. If the answer was no—the court would make this determination (Figure 3).[145]

The court recognized that "[a] contract need not contain an express delegation clause to meet this standard," and that "an arbitration agreement that incorporates the AAA Rules 'presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'"[146] Moreover, it was "undisputed that the [parties'] Agreement incorporates the AAA rules, delegating the threshold arbitrability inquiry to the arbitrator for at least some category of cases."[147] However, according to the Fifth Circuit this did not end the matter. Rather, the question then became whether the parties' carve-out provision negated this delegation provision with respect to Archer's claim/action for injunctive relief (Figure 6).[148] The question of the effect of a carve-out provision (carving-out particular claims or disputes from the scope of an arbitration agreement) on a valid delegation provision

141. *Id*.
142. *See supra* p. 100.
143. *Id.*
144. Archer & White Sales, Inc. v. Henry Schein, Inc. (*Schein II*), 935 F.3d 274, 277 (5th Cir. 2019).
145. *See supra* p. 100.
146. *Id*. at 279.
147. *Id*. at 280.
148. *See Id*. at 280–82 As noted above, the parties' arbitration agreement stated that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief. . .), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 528 (2019); *see also supra* p. 105.

(delegating such scope questions to the arbitrator) had not been previously addressed by the Supreme Court.

Archer argued that there was no clear and unmistakable evidence that the parties delegated arbitrability disputes concerning actions seeking injunctive relief to the arbitrator.[149] Such actions, according to Archer, were included in the carve-out provision and therefore fell outside the scope of the arbitration agreement, including its delegation provision (the incorporation of the AAA rules).[150] In contrast, Schein argued that the parties' "carve-out [of] actions seeking injunctive relief [did] not trump the parties' delegation" provision.[151] It noted that Archer's reading of the arbitration clause effectively required the court to determine the scope of the carve-out provision—"precisely the category of inquiries a court is precluded from making in answering the delegation question."[152]

Agreeing with Archer, the Fifth Circuit found that

> the placement of the carve-out here is dispositive . . . [t]he most natural reading of the arbitration clause at issue here states that any dispute, except actions seeking injunctive relief, shall be resolved in arbitration in accordance with the AAA rules. The plain language incorporates the AAA rules—and therefore delegates arbitrability—for all disputes *except* those under the carve-out.[153]

The court accordingly concluded that the parties' arbitration clause did not evidence a clear and unmistakable intent to arbitrate arbitrability—at least in so far as actions seeking injunctive relief were concerned—since the carve-out provision operated to carve-out not only such actions, but also the parties' delegation of their arbitrability to the arbitrator.[154] Therefore, the court held that it was within its jurisdiction to determine the arbitrability of Archer's action for injunctive relief.[155]

As I will explain in more detail in section IV.A.2 below, this finding of the Fifth Circuit appears to conflate two separate questions, represented in Figure 1.[156] The first question is what the parties' carve-out provision in fact carves-out, or in other words what is the scope of the

149. *Schein II*, 935 F.3d at 279.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 281. The precedent relied on by the Fifth Circuit, of its own and of other circuit courts, in reaching this conclusion will be discussed in the next section.
154. *Id.* at 281–82.
155. *Id.* at 282.
156. *See supra* p. 86.

parties' arbitration clause—the doughnut's hole. The second question is *who* is to decide this scope question, the arbitrator or the court—the hole in the doughnut's hole. While the first question is governed by the parties' carve-out provision, the second question is governed by the parties' delegation provision. The Fifth Circuit should have answered the second question first by determining whether the parties' delegation provision is valid (which was not disputed in this case) and clearly and unmistakably evidences their intention to arbitrate arbitrability questions (Figure 4).[157]

Instead, the Fifth Circuit prematurely answered the first question in order to answer the second. That is, the court determined that Archer's claim/action for injunctive relief fell outside the scope of the arbitration clause (the doughnut's hole) and *therefore* that the parties' (valid) delegation provision could not operate to refer this scope question to the arbitrator (the hole in the doughnut's hole).[158] However, according to the clear and unmistakable principle set out by the Supreme Court (Figure 3),[159] once the Fifth Circuit had determined that the parties' incorporation of the AAA rules clearly and unmistakably evidenced their intention to arbitrate arbitrability questions, then *all* such questions should have been referred to the arbitrator, including whether Archer's claim/action for injunctive relief fell outside the scope of the arbitration clause.[160]

Arriving at the opposite conclusion, the Fifth Circuit proceeded to determine whether Archer's claim/action for injunctive relief was arbitrable.[161] It rejected Schein's argument that even if Archer's claim/action for injunctive relief were non-arbitrable, the court should send Archer's claim for damages to arbitration.[162] The court reiterated its finding in *Schein I* that the arbitration clause created a broad carve-out for "actions seeking injunctive relief" and was not limited to "actions seeking *only* injunctive relief," "actions for injunction in aid of an arbitrator's award," or "*claims* for injunctive relief."[163] Purporting to give effect to the "clear and unambiguous" plain language of the parties' agreement, the Fifth Circuit found that Archer's "action as a whole constitutes an 'action seeking injunctive relief'"[164] that was excluded from the scope of the arbitration agreement.

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157. *See supra* p. 101.
158. *Id.*
159. *See supra* p. 100.
160. *Id.*
161. *Id.*
162. *Id.* at 283.
163. *Id.*
164. *Id.* at 284 n.42.

Moreover, the Fifth Circuit noted that the mere fact that this interpretation of the parties' arbitration clause effectively permitted Archer to avoid arbitration simply by adding a claim for injunctive relief "does not change the clause's plain meaning."[165] The court characterized as "overreach[ing]"[166] Schein's argument that this would lead to "absurd results" since a party could unilaterally evade an arbitration agreement simply by requesting injunctive relief. The Fifth Circuit accordingly denied, for the second time, Schein's motion to compel arbitration.[167]

Both Archer and Schein appealed the Fifth Circuit's decision to the Supreme Court.[168] Archer appealed the court's finding that, absent the carve-out provision, the parties' incorporation of the AAA rules would have clearly and unmistakably evidenced their intent to delegate arbitrability questions to the arbitrator.[169] The Court denied certiorari to Archer's appeal.[170] Schein appealed the Fifth Circuit's finding that a carve-out clause negates an otherwise clear and unmistakable delegation clause. The Court allowed Schein's appeal.[171]

IV. *SCHEIN II* BEFORE THE SUPREME COURT

The question presented by Schein in its second appeal before the Supreme Court was "[w]hether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear

165. *Id.* at 283.
166. *Id.*
167. *Id.* at 284.
168. Petition for Writ of Certiorari, *supra* note 38; Conditional Cross-Petition for a Writ of Certiorari, *Schein II*, 935 F.3d 274 (5th Cir. 2019) (No. 19-1080), 2020 WL 1391910.
169. This question was phrased by Archer as follows: "[w]hether an arbitration agreement that identifies a set of arbitration rules to apply *if* there is arbitration clearly and unmistakably delegates to the arbitrator disputes about *whether* the parties agreed to arbitrate in the first place." Conditional Cross-Petition for a Writ of Certiorari at I, *supra* note 167. Archer also presented a second issue on appeal: "[w]hether an arbitrator or a court decides whether a nonsignatory to an arbitration agreement can enforce the arbitration agreement through equitable estoppel." *Id.* This second issue was not addressed by the Fifth Circuit in either of its decisions.
170. Archer & White Sales, Inc. v. Henry Schein, Inc., 207 L. Ed. 2d 1053 (2020).
171. Henry Schein, Inc. v. Archer & White Sales, Inc., 207 L.Ed.2d 1050 (2020). As noted above, the Court later dismissed the certiorari as improvidently granted. Some commentators have suggested that the Supreme Court decided to dismiss the certiorari it had granted in *Schein II* because the justices realized in oral argument that "they couldn't sensibly say anything about this matter without addressing the question of whether the contract called for arbitration of the gateway question," *i.e.,* whether incorporating the AAA's Rules constituted clear and unmistakable evidence that the parties had agreed to delegate the arbitrability question to the arbitrator. Ronald Mann, Opinion Analysis, *Justices Dismiss Arbitrability Dispute*, SCOTUSBLOG (Jan. 25, 2021, 5:25 PM), https://www.scotusblog.com/2021/01/justices-dismiss-arbitrability-dispute/.

and unmistakable delegation of questions of arbitrability to an arbitrator."[172] This question put to the test the complementary jurisdictional spheres that the Supreme Court has carefully established in its previous decisions (Figure 5),[173] as well as the principles that the Court has set out to guide lower courts in implementing these jurisdictional spheres (Figures 2-4).[174]

According to the framework that the Supreme Court has set out, a finding by a court of a valid delegation provision (Figure 4)[175] that clearly and unmistakably (Figure 3)[176] evidences the parties' intention to have the arbitrator resolve challenges to the arbitration agreement (Figure 2[177])—thereby filling the hole in the doughnut's hole—signals the end of the court's jurisdiction and the beginning of the arbitrator's jurisdiction. In *Schein II*, the Supreme Court was called upon to decide whether a carve-out provision that limits the scope of the parties' arbitration clause—the doughnut's hole—should affect this jurisdictional division of power. It may be instructive to examine what other circuit courts have held in this regard.

All circuit courts have opined on the question of who decides arbitrability—the hole in the doughnut's hole—in cases involving delegation clauses, and some have also addressed the impact of carve-out clauses on such delegation.[178] In section A, I examine these decisions.[179]

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172. Petition for Writ of Certiorari, *supra* note 38, at I.

173. *See supra* p. 102.

174. *See supra* pp. 99–101.

175. *See supra* p. 101.

176. *See supra* p. 100.

177. *See supra* p. 99.

178. In several cases involving challenges to an arbitrator's arbitrability determination, parties have also argued that the clear and unmistakable standard was satisfied (or not) on the basis of their conduct during the arbitration, for instance by the fact that arbitrability had been argued (or not argued) before the arbitrator. Such conduct-based arguments have been accepted, for instance, by the Fourth and Sixth Circuits. *See generally* Rock-Tenn Co. v. United Paperworkers Int'l Union, 184 F.3d 330 (4th Cir. 1999); Cleveland Elec. Illuminating Co. v. Util. Workers Union of America, 440 F.3d 809 (6th Cir. 2006); Crossville Med. Oncology, P.C. v. Glenwood Sys., LLC, 485 F. App'x 821 (6th Cir. 2012). The Fifth Circuit, however, has rejected such arguments. *See generally* ConocoPhillips, Inc. v. Local 13-0555 United Steelworkers Int'l Union, 741 F.3d 627 (5th Cir. 2014); Houston Refin., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, 765 F.3d 396 (5th Cir. 2014).

179. This analysis includes representative examples of circuit court decisions on this matter and is not intended to be exhaustive. Moreover, of the three principles set out by the Supreme Court as discussed above (the severability principle, the clear and unmistakable principle, and the delegation principle), the following analysis focuses on the circuit courts' application of the latter two principles. The severability principle does not directly relate to the question on appeal in *Schein II*.

Then, in section B, I discuss the Fifth Circuit's decision in *Schein II* in light of this jurisprudence.

A. Circuit Courts Jurisprudence

All circuit courts have applied the clear and unmistakable principle (Figure 3)[180] to determine whether parties intended to arbitrate "arbitrability questions" (the hole in the doughnut's hole).[181] Such questions have concerned, for instance, the scope of the arbitration

180. *See supra* p. 100.

181. As noted above, *supra* note 10, in this article "arbitrability questions" do not include challenges to the *existence* of an arbitration agreement.

Several circuit courts have indeed refused to apply the clear and unmistakable principle to questions that related to the formation or existence of arbitration agreements, leaving such questions within the exclusive purview of the courts regardless of the parties' intentions. However, some of these courts have not been consistent or clear in this regard. *Compare* Dr.'s Assocs., Inc. v. Alemayehu, 934 F.3d 245, 251 (2d Cir. 2019) ("[P]arties may not delegate to the arbitrator the fundamental question of whether they formed the agreement to arbitrate in the first place."), *with* Schneider v. Kingdom of Thailand, 688 F.3d 68, 72 (2d Cir. 2012) ("[I]n the absence of such clear and unmistakable evidence, questions of arbitrability are presumptively resolved by the court, regardless of whether they are related to scope or formation."). Particularly unclear is whether claims by/against non-signatories relate to the *scope* of the arbitration agreement or to its *existence*. *See, e.g.*, DK Joint Venture 1 v. Weyand, 649 F.3d 310, 317 (5th Cir. 2011) (holding that non-signatories who *oppose* arbitration is an issue that goes to the existence of the agreement and must therefore be decided by the court); Brittania-U Nigeria, Ltd. v. Chevron USA, Inc., 866 F.3d 709, 714 (5th Cir. 2017) (holding that non-signatories who *seek* arbitration is an issue that goes to the scope of the agreement and could be decided by the arbitrator); Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 848 (6th Cir. 2020) (holding that a challenge to the enforcement of an arbitration agreement by a signatory was a scope issue); *In re* Automotive Parts Antitrust Litig., 951 F.3d 377, 380, 384 (6th Cir. 2020) (holding that "the parties did not form an agreement to arbitrate . . . [and] '[o]nly if the parties have agreed to arbitrate do the AAA's rules apply.'").

Questions relating to whom the arbitration agreement applies (i.e., non-signatories) should generally be considered as relating to the scope of the arbitration agreement ("arbitrability questions") rather than to its existence. *See* Tamar Meshel, *Caught Between the FAA and the New York Convention: Non-Signatories to International Commercial Arbitration Agreements and the "In Writing" Requirement*, 22(3) U. PA. J. BUS. L. 677, 690 (2020); Tamar Meshel, *Of International Commercial Arbitration, Non-Signatories, and American Federalism: The Case for a Federal Equitable Estoppel Rule*, 56(2) STAN. J. INT'L L. 123 (2020); Tamar Meshel, GE Energy v. Outokumpu*: Non-signatories Can Now Enforce International Commercial Arbitration Agreements on Equitable Estoppel Grounds*, 11 HARV. BUS. L. REV. ONLINE (2021); *see also*, Rau, *Allocation of Power*, *supra* note 10, at 339 (distinguishing between "attempts to bind a non-signatory to an arbitration agreement, and attempts to impose, on a signatory to an agreement, the obligation to arbitrate with other, unnamed parties.").

agreement,[182] its validity,[183] the availability of class arbitration,[184] the enforceability of a class action waiver clause,[185] waiver of arbitration by

182. *See, e.g.*, Apollo Comput., Inc. v. Berg, 886 F.2d 469, 470, 472 (1st Cir. 1989) (concerning the application of the arbitration agreement to a non-signatory); Bell v. Cendant Corp., 293 F.3d 563, 565, 569 (2d Cir. 2002) (concerning the application of the arbitration agreement to plaintiff's fraud and breach of fiduciary duty claims); Richardson v. Coverall N. Am., Inc., 811 F. App'x 100, 102, 104 (3d Cir. 2020) (concerning the application of the arbitration agreement to plaintiff's employment claims); Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522, 524–25 (4th Cir. 2017), *abrogated by* Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 529 (2019) (concerning the application of the arbitration agreement to plaintiff's trademark infringement claims. This decision was abrogated in part by the Supreme Court's finding in *Schein I* since the Fourth Circuit had applied the "wholly groundless" exception); Douglas v. Regions Bank, 757 F.3d 460, 461, 464 (5th Cir. 2014), *abrogated by Schein*, 139 S. Ct. at 529 (concerning the application of the arbitration agreement to plaintiff's negligence and conversion claims. This decision was abrogated in part by the Supreme Court's finding in *Schein I* since the Fifth Circuit had applied the "wholly groundless" exception). *See also* Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 843–44 (6th Cir. 2020) (concerning the invocation of the arbitration agreement by a non-signatory); Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 510 (7th Cir. 1992) (concerning the application of the arbitration agreement to plaintiff's misrepresentation claims); Lebanon Chem. Corp. v. United Farmers Plant Food, Inc., 179 F.3d 1095, 1097 (8th Cir. 1999) (concerning the application of the arbitration agreement to a disputed invoices); Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co., 862 F.3d 981, 983, 985 (9th Cir. 2017) (concerning the application of the arbitration agreement to a non-signatory); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1368 (Fed. Cir. 2006), *abrogated in part by Schein*, 139 S. Ct. at 529 (concerning the application of the arbitration agreement to plaintiff's patent infringement claim. This decision was abrogated in part by the Supreme Court's finding in *Schein I* since the Federal Circuit had applied the "wholly groundless" exception); Chevron Corp. v. Ecuador, 795 F.3d 200, 202 (D.C. Cir. 2015) (concerning the application of a treaty's arbitration provision to the investor's claim).

183. The "validity" of a written agreement to arbitrate concerns "whether it is legally binding, as opposed to whether it was in fact agreed to." Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69 n.1 (2010). *See, e.g.*, Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 11 (1st Cir. 2009) (concerning plaintiff's claim that the arbitration agreement was unconscionable); Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 394 (2d Cir. 2011) (concerning Ecuador's estoppel and waiver claims, which "challenge the 'validity' of the arbitration agreement."); Brennan v. Opus Bank, 796 F.3d 1125, 1131 (9th Cir. 2015) (concerning an unconscionability determination); Terminix Int'l Co., v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1329 (11th Cir. 2005) (concerning a claim that the arbitration agreement was unenforceable because it "illegally deprive[d] [plaintiff] of statutory remedies and rights.").

184. Most of the circuit courts have assumed (although some without deciding), that the question of whether an arbitration clause authorizes class arbitration is one of "arbitrability." *See, e.g.*, Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392 (2d Cir. 2018); Jock v. Sterling Jewelers Inc., 942 F.3d 617 (2d Cir. 2019); Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630 (5th Cir. 2012); Herrington v. Waterstone Mortg. Corp., 907 F.3d 502, 507 (7th Cir. 2018); Dish Network L.L.C. v. Ray, 900 F.3d 1240 (10th Cir. 2018); Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230 (11th Cir. 2018); JPay, Inc. v. Kobel, 904 F.3d 923 (11th Cir. 2018). For commentary on the question of who decides the availability of class arbitration see, for example, Alexander Corson, *Who Decides Class Arbitrability?: The Vanishing Class Action Mechanism's Last Stand*, 50 SETON HALL L. REV. 1095 (2020); Mitchell L. Lathrop, *Class Arbitration: Who Decides*, 86 DEF. COUNS. J. 1 (2019); Virginia

litigation conduct,[186] and the interpretation of a termination clause in a collective bargaining agreement.[187] Moreover, some circuit courts, in decisions rendered after the 2010 Supreme Court decision in *Rent-A-Center,*[188] have also applied the delegation principle (Figure 4).[189] Most of these courts have found that unless the delegation clause (evidencing clear and unmistakable intent to arbitrate arbitrability) is specifically challenged, it is valid and enforceable.[190]

However, differences have arisen between the circuit courts regarding two aspects of these principles.[191] The first aspect concerns the

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Stevens Crimmins, *Delegating Questions of Whether A Case Can Be Arbitrated on A Class-Wide Basis – The Fight Over Who Decides Continues*, 74 DISP. RESOL. J. 63 (2019).

185. *See, e.g.*, Emilio v. Sprint Spectrum L.P., 508 F. App'x 3 (2d Cir. 2013).

186. *See, e.g.*, Martin v. Yasuda, 829 F.3d 1118 (9th Cir. 2016).

187. *See, e.g.*, Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distrib. Co., 832 F.2d 507 (9th Cir. 1987).

188. 561 U.S. at 63.

189. *See supra* p. 101.

190. The Fifth, Ninth, and Eleventh Circuits have required such a specific challenge to the delegation clause itself in, *e.g.,* Maravilla v. Gruma Corp., 783 F. App'x 392, 396–97 (5th Cir. 2019) ("Because [plaintiff's] unconscionability argument targets the Agreement as a whole and because he fails to specifically challenge the delegation clause, we treat the delegation clause as valid."); Brennan v. Opus Bank, 796 F.3d 1125, 1133 (9th Cir. 2015) ("In order to have the federal court address his unconscionability challenge, [plaintiff] would have had to argue that the agreement to delegate to an arbitrator his unconscionability claim was *itself* unconscionable."); Parnell v. CashCall, Inc., 804 F.3d 1142, 1144 (11th Cir. 2015) ("[W]hen a plaintiff seeks to challenge an arbitration agreement containing a delegation provision, he or she must challenge the delegation provision directly."). In contrast, the Sixth Circuit has rejected the argument that a delegation clause should be enforced since it was not specifically challenged in a case involving a non-signatory. *In re* Automotive Parts Antitrust Litig., 951 F.3d 377, 385–86 (6th Cir. 2020).

191. Another issue that seems inconsistent in the courts' jurisprudence is whether state or federal law governs the application of the clear and unmistakable principle. Some circuit courts have applied the clear and unmistakable standard pursuant to state law. *See, e.g.*, Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 395 (2d Cir. 2018) ("the presumption that a court should decide a question of arbitrability is overcome when there exists 'clear and unmistakable' evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by [an] arbitrator") (quoting PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1198–99 (2d Cir. 1996)); Shaw Group Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 121 (2d Cir. 2003); Wynn Resorts, Ltd. v. Atl.-Pac. Cap., Inc., 497 F. App'x 740, 741 (9th Cir. 2012); Riley Mfg. Co., Inc. v. Anchor Glass Container Corp., 157 F.3d 775, 780 (10th Cir. 1998); Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1245–46 (10th Cir. 2018).

Other circuit courts have treated it as a federally-created "qualification" to the application of state law to arbitrability questions. *See, e.g.*, Arnold v. Homeaway, Inc., 890 F.3d 546, 552 (5th Cir. 2018) (following its "own interpretation of the 'clear and unmistakable' threshold," reading *First Options* to mean that "the clear-and-unmistakable standard is a requirement of [the Supreme Court's] own creation, framing it as a 'qualification' to the application of 'ordinary state-law principles that govern the formation of contracts.'") (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)); Cape Flattery Ltd. v. Titan Mar., LLC, 647 F.3d 914, 919, 921 (9th Cir. 2011) (applying the "clear

kind of evidence that is required in order to show that the parties clearly and unmistakably intended to arbitrate arbitrability questions. Specifically, circuit courts have differed on whether broad language used in the arbitration clause and/or the incorporation of institutional arbitration rules is sufficient to evidence such intention. The second controversial aspect was addressed by the Fifth Circuit in *Schein II*.[192] It concerns the effects, if any, of a carve-out provision that excludes some claims or disputes from the parties' arbitration clause on an otherwise valid delegation provision. These two aspects will be addressed in turn.

1. Clear and Unmistakable Evidence

In cases involving an arbitration agreement that purports to cover all disputes that may arise between the contracting parties, and where there is no carve-out of particular claims or disputes, several circuit courts have found that such broad language evidences the parties' clear and unmistakable intention to refer arbitrability questions to the arbitrator. These courts have so held regardless of whether the language of the

and unmistakable" standard to determine what law governs arbitrability and finding that "courts should apply federal arbitrability law absent 'clear and unmistakable evidence' that the parties agreed to apply non-federal arbitrability law") (quoting *First Options*, 514 U.S. at 944 (1995)); Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 761 (3d Cir. 2016) ("[T]he general rule that courts should apply ordinary state law principles is subject to the [clear and unmistakable evidence] qualification."); Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 844, 847 (6th Cir. 2020) ("Usually, courts look to state law to interpret arbitration agreements. But for questions of 'arbitrability,' the Supreme Court has adopted an additional interpretive rule: there must be 'clear and unmistakable' evidence that the parties agreed to have an arbitrator decide such issues . . . . [n]othing . . . suggests that this new standard should be governed by state law.") (quoting *First Options*, 514 U.S. at 944); Brennan v. Opus Bank, 796 F.3d 1125, 1129 (9th Cir. 2015) ("'[A]ny arbitration agreement within the coverage of the [FAA],' '[t]he court is to make th[e] [arbitrability] determination by applying the federal substantive law of arbitrability,' 'absent clear and unmistakable evidence that the parties' agreed to apply non-federal arbitrability law.'") (alteration in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

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

arbitration agreement was explicit on the question of arbitrability[193] or implicit.[194]

193. *See, e.g.*, Allen v. Regions Bank, 389 F. App'x 441, 446 (5th Cir. 2010) (the parties' arbitration agreement stated that "[a]ny dispute regarding whether a particular controversy is subject to arbitration . . . shall be decided by the arbitrator(s)."); Reyna v. Int'l Bank of Com., 839 F.3d 373, 378 (5th Cir. 2016) (the parties' arbitration agreement stated that "[t]he arbitrator(s) shall have the exclusive authority to determine the arbitrability of any dispute which the employee or the employer asserts is subject to the [Policy]" and granted the arbitrator "the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of the [Policy]." (alteration in original)); Given v. M & T Bank Corp., 674 F.3d 1252, 1255 (11th Cir. 2012) (the parties' arbitration agreement provided that "[a]ny issue regarding whether a particular dispute or controversy is . . . subject to arbitration will be decided by the arbitrator." (alteration in original)); JPay, Inc. v. Kobel, 904 F.3d 923, 927 (11th Cir. 2018) (the parties' arbitration agreement provided that "[t]he ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration.").

194. *See, e.g.*, Bell v. Cendant Corp., 293 F.3d 563, 568 (2d Cir. 2002) (holding that an arbitration agreement providing for arbitration of "[a]ny controversy arising in connection with or relating to this Agreement . . . *or any other matter or thing*" was "as broad an arbitration provision as one can imagine" and therefore "clearly and unmistakably evidence[d] the parties' intention to have the arbitrator determine its scope." (alteration in original)); *Wells Fargo*, 884 F.3d at 396 (explaining the parties' arbitration agreement provided that "'any controversy or dispute' arising from the employment relationship is subject to arbitration." The court found that Missouri law did not require that "[a]n arbitration agreement . . . recite verbatim that the 'parties agree to arbitrate arbitrability' in order to manifest 'clear and unmistakable' agreement." (alteration in original) (quoting Dotson v. Dillard's, Inc., 472 S.W.3d 599, 604 (Mo. Ct. App. 2015)); PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1199–1200 (2d Cir. 1996) (the parties' arbitration agreement provided that "any and all controversies are to be determined by arbitration." The court found that this wording was "inclusive, categorical, unconditional and unlimited," concluding that "the parties intended to arbitrate issues of arbitrability."); Douglas v. Regions Bank, 757 F.3d 460, 462, 468 n.3 (5th Cir. 2014) *overruled in part by* Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 529 (2019) (holding that an arbitration agreement providing for arbitration of "any claim, controversy or dispute arising from or relating in any way to . . . the relationships, accounts or balances on the accounts resulting from this Agreement or such other agreements, including the validity, enforceability, or scope of this Arbitration provision or any amendments or supplements to this Agreement" evidenced that plaintiff "unmistakably intended to arbitrate gateway questions of arbitrability." This decision was abrogated because the Fifth Circuit proceeded to apply the "wholly groundless" exception); Aviles v. Russell Stover Candies, Inc., 559 F. App'x 413, 414–15 (5th Cir. 2014) (the arbitration agreement referred to arbitration "any and all claims challenging the validity or enforceability of th[e] Agreement (in whole or in part) or challenging the applicability of th[e] Agreement to a particular dispute or claim." (alteration in original)); Momot v. Mastro, 652 F.3d 982, 988 (9th Cir. 2011) (holding that the language "delegating to the arbitrators the authority to determine 'the validity or application of any of the provisions of' the arbitration clause, constitutes 'an agreement to arbitrate threshold issues concerning the arbitration agreement.' In other words, the parties clearly and unmistakably agreed to arbitrate the question of arbitrability." (quoting Rent-A-Center., W., Inc. v. Jackson, 561 U.S. 63, 68 (2010)); Wynn Resorts, Ltd. v. Atl.-Pac. Cap., Inc., 497 F. App'x 740, 742 (9th Cir. 2012) (the arbitration provision provided that "[a]ny dispute, controversy or claim arising from or relating to this Agreement shall be submitted to and

However, the Fourth, Eight, and Tenth Circuits have imposed higher requirements for satisfying the clear and unmistakable standard. The Fourth Circuit has found that the "clear and unmistakable" standard is generally "exacting, and the presence of an expansive arbitration clause, without more, will not suffice."[195] It has repeatedly held that "broad arbitration clauses that generally commit all interpretive disputes 'relating to' or 'arising out of' the agreement do not satisfy the clear and unmistakable test."[196] Instead, the Fourth Circuit has suggested that parties wishing to arbitrate arbitrability questions should explicitly state that "'all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,' or words to that clear effect."[197]

The Eight Circuit has also held that broad language such as "all differences" or "any controversy" is "too general to amount to an express delegation of the issue of arbitrability."[198] Similarly, the Tenth Circuit has found that a broadly written arbitration clause, referring to arbitration "any and all disputes arising out of or relating to" the parties' contract, did not satisfy the "clear and unmistakable" standard since there was "no hint in the text of the clause or elsewhere in the contract that the parties expressed a specific intent to submit to an arbitrator the question whether an agreement to arbitrate exists or remained in existence."[199]

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determined by binding arbitration. . . ."); Parnell v. CashCall, Inc., 804 F.3d 1142, 1148 (11th Cir. 2015) (the parties' agreement submitted to arbitration "any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement." The court further found that "there is no requirement that a delegation provision be offset from other contractual language or solely discuss arbitration of arbitrability in order to be valid."); Jones v. Waffle House, Inc., 866 F.3d 1257, 1261–62 (11th Cir. 2017) (the parties' arbitration agreement provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement.").

195. Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union, 665 F.3d 96, 102 (4th Cir. 2012); Simply Wireless, Inc v. T-Mobile U.S., Inc, 877 F.3d 522, 526 (4th Cir. 2017), *abrogated by Schein*, 139 S. Ct. at 529.

196. Carson v. Giant Food, Inc., 175 F.3d 325, 329–30 (4th Cir. 1999) (concerning a labor that referred "any grievance or dispute arise between the parties regarding the terms of this Agreement" to arbitration); *Peabody*, 665 F.3d at 102–03 (concerning a labor agreement that referred "[a]ny dispute alleging a breach of this [Agreement]" to arbitration.); *Simply Wireless*, 877 F.3d at 525–27 (concerning a business agreement that referred "[a]ny claims or controversies . . . arising out of or relating to this Agreement" to arbitration) (alteration in original).

197. *Carson*, 175 F.3d at 330–31.

198. Lebanon Chem. Corp. v. United Farmers Plant Food, Inc., 179 F.3d 1095, 1100 (8th Cir. 1999); *see* McLaughlin Gormley King Co. v. Terminix Int'l Co., L.P., 105 F.3d 1192, 1194 (8th Cir. 1997).

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

Regardless of how broad or narrow the language of the parties' arbitration clause may be, virtually all circuit courts have found that the adoption of institutional arbitration rules that empower the arbitrator to determine arbitrability questions constitutes clear and unmistakable evidence of the parties' intent to arbitrate arbitrability.[200] Such institutional rules include, for instance, those of the American Arbitration Association (AAA)[201] (as in the *Schein* case), Judicial

200. *See generally* Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005) ("[W]hen, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator.").

The exception appears to be the Seventh Circuit, where, in *Edward D. Jones & Co. v. Sorrells* and *Miller v. Flume*, the court held that the parties' incorporation of the National Association of Securities Dealers Code of Arbitration Procedure was not a "clear and unmistakable expression of [their] intent to have the arbitrators, and not the court, determine which disputes the parties have agreed to submit to arbitration." 957 F.2d 509, 514 n.6 (7th Cir. 1992); 139 F.3d 1130, 1134 (7th Cir. 1998). Additionally, in *Reliance Insurance Co. v. Raybestos Products Co.*, the court found that the incorporation of the AAA rules was not clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. 382 F.3d 676, 678–79 (7th Cir. 2004).

Subsequently, the Ninth Circuit also found in *Goldman, Sachs & Co. v. City of Reno*, that the incorporation of the Financial Industry Regulatory Authority (FINRA) Rules "does not provide 'clear and unmistakable' evidence that FINRA members . . . have consented to FINRA determination of the issue of arbitrability." 747 F.3d 733, 739 (9th Cir. 2014). However, the FINRA rule at issue provided that:

> "[t]he Director may decline to permit the use of the FINRA arbitration forum if the Director determines that . . . the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives."

Id. The court held that this rule "simply describes certain circumstances under which the FINRA Director may deny access to the FINRA arbitration forum." *Id.*

Finally, the Third Circuit, in *Richardson v. Coverall North America, Inc.*, found that the parties' incorporation of the AAA rules satisfied the clear and unmistakable standard, but noted that in this case the parties' arbitration agreement was not "so ambiguous or unclear that the meaning of the AAA Rules becomes murky." 811 F. App'x 100, 103 (3d Cir. 2020). The court cautioned that "a contract might still otherwise muddy the clarity of the parties' intent to delegate," such as where the parties incorporate "unspecified AAA rules." *Id.* at 103 n.2.

201. *See, e.g.*, Awuah v. Coverall N. Am., Inc., 554 F.3d 7 (1st Cir. 2009); Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 397 (2d Cir. 2018) (finding that the parties' incorporation of the 1993 Securities Arbitration Rules of the AAA, which were replaced in 1999 with the AAA Commercial Arbitration Rules and supplemented in 2003 with the AAA Supplementary Rules for Class Arbitrations, "clearly leave[] the class arbitration question to an arbitrator" since they were effective well before the plaintiffs filed their demands for arbitration); Dr.'s Assocs., LLC v. Tripathi, 794 F. App'x 91, 94 (2d Cir. 2019); Richardson v. Coverall N. Am., Inc., 811 F. App'x 100, 103 (3d Cir. 2020); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630, 635–36 (5th Cir. 2012) (concluding that the parties' agreement to the AAA's Commercial Rules constituted consent also to the AAA Supplementary Rules for Class Arbitration); Blanton v. Domino's Pizza Franchising LLC,

Arbitration and Mediation Services, Inc. (JAMS),[202] the United Nations Commission on International Trade Law (UNCITRAL),[203] and the International Chamber of Commerce (ICC).[204]

There are essentially two situations in which circuit courts have deviated from this general agreement that the adoption of institutional arbitration rules constitutes clear and unmistakable evidence of the parties' intent to arbitrate arbitrability. The first situation is where the parties are "unsophisticated." The Fourth and Ninth Circuits, for instance, have found that only the incorporation of such rules "in the context of a commercial contract between sophisticated parties" would constitute clear and unmistakable evidence that the parties intended to arbitrate arbitrability.[205] However, this qualification has been rejected by other circuit courts.[206]

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962 F.3d 842, 849 (6th Cir. 2020) (finding that "the AAA Rules are best read to give arbitrators the exclusive authority to decide questions of 'arbitrability'"); McGee v. Armstrong, 941 F.3d 859, 866 (6th Cir. 2019) (concerning the AAA Employment Arbitration Rules and Mediation Procedures); Fallo v. High-Tech Inst., 559 F.3d 874, 879 (8th Cir. 2009) (finding "the arbitration provision's incorporation of the AAA Rules supersedes [state] law regarding the question of arbitrability"); Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015); Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1245 (10th Cir. 2018) (concerning the AAA Employment Arbitration Rules and Mediation Procedures); Terminix Int'l. Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332 (11th Cir. 2005); U.S. Nutraceuticals, LLC v. Cyanotech Corp., 769 F.3d 1308, 1318 (11th Cir. 2014); Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1233 (11th Cir. 2018); JPay, Inc. v. Kobel, 904 F.3d 923, 936 (11th Cir. 2018); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1368 (Fed. Cir. 2006), *abrogated in part by* Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 529 (2019) (because the Federal Circuit proceeded to apply the "wholly groundless" exception).

202. *See, e.g.*, Emilio v. Sprint Spectrum L.P., 508 F. App'x 3, 4 (2d Cir. 2013); Cooper v. WestEnd Cap. Mgmt., L.L.C., 832 F.3d 534, 546 (5th Cir. 2016); Wynn Resorts, Ltd. v. Atl.-Pac. Cap., Inc., 497 F. App'x 740, 742 (9th Cir. 2012); Belnap v. Iasis Healthcare, 844 F.3d 1272, 1281 (10th Cir. 2017).

203. *See, e.g.*, Schneider v. Kingdom of Thailand, 688 F.3d 68, 73 (2d Cir. 2012); Brittania-U Nigeria, Ltd. v. Chevron U.S.A. Inc., 866 F.3d 709, 714 (5th Cir. 2017); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1075 (9th Cir. 2013); Earth Science Tech, Inc. v. ImpactUA, Inc., 809 F. App'x 600, 606 (11th Cir. 2020); Chevron Corp. v. Republic of Ecuador, 795 F.3d 200, 207–08 (D.C. Cir. 2015).

204. *See, e.g.*, Apollo Comput., Inc. v. Berg, 886 F.2d 469, 473 (1st Cir. 1989); Shaw Grp. Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 124–25 (2d Cir. 2003); Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co., 862 F.3d 981, 985 (9th Cir. 2017).

205. *See* Simply Wireless, Inc. v. T-Mobile U.S., Inc., 877 F.3d 522, 528 (4th Cir. 2017) (explaining that the parties explicitly incorporated the JAMS Rules), *abrogated by Schein*, 139 S. Ct. at 529. This decision was abrogated in part by the Supreme Court because the Fourth Circuit proceeded to apply the "wholly groundless" exception. *Schein*, 139 S. Ct. at 529 (2019); *see also Oracle*, 724 F.3d at 1075 ("We hold that as long as an arbitration agreement is between sophisticated parties to commercial contracts, those parties shall be expected to understand that incorporation of the UNCITRAL rules delegates questions of arbitrability to the arbitrator.").

206. *See, e.g.*, Arnold v. HomeAway, Inc., 890 F.3d 546, 552 (5th Cir. 2018); Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 851 (6th Cir. 2020); Richardson v. Coverall

The second situation is where the arbitrability question (the doughnut's hole) concerns class claims.[207] The Third, Fourth, Sixth, and Eight Circuits have established a higher burden for showing clear and unmistakable evidence of parties' intention to arbitrate the arbitrability of such claims (the hole in the doughnut's hole). For instance, these circuit courts have required parties to explicitly delegate the arbitrability question to the arbitrator in their arbitration agreement.[208] The Third Circuit has emphasized in this regard the "critical differences between individual and class arbitration and the significant consequences of that determination for both whose claims are subject to arbitration and the type of controversy to be arbitrated."[209] However, other circuit courts have not followed this reasoning. The Second and Tenth Circuits, for instance, have rejected any distinction between bilateral and class arbitration in determining whether the parties have clearly and unmistakably agreed to arbitrate arbitrability.[210]

N. Am., Inc., 811 F. App'x 100, 104 (3d Cir. 2020); Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015).

207. As noted above, *supra* note 59, in *Green Tree Financial Corp. v. Bazzle*, the plurality of the Supreme Court found that the category of "dispositive gateway questions" for the arbitrator to decide included the question of whether the parties' arbitration clause prohibited class arbitration. 539 U.S. 444, 452–53 (2003). However, given the split in the Supreme Court's judgment, the Court has since noted that "no single rationale commanded a majority" in *Bazzle*, and that the Court has not yet decided whether the availability of class arbitration is a question of arbitrability to be presumptively decided by the court or a "gateway question" for the arbitrator to decide. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 678–679 (2010).

In addition, several decisions of the Supreme Court reveal a rather hostile attitude on the part of the Court toward class arbitration. The Court has held that class arbitration may not be compelled where the arbitration agreement is silent in this regard. *Id.* at 684. Nor may class arbitration be compelled where the parties' arbitration agreement is ambiguous on the availability of this procedure. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1414–15 (2019). The Court has also suggested that arbitration loses its advantages over litigation in a class format that "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).

208. *See, e.g.*, Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 335 (3d Cir. 2014); Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 759–60 (3d Cir. 2016); Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 877 (4th Cir. 2016); Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 972–73 (8th Cir. 2017); Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 600 (6th Cir. 2013); Huffman v. Hilltop Cos., LLC, 747 F.3d 391, 398 (6th Cir. 2014); AlixPartners, LLP v. Brewington, 836 F.3d 543, 553 (6th Cir. 2016).

209. *Opalinski*, 761 F.3d at 335.

210. *See* Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1247 (10th Cir. 2018) ("The fundamental differences between bilateral and classwide arbitration are irrelevant to us" when determining "whether there is clear evidence of the parties' intent to let the arbitrator decide the issue."); Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 398–99 (2d Cir. 2018). The Fifth and Eleventh Circuits have also said that "consent to any of the AAA's

2. Carve-out Provisions

The Second, Sixth, and Ninth Circuits have also had occasion to apply the clear and unmistakable principle and the delegation principle in cases where, as in *Schein* (Figure 6), the parties' arbitration agreement contained a carve-out provision limiting its scope (the doughnut's hole). The question before the courts in these cases was whether this carve-out provision negated the parties' valid delegation provision, which evidenced their clear and unmistakable intent to arbitrate arbitrability questions (the hole in the doughnut's hole).

These circuit courts have differed widely in their analysis of the relationship between a delegation provision and a carve-out provision.[211]

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substantive rules also constitutes consent to the Supplementary Rules [for class arbitrations]." Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630, 635 n.5 (5th Cir. 2012) (explaining, however, that in the instant case, "the parties have never specifically disputed the applicability of the Supplementary Rules"); *see also* Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1233 (11th Cir. 2018) ("The parties' agreement plainly chose AAA rules. Those rules include AAA's Supplementary Rules for Class Arbitrations, which, true to their name, supplement the other AAA rules."); JPay, Inc. v. Kobel, 904 F.3d 923, 941–42 (11th Cir. 2018) (asserting that the circuit courts imposing a higher threshold for the "clear and unmistakable" standard have "conflate[d] the 'who decides' question with the 'clause construction' question of class availability by analyzing the former question with reasoning developed in the context of the latter. . . . Here we ask only whether the parties intended to delegate the question of class availability. Having found that the parties intended to delegate, we have no reason—and, indeed, no power—to evaluate whether a class proceeding is available or what consequences might result if it is.").

211. Several circuit courts have also decided on the effects of other kind of provisions limiting the authority of the arbitrator on a valid delegation provision. All of these circuit courts have rejected the suggestion that such limitations negated the parties' valid delegation clause.

For instance, in *Awuah v. Coverall North America, Inc.*, the First Circuit found that the parties' adoption of the AAA rules (the delegation provision) was not negated by the fact that their arbitration agreement also provided that "the arbitrator . . . shall not alter or otherwise reform the terms of this agreement." 554 F.3d 7, 11 (1st Cir. 2009). This language, it was argued, meant that the arbitrator could not strike the arbitration clause if they were to find it inval*Id. Id.* However, the First Circuit found that this interpretation of the limiting provision in the arbitration agreement was "too thin a basis" for concluding that this language "evinces an intent to allow questions of arbitrability to be decided by a court." *Id*.

The Eight Circuit has found that a reference to "court costs" in the parties' contract, which arguably indicated their intention to submit at least some disputes to the courts, did not conflict with their adoption of the AAA rules (the delegation provision) since "after participating in arbitration, a party may seek to have the arbitrator's order confirmed, modified or vacated in a court, thereby incurring court costs." Fallo v. High-Tech Inst., 559 F.3d 874, 879 (8th Cir. 2009).

Similarly, the Ninth Circuit has found that venue provisions referring to courts' jurisdiction over "any disputes, actions, claims, or causes of action arising out of or in connection with this Agreement" did not conflict with the agreement's arbitration and delegation provisions. Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1209 (9th Cir. 2016)

The Second Circuit's approach is similar to that of the Fifth Circuit in *Schein II*, i.e., conflating arbitrability questions with who decides them.[212] The Sixth and Ninth Circuits, in contrast, have treated these two questions separately and have found that a carve-out provision that applies to the arbitration agreement as a whole does not negate a valid delegation provision.[213]

In the Second Circuit case of *NASDAQ OMX Group v. UBS Securities*,[214] a broker-dealer commenced arbitration against the NASDAQ for, *inter alia*, breach of contract and negligence associated with the latter's alleged mishandling of an initial public offering.[215] The parties had an arbitration agreement containing both a delegation provision incorporating the AAA rules (the hole in the doughnut's hole) and a carve-out provision that arguably excepted the plaintiff's claims from arbitration (the doughnut's hole).[216] The arbitration agreement stated that *"[e]xcept as may be provided in the NASDAQ OMX Requirements*, all claims, disputes, controversies and other matters in question between the Parties to this Agreement . . . shall be settled by final and binding arbitration" in accordance with the AAA rules.[217] The NASDAQ OMX Requirements, in turn, precluded NASDAQ members such as the plaintiff "from seeking compensation for losses attributable to the exchange's handling of securities transactions."[218] The Second Circuit made two important (and erroneous) findings concerning the relationship between the parties' carve-out and delegation provisions.

(explaining that the venue provision was intended "to identify the venue for any other claims that were not covered by the arbitration agreement.").

212. An exception is *Wells Fargo Advisors* in which the Second Circuit held that parties' carve-out of particular types of employment claims (namely unemployment insurance and employee benefits) from arbitration did not negate the otherwise broad language of their arbitration agreement. 884 F.3d at 398–99. This broad language, the court found, clearly and unmistakably delegated the arbitrability of class claims to the arbitrator. *Id.* The court said: "[t]hese exclusions reinforce our view that the parties intended to let an arbitrator decide whether class claims are arbitrable. By expressly foreclosing certain proceedings from arbitration, the parties in these cases strongly implied that every other 'controversy or dispute' remains subject to arbitral resolution." *Id.* at 396.

213. Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069 (9th Cir. 2013); Brennan v. Opus Bank, 796 F.3d 1125 (9th Cir. 2015).

214. 770 F.3d 1010 (2d Cir. 2014).

215. *Id.* at 1012–13; *see also Wells Fargo Advisors*, 884 F.3d at 395–96; Katz v. Feinberg, 290 F.3d 95, 97 (2d Cir. 2002) (explaining that because the parties had agreed to refer to arbitration all disputes other than a particular valuation issue, the agreement created an ambiguity as to whether the parties intended for the arbitrability of the valuation issue to be determined by the arbitrator).

216. *UBS Secs.*, 770 F.3d at 1032.

217. *Id.* at 1031 (quoting Services Agreement, § 18.A, A. 139).

218. *Id.* at 1033.

First, it found that since the NASDAQ OMX Requirements "at least arguably" excluded plaintiff's claim from arbitration,[219] it was "far from 'clear and unmistakable' that the [parties' agreement] provide[d] [plaintiff] with an arbitrable claim."[220] This finding of the Second Circuit misapplied the clear and unmistakable principle (Figure 3)[221] to the question of whether the parties' dispute fell within the scope of their arbitration agreement (the doughnut's hole). This principle, however, applies *only* to the question of who decides arbitrability (the hole in the doughnut's hole).[222] In other words, a claim need not be clearly and unmistakably arbitrable in order to be delegated to the arbitrator for determination. It is only the parties' intention to delegate arbitrability questions that needs to be clear and unmistakable. This finding therefore misinterprets the clear and unmistakable principle set out by the Supreme Court (Figure 3)[223] and blurs the complementary jurisdictional spheres that the Court has created for courts and arbitrators (Figure 5).[224]

Second, the Second Circuit found that the parties' incorporation of the AAA rules was insufficient to clearly and unmistakably evidence their intention to arbitrate arbitrability questions (the hole in the doughnut's hole) since their agreement carved-out "certain issues" from arbitration (the doughnut's hole).[225] This carve-out, according to the court, meant that the AAA rules would apply only once a decision had been made (by the court) as to whether the parties' dispute fell within the scope of their arbitration agreement, "in short, [once] arbitrability is decided."[226] Accordingly, the court set out to determine the arbitrability

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219. *Id.* at 1031.
220. *Id.* at 1032.
221. *See supra* p. 100.
222. As noted by the Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*, the clear and unmistakable test applies only "to the parties' manifestation of intent, not the agreement's *validity*." 561 U.S. 63, 69 n.1 (2010). The same flaw is evident in the reasoning of the Fourth Circuit in *Kabba v. Rent-A-Center, Inc.*, where it held that because a juror could reasonably find that the parties' arbitration agreement excluded the particular claims raised by the plaintiff, no arbitration agreement applied to those claims and therefore there was no clear and unmistakable evidence that the parties had "agreed to arbitrate" such claims. 730 F. App'x 141, 143–44 (4th Cir. 2018). Again, the clear and unmistakable principle is not intended to determine whether parties have agreed to arbitrate particular claims (i.e., the scope of the arbitration agreement—the doughnut's hole). Rather, it is intended to determine only whether parties have agreed to arbitrate the arbitrability of such claims (i.e., who decides the scope of the arbitration agreement—the hole in the doughnut's hole).
223. *See supra* p. 100.
224. *See supra* p. 102.
225. *UBS Secs.*, 770 F.3d at 1032.
226. *Id.*

of the plaintiff's claims (the doughnut's hole) in order to determine whether the parties' incorporation of the AAA rules clearly and unmistakably evidenced their intention to submit this very question to the arbitrator (the hole in the doughnut's hole).[227] However, arbitrability should only be decided by the court *after* and *if* it determines that the parties did not clearly and unmistakably intend to delegate this question to the arbitrator (Figure 3),[228] and not the other way around. By reversing the order of these two questions, the Second Circuit effectively rendered moot the hole in the doughnut's hole question of who should decide arbitrability.

The Fifth Circuit in *Schein II* relied on the Second Circuit's reasoning in *NASDAQ* in holding that the parties' carve-out provision negated their valid delegation provision.[229] The Fifth Circuit interpreted the Second Circuit's holding in *NASDAQ* to mean that "[b]ecause there was ambiguity as to whether the parties intended to have arbitrability questions decided by an arbitrator—because the dispute arguably fell within the carve-out—the court held the arbitrability question was for the court to decide."[230] As already noted, this interpretation conflates the arbitrability question concerning the scope of the parties' arbitration agreement (the doughnut's hole), which is governed by the carve-out provision, with the question of *who* decides the arbitrability question (the hole in the doughnut's hole), which is governed by the delegation principle (Figure 4) and the clear and unmistakable principle (Figure 3).[231]

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227. *Id.*

228. *See supra* p. 100.

229. Archer & White Sales, Inc. v. Henry Schein, Inc. (*Schein II*), 935 F.3d 274, 281–82 (5th Cir. 2019).

230. *Id.* at 281.

231. Prior to its decision in *Schein II*, the Fifth Circuit had enforced a delegation provision in an arbitration agreement despite the presence of a carve-out provision in the same agreement in two cases. In *Crawford Professional Drugs, Inc. v. CVS Caremark Corp.*, the parties' arbitration clause carved-out claims for injunctive relief from arbitration, and the plaintiff raised such a claim. 748 F.3d 249, 255 (5th Cir. 2014). Nonetheless, the court upheld the parties' delegation provision incorporating the AAA rules. *Id.* at 262–63. However, as noted by the Fifth Circuit in *Schein II*, the court in *Crawford* did not specifically address the carve-out provision. *Schein II*, 935 F.3d at 280. In *Arnold v. HomeAway, Inc.*, the Fifth Circuit also held that the "mere fact that an arbitration provision does not apply to every possible claim does not render the parties' intent to delegate threshold questions about that provision less clear." 890 F.3d 546, 553 (5th Cir. 2018) (the parties' arbitration agreement provided that "[a]ny and all Claims will be resolved by binding arbitration [governed by the AAA rules], rather than in court, except [the user] may assert Claims on an individual basis in small claims court if they qualify." The plaintiff did not contend that his claims qualified for disposition in small claims court). *Id.* However, *Arnold* is arguably distinguishable from *Schein* since the plaintiff in *Arnold* did not raise the allegedly excluded claims. Indeed, the Fifth Circuit emphasized in that case that "a

This important distinction was recognized by the Sixth Circuit in *Blanton v. Domino's Pizza Franchising*.[232] In that case, the plaintiff denied that the parties' incorporation of the AAA rules clearly and unmistakably evidenced their intention to arbitrate arbitrability questions.[233] Much like Archer in *Schein,* the plaintiff in *Blanton* contended that the arbitration agreement incorporated the AAA rules only with respect to claims that *already* fell within the scope of the agreement.[234] Therefore, his argument went, the court must first determine whether a particular claim was arbitrable (the doughnut's hole) before it could determine that the parties' had clearly and unmistakably (Figure 3)[235] intended for the arbitrator to make this determination (the hole in the doughnut's hole).[236]

The Sixth Circuit rightly rejected this circular argument, noting that it would require reading "the agreement to say that the arbitrator shall have the power to determine the scope of the agreement *only* as to claims that fall within the scope of the agreement. Yet that reading would render the AAA's jurisdictional rule superfluous."[237] The Sixth Circuit therefore concluded that "the carveout goes to the *scope of the agreement* [the doughnut's hole]—a question that the agreement otherwise delegates to the arbitrator—not the *scope of the arbitrator's authority* to decide questions of 'arbitrability' [the hole in the doughnut's hole]."[238]

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contract might incorporate the AAA rules but nonetheless otherwise muddy the clarity of the parties' intent to delegate." *Id*.

232. 962 F.3d 842 (6th Cir. 2020).

233. *Id*. at 851.

234. *Id*. at 847–52.

235. *See supra* p. 100.

236. *Id*. at 845–47.

237. *Id*. at 847

238. *Id*. at 848 (alterations in original). The Sixth Circuit also relied on the location of the carve-out clause within the parties' contract in *Solvay Pharmaceuticals, Inc. v. Duramed Pharmaceuticals, Inc.*, 442 F.3d 471 (6th Cir. 2006). In this case, the court was to determine whether the agreement's exclusive remedy/no damages provision defined the scope of arbitrable matters or simply the type of relief that arbitrators were allowed to award. *Id*. at 474–75. The court noted that

> courts may consider the location of the targeted provision—*i.e.*, the limitation that the arbitrators allegedly violated—in the contract. If the limitation appears in close proximity to the arbitration clause, there is good reason to believe that the parties considered it to be a limitation on the proper subjects for arbitration. Alternatively, if the limitation appears nowhere near the contract's arbitration clause, there is reason to believe that the parties did not intend it to limit the proper subjects for arbitration.

Id. at 478. The court then proceeded to find that the exclusive remedy/no damages provision had no bearing on arbitrability on the basis of its location relative to the arbitration clause in the agreement (section 13 vs. section 22), and on the basis of the broad language used in the arbitration clause ("*[a]ny* dispute, controversy, or claim arising out of or relating to [the agreement]."). *Id*. at 481.

The plaintiff appealed the Sixth Circuit decision. The Supreme Court denied certiorari on the same day it dismissed the certiorari it had granted in *Schein II*.[239]

The Sixth Circuit in *Blanton* distinguished the Fifth Circuit's decision in *Schein II* on the basis of the placement of the carve-out provision in the parties' respective arbitration agreements.[240] While in *Schein* the carve-out provision was placed prior to the incorporation of the AAA rules (the delegation provision),[241] in *Blanton* the delegation provision was entirely separate.[242] However, as I will argue in the next section, the placement of the carve-out provision should not affect the enforcement of a valid delegation provision since, regardless of such placement, the two questions (carve-out and delegation) remain entirely separate.

This separation was recognized by the Ninth Circuit in *Oracle America, Inc. v. Myriad Group A.G.*,[243] a case very similar to that in *Schein* and involving an arbitration clause in a source license agreement. The agreement in *Oracle* provided, first, that "[a]ny dispute arising out of or relating to [it]" would be resolved by arbitration (the doughnut).[244] It then set out an exception from arbitration with respect to disputes concerning intellectual property rights (the carve-out provision, or doughnut's hole).[245] Next, the agreement provided that any arbitration shall be administered in accordance with the UNCITRAL arbitration rules (the delegation provision, or the hole in the doughnut's hole).[246]

Rejecting the claim, later adopted by the Fifth Circuit in *Schein II*, that the parties' carve-out provision negated their delegation provision, the Ninth Circuit noted that this argument

239. Piersing v. Domino's Pizza, No. 20-695, 2021 WL 231566 (U.S. Jan. 25, 2021).

240. *Blanton*, 962 F.3d at 847–48.

241. *See* Archer & White Sales, Inc. v. Henry Schein, Inc. (*Schein II*), 935 F.3d 274, 281 (5th Cir. 2019).

242. *Blanton*, 962 F.3d at 847–48

243. 724 F.3d 1069 (9th Cir. 2013).

244. *Id.* at 1071.

245. *Id.*

246. The arbitration clause provided that: "Any dispute arising out of or relating to this License shall be finally settled by arbitration as set out herein, except that either party may bring any action, in a court of competent jurisdiction (which jurisdiction shall be exclusive), with respect to any dispute relating to such party's Intellectual Property Rights or with respect to Your compliance with the TCK license. Arbitration shall be administered . . . in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) . . . ." *Id.* Similar to the AAA rules, the UNCITRAL rules give the arbitral tribunal the authority to decide its own jurisdiction. *See* UNCITRAL Res. 40/72, 61/33, U.N. Doc. A/40/17, annex I and A/61/17, annex I, at art. 16 (Jul. 7, 2006).

> conflates the *scope* of the arbitration clause, *i.e.*, which claims fall within the carve-out provision, with the question of *who* decides arbitrability. The decision that a claim relates to intellectual property rights . . . constitutes an arbitrability determination, which the parties have clearly and unmistakably delegated to the arbitrator by incorporating the UNCITRAL rules.[247]

Moreover, the Ninth Circuit rejected the suggestion that the "federal majority rule" pursuant to which incorporation of the AAA rules is sufficient to establish that the parties clearly and unmistakably intended to arbitrate arbitrability questions (Figure 3)[248] "only applies when an arbitration agreement lacks a carve-out provision."[249] In other words, the parties' incorporation of the AAA rules (the delegation provision) evidenced their clear and unmistakable intention to arbitrate arbitrability questions (the hole in the doughnut's hole),[250] and this finding was unaffected by the alleged carving-out of particular claims (that were in fact raised by the parties) from the scope of their arbitration agreement (the doughnut's hole).[251] The Ninth Circuit's reasoning therefore preserves the complementary jurisdictional spheres that the Supreme Court has established for courts and arbitrators with respect to who decides arbitrability (Figure 5).[252]

In sum, there seems to be broad consensus among circuit courts that, at least in cases involving sophisticated parties and challenges to the arbitrability of bilateral, rather than class, claims, the incorporation of institutional rules such as the AAA rules evidences the parties' clear and unmistakable intention to arbitrate arbitrability. Disagreement is evident, however, in cases involving both the incorporation of such

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247. *Oracle*, 724 F.3d at 1076. The Fifth Circuit in *Schein II* distinguished *Oracle*, reading the Ninth Circuit's decision to mean that "the issue with Oracle's carve-out argument was that the two categories of exempted claims by definition were claims arising out of or relating to the Source License, which were explicitly subject to arbitration. No such circularity exists in the contract at issue here." Archer & White Sales, Inc. v. Henry Schein, Inc. (*Schein II*), 935 F.3d 274, 281 n.30 (5th Cir. 2019) (internal citations omitted). However, the categories of exempted claims in *Schein II* (which included claims for injunctive relief) were also claims "arising under or related to" the parties' agreement and were explicitly subject to arbitration (otherwise, the parties would not have had to exclude them from arbitration through the carve-out clause). *Id.* at 278. Therefore, the "circularity" identified by the Ninth Circuit and its finding that Oracle's argument conflated the scope of the arbitration agreement with who decides arbitrability apply also to the Fifth Circuit's decision in *Schein II*.

248. *See supra* p. 100.

249. *Oracle*, 724 F.3d at 1076.

250. *Id.* at 1077.

251. *Id.* at 1075–76.

252. *See supra* p. 102.

institutional rules (a delegation provision) and a carve-out provision excluding particular claims or disputes from the scope of the arbitration agreement. As I will argue in the next section, those circuit courts (namely the Second and Fifth Circuits) that have held in such cases that the carve-out provision negates the delegation provision have misinterpreted the clear and unmistakable principle (Figure 3)[253] and the delegation principle (Figure 4),[254] and have conflated arbitrability questions (the doughnut's hole) with who decides arbitrability questions (the hole in the doughnut's hole). Therefore, rather than implementing the complementary jurisdictional spheres established by the Supreme Court (Figure 5),[255] these circuit courts have blurred the jurisdictional dividing line drawn by the Court.

B. The Way Forward

I will assume for analytical purposes that whether Archer's action/claim for injunctive relief falls within the arbitration agreement is an arbitrability question relating to the scope of the agreement, rather than a "dispositive gateway question" that is presumptively for the arbitrator to decide in accordance with the severability principle (Figure 2).[256] According to the clear and unmistakable principle (Figure 3)[257] and the delegation principle (Figure 4),[258] a court is to decide this arbitrability question (the doughnut's hole) unless the parties clearly and unmistakably intended to delegate it to the arbitrator (the hole in the doughnut's hole). Once the Fifth Circuit determined that, given the parties' incorporation of the AAA rules, there was such clear and unmistakable evidence in this case—"for at least some category of

253. *See supra* p. 100.
254. *See supra* p. 101.
255. *See supra* p. 102.
256. It may be convincingly argued that whether the arbitration clause's carve-out of "injunctive relief" renders the clause unenforceable is not an "arbitrability question" that is presumptively for the court to decide unless the parties clearly and unmistakably delegated it to the arbitrator, but rather a "gateway question" that is presumptively for the arbitrator to decide. Indeed, in *PacifiCare Health Systems, Inc. v. Book*, the Supreme Court held that an arbitration clause's "remedial limitations" prohibiting punitive damages from being awarded in arbitration, were "not a question of arbitrability." 538 U.S. 401, 407 n.2 (2003). Therefore, the Court concluded that "since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract . . . . [T]he proper course is to compel arbitration." *Id.* at 407. Nevertheless, I analyze the carve-out of injunctive relief in *Schein* as a question of arbitrability since this is how the Fifth Circuit and the parties have approached it. Archer & White Sales, Inc. v. Henry Schein, Inc. (*Schein II*), 935 F.3d 274, 281 (5th Cir. 2019).
257. *See supra* p. 100.
258. *See supra* p. 101.

cases"[259]—the court should have referred the scope question to the arbitrator as the delegation provision was indisputably valid.[260]

Instead, no longer able to rely on the "wholly groundless" exception to justify deciding the scope of the parties' arbitration agreement in the face of a valid delegation provision, the Fifth Circuit in *Schein II* reached the same outcome by different means.[261] It interpreted the parties' carve-out provision as applying not only to the scope of the arbitration agreement (the doughnut's hole) but also to the parties' delegation provision with respect to Archer's action/claim for injunctive relief (the hole in the doughnut's hole).[262] The Fifth Circuit therefore ignored the fact that these two provisions apply to entirely different questions. The carve-out provision applies to the question of whether Archer's action/claim for injunctive relief falls outside the scope of the parties' arbitration agreement (the doughnut's hole).[263] The delegation provision applies to the question of who is to decide this arbitrability question (the hole in the doughnut's hole).[264]

Conflating these two questions,[265] the Fifth Circuit first reasoned that the carve-out provision negated the application of the AAA rules to

259. *Schein II*, 935 F.3d at 280.

260. See, for example, *Belnap v. Iasis Healthcare*, where the Tenth Circuit overturned the district court's judgment for failing to do precisely this. 844 F.3d 1272 (10th Cir. 2017). Notwithstanding a finding that the parties clearly and unmistakably intended to arbitrate arbitrability, the district court had held that "[d]etermining whether the claims are within the scope of the contract . . . necessarily precedes any question of arbitrability, and precedes the question of who decides questions of arbitrability." *Id.* at 1278. The district court then concluded that some of the plaintiff's claims fell within the scope of the arbitration agreement and others did not. *Id.* The Tenth Circuit overturned, finding that since the parties "clearly and unmistakably agreed to arbitrate arbitrability, we must hold that the district court was obliged to eschew consideration of the arbitrability of the claims and to grant the motion to compel arbitration as to *all* of the [plaintiff's] claims." *Id.* at 1292–93.

261. *See Schein II*, 935 F.3d at 278, 283–84.

262. *Id.* at 279–280.

263. *Id.*

264. *Id.*

265. As the Ninth Circuit noted in *Oracle America, Inc. v. Myriad Group A.G.*, this "reasoning collapses two separate questions into one." 724 F.3d 1069, 1076 (9th Cir. 2013). The Ninth Circuit made this comment with respect to the Sixth Circuit's decision in *Turi v. Main Street Adoption Services, LLP*, which was abrogated in part by the Supreme Court's judgment in *Schein I*. 633 F.3d 496 (6th Cir. 2011). In *Turi*, the parties had clearly and unmistakably delegated arbitrability to the arbitrator, but their arbitration agreement only applied to disputes "'regarding fees' . . . . exceeding $5,000." *Id.* at 507, 510. The Sixth Circuit found that, given this limitation, it was for the court to "analyze the scope of the parties' arbitration clause in order to properly assess whether the arbitrator should determine the arbitrability of the plaintiffs' claims." *Id.* at 508. In other words, the Sixth Circuit set out to decide whether the plaintiffs' claims fell within the scope of the arbitration agreement in order to determine whether the arbitrator was authorized to decide that very same question. In doing so, it conflated two separate questions: the *scope* of the arbitration

the (arguably) excluded action/claim for injunctive relief.[266] It then concluded, in a rather circular fashion, that since the AAA rules did not apply to this action/claim, the parties did not clearly and unmistakably intend to submit the question of its arbitrability to the arbitrator.[267] Once it dispensed with the delegating effect of the AAA rules, the Fifth Circuit reached precisely the same result as it did in *Schein I*: it found that the parties' *entire* dispute, concerning both Archer's claims for injunctive relief and for damages, was non-arbitrable.[268]

All this is not to say that parties are not free to limit their delegation provision, for instance by reserving certain arbitrability questions for the courts to determine, or that courts should not respect such limitations. After all, courts should not "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated."[269] An example of a limited delegation provision can be seen in *Mohamed v. Uber Technologies*.[270] In that case, the parties' delegation provision referred challenges to "the enforceability, revocability or validity of the Arbitration Provision" to the arbitrator, but reserved challenges to the waiver of class actions contained in the agreement for the courts.[271] The

agreement (the doughnut's hole) and *who* decides the scope of the arbitration agreement (the hole in the doughnut's hole).

266. It may seem intuitive for a court to find, on the language of Archer & Schein's arbitration clause, that a claim for injunctive relief is carved-out (and therefore excluded) from their arbitration clause. Such a finding, no matter how seemingly clear, should be resisted for two reasons. First, as the Supreme Court emphasized in its judgment in *Schein I*, just as a court has no place deciding the merits of a claim in the face of a valid arbitration agreement (no matter how frivolous), it also has no place deciding the arbitrability of a claim in the face of a valid delegation clause. Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 529 (2019). Second, as the Fifth Circuit's decision in *Schein II* illustrates, a court may be tempted to read this seemingly clear, yet narrow, language expansively to include other claims in addition to injunctive relief (namely damages), which at least arguably should be submitted to arbitration. *Schein II*, 935 F.3d at 283–84. It is precisely this kind of jurisdictional confusion that the Supreme Court intended to avoid when it struck down the "wholly groundless" exception in its judgment in *Schein I*. *Schein*, 139 S. Ct at 528.

267. *Schein II*, 935 F.3d at 282.

268. As noted by one commentator, a better approach to a purported provision limiting the remedies available to the parties in arbitration would be to treat it "simply as an instruction to [the arbitrators] as to how they should go about doing their job," rather than "as a limit on the decision-making authority of the arbitrators." Rau, *"Consent" to Arbitral Jurisdiction*, *supra* note 55, at 97.

269. EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002).

270. 848 F.3d 1201, 1201 (9th Cir. 2016).

271. *Id.* at 1209. The parties' agreement submitted to arbitration "disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision." *Id.* at 1208. It further provided, however, that "any claim that all or

Ninth Circuit found that the expansive language of the delegation clause "clearly and unmistakably delegated the question of arbitrability to the arbitrator for all claims except challenges to the [waiver]."[272] Applying the delegation principle (Figure 4),[273] the court held that absent some "generally applicable contract defense" to the enforcement of the delegation provision, the arbitrator was to "determine arbitrability as to all but the claims specifically exempted."[274]

Unlike in *Mohamed*, in *Schein* the parties did not explicitly limit their delegation provision (the hole in the doughnut's hole).[275] Rather, they limited the scope of their arbitration agreement as a whole (the doughnut's hole).[276] The extent of that limitation, i.e., whether it in fact excludes Archer's claim for injunctive relief from arbitration, is for the arbitrator to decide in light of the parties' valid delegation clause.[277] Moreover, even if the parties' delegation provision were interpreted as reserving the arbitrability of an action/claim for injunctive relief for the courts, only the arbitrability of *that* action/claim should have been determined by the Fifth Circuit, rather than the arbitrability of the parties' entire dispute. The Fifth Circuit's reasoning in *Schein II* effectively rendered both the parties' valid delegation provision and their entire arbitration agreement unenforceable.[278] An interpretation that leads to such an outcome should be disfavored for at least three reasons.

First, the three principles set out by the Supreme Court (Figures 2-4) clearly establish that parties are free to agree to arbitrate arbitrability questions.[279] The Fifth Circuit's reasoning undermines this freedom[280] as

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part of the Class Action Waiver, Collective Action Waiver or Private Attorney General Waiver is invalid, unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator." *Id.*

272. *Id.* at 1209.

273. *See supra* p. 101.

274. *Id.*

275. Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 531 (2019).

276. *Id.*

277. Rau, *Allocation of Power*, *supra* note 10, at 252 ("[W]hether the claimant can in fact, under the applicable law, recover 'consequential' or 'punitive' damages—or whether some provision in the contract validly prevents him from doing so—is in all cases and in any event to be treated as simply one more claim or dispute within the scope of the arbitration clause.").

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

279. Rau, *Arbitral Power*, *supra* note 41, at 494 ("[T]here is certainly no mandatory interest of public policy—still less can there be any logical or conceptual barrier—that can be imposed to override a party preference for submitting [arbitrability] questions to private decision-makers.").

280. *See Schein II,* 935 F.3d at 281–82. Other decisions of the Supreme Court also do not support the Fifth Circuit's reasoning. For instance, in a case involving an agreement that "'any dispute . . . relating to . . . the breach, validity, or legality' of the contract should be

well as the complementary jurisdictional spheres that the Supreme Court has created for courts and arbitrators (Figure 5).[281] Indeed, notwithstanding their explicit incorporation of the AAA rules, which has been held in the past by the Fifth Circuit to evidence clear and unmistakable intention to arbitrate arbitrability questions, the parties' valid delegation clause in *Schein* has been effectively rendered inoperable. By circumventing the parties' delegation provision, the Fifth Circuit encroached upon the jurisdictional sphere reserved by the Supreme Court to the arbitrator.

Second, the Fifth Circuit's decision opens the door for parties to include claims that are arguably outside the scope of their arbitration agreement (the doughnut's hole) merely to have the courts determine the arbitrability of their dispute rather than the arbitrator (the hole in the doughnut's hole). As already mentioned, who decides arbitrability is not merely a procedural question—it enforces the parties' intentions and contractual obligations and implicates parties' right to access the courts. Therefore, were the mere inclusion of an arguably non-arbitrable claim in a court action sufficient to negate a valid delegation clause, nothing would be easier for a party attempting to evade arbitration than strapping such a claim onto a lawsuit. Such an outcome would defeat the purpose of including carve-out and delegation provisions in arbitration agreements to begin with.

Third, the Fifth Circuit's reasoning creates uncertainty for parties to arbitration agreements regarding their ability to arbitrate arbitrability questions by including a delegation provision. Certainty and predictability cannot be achieved if courts proclaim a uniform standard (e.g., that the incorporation of the AAA rules constitutes clear and unmistakable intent to arbitrate arbitrability questions in a bilateral agreement between sophisticated parties), but then reach diametrically opposed outcomes based solely on the meaning *they* assign to the placement of particular words next to such incorporation. If courts are permitted to look behind parties' delegation of arbitrability questions through the incorporation of institutional rules, "contract-drafting would be made needlessly, if not impossibly, complex."[282] Parties would be left guessing (and litigating) which words, or order of words, in their

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arbitrated in accordance with the American Arbitration Association (AAA) rules," the Supreme Court has held that the arbitration provision's incorporation of the AAA Rules superseded a choice-of-law clause providing for a non-arbitral forum. Preston v. Ferrer, 552 U.S. 346, 361–63 (2008). This finding has been interpreted as reliance by the Supreme Court "on the incorporation of the AAA Rules to determine what the parties agreed to." Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 845 (6th Cir. 2020).

281. *See supra* p. 101.

282. JPay, Inc. v. Kobel, 904 F.3d 923, 943 (11th Cir. 2018).

arbitration agreement might be interpreted by a court as negating their delegation provision, creating the "time-consuming sideshow" that the Supreme Court sought to avoid in its judgment in *Schein I*.[283]

Another analytical approach that could have avoided the outcome reached by the Fifth Circuit in *Schein II* is based on the delegation principle (Figure 4).[284] As explained above, this principle provides that where a party seeks to enforce a delegation provision, unless the validity of that provision is specifically challenged the court must treat it as valid and enforceable and refer any arbitrability questions to the arbitrator.[285] Applying this principle to the facts of *Schein* would work as follows.

Once the Fifth Circuit found that the parties' agreement "incorporates the AAA rules, delegating the threshold arbitrability inquiry to the arbitrator for at least some category of cases,"[286] the parties' delegation provision (which Schein sought to enforce) would be severed from the rest of their arbitration clause (which contained the carve-out provision) and would be presumed valid. Archer would then have to challenge the validity of the delegation provision specifically in order to negate this presumption.[287] It is important to recall that the Fifth Circuit did not find, nor did Archer contend, that the delegation provision (or the arbitration clause, or the contract as a whole for that matter) was invalid due to, for instance, unconscionability, fraud, or duress.[288] Rather, the unenforceability of the delegation provision was hinged solely on it being effectively 'canceled out' by another portion of the arbitration clause, namely the carve-out provision.[289]

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283. Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 530–31 (2019).

284. *See supra* p. 101.

285. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 72 (2010).

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

287. The Fifth Circuit has required such a specific challenge to the delegation clause itself in, for example, Maravilla v. Gruma Corp., 783 F. App'x 392, 396–97 (5th Cir. 2019) ("Because [plaintiff's] unconscionability argument targets the Agreement as a whole and because he fails to specifically challenge the delegation clause, we treat the delegation clause as valid.") and Edwards v. Doordash, Inc., 888 F.3d 738, 744 (5th Cir. 2018) ("If there is an agreement to arbitrate with a delegation clause, and absent a challenge to the delegation clause itself, we will consider that clause to be valid and compel arbitration. Challenges to the arbitration agreement as a whole are to be heard by the arbitrator.").

288. An argument that the delegation clause itself was unconscionable was advanced, and rejected, in *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201, 1210–11 (9th Cir. 2016) and in *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1265–67 (11th Cir. 2017).

289. *Schein II*, 935 F.3d at 281–82. This argument, much like the "wholly groundless" exception, is not "a specific challenge to the validity or enforceability of the delegation provision." *Waffle House*, 866 F.3d at 1264–65. I note and agree that inquiring "into what 'goes' 'specifically' to the 'delegation,' as opposed to the 'agreement as a whole—is likely to prove a tad oversubtle for sensible application. This is carving up the available universe

Applying the delegation principle as set out by the Supreme Court in *Rent-A-Center* (Figure 4)[290] would therefore have led the Fifth Circuit to conclude that since the delegation provision itself was valid and unqualified, it must be enforced with respect to *all* arbitrability questions (the hole in the doughnut's hole). The severed carve-out provision and its effect on the scope of the arbitration clause and on Archer's action/claim for injunctive relief (the doughnut's hole) would then be for the arbitrator to interpret and apply.[291]

Ultimately, the jurisprudential context in which the Fifth Circuit decided *Schein II* is that "[v]irtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."[292] The wisdom of considering the incorporation of institutional arbitration rules as evidencing clear and unmistakable intention to arbitrate arbitrability may fairly be questioned. It may be argued, for instance, that such institutional rules are not designed to provide for the exclusive competence of arbitrators to resolve arbitrability questions to the exclusion of the courts, or that their ubiquitous use in

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pretty fine, and requires line drawing that may seem artificial to the vanishing point." Rau, *Arbitral Power, supra* note 41, at 519. Nonetheless, it seems that in a case such as *Schein*, where there is no validity challenge *at all*, it would not be difficult to make this determination.

290. *See supra* p. 101.

291. This reasoning was applied by the Ninth Circuit in *Brennan v. Opus Bank*, 796 F.3d 1125, 1133 (9th Cir. 2015). The parties' arbitration clause provided that "[e]xcept with respect to any claim for equitable relief . . . any controversy or claim arising out of this [Employment] Agreement or [Brennan's] employment with the Bank or the termination thereof . . . shall be settled by binding arbitration in accordance with the Rules of the American Arbitration Association." *Id.* at 1128. The court rejected the argument that the parties' delegation clause (incorporating the AAA rules) was invalid since the arbitration clause in which it was contained was arguably unconscionable. *Id.* A similar approach was also applied by the Eleventh Circuit in *Parm v. National Bank of* California, 835 F.3d 1331, 1335 (11th Cir. 2016) ("Only if we determine that the delegation clause is itself invalid or unenforceable may we review the enforceability of the arbitration agreement as a whole."). *See also Waffle House*, 866 F.3d at 1264 ("[Plaintiff] must have alleged that the delegation provision specifically—and not just the agreement as a whole—can be 'defeated by fraud, duress, unconscionability, or another generally applicable contract defense.'" (quoting Parnell v. CashCall, Inc., 804 F.3d 1142, 1146 (11th Cir. 2015)); *Parnell*, 804 F.3d at 1148 ("[Plaintiff's] complaint only challenges the arbitration provision generally, and therefore falls short of the *Rent–A–Center* pleading requirement.*")*.

292. Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013). *See also* Belnap v. Iasis Healthcare, 844 F.3d 1272, 1283–84 (10th Cir. 2017) ("[A]ll of our sister circuits to address the issue have unanimously concluded that incorporation of the substantively identical (as relevant here) AAA Rules constitutes clear and unmistakable evidence of an agreement to arbitrate arbitrability . . . . Some courts have suggested that the Tenth Circuit is the only federal appellate court that has deviated from this consensus. . . . We disagree, however, with this reading of our precedent.").

arbitration agreements effectively turns all such agreements into clear and unmistakable evidence that the parties intended to arbitrate arbitrability, rendering the standard ineffectual.[293]

However, while anti-delegation arguments may give pause to a court faced with an arbitration agreement contained in a standard form contract or invoked with regard to class claims,[294] these situations are a far cry from a case such as *Schein*, where the only issue is the scope of a bilateral commercial arbitration agreement negotiated by sophisticated parties.[295] There is no doubt that the parties in this case have validly

293. *See, e.g.*, Restatement (Third) U.S. L. of Int'l Com. Arb. § 2.8 (AM. L. INST., Tentative Draft No. 4, 2015); Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent is Not "Clear and Unmistakable,"* 17 AM. REV. INT'L ARB. 545 (2006); Guy Nelson, *The Unclear "Clear and Unmistakable" Standard: Why Arbitrators, Not Courts, Should Determine Whether a Securities Investor's Claim is Arbitrable*, 54 VAND. L. REV. 591 (2001). For a contrary view, *see, e.g.*, Rau, *"Separability" in Seventeen Simple Proposition*, *supra* note 20, at 117–18 ("The AAA Commercial Arbitration Rules, for example, have been amended to accomplish precisely this result of giving most determinations of scope to the arbitrators. Other widely used bodies of rules may have the same effect. If the regime of contract is to mean anything, such provisions must end all further questioning—I am quite unable to understand any suggestions to the contrary."); Rau, *Arbitral Power*, *supra* note 41, at 550 n.210.

294. *See, e.g.*, Horton, *supra* note 79, at 404 ("There is a strong argument that . . . adhesive delegation clauses never satisfy the 'clear and unmistakable' criterion."); Karen H. Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. ON DISP. RESOL. 1, 6 (2011) (the approach of "allowing the arbitrator to make the initial determination of whether there is an enforceable agreement to arbitrate. . . . especially in the commercial sphere, has the potential to be relatively efficient and consistent. But in the context of mandatory arbitration of employment, franchise, and consumer disputes, such a delegation of authority to the arbitrator effectively removes an important check (the unconscionability doctrine) on the use of one-sided arbitration clauses."); Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Conception and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 367 ("The concept of 'separability' and the related notion that arbitrators may be empowered to decide their own jurisdiction, are inconsistent with general concepts of contract interpretation, but nevertheless enjoy wide application in the world of commercial arbitration because they support the independence and autonomy of those systems from courts. Where the same concepts are employed in the context of adhesion contracts, however, they arguably strike at the very heart of the FAA scheme itself.").

295. *See* Archer & White Sales, Inc. v. Henry Schein, Inc. (*Schein II*), 935 F.3d 274, 277 (5th Cir. 2019). Moreover, the Supreme Court has recently declined the opportunity to examine this question in the employment class action context when it dismissed the leave to appeal the Sixth Circuit's decision in *Blanton*, discussed above *supra* p. 128. The question presented to the Court in the plaintiff's Petition for a Writ of Certiorari was "[i]n the context of a form employment agreement, is providing that a particular set of rules will govern arbitration proceedings, without more, 'clear and unmistakable evidence' of the parties' intent to have the arbitrator decide questions of arbitrability?" Petition of Writ of Certiorari, Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842 (6th Cir. 2020) Piersing v. Domino's Pizza, (No. 20-695), 2020 WL 6826371, at *i. A similar leave to appeal is pending before the Court at the time of writing from the Third Circuit's decision in Richardson v. Coverall N. Am., Inc. on the following question: "Whether incorporation by

agreed to arbitrate at least *some* claims, and the sole question before the courts has been who is to determine what those claims are.

According to the principles set out by the Supreme Court in its earlier judgments, unless the validity of a delegation provision is directly challenged (Figure 4),[296] a court should not continue to analyze the parties' agreement for ways to get around the fact that it clearly and unmistakably evidences the parties' intention to arbitrate arbitrability questions (Figure 3).[297] Rather, the court's "work [will] then have been done,"[298] and it should refer any arbitrability questions to the arbitrator, in line with the complementary jurisdictions spheres the Supreme Court has established (Figure 5).[299]

V. CONCLUSION

Arbitrability questions such as challenges to the scope of arbitration agreements—the doughnut's hole—reveal "the tensions that inhere in allocating some threshold issues to the court that is asked to compel arbitration and others to the arbitral tribunal that is expected to conduct the arbitration and eventually determine the merits of the dispute."[300] As the *Schein* saga demonstrates, *who* decides these arbitrability questions––the hole in the doughnut's hole—enhances these tensions even further (Figure 1).[301]

By setting out the severability principle (Figure 2), the clear and unmistakable principle (Figure 3),[302] and the delegation principle (Figure 4),[303] the Supreme Court has constructed complex, yet complementary, jurisdictional spheres for courts and arbitrators with respect to the hole in the doughnut's hole question of who decides arbitrability (Figure 5).[304] The Court's approach makes sense in light of the implications of this determination, the contractual and consent-based nature of the arbitral

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reference of a separate set of arbitration rules constitutes clear and unmistakable evidence of intent to delegate the threshold question of arbitrability to an arbitrator in a case involving an unsophisticated party presented with an adhesive agreement." Petition for Writ of Certiorari, 811 F. App'x 100 (No. 20-763), Nov. 20, 2020.

296. *See supra* p. 101.

297. *See supra* p. 100.

298. VRG Linhas Aereas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P., 717 F.3d 322, 326 (2d Cir. 2013).

299. *See supra* p. 86.

300. Bermann, *supra* note 9, at 160.

301. *See supra* p. 86.

302. *See supra* p. 100.

303. *See supra* p. 101.

304. *See supra* p. 102.

process, and the Court's own focus on the parties' intentions.[305] Therefore, courts should adhere to the jurisdictional framework established by the Supreme Court and recall that "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms."[306] Once clear and unmistakable intention to arbitrate arbitrability questions is present (whether through the incorporation of institutional rules or otherwise), courts should not scout the parties' arbitration agreement in search of an interpretation that would negate this intention, such as the now discarded "wholly groundless" exception.[307]

Prior to the Supreme Court's rejection of this exception in its judgment in *Schein I*, the Tenth Circuit noted that, although the Supreme Court had yet to opine on

> the next steps for a court when it finds clear and unmistakable intent to arbitrate arbitrability. . . . the message that we glean from the language of the Court's opinions and our own, as well as the holdings of our sister circuits, is that courts in that situation must compel the arbitration of arbitrability issues in all instances in order to effectuate the parties' intent regarding arbitration.[308]

This "message" was indeed affirmed by the Supreme Court in its first judgment in *Schein*. The Fifth Circuit's reasoning in *Schein II*, however, has once again undermined the principles carefully devised by the Supreme Court and has needlessly complicated the complementary jurisdictional spheres that the Court has created.

Notwithstanding the Supreme Court ultimate dismissal of the certiorari it had granted in *Schein II*, , it is hoped that the Court will have another opportunity to confirm and reinforce its previous jurisprudence in the future. It is hoped that at that time the Court will reiterate, once

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305. Rau, *Arbitral Power*, *supra* note 41, at 501–03 (noting "the values of private autonomy that inform every aspect of our law of arbitration" and viewing "the arbitration process as an integral part of a system of private ordering and self-determination.").

306. Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 529 (2019) (citation omitted).

307. *Id.* at 531.

308. Belnap v. Iasis Healthcare, 844 F.3d 1272, 1286 (10th Cir. 2017). *See also* Jones v. Waffle House, Inc., 866 F.3d 1257, 1270 (11th Cir. 2017) (alteration in original) (where the court noted that "'[R]equir[ing] the courts to examine and, to a limited extent, construe the underlying agreement' . . . runs counter to the Supreme Court's mandate. Either the parties have evinced an intent to arbitrate gateway issues, or they have not. It's not for the courts to say the parties really didn't mean to do so in some circumstances, when the language they have employed allows for no such exceptions.").

again, the distinction between the doughnut's hole (arbitrability questions) and the hole in the doughnut's hole (who decides arbitrability questions), and that only the latter engages the clear and unmistakable principle.