Rent-A-Center Ten Years Later: Surveying How Courts Analyze Franchise Agreement Provisions That Delegate Gateway Arbitrability Issues to the Arbitrator

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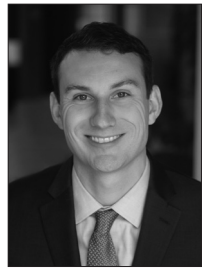

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I. Introduction

Return to the summer of 2010. *Breaking Bad* concludes season three with a stunning finale.[1] *Inception* bends audience's minds in theaters and leaves them wondering if it was all a dream.[2] "Tik Tok"—no, not that one[3]—tops the charts.[4] And the Supreme Court surprises the legal world with its landmark decision in *Rent-A-Center, West, Inc. v. Jackson*. More than a decade later, *Rent-A-Center*'s impact arguably remains the most lasting.

Before *Rent-A-Center*, the widely accepted view was that arbitration agreements were severable from the broader contracts that contained them.

1. James Poniewozik, *Breaking Bad Watch: Nowhere to Go but Up*, Time (June 14, 2010), https://entertainment.time.com/2010/06/14/breaking-bad-watch-nowhere-to-go-but-up.

2. David Edelstein, *'Inception' A Masterpiece? Only in Someone's Dream*, NPR (July 15, 2010, 5:00 PM), https://www.npr.org/templates/story/story.php?storyId=128493953.

3. Tom Taulli, *TikTok: Why the Enormous Success?*, Forbes (Jan. 31, 2020, 06:38 PM), https://www.forbes.com/sites/tomtaulli/2020/01/31/tiktok-why-the-enormous-success/?sh=7c483b1b65d1.

4. *Kesha Chart History*, Billboard, https://www.billboard.com/music/kesha/chart-history/adult-pop-songs/song/619788 (last visited Mar. 25, 2021).

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As a result, courts would hear only challenges to the arbitration provision, not the broader contract, before compelling the parties to arbitrate. Over time, of course, parties opposing arbitration focused their objections on the arbitration provision, particularly by alleging that it was unconscionable. Those attacks generally were for courts to resolve; however, whether the parties could avoid that outcome by delegating such gateway questions to the arbitrator divided courts. Some held that the agreement's language was sufficient to delegate gateway questions, like unconscionability, to the arbitrator. Others argued that unconscionability allegations undermined the arbitration agreement's plain language and required a court to resolve the objection first.

In a surprise result, the Supreme Court created an entirely new framework for resolving delegation disputes.[5] The delegation provision, the Court reasoned, is itself a severable agreement within the broader arbitration agreement.[6] Under the Federal Arbitration Act (FAA) and prior Supreme Court precedent, therefore, courts may resolve only challenges aimed at the delegation provision specifically, not the broader arbitration agreement, before compelling all other disputes to the arbitrator to decide.[7] This article surveys key decisions since *Rent-A-Center* to examine how parties to franchise and distribution agreements delegate gateway questions to arbitrators and whether there remain any questions that cannot be delegated to arbitrators in the first instance.

II. Background

The story of *Rent-A-Center* and its impact is best told along with four other Supreme Court cases—three that preceded it and one that followed it by a few days. Each is briefly examined below.

Prima Paint Corp. v. Flood & Conklin Manufacturing Company created the standard that, as a matter of federal substantive law, arbitration provisions are severable from the broader contract in which they may be contained.[8] In that matter, the seller of a business entered into a post-sale agreement to provide consulting services to the buyer.[9] Later dissatisfied with the transaction, the buyer brought a lawsuit in federal court and sought to avoid the consulting agreement's arbitration provision by arguing that it had been fraudulently induced to enter into the consulting agreement.[10] The Supreme Court held that allegations of fraud in the inducement as to the consulting agreement as a whole were for the arbitrator to resolve—not the court.[11] In reaching this holding, the Supreme Court relied heavily on Section 4 of the

5. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 72 (2010).
6. *Id.*
7. *Id.*
8. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
9. *Id.* at 397.
10. *Id.*
11. *Id.* at 399–400.

FAA, which requires courts to compel arbitration once satisfied with "the making of the agreement for arbitration."[12] Absent allegations of fraud specific to the agreement for arbitration, the Court concluded, it must compel arbitration without consideration of allegations of fraud directed at the contract in general.[13]

First Options of Chicago v. Kaplan dealt with an entirely different issue relating to the deference courts give arbitrators' rulings on their own authority.[14] In the case, respondents participated in an arbitration brought against them after unsuccessfully contesting at the outset that they had signed the arbitration agreement.[15] The arbitrators ruled that they had the authority to hear the claims despite respondents' objection and ultimately entered an award in the claimant's favor.[16] During the subsequent confirmation proceeding in federal court, respondents again objected that they had ever agreed to arbitrate, and the Third Circuit agreed.[17] The respondents appealed to the Supreme Court, which considered whether courts review an arbitrator's ruling on arbitrability de novo or with the same deference given a ruling on the merits.[18] Writing for the unanimous Court, Justice Breyer announced that courts may defer to the arbitrator's ruling on questions of arbitrability only if the parties "clearly and unmistakably" delegated such issues to the arbitrator.[19] Not surprisingly, the Court held that merely objecting to the arbitrator about the arbitrator's authority over the dispute did not satisfy this burden.[20]

In ***Buckeye Check Cashing, Inc. v. Cardenga***, the Court returned to *Prima Paint* to determine whether a court or arbitrator should consider the claim that a loan agreement containing an arbitration provision was void

12. *Id.* at 403–04 (citing 9 U.S.C. § 4).
13. *Id.* at 406.
14. First Options of Chicago v. Kaplan, 514 U.S. 938 (1995).
15. *Id.* at 941.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 943–44 (citing AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)). *First Options* is also important because it used the term *arbitrability* to encompass not only challenges to whether the arbitration provision covers the claims asserted (also known as a dispute relating to scope) but also disputes over whether there is an agreement at all. *Id.* at 942 ("[Respondents] disagree about whether they agreed to arbitrate the merits. That disagreement is about the *arbitrability* of the dispute."). *Howsam v. Dean Witter*, 537 U.S. 79 (2002), further expanded on this issue by defining *question of arbitrability*,—*i.e.*, threshold issues normally reserved for the court as opposed to procedural issues reserved for the arbitrator—as the "kind of 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 the parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83–84. Some critics, however, have argued that the expansion of the parties' right to delegate gateway issues relating to the agreement to arbitrate in general, and not just the scope of the arbitration provision, was not warranted by the precedent cited in *First Options*. *See*, *e.g.*, Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 Ohio St. J. on Disp. Resol. 1, 27 (2011).
20. *First Options*, 514 U.S. at 939.

for illegality.[21] The Florida Supreme Court had said a court should answer that question, drawing a distinction between (1) *Prima Paint's* requirement to enforce an arbitration provision in an agreement that ultimately may have been fraudulently induced, and (2) the petitioner's request to enforce an arbitration provision in an agreement that may be void as illegal.[22] Writing for the majority, Justice Scalia found no meaningful distinction and extended the *Prima Paint* severability principle to circumstances where the broader agreement was allegedly void.[23] "It is true," Justice Scalia wrote, "that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that [the alternative] approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable."[24] He concluded, "*Prima Paint* resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration provisions."[25]

These decisions set the table for ***Rent-A-Center, West, Inc. v. Jackson***.[26] In that matter, a former employee of Rent-A-Center brought claims against the company for race discrimination and retaliation in federal court.[27] But, as part of his employment, the employee had signed a stand-alone agreement to arbitrate, among other things, all claims for discrimination.[28] In addition, the agreement stated that the arbitrator, not the court, had exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the arbitration agreement.[29] Rent-A-Center moved to compel arbitration, and the employee argued that the arbitration agreement was unconscionable.[30] Citing *Buckeye*, the district court held that because the employee challenged the entire agreement, the arbitrator, not the court, should decide the unconscionability objection.[31]

The Ninth Circuit disagreed with the district court's application of *Buckeye*.[32] Unlike the arbitration provision at issue in that matter (and in *Prima Paint*), this dispute involved a stand-alone arbitration agreement, not one

21. Buckeye Check Cashing, Inc. v. Cardenga, 546 U.S. 440 (2006).

22. *Id.* at 446.

23. *Id.* at 447; *see also id.* at 444 ("The crux of the complaint is that the contract as a whole (including its arbitration provision) is rendered invalid by the usurious finance charge.").

24. *Id.* at 448–49.

25. *Id.* Justice Scalia previewed without citation that the issue of the contract's "validity" differs from whether any agreement was ever "concluded." *Id.* at 444 n.1. *Buckeye* only addressed validity and did not address cases which held that courts should decide "conclu[sion]" issues such as whether a contract was ever signed; whether the signor lacked authority to commit a principal; or whether the signor lacked mental capacity to assent. *Id.*

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

27. *Id.* at 65.

28. *Id.* at 65–66.

29. *Id.* at 66 (noting that the provision also expressly covered "any claim that all or any part of this Agreement is void or voidable").

30. *Id.* at 65–66.

31. *Id.*

32. Jackson v. Rent-A-Center W., Inc., 581 F.3d 912, 916 (9th Cir. 2009), *rev'd*, 561 U.S. 63 (2010).

buried in a broader "container" agreement.[33] Accordingly, the Ninth Circuit reasoned that challenges to the agreement as a whole and challenges exclusive to the arbitration agreement were one in the same.[34] For this reason, the court explained, the "severability principle" announced in *Buckeye* and *Prima Paint* did not apply.[35] The Ninth Circuit then held that where a party challenges an arbitration agreement as unconscionable—an assertion that it could not meaningfully assent to the agreement—the threshold question of unconscionability is for the court to decide even if the language of the agreement delegates that issue to the arbitrator.[36]

Judge Hall dissented from the decision, worrying about the practical effect of the majority's ruling.[37] The arbitration agreement at issue contained more employee-friendly terms than most.[38] And the employee's unconscionability allegations were "thinner" than most.[39] Under the majority's rule, parties who had otherwise clearly and unmistakably provided for the arbitrator to determine gateway issues could now avoid such an outcome by asserting even the "bare[st]" unconscionability allegations.[40] Judge Hall predicted a nightmare scenario of court-ordered "mini-trials" as to unconscionability before arbitration could be compelled under even "run-of-the-mill" arbitration provisions.[41]

Against this backdrop, the Supreme Court reversed the Ninth Circuit and created out of seemingly thin air the now well-known rule applying severability to the delegation provision itself.[42] Perhaps primed by his recent *Buckeye* decision or offended by the Ninth Circuit's certainty that *Prima Paint's* severability principle did not apply, Justice Scalia, again writing for

33. *Id.*
34. *Id.* at 915.
35. *Id.* at 916 n.2.
36. *Id.* at 917, 919. The Ninth Circuit relied heavily on the *First Options* standard in its analysis and held that allegations of unconscionability undermine any evidence of delegation found in the agreement's language. *Id.* at 917; *see also* Cross, *supra* note 19, at 60 ("[O]f the circuit courts that have addressed whether the *First Options* dictum allows parties to delegate unconscionability challenges to the arbitrator, only the Ninth Circuit has held that such a delegation was unenforceable.").
37. *Jackson*, 581 F.3d at 920 (Hall, J., dissenting).
38. *Id.*
39. *Id.*
40. *Id.* at 920–21. *See generally*, Thomas J. Stipanowich, *The Third Arbitration Trilogy*, 22 Am. Rev. Int'l Arb. 323, 352 (2012) (explaining how judicial decisions based on the unconscionability doctrine were rare before becoming a popular way to challenge arbitration provisions leading up to *Rent-A-Center*: "[f]raud, the covenant of good faith and fair dealing, and the doctrine of reasonable expectations have all been employed by federal and state courts in invalidating and reforming arbitration agreements"; however, "[u]nconscionability . . . remains the most versatile tool available to courts, as well as the primary engine for promoting fairness and transparency in arbitration provisions in adhesion contracts.").
41. *Rent-A-Center W., Inc.*, 581 F.3d at 920–21. Although the dissent identified the problem, it stopped short of providing a workable solution—ideating that perhaps courts intervene for "well-supported" claims of unconscionability, but resolve any doubts in favor of arbitration. *Id.* at 922.
42. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 72 (2010).

the majority,[43] crafted a solution to the problem that Judge Hall identified. First, Justice Scalia noted that the FAA applies to valid "written provision[s]" to "settle by arbitration a controversy."[44] Justice Scalia then identified two such provisions at issue in the matter: (1) the provision to arbitrate the employee's merit-based claims and (2) the provision that granted the arbitrator exclusive authority to resolve disputes related to the enforceability of the agreement.[45] Justice Scalia characterized the latter provision—dubbed the "delegation provision"—as a separate agreement to arbitrate threshold issues concerning the arbitration agreement.[46] Then, in a stroke of logic that Justice Stevens's dissent called "akin to Russian nesting dolls," Justice Scalia applied *Prima Paint*'s severability principle to the delegation provision within the broader "container" arbitration agreement.[47] Because the employee failed to attack the delegation provision specifically, and instead attacked the entire "container" arbitration agreement, Justice Scalia reasoned that *Prima Paint*'s interpretation of the FAA required the Court to enforce the valid delegation agreement and leave the unconscionability argument for the arbitrator to determine.[48] In this way, the presence of a delegation provision rendered the employee's attack on the entire arbitration agreement no different from the buyer's attack on the entire consulting agreement in *Prima Paint*.[49]

Justice Stevens's zealous dissent[50] objected to the majority's "breezy" assertion that the subject matter of the container contract made no difference when applying the severability principle.[51] He argued that instead of creating a new standard extending *Prima Paint*—which neither party briefed nor argued—the Court should have addressed the delegation issue under the *First Option*s standard that the delegation of such issues to the arbitrator be clear and unmistakable.[52] The employee's unconscionability allegations, Justice Stevens argued, undermined the delegation provision and precluded it

43. Justices Roberts, Thomas, Alito, and Kennedy joined in the opinion. *See generally id.*
44. *Id.* at 67 (citing 9 U.S.C. § 2).
45. *Id.* at 68.
46. *Id.*
47. *Id.* at 72, 85 (Stevens, J., dissenting).
48. *Id.* at 71–72.
49. *Id.* One commentary succinctly set forth *Rent-A-Center*'s application to a broader container agreement, like a franchise agreement:

> [*Rent-A-Center*] gives rise to the possibility that a single document qua agreement will be legally understood to contain at least three separate contracts: (1) the underlying substantive commitments (for example, a cell phone for a monthly fee); (2) a bilateral commitment to arbitrate; and (3) a bilateral commitment to arbitrate challenges to (2). Only if a challenge were directed at contract (3) could a party resisting arbitration seek refuge in court (subject to an important qualification).

Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 Marq. L. Rev. 1103, 1121–22 (2011). The "important qualification" is discussed *infra* Part III.E.

50. Justices Ginsberg, Breyer, and Sotomayor joined in Justice Stevens' dissent. *See Rent-A-Center*, 561 U.S. at 76 (Stevens, J., dissenting).
51. *Id.* at 77–78 (Stevens, J., dissenting).
52. *Id.* at 80–81.

from meeting the clear and unmistakable burden.[53] Justice Scalia—ever the textualist—dismissively reasoned that the Court need not look further than the language of the delegation provision itself to discern the parties' clear and unmistakable intent to delegate disputes over the agreement's validity to the arbitrator.[54]

In the end, the narrow majority's reasoning prevailed.[55] *Rent-A-Center* held that where an agreement to arbitrate contains a clear and unmistakable delegation provision, the district court may hear only challenges aimed at that particular delegation provision, and challenges to the broader arbitration agreement or container agreement must be decided by the arbitrator.[56] Moreover, the opinion confirmed that parties can agree to arbitrate "gateway" questions of "arbitrability," such as (1) whether the agreement covers a particular claim or, more broadly, and (2) whether the parties have agreed to arbitrate.[57] For the second category of gateway questions, Justice Scalia cautioned in a footnote similar to the one in *Buckeye*:[58] "The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties was 'ever concluded.'"[59]

Just three days later, Justice Thomas elaborated on this distinction in ***Granite Rock Company v. International Brotherhood of Teamsters***, which involved an unusual set of facts relating to an employer's claim against a local labor union and its parent arising out of a labor strike.[60] Whether the claims were arbitrable hinged on when the underlying collective bargaining agreement was ratified, and that issue, the Court held, was for a court to decide.[61] Justice Thomas summarized the Court's framework to date: To determine whether an arbitration agreement exists, the court must resolve any issue that calls into question formation or applicability of the specific arbitration

53. *Id.* at 81–82. In the decision's aftermath, commentators wrestled with why the Court invoked *Prima Paint*'s severability rule—clever as it was—rather than simply overrule the Ninth Circuit's holding that there had been no clear and unmistakable delegation under *First Options*. *Compare* Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am. Rev. Int'l Arb. 435, 517 (2011) ("[T]his construct, however elegant and ingenious, is intricate and recondite to a degree that seems wholly unnecessary."), *with* Cross, *supra* note 19, at 49 ("[I]t is possible that the Court based the Rent-A-Center decision on the separability doctrine in order to avoid the implications of First Options for post-award review. A majority of the Court may not have been willing to hold that a delegation clause empowers the arbitrator to make a final determination of his or her jurisdiction.").

54. *Rent-A-Center*, 561 U.S. at 74–75. Justice Stevens, on the contrary, declared that an agreement to arbitrate never can manifest a clear and unmistakable intent to arbitrate its own validity. *Id.* at 82 (Stevens, J., dissenting).

55. *See supra* note 43 (identifying that the four "conservative" justices were in the majority). Like many other close decisions during this time, Justice Kennedy proved to be the decisive "swing" vote. Colin Dwyer, *A Brief History of Anthony Kennedy's Swing Vote—and the Landmark Cases It Swayed*, NPR (June 27, 2018, 7:00 PM), https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed.

56. *Rent-A-Center*, 561 U.S. at 72.

57. *Id.* at 69 (citing Howsam v. Dean Witter, 537 U.S. 79, 83–85 (2002)).

58. *See supra* note 25.

59. *Rent-A-Center*, 561 U.S. at 70, n.2.

60. Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287 (2010).

61. *Id.* at 297, 304–05.

clause.[62] Those issues *always* include whether the clause was agreed to, but only may include scope and enforceability issues in the absence of a delegation provision.[63] Put another way, "courts 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."[64]

III. Delegation Landscape Ten Years Later

Before *Rent-A-Center*, it was widely accepted that parties could delegate disputes over the scope of the arbitration provision (i.e., whether asserted claims were covered by a provision) to the arbitrator.[65] After *Rent-A-Center*, traditional challenges to the validity or enforceability of arbitration agreements—unconscionability (*Rent-A-Center*), fraudulent inducement (*Prima Paint*), and illegality (*Buckeye Check*)—could all be delegated to the arbitrator as well.[66] *Rent-A-Center* generally stands for the proposition that an arbitrator must decide these "gateway issues," which are also often referred to as "questions of arbitrability,"[67] if clearly and unmistakably delegated to the arbitrator *unless* the party opposing arbitration challenges the delegation provision specifically.[68] Justice Scalia predicted that, while conceivable, challenges to the delegation provision itself were unlikely to succeed.[69] Generally that has proved true. The authors uncovered few franchise cases where the challenging party attacked an express delegation provision itself and none that succeeded.[70]

62. *Id.* at 299–300 (citing First Options of Chicago v. Kaplan, 514 U.S. 938, 943 (1995)).

63. *Id.* at 297.

64. *Id.* at 299 (citing *First Options*, 514 U.S. at 943). Because delegation was not at issue in the matter, this oft-cited language is, in fact, dicta. Some courts have held, however, that the placement of the parenthetical is significant and means that formation issues never can be delegated to the arbitrator. *See infra* Part III.E.

65. *See*, *e.g.*, Way Servs., Inc. v. Adecco N. Am., LLC, Civil No. 06-CV-2109, 2007 WL 1775393, at *5 (E.D. Pa. June 18, 2007).

66. *See* discussion *supra* Part II.

67. Justice Stevens's dissent explained that although unclear from prior decisions, "gateway matters" and "questions of arbitrability" are roughly synonymous (with the former including all of the latter). Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 78, n.1 (2010) (Stevens, J., dissenting).

68. *Id.* at 72.

69. *Id.* at 74; *see also* Cross, *supra* note 19, at 48–49 ("[Rent-A-Center] sets up an almost insurmountable obstacle to unconscionability challenges because the factors that have been the basis for a successful challenge in the past . . . for the most part are either not specifically relevant to the delegation clause or are applicable to the entire arbitration agreement.").

70. *See* VieRican, LLC v. Midas Int'l, LLC, Civil No. 19-00620 JAO-RT, 2020 WL 4430967, at *7 (D. Haw. July 31, 2020) ("As the Supreme Court observed in *Rent-A-Center*, it is 'much more difficult' to establish that a certain provision is unconscionable in the context of a *delegation provision* as compared to showing that the same limitation renders arbitration of a plaintiff's complex and fact-bound claims unconscionable."); Doctor's Assocs., Inc. v. Kirksey, Civil Action No. 3:18-cv-963 (JCH), 2018 WL 6061573, at *5 (D. Conn. Nov. 20, 2018) ("Although Kirksey's argument that the entire arbitration agreement is invalid implicitly contains a challenge to the delegation clause, it is not sufficiently targeted to the delegation clause to avoid arbitration under *Rent-A-Center*."); *but see infra* Part III.D.

In the ten years since *Rent-A-Center*, lower courts have developed the contours of the delegation standard, including addressing certain issues left open by the landmark decision. The remainder of this article takes aim at two open issues. How do parties clearly and unmistakably delegate gateway issues[71] to the arbitrator? Are there any gateway issues that cannot be delegated to the arbitrator?

A. *Express Delegation Clauses Generally Include Certain Buzzwords That Trigger the Delegation of Gateway Issues.*

The delegation provision at issue in *Rent-A-Center* was strongly worded to expressly cover all conceivable gateway issues. It granted the arbitrator—and not any court or agency—exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement. Shortly after *Rent-A-Center*, one commentator reviewed a set of franchise agreements with arbitration provisions from shortly before the decision and found similar "strongly-worded" delegation provisions in only about fourteen percent of clauses.[72] That number has increased dramatically for franchisors who include arbitration provisions in their franchise agreements. The authors reviewed current arbitration provisions from twenty different franchisors and found seventy-five percent had strongly-worded delegation clauses.[73]

Fortunately for franchisors dealing with legacy provisions, courts applying *Rent-A-Center* have not required such unequivocal delegation language. The authors reviewed the hundreds of franchise or distribution-related cases that have cited *Rent-A-Center* to analyze the arbitration provisions involved in each matter. From that review, a few trends emerged.

1. Courts Generally Find That the Term "Interpret" or "Scope" Delegates Gateway Questions of Scope to the Arbitrator.

Delegation clauses with language related to "interpretation" or "application" are often clear indicators that the parties intended to delegate scope issues to the arbitrator. For example, in *Capelli Enterprises, Inc. v. Fantastic Sams Salons Corp.*, the franchisee argued that its claim for declaratory relief fell outside the scope of the applicable arbitration agreement.[74] A federal court

71. Gateway issues as used hereinafter includes both (1) objections to the scope of the arbitration agreement, and (2) objections to the agreement to arbitrate itself.

72. Drahozal & Rutledge, *supra* note 49, at 1122–23. An additional handful of the franchise arbitration clauses analyzed included language stating that the parties agreed to arbitrate claims that the entire franchise agreement or any provision thereof was invalid. *Id.* Because those provisions did not specifically refer to the arbitration clause, the authors did not classify them as delegation clauses. *Id.*; *see also infra* Part III.B.

73. The authors pulled public franchise disclosure documents from the Wisconsin website for the top thirty-six franchises listed on 2021 Franchise 500 Ranking, Entrepreneur.com, https://www.entrepreneur.com/franchise500/2021 (last visited Feb. 9, 2021). Of the franchise agreements in those franchise disclosure documents, twenty contained arbitration clauses. The data is on file with the authors.

74. Capelli Enters., Inc. v. Fantastic Sams Salons Corp., *Case No. 5:16-cv-03401-EJD*, 2017 WL 130284, at *2 (N.D. Cal. Jan. 13, 2017). The arbitration provision at issue excluded claims related to the "collection of monies owed." *Id.* at *3.

in California denied the franchisee's request to enjoin a pending arbitration, but did so based on the parties' incorporation of procedural rules,[75] not the express delegation language.[76] Regarding the express language—which covered "any controversy or claim arising out of or relating to this Agreement or with regard to its interpretation, formation or breach"[77]—the court noted that, although interpretation was mentioned, the provision did not refer issues of validity or application of the agreement to the arbitrator and thus did not alone evidence the clear and unmistakable intent of the parties.[78] In a later order compelling arbitration, however, the court had a change of heart and held the express language *was* expansive enough to constitute clear and unmistakable evidence of the parties' intent to arbitrate the scope of the provision because it "plainly refers issue of interpretation to the arbitrator."[79] The court observed that "the present dispute over the scope of the clause will undoubtedly require an interpretation of the exclusionary provision" that the franchisee argued excluded its claim for declaratory relief.[80]

There was a similar scope carve-out at issue in *Cellairis Franchise, Inc. v. Duarte*.[81] There, a franchisor had moved for injunctive relief.[82] The relevant delegation clause stated that the parties would arbitrate any claims or disputes arising out of or relating to "the scope and validity of this Agreement . . . including the scope and validity of the arbitration obligations . . . ."[83] The arbitration clause had several categories of exempted claims, one of which was claims for injunctive or equitable relief.[84] The franchisor argued the arbitration provision clearly and unambiguously carved out claims for injunctive or equitable relief.[85] A court in the Northern District of Georgia disagreed, finding that there was clear and unmistakable intent to delegate questions of arbitrability to the arbitrator in view of the contractual language and that "courts have overwhelmingly found provisions like this one remove scope determinations from the court's purview."[86] The court explained that the presence of a provision authorizing the franchisor to opt out of the arbitration clause did not change its finding on the question of arbitrability.[87]

Likewise, in *Inferno Group Holdings, LLC v. 1000 Degrees Pizzeria Franchise, Inc.*, a franchisee brought suit seeking rescission and damages under a theory

75. *See infra* Part III.B.
76. *Capelli Enters., Inc.*, 2017 WL 130284, at *3, *4, *6.
77. *Id.* at *3.
78. Capelli Enters. v. Fantastic Sams Salons Corp., slip op. at 6, No. 5:16-cv-03401 (N.D Cal. Aug. 26, 2016).
79. *Capelli Enters., Inc.*, 2017 WL 130284, at *3.
80. *Id.*
81. Cellairis Franchise, Inc. v. Duarte, Civil Action No. 2:15–cv–00101–WCO, 2015 WL 11422299 (N.D. Ga. July 20, 2015).
82. *Id.* at *1.
83. *Id.* at *4.
84. *Id.* at *2.
85. *Id.* at *3.
86. *Id.* at *4.
87. *Id.*

of fraud in the inducement to enter into an area development agreement.[88] The agreement provided in part: "[A]ny dispute between [the parties] . . . arising under, out of, in connection with or in relation to . . . the scope or validity of the arbitration obligation under [this section] shall be submitted to binding arbitration . . . ."[89] The franchisee argued that its claims did not fall within the arbitration clause's purview.[90] A federal court in the Southern District of Florida explained that, based on the plain language of the clause, the parties "delegated the scope of the arbitration provision to the arbitrator."[91] The court noted nothing precluded the franchisee from raising scope issues to the arbitrator.[92]

Even just use of the word "scope" may be sufficient. In *Doctor's Associates, Inc. v. El Turk*, a franchisee filed a counterclaim against the franchisor, arguing that the franchisor had abused their powers as development agents.[93] A Connecticut federal court analyzed the arbitration clause, which read "[a]ny disputes concerning the enforceability or scope of the arbitration clause shall be resolved pursuant to the [FAA] . . . . "[94] The franchisee argued that his counterclaims did not arise under the franchise agreement, but the court held this was a question for the arbitrator to decide because the parties had explicitly delegated questions of scope of the arbitration agreement to the arbitrator.[95]

2. Courts Generally Find That "Validity" and "Enforceability" Delegate Any Remaining Gateway Issues to the Arbitrator.

Unconscionability is frequently used to challenge an arbitration provision's validity. Generally, including the words "validity" or "enforceability" in a delegation clause is sufficient to ensure this challenge is for the arbitrator.[96] *Meena Enterprises, Inc. v. Mail Boxes Etc.*[97] demonstrates this point. There, franchisees alleged that the arbitration clauses in several franchise agreements were unconscionable and that the court had the authority to address this argument.[98] The Maryland federal court disagreed, finding that the

88. Inferno Grp. Holdings, LLC v. 1000 Degrees Pizzeria Franchise, Inc., 2017 WL 8772155, at *1 (S.D. Fla. Nov. 28, 2017).
89. *Id.* at *6.
90. *Id.* at *4.
91. *Id.* at *6.
92. *Id.*
93. Doctor's Assocs., Inc. v. El Turk, Civil Action No. 3:17-CV-2019 (JCH), 2018 WL 3238701, at *9 (D. Conn. Feb. 28, 2018).
94. *Id.*
95. *Id.*
96. *See, e.g.*, Billie v. Coverall N. Am., Inc., 444 F. Supp. 3d 332 (D. Conn. 2020); Meadows v. Dickey's Barbecue Rests. Inc., 144 F. Supp. 3d 1069 (N.D. Cal. 2015); TD Auto Fin., LLC v. Bedrosian, 609 S.W.3d 763 (Mo. Ct. App. 2020); Ford Motor Credit Co., LLC v. Jones, 549 S.W.3d 14 (Mo. Ct. App. 2018), *reh'g and/or transfer denied* (May 1, 2018), *transfer denied* (July 3, 2018).
97. Meena Enters., Inc. v. Mail Boxes Etc., Civil Action No. DKC 12–1360, 2012 WL 4863695 (D. Md. Oct. 11, 2012).
98. *Id.* at *3, *5.

following delegation language unequivocally delegated to the arbitrator all claims regarding the validity of the arbitration clauses: every "controversy, claim or dispute arising out of or in connection with the negotiation, performance or non-performance of this Agreement, including, without limitation, any alleged torts and/or claims regarding the validity, scope, and enforceability of this Section, shall be solely and finally settled by binding arbitration."[99] The court specifically identified "the validity, scope, and enforceability of this Section," and "solely and finally settled by binding arbitration" as the operative language.[100]

Franchisees have similarly claimed franchise agreements are contracts of adhesion, leading to challenges to arbitration clauses related to their alleged inability to consult with an attorney, review documents before signing, or review language buried in standard forms.[101] The franchisees in *Morris CM Enterprises, LLC v. Wingstop Franchising, LLC* made many of these arguments. But the United States District Court for the Eastern District of California held that this case was analogous to *Rent-A-Center*, as the arbitration provision at issue had an express delegation to the arbitrator to determine the "validity" of the parties' arbitration obligations and such arguments did not go to formation, but to whether a contract was valid or enforceable.[102]

A franchisor of a construction material installation company drafted its delegation clause differently, but still achieved the same result in *Fatt Katt Enterprises, Inc. v. Rocksolid Granit (USA), Inc.*[103] The relevant clause there stated that "[a]ll disputes and claims relating to this Agreement . . . the rights and obligation of the parties, or any other claims or cause of action relating to the making, interpretation, or performance of either party under this Agreement, shall be settled by arbitration. . . ."[104] The United States District Court for the Northern District of Georgia held that this delegation provision committed unconscionability challenges to resolution by the arbitrator in view of the "making, interpretation, or performance" language.[105] Notably, the court did not find it necessary for the provision to use the words "enforceability" or "validity."

Not all courts share this view. In *Doe v. TCSC, LLC*, the absence of those exact words proved damaging for a car dealership.[106] A South Carolina appellate court analyzed an arbitration clause, which mandated that any "claim or dispute, whether in contract, tort, statute, or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of

99. *Id.* at *5.
100. *Id.*
101. Morris CM Enters., LLC v. Wingstop Franchising, LLC, 2020 WL 5502329, at *2 (E.D. Cal. Sept. 11, 2020).
102. *Id.* at *4.
103. Fatt Katt Enters., Inc. v. Rocksolid Granit (USA), Inc., Civil Action File No. 1:17-CV-1900-MHC, 2018 WL 482461 (N.D. Ga. Jan. 11, 2018).
104. *Id.* at *3.
105. *Id.* at *4.
106. Doe v. TCSC, LLC, 846 S.E.2d 874 (S.C. Ct. App. 2020).

the claim or dispute)" between the parties "which arises out of or relates to your credit application, purchase, lease, or condition of this vehicle, your purchase, lease agreement, or financing contract or any resulting transaction or relationship . . . shall at your or our election, be resolved by neutral, binding arbitration and not by a court action."[107] The dealership argued the parties clearly and unmistakably agreed to delegate the issue of validity and enforceability of the arbitration provision to the arbitrator in response to an unconscionability challenge.[108] The court disagreed, finding that only issues of scope were appropriate for an arbitrator because the delegation clause stated that the arbitrator could resolve "only the limited gateway issues of 'the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute.' The parties did not delegate the decision of whether the Agreement was valid and enforceable."[109] After all, the court concluded, "one cannot 'interpret' an invalid contact."[110]

3. In Some Instances, Courts Have Found Broad Language to Be Enough to Delegate Gateway Issues.

Some courts have rested their delegation findings on even broader language. In *Doctor's Associates, Inc. v. Rahimzadeh*, the court noted the arbitration clause in the relevant franchise agreement was "a broad clause."[111] The clause stated that "[a]ny dispute, controversy or claim arising out of or relating to this Agreement or the breach thereof will be settled by arbitration."[112] The franchisee argued that his claims arose from the operations manual and actions outside the scope of any agreement between the parties.[113] The court concluded that it lacked the authority to reach the question of whether franchisee's claims arose out of the franchise agreement because the parties had expressly delegated that determination to the arbitrator.[114]

Simply using the words "all issues" passed one court's test. A franchisee challenged the scope of an arbitration provision of a franchise agreement that contemplated the arbitrator would decide "*all* issues relating to arbitration. . . ."[115] The court held that "it is clear that the parties intended for an arbitrator to determine the arbitrability of 'all issues.'"[116] The court noted that "the parties went so far as to underline the term 'all'" while citing case law holding that this type of agreement "could not [be] broader."[117]

107. *Id.* at 876.
108. *Id.* at 877.
109. *Id.*
110. *Id.*
111. Doctor's Assocs., Inc. v. Rahimzadeh, Civil Action No. 3:17-CV-2126 (JCH), 2018 WL 1704757, at *2 (D. Conn. Apr. 9, 2018).
112. *Id.*
113. *Id.* at *3.
114. *Id.* at *4–5.
115. Morning Star Assocs., Inc. v. Unishippers Glob. Logistics, LLC, No. CV 115–033, 2015 WL 2408477, at *9 (S.D. Ga. May 20, 2015).
116. *Id.* at *10.
117. *Id.*

4. Broadly Worded Arbitration Provisions That Cover "Questions Arising out of or Relating to" the Agreement as a Whole Generally Do Not Delegate Gateway Issues Without Something More.

An example of a case with a deficient clause came out of a federal district court in Utah. In *One Man Band Corporation v. Smith*, the court analyzed whether an arbitrator should decide whether the claims brought by the franchisor fell within the scope of the parties' arbitration clause.[118] The relevant language provided that "[f]rom time to time there may be controversy about this Agreement, its interpretation, or performance or breach by the parties. The controversy . . . will be resolved by arbitration . . . The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this Agreement is a condition precedent to legal action by either party."[119] The court found that this language was insufficient to clearly convey disputes over the agreement's scope to the arbitrator since the arbitration clause was silent regarding the arbitration of controversies regarding arbitrability, providing no clear and unmistakable evidence that the parties intended to arbitrate arbitrability.[120]

Incorporation of administrative rules is one way that a clause might include "something more" to strengthen an insufficiently specific delegation clause.[121] For example, the Ninth Circuit analyzed a distributorship agreement containing an arbitration clause stating that "claims or disputes 'arising out of or related to this agreement, or the breach thereof' shall exclusively be submitted to arbitration" under the AAA Commercial Arbitration Rules.[122] The appellant specifically argued that the lower court, in finding clear and mistakable delegation, placed too much emphasis on the "arising out of or relating to" language.[123] The appellate court was unpersuaded, holding that "the language of the arbitration clause shows a clear and unmistakable intent to delegate questions of scope to the arbitrator" by incorporating the AAA's Commercial Arbitration Rules.[124]

As shown in the above example, courts continue to review the express language of delegation clauses, but may also turn to indirect means of

118. One Man Band Corp. v. Smith, Case No. 2:14–CV–221 TS, 2014 WL 12622274, at *2 (D. Utah Aug. 19, 2014).

119. *Id.*

120. *Id.* at *2–3, n.16, n.18 (citing *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998) (noting that the phrase "any and all disputes arising out of or relating to the contract" was not clear and unmistakable evidence that the parties intended arbitrability to be decided by an arbitrator) and contrasting current delegation clause with that from *Sadler v. Green Tree Servicing, LLC*, 466 F.3d 623, 624 (8th Cir. 2006) (there was clear and unmistakable evidence regarding the intent of the parties where a contract provided that "[a]ny controversy concerning whether an issue is arbitrable shall be determined by the arbitrator(s)).).

121. *See infra* Part III.B; *see, e.g.*, Willcock v. My Goodness Games, Inc., Case No. PWG-16-4020, 2017 WL 2537010 (D. Md. June 12, 2017).

122. Fadal Machining Ctrs., LLC v. Compumachine, Inc., 461 F. App'x 630, 631 (9th Cir. 2011).

123. *Id.* at 632.

124. *Id.*

delegation through the use of arbitration rules. As discussed in the next Part, this far more prevalent analysis leads courts to the same conclusion.

B. *It Is Generally Accepted That Parties Indirectly Delegate Gateway Issues to the Arbitrator by Incorporating Procedural Rules That Authorize Arbitrators to Resolve Those Issues.*

Most arbitration provisions in franchise agreements select an organization to administer the arbitration and incorporate by reference the arbitration rules promulgated by that administrator. Of the twenty current arbitration agreements that the authors reviewed, all had incorporated some arbitration organization's rules.[125] The rules set forth by the two dominant administrators—JAMS and the American Arbitration Association (AAA)—each grant the duly-appointed arbitrator the authority to rule on the arbitrator's own jurisdiction, including issues relating to the existence, scope, or validity of the arbitration agreement or any claim.[126]

Franchisors have argued with great success that the parties clearly and unmistakably delegated all gateway issues to the arbitrator by incorporating these rules into the arbitration agreement.[127] Indeed, courts in every federal circuit currently apply this rule.[128] As a result, in the decade since

125. *See supra* note 73.

126. For example, AAA Commercial Rule 7(a) provides that "[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 or to the arbitrability of any claim or counterclaim." Likewise, JAMS Comprehensive Arbitration Rule 11(b) provides that "[j]urisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator."

127. Typically, where courts find the parties have delegated questions of arbitrability to an arbitrator based on incorporation of arbitration rules, any "gateway" issues, whether scope or validity, are for the arbitrator. In *AMC Pinnacle, Inc. v. Jeunesse, LLC*, Case No. 6:18-cv-1102-Orl-40DCI, 2018 WL 6267314, at *4 (M.D. Fla. Nov. 30, 2018), for example, the court rejected a distributor's argument that the case was outside the scope of the arbitration provision. The court reasoned, in part, that this interpretation of a carve-out in the arbitration provision would contradict the incorporation of the AAA Commercial Rules that "vest the arbitrator [with] broad authority." *Id; cf. supra* Part III.B.

128. First Circuit: Awuah v. Coverall N. Am., Inc., 554 F.3d 7 (1st Cir. 2009). Second Circuit: Doctor's Assocs., LLC v. Tripathi, 794 F. App'x 91 (2d Cir. 2019). Third Circuit: Richardson v. Coverall N. Am., Inc., 811 F. App'x 100 (3d Cir. 2020). Fourth Circuit: Simply Wireless, Inc v. T-Mobile US, Inc., 877 F.3d 522 (4th Cir. 2017), *abrogated on other grounds by* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019); Willcock v. My Goodness Games, Inc., Case No. PWG-16-4020, 2017 WL 2537010 (D. Md. June 12, 2017). Fifth Circuit: Maravilla v. Gruma Corp., 783 F. App'x 392 (5th Cir. 2019). Sixth Circuit: Blanton v. Domino's Pizza Franchising, LLC, 962 F.3d 842 (6th Cir. 2020); Fruit Creations, LLC v. Edible Arrangements, LLC, Case No. 3:20-cv-00479, 2020 WL 5095460 (M.D. Tenn. Aug. 27, 2020). Seventh Circuit: Kuznik v. Hooters of Am., LLC, Case No. 1:20-cv-01255, 2020 WL 5983879 (C.D. Ill. Oct. 8, 2020); Allscripts Healthcare, LLC v. Etransmedia Tech., Inc., 188 F. Supp. 3d 696 (N.D. Ill. 2016). Eighth Circuit: Giddings v. Media Lodge, Inc., 320 F. Supp. 3d 1064 (D.S.D. 2018) (citing Fallo v. High-Tech Inst., 559 F.3d 874 (8th Cir. 2009)). Ninth Circuit: Esguerra-Aguilar, Inc. v. Shapes Franchising, LLC, Case No. 20-cv-00574-BLF, 2020 WL 3869186 (N.D. Cal. July 9, 2020) (citing Brennan v. Opus Bank, 796 F.3d 1125 (9th Cir. 2015)). Tenth Circuit: Dreamstyle Remodeling, Inc. v. Renewal by Andersen, LLC, Civ. No. 19-1086 KG/JFR, 2020 WL 2065276 (D.N.M. Apr. 29, 2020) (citing Belnap v. Iasis Healthcare, 844 F.3d 1272 (10th

Rent-A-Center, near universal precedent holds that franchise agreements delegate gateway issues to the arbitrator when their arbitration provisions incorporate arbitration rules that say as much.

There are few notable exceptions to this general rule.[129] Some courts have declined to find delegation where the agreement incorporating the rules predated the addition of the administrator's rule providing for the arbitrator to decide arbitrability issues.[130] Further, some courts have refused to find that rule incorporation clearly and unmistakably delegates gateway issues where one of the contracting parties is not sophisticated.[131] This line of cases often relates to consumer disputes and therefore is easily distinguished from the franchising context.

These cases, moreover, constitute an extreme minority position and are not widely followed. For example, the issue of if a party's level of sophistication impacts whether incorporation of the AAA Commercial Rules is a valid delegation has been petitioned to the Supreme Court at least twice in the last year.[132] In *Blanton v. Domino's Pizza Franchising, LLC*, a franchisee's employee argued, among other things, that incorporation of the AAA Rules was not a "clear and unmistakable" delegation of gateway issues because he was not a "sophisticated party."[133] But the Sixth Circuit rejected this argument, holding that the employee had "ample notice" of the meaning and effect of the rules based on the judicial precedent and his certification in the arbitration agreement that he had time to obtain advice from an attorney, as well as the fact that the FAA does not distinguish between "sophisticated" and "unsophisticated" parties.[134] Similarly in *Richardson v. Coverall North America, Inc.*, the Third Circuit rejected a franchisee's argument that it was unreasonable to rely on incorporated rules in agreements with "unsophisticated

Cir. 2017)). Eleventh Circuit: AMC Pinnacle, Inc. v. Jeunesse, LLC, Case No: 6:18-cv-1102-Orl-40DCI, 2018 WL 6267314 (M.D. Fla. Nov. 30, 2018) (citing Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327 (11th Cir. 2005)). Federal Circuit: Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366 (Fed. Cir. 2006), *abrogated on other grounds by* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019). D.C. Circuit: Sakyi v. Estée Lauder Cos., Inc., 308 F. Supp. 3d 366 (D.D.C. 2018).

129. The "wholly groundless" exception was recently eliminated. *See infra* Part III.C.

130. St. Louis Reg'l Convention v. Nat'l Football League, 581 S.W.3d 608 (Mo. Ct. App. 2019) (holding that incorporation of AAA Rules in a 1995 agreement was not "clear and unmistakable" evidence of an intent to delegate the issue of arbitrability because AAA Rule 7(a) didn't appear in the rules until 2003). *But see* Wild v. H&R Block, Inc., 2011 WL 1833113 (D. Colo. May 12, 2011) (rejecting franchisee's argument against delegation where agreement pre-dated AAA's adoption of Rule 7(a) because arbitration agreement incorporated "then obtaining" AAA Rules, which adoption inherently included changes and additions to rules).

131. Aguilera v. Matco Tools Corp., Case No.: 3:19-cv-01576-AJB-AHG, 2020 WL 1188142 (S.D. Cal. Mar. 12, 2020); Meadows v. Dickey's Barbecue Rests. Inc., 144 F. Supp. 3d 1069 (N.D. Cal. 2015). *But see* Davis v. Seva Beauty, LLC, slip op. at 5, No. 2:17-cv-00547-TSZ (W.D. Wash. Sept. 13, 2017) (distinguishing *Meadows* because there was no evidence that franchisees were similarly unsophisticated); Capelli Enters., Inc. v. Fantastic Sams Salons Corp., Case No. 5:16-cv-03401-EJD, 2017 WL 130284, at *2 (N.D. Cal. Jan. 13, 2017) (rejecting franchisee's argument that it was unsophisticated).

132. *See Blanton*, 962 F.3d at 844; *Richardson*, 811 F. App'x at 104.

133. *Blanton*, 962 F.3d at 851.

134. *Id.*

parties," reasoning that such a rule would "disregard the 'clear and unmistakable' standard and ignore even the plainest of delegations."[135] On that basis, the Third Circuit reversed the district court's holding that incorporation of the AAA Commercial Arbitration Rules was not a clear and unmistakable delegation in a contract with an unsophisticated party, ruling that this incorporation was "about as 'clear and unmistakable' as language can get."[136]

Both the employee in *Blanton* and the franchisee in *Richardson* petitioned the Supreme Court for c*ertiorari*, in part based on arguments that the parties' level of sophistication should impact whether incorporation of arbitration rules is a valid delegation of arbitrability.[137] By denying *certiorari* in *Blanton*, the Supreme Court seemingly indicated that, at least for now, it has no interest in addressing whether a party's "sophisticat[ion]" impacts this analysis.[138] It remains to be seen, however, if the Supreme Court will use *Richardson* as an opportunity to address "unsophisticated" parties.[139]

Ultimately, the distinction—"unsophisticated" versus "sophisticated"—is not one courts should make, as it would result in mini-trials regarding the sophistication level of the party trying to avoid arbitration. Indeed, this type of issue is what Judge Hall's *Rent-A-Center* dissent predicted, and which the Supreme Court impliedly sought to avoid.[140] Moreover, even if the Supreme Court addresses this issue and holds that sophistication level impacts the analysis, most franchise agreements contain fall back express delegation language.[141] Also, in most cases, franchisees will struggle to make an even a *prima facie*

135. Richardson v. Coverall N. Am., Inc., 811 F. App'x 100, 104 (3d Cir. 2020) (citing Brennan v. Opus Bank, 796 F.3d 1125, 1130–31 (9th Cir. 2015)).

136. *Id.* at 102–03 (quoting Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 11 (1st Cir. 2009)).

137. *See* Petition for Writ of *Certiorari* at 12, Blanton v. Domino's Pizza Franchising, LLC, 962 F.3d 842 (6th Cir. 2020) (No. 20-695) (arguing that ordinary employees were like consumers, making it implausible that such parties could understand that they were clearly and unmistakably delegating arbitrability based on a mere reference to the rules); Petition for Writ of *Certiorari* at 15, Richardson v. Coverall N. Am., Inc., 811 F. App'x 100 (3d Cir. 2020) (No. 20-763) (arguing that the Third Circuit's opinion deepened a circuit court split as to whether an unsophisticated party can clearly and unmistakably delegate arbitrability through incorporation of arbitration rules).

138. *See Blanton*, 962 F.3d at 844, *cert. denied*, 2021 WL 231566 (U.S. 2021) (No. 20-695).

139. In its opposition to the petition for *certiorari*, the franchisor in *Richardson* pointed out that the Court has already denied *certiorari* on delegation by reference five times. *See* Opposition to Petition for Writ of *Certiorari* at 4, Richardson v. Coverall N. Am., Inc., 811 F. App'x 100 (3d Cir. 2020) (No. 20-763) (citing Blanton v. Domino's Pizza Franchising, LLC, 962 F.3d 842 (6th Cir. 2020), *cert. denied*, 2021 WL 231566, at *1 (U.S. Jan. 25, 2021) (No. 20-695); Archer & White Sales, Inc. v. Henry Schein, 935 F.3d 274 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 113 (U.S. June 15, 2020) (No. 19-1080); Simply Wireless, Inc. v. T-Mobile U.S., Inc., 877 F.3d 522 (4th Cir. 2017), *cert. denied*, 139 S.Ct. 915 (Jan. 14, 2019) (No. 17-1423); Ltd. Liab. Co. v. Doe, *cert. denied*, 569 U.S. 1029 (2013) (No. 12-855); Dunn v. Nitro Distrib., Inc., 194 S.W.3d 339 (Mo. 2006), *cert. denied*, 549 U.S. 1077 (2006) (No. 06-446)). The franchisor further argued that the franchisee was seeking two sets of rules: one for sophisticated parties and one for unsophisticated parties, which no circuit court has suggested. *See* Opposition to Petition for Writ of *Certiorari* at 2, Richardson v. Coverall N. Am., Inc., 811 F. App'x 100 (3d Cir. 2020) (No. 20-763).

140. *See supra* Part II.

141. *See supra* Part III.A.

showing that they lack sophistication as many franchised businesses require significant capital investment and some business acumen to operate.[142]

C. *The Supreme Court Recently Eliminated the Narrow "Wholly Groundless" Exception to* Rent-A-Center*'s Delegation Mandate.*

In addition to clarifying how parties delegate gateway issues to the arbitrator, courts since *Rent-A-Center* have also grappled with whether they can avoid the delegation mandate in extreme circumstances. Under what was commonly referred to as the "wholly groundless" exception, courts would not delegate questions of arbitrability to an arbitrator where, in the court's determination, the alleged basis for arbitration had no chance to succeed.[143] The rationale for this rule was that the court should save the parties from the unnecessary costs and expense of asking an arbitrator to answer baseless assertions of arbitrability.[144]

In *Henry Schein, Inc. v. Archer and White Sales, Inc.*, however, the Supreme Court considered this exception and determined that it had no basis.[145] In that matter, a distributor of dental equipment sued a manufacturer and related parties, alleging violations under federal and state antitrust law and seeking millions of dollars in damages, as well as injunctive relief.[146] The defendants moved to compel arbitration under a written dealer agreement that stated that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets or other intellectual property of [supplier]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association."[147] The district court denied the motion to compel for two reasons. First, it said the incorporation of the rules did not apply to "actions seeking injunctive relief," like the present one, and therefore the parties did not delegate questions of arbitrability to the arbitrator.[148] Second, even assuming the parties had delegated arbitrability to the arbitrator, the

142. *See, e.g.*, Capelli Enters., Inc. v. Fantastic Sams Salons Corp., Case No. 5:16-cv-03401-EJD, 2017 WL 130284, at *4 (N.D. Cal. Jan. 13, 2017) ("In any event, Plaintiffs were not unsophisticated in the details of business transactions at the time they entered into the Agreement.").

143. *Compare Simply Wireless, Inc. v. T–Mobile US, Inc.*, 877 F.3d 522 (4th Cir. 2017); *Douglas v. Regions Bank*, 757 F.3d 460 (5th Cir. 2014); *Turi v. Main Street Adoption Servs., LLP*, 633 F.3d 496 (6th Cir. 2011); *Qualcomm, Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006), *with Jones v. Waffle House, Inc.*, 866 F.3d 1257 (11th Cir. 2017); *Belnap v. Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017); *Douglas*, 757 F.3d at 467 (Dennis, J., dissenting).

144. The case in which the Fifth Circuit first adopted the wholly groundless exception had particularly egregious facts. The plaintiff alleged that her lawyer embezzled the plaintiff's portion of a car accident settlement and sued the bank where the lawyer had maintained the money for allegedly having notice of the embezzlement. *Douglas*, 757 F.3d at 461.The bank sought to compel arbitration under a checking account agreement that the plaintiff had opened and closed with the bank's predecessor in interest years before the accident occurred. *Id.*

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

146. *Id.* at 528.

147. *Id.*

148. Archer & White Sales, Inc. v. Henry Schein, Inc., Civil Action No. 2:12-cv-572-JRG, 2016 WL 7157421, at *5 (E.D. Tex. Dec. 7, 2016), *vacated*, 139 S. Ct. 524 (2019); *see also infra* Part III.D.

district court invoked the Fifth Circuit's wholly groundless exception, which saves a party from "gateway arbitration merely because there is a delegation provision" if, as the district court found here, the arbitrability argument is "wholly without merit."[149] The Fifth Circuit initially addressed and affirmed only the second holding: defendants' argument in support of arbitration, even if delegated to the arbitrator, was wholly groundless based on a plain reading of the arbitration provision's carve-out for "actions seeking injunctive relief."[150]

The Supreme Court reversed. Justice Kavanaugh, writing for the unanimous Court, cited *Rent-A-Center* six times in an opinion that unequivocally held: "[I]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue."[151] The Court emphasized that there exists no "wholly groundless" exception in the FAA, and therefore it could not create one.[152] The Court expressed little concern over the argument that eliminating the exception would encourage frivolous motions to compel, noting that circuit courts that did not recognize the wholly groundless exception reported no such issues.[153]

After *Schein*, courts must delegate validly delegated questions of arbitrability to the arbitrator for determination even if, in the court's view, there exists no basis on which the arbitrator could rule in the compelling party's favor.[154] In this way, the Supreme Court has strengthened *Rent-A-Center*'s delegation mandate by removing one of the few narrow exceptions that had developed in its wake.

D. *The Supreme Court May Soon Answer Whether Language Excluding Certain Claims from the Scope of an Arbitration Provision Negates Otherwise Clear and Unmistakable Delegation of Gateway Issues to the Arbitrator.*

The holding in *Schein* does not mean, however, that courts never can avoid delegation provisions. Indeed, the rest of the *Schein* saga illustrates an unusual example. After the Supreme Court eliminated the wholly groundless exception, it remanded the matter to the Fifth Circuit to determine whether the arbitration provision clearly and unmistakably delegated questions of arbitrability to the arbitrator.[155] At the lower court level, the parties had agreed that incorporation of the AAA Rules evidences clear and unmistakable intent

149. *Archer*, 2016 WL 7157421, at *8–9 (citing *Douglas v. Regions Bank*, 757 F.3d 460, 463–64 (5th Cir. 2014)).

150. Archer & White Sales, Inc. v. Henry Schein, Inc., 878 F.3d 488, 496–97 (5th Cir. 2017), *vacated*, 139 S. Ct. 524 (2019).

151. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530 (2019).

152. *Id.*

153. *Id.* at 531.

154. *Id.* ("After all, an arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious. It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way.").

155. *See* Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 276–77 (5th Cir. 2019).

to delegate.[156] Instead, the issue turned again on the effect of the provision's unusually placed exclusion.[157] The side opposing delegation argued that the rules were incorporated only as to claims not exempted by the carve-out for "actions seeking injunctive relief." The side seeking arbitration, on the contrary, argued that the incorporation of the rules applied to the entire provision and that the scope of the carve-out was for the arbitrator to decide.[158]

In a prior case, the Fifth Circuit held that incorporation of the AAA Rules clearly and unmistakably delegated arbitrability issues, even though the provision contained a permissive carve-out stating that nothing in it prevents either party from seeking injunctive relief for breach of the argument.[159] The Ninth Circuit reached a similar result in a software dispute that delegated questions of arbitrability to the arbitrator for any disputes arising out of or relating to a license agreement, but exempted disputes relating to intellectual property rights or compliance with another license.[160] Noting that the allegedly exempt claims also related to the license agreement, the Ninth Circuit avoided wading into the circular construction of the provision and instead, relying on the delegation provision, sent the entire issue to the arbitrator to resolve.[161] The Second Circuit, however, reached a different conclusion where a broad arbitration clause that delegated arbitrability by incorporating the AAA Rules began with "except for" language that "arguably cover[ed] the present dispute."[162] That exception, the Second Circuit reasoned, negated the otherwise clear and unmistakable intent to delegate.[163]

After reviewing those cases, the Fifth Circuit held that the provision at issue in *Schein* resembled the one in the Second Circuit's case and similarly held that the carve-out negated any delegation.[164] The Supreme Court certified the case again for review but dismissed it as improvidently granted after oral argument.[165] It is likely that the Supreme Court could not decide the negation question—over which it had granted *certiorari*—without addressing whether incorporation of the AAA Rules constituted clear and unmistakable delegation—a question that it did not certify.[166]

156. *Id.* at 280 ("It is undisputed that the Dealer Agreement incorporates the AAA rules, delegating the threshold arbitrability inquiry to the arbitrator for at least some category of cases.").

157. *Id.* at 279.

158. *Id.*

159. *See* Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249, 262–63 (5th Cir. 2014).

160. Oracle Am., Inc. v. Myriad Group A.G., 724 F.3d 1069, 1072–75 (9th Cir. 2013).

161. *Id.* at 1076.

162. NASDAQ OMX Grp., Inc. v. UBS Secs., LLC, 770 F.3d 1010, 1031 (2d Cir. 2014).

163. *Id.* at 1032.

164. Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 281–82 (5th Cir. 2019). The Fifth Circuit further affirmed the district court's ruling that the entire action fell outside the scope of the arbitration provision. *Id.* at 284.

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

166. Petition question presented: "Whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator." *See* Petition for Writ of *Certiorari*, Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274 (5th Cir. 2019) (No. 19-963).

As a result, there remains a split among the circuits over whether carve-out language can negate otherwise clear and unmistakable delegation provisions.[167] *Schein*, however, is unlikely to apply to many franchise disputes. The case dealt with an awkwardly constructed arbitration provision that inserted an exception in the middle of the operative clause.[168] The provision also involved only delegation through incorporation, not an express delegation like the ones discussed in Part III.A above.[169] Nevertheless, until the Supreme Court addresses this issue again, franchisors should anticipate more franchisees seeking to avoid delegation provisions by shoehorning any arguably exempt claims into their pleadings.

E. *Some Courts Have Held That Certain Narrow Disputes over the "Making" of the Arbitration Agreement First Must Be Resolved by the Court Despite the Parties' Delegation of That Issue to the Arbitrator.*

There is one other category of gateway issues that some courts have resolved even in the presence of a valid delegation provision after *Rent-A-Center*—disputes over whether an arbitration agreement was formed. As suggested by a footnote in *Rent-A-Center* and dicta in *Granite Rock*, the Supreme Court may treat disputes over an arbitration agreement's validity, enforceability, and scope differently from disputes over whether an agreement was ever "concluded" or agreed to in the first place.[170] Some courts have found this distinction compelling, with one district court summarizing: "In other words, whether an arbitration agreement was formed is always a question to be resolved by the court, and whether the arbitration agreement is enforceable or covers a particular claim is typically a question for the court unless it has been effectively delegated to the arbitrator."[171]

In a few narrow circumstances, franchisees or their employees have argued with success that questions as to the very existence of the agreement cannot be delegated. For example, in *Denar Restaurants, LLC v. King*, an employee of a franchised restaurant disputed that she ever signed an agreement to arbitrate and the trial court agreed.[172] The appellate court acknowledged that the terms of the agreement delegated gateway issues to the arbitrator, but affirmed the lower court on the basis that the agreement never came into "existence." [173]

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167. *Compare* Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249, 262–63 (5th Cir. 2014), *with* NASDAQ OMX Grp., Inc. v. UBS Secs., LLC, 770 F.3d 1010, 1032 (2d Cir. 2014).

168. *See Archer & White Sales, Inc.*, 935 F.3d at 277 ("Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.").

169. *See supra* Part III.A.

170. *See supra* notes 59, 64.

171. Fruit Creations, LLC v. Edible Arrangements, LLC, Case No. 3:20-cv-00479, 2020 WL 5095460, at *4 (M.D. Tenn. Aug. 27, 2020).

172. Denar Restaurants, LLC v. King, No. 02–13–00142–CV, 2014 WL 2430854, at *1 (Tex. App. May 30, 2014).

173. *Id.* at *6.

Similarly, in *Doctor's Associates v. Alemayehu*, a franchisee applicant avoided the delegation provision in the arbitration agreement that it signed in connection with its application based on the court's determination that the agreement to arbitrate with the franchisor was unenforceable for lack of consideration.[174] On appeal, the Second Circuit, citing *Granite Rock*, asked whether the question of consideration went to contract "*formation*, such that a court must decide the issue in order to ensure that the parties actually consented to arbitrate at all? Or is it an issue related to the enforceability or scope of the arbitration clause and therefore one that the parties may choose to delegate?"[175] Relying on contract treatises, the Second Circuit determined that consideration is "fundamental" to contract formation and therefore reserved for the courts.[176] The Second Circuit, however, reversed the district court's ruling that there had been no exchange of consideration; the franchisor agreed to process the application (which it did) and the promise to arbitrate was bilateral.[177]

At least one other court cautions that the Supreme Court to date has not ruled whether questions as to the "making" of the arbitration agreement can be delegated to an arbitrator.[178] The Seventh Circuit, in contrast to the Second Circuit, has stated that "existence" must be decided by the court, "unless the parties have committed even that gateway issue to the arbitrators."[179] One commentator argues that only where the absence of an agreement to arbitrate is "manifestly apparent" should a court disregard an otherwise enforceable delegation provision.[180] And another warns that drawing any line at contract formation "would ineluctably lead us back into all sorts of doomed quixotic metaphysical speculation about the nature of a contract's 'coming into being' or 'existence.'"[181]

What can be said at this stage is that some courts have shown a willingness to distinguish disputes over the "making" of the agreement from all other gateway issues. *Denar Restaurants* is an obvious example of a "making" dispute because the lack of any signature on the arbitration agreement was at issue. *Alemayehu* is less so, given that there was no dispute that a signed, written agreement exists and instead the question went to whether that agreement was unenforceable for lack of consideration. According to the Second

174. Doctor's Assocs. v. Alemayehu, 934 F.3d 245, 249–50 (2d Cir. 2019).
175. *Id.* at 251–53.
176. *Id.* at 252.
177. *Id.* at 253–55.
178. CT Miami, LLC v. Samsung Elecs. Latinoamerica Miami, Inc., 201 So. 3d 85, 94–95 (Fla. Ct. App. 2015).
179. Janiga v. Questar Capital Corp., 615 F.3d 725, 738 (7th Cir. 2010).
180. Cross, *supra* note 19.
181. Rau, *supra* note 53, at 498–99. In response to Justice Thomas's summary of the delegation framework in *Granite Rock*, including the parenthetical that suggests questions of formation cannot be sent to arbitrators, this same commentator quipped: "It is always a mistake to overread Justice Thomas." *Id.* at 498.

Circuit, consideration goes to the making of the contract, but other district courts have reached the opposite conclusion.[182]

The Ninth Circuit's recent decision in *Nygaard v. Property Damage Appraisers* could have created another interesting data point along this continuum.[183] In that matter, the parties disputed the enforceability of a franchise agreement's out-of-state arbitration agreement.[184] The district court agreed with the California-based franchisee's argument that an addendum to the franchise agreement, which stated that such a provision "may not be enforceable under California law," demonstrated a lack of meeting of the minds on the issue and therefore invalidated the entire arbitration agreement.[185] The Ninth Circuit affirmed, not based on its own independent analysis of the objection but based on a prior state court of appeals case *Winter v. Window Fashions Professionals*, which it deemed binding precedent.[186] In his dissenting opinion in *Nygaard*, Judge Smith argued against following *Winter* based on his belief that the California Supreme Court would reject it.[187] Notably, Judge Smith questioned why a lack of meeting of the minds on the forum selection provision would negate the entire agreement to arbitrate where the franchise agreement contained a broad severability clause.[188]

Nygaard certainly will breathe new life into a wrongly decided line of cases.[189] But the opinion leaves unanswered whether, post-*Rent-A-Center*, the court should have decided the franchisee's meeting-of-the-minds objection in the first place. Because the arbitration agreement at issue delegated gateway issues to the arbitrator by incorporating the AAA Rules,[190] the franchisor

182. Allstate Ins. Co. v. Toll Bros., Inc., 171 F. Supp. 3d 417, 422–26 (E.D. Pa. 2016) (concluding that *Granite Rock* did not address whether courts or arbitrators should decide whether an agreement is supported by consideration when the parties delegated arbitrability issues to the arbitrator). Two other district courts within the Second Circuit reached similar conclusions, but those cases are no longer good law after *Alemayehu*. *See* Discover Prop. & Cas. Ins. Co. v. Tetco, Inc., Civil No. 3:12cv473 (JBA), 2014 WL 685367, at *8–9 (D. Conn. Feb. 19, 2014); Damato v. Time Warner Cable, Inc., No. 13–CV–994 (ARR)(RML), 2013 WL 3968765, at *6 & n.6 (E.D.N.Y. July 31, 2013).

183. Nygaard v. Prop. Damage Appraisers, Inc., 779 F. App'x. 474 (9th Cir. 2019).

184. *Id.* at 476.

185. Nygaard v. Prop. Damage Appraisers, Inc., Case No. 16-cv-02184-VC, 2017 WL 8793228, at *1–2 (E.D. Cal. Dec. 28, 2017), *aff'd*, 779 F. App'x 474 (9th Cir. 2019).

186. *Nygaard*, 779 F. App'x at 476. Under *First Options*, whether an agreement to arbitrate has been made is a matter of state law. First Options of Chicago v. Kaplan, 514 U.S. 938, 944 (1995). In *Winter*, a California appellate court invalidated an entire arbitration agreement on the basis that a similar disclaimer about enforceability of the provision demonstrated a lack of meeting of the minds. Winter v. Window Fashions Prof'ls, 166 Cal. App. 4th 943, 949–50 (2009).

187. *Nygaard*, 779 F. App'x at 477 (Smith, J., dissenting). Judge Smith argued that by affirming the district court's decision, the majority "overlooked a severability clause, sidestepped circuit precedent, and ducked under the Supreme Court's preemption cases." *Id.*

188. *Id.* at 479 ("If we must perform any necessary surgery on the Agreement, the severability clause requires [us] to use a scalpel, not a hacksaw.").

189. The faulty logic on which *Winter* is based is beyond the scope of this article but familiar to most franchise attorneys. Suffice it to say that the decision sought to avoid then-recent precedent holding that the FAA preempted the CFIL's prohibition on out-of-state forum selection clauses.

190. Exhibit A to Declaration of Katherine Slate, *Nygaard*, No. 16-CV-02184 (E.D. Cal. Sept. 20, 2016), ECF No. 4–2, at 42.

might have argued under *Rent-A-Center* that the meeting-of-the-minds objection, like unconscionability and fraudulent inducement objections, went to the provision's validity or enforceability and was therefore delegated to the arbitrator to decide.[191] The franchisee, of course, likely would have responded that its objection went to the very making of the agreement and is therefore for the court to determine. It is noteworthy that the genesis of this objection arising out of enforceability disclaimers in franchise documents traces to *Alphagraphics Franchising v. Whaler Graphics*, where the Arizona district court held that there was no meeting of the minds, without citation, and then added that "[m]ore importantly, this conduct constitutes fraud in the inducement of the contract."[192] Under *Rent-A-Center*, that objection is delegated to the arbitrator.

IV. Conclusion

In sum, the outlook for the enforceability of provisions that delegate gateway issues—both by express terms and through incorporation of procedural arbitration rules—has been and should continue to be strong. The Supreme Court may at some point address the effectiveness of procedural rule incorporation in agreements entered into by unsophisticated parties, but, even if incorporation is deemed ineffective to delegate in that case, those circumstances are unlikely to apply to most franchise agreements. Moreover, the Supreme Court recently strengthened *Rent-A-Center*'s delegation mandate by eliminating the narrow "wholly groundless" exception created by some circuit courts. The Supreme Court also may soon decide whether carve-out provisions can negate the effectiveness of some indirect delegation provisions. Again, most franchise agreements will not be impacted by an adverse decision so long as they also include language expressly delegating disputes over the interpretation of any exclusions to the arbitrator. Finally, courts generally have been unwilling to abide by provisions that delegate disputes over the "making" of the arbitration agreement to the arbitrator in the first instance. In that context, however, "making" is narrowly limited to disputes over signatures or an agent's authority to bind the principal. It remains unclear where to draw the line between disputes over the arbitration agreement's "making"—which cannot be delegated—and its "validity" or "enforceability"—which can be delegated.

191. Neither the district court nor Ninth Circuit addressed delegation, and the parties do not appear to have raised or briefed the issue.

192. Alphagraphics Franchising v. Whaler Graphics, 840 F. Supp 708, 711 (D. Ariz. 1993).