Clear and Unmistakable for Whom?

Arbitral Rules, Unsophisticated Parties, and the Clear and Unmistakable Standard

INTRODUCTION

Jennifer Howard had been a manager at Rent-A-Center for two years when she found out she was pregnant.[1] But Rent-A-Center did not share in her joy: a supervisor told her she needed to prove she cared more about the company than making babies, she was transferred to a location that required a three-hour daily commute, and she received a pay cut.[2] After complications in her pregnancy, she exercised her right under the Family Medical and Leave Act (FMLA) to take time off.[3] For her trouble, Rent-A-Center fired her.[4]

When Howard sued for sex discrimination and FMLA retaliation, Rent-A-Center moved to compel arbitration.[5] As a condition of employment, Howard had agreed to arbitrate any disputes, and that "any arbitration shall be in accordance with the then-current" rules of the American Arbitration Association (AAA), Juridical Arbitration and Mediation Services (JAMS), or the National Arbitration Forum (NAF).[6] For the court, this was enough: Even though Howard argued the arbitration agreement itself was unconscionable, the mere mention of those three sets of rules amounted to evidence of Howard's clear and unmistakable intent that even this challenge had to be arbitrated.[7] And so to arbitration Howard went.

In other words, when Howard signed five pages of dense boilerplate as a condition of employment, not only did she agree to arbitrate any dispute she might have with her employer,

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[1] Howard v. Rent-A-Center, Inc., No. 10-cv-103, 2010 WL 3009515, at *1 (E.D. Tenn. July 28, 2010).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* at *3.
[7] *Id.* at *2, *6.

she also signed away her right to challenge the validity of the arbitration agreement in court.[8] But the text of the arbitration agreement did not even mention this second step.[9] Howard was expected to know that the mention of various arbitral providers and their rules—on page 3 of 5—amounted to her clearly and unmistakably manifesting her intent to arbitrate what she likely would have considered a legal technicality. Why? Because the rules of those arbitral providers each include a provision granting the arbitrator jurisdiction to rule on questions of validity and scope. Howard was presumed to have read, understood, and consented to a single provision in three different sets of arbitral rules she presumably never even thought to examine.

Howard's encounter with arbitration under the Federal Arbitration Act (FAA) may strike some as a challenging result. How could the mere mention of arbitral rules in a standardized arbitration agreement amount to an employee's clear and unmistakable manifestation of intent to arbitrate questions about the scope or validity of an arbitration agreement?

This Comment endeavors to answer this question, and answer it in the negative: When a party to an arbitration agreement is unsophisticated, incorporation of arbitral rules should not be considered a clear and unmistakable manifestation of their intent to arbitrate questions of arbitrability. Part I discusses how parties may agree to arbitrate questions of arbitrability using delegation clauses and reviews several key U.S. Supreme Court decisions on the topic.[10] Part II discusses a circuit split on the question of whether incorporated delegation clauses can be seen as clear and unmistakable evidence of an unsophisticated party's intent. Part III then provides

[8] Motion to Dismiss or, in the alternative, to Stay Proceedings and Compel Arbitration, Exhibit A, Howard v. Rent-A-Center, Inc., No. 10-cv-103 (E.D. Tenn. May 4, 2010).
[9] *Howard*, 2010 WL 3009515, at *3 ("Neither form, however, expressly includes clear and unmistakable language to the effect of 'we agree to arbitrate arbitrability.'").
[10] I refer to delegation clauses found in incorporated arbitral rules as "incorporated delegation clauses" throughout this Comment.

theoretical support for the proposition that they cannot, drawing on contract of adhesion theory, the doctrine of unconscionability, and principles of incorporation by reference. Part III concludes by proposing a rebuttable presumption of unsophistication when courts confront incorporated delegation clauses in employment and consumer contexts.

I. THE ROLE OF DELEGATION CLAUSES

A. DISTINGUISHING THE MERITS FROM GATEWAY QUESTIONS

Arbitration jurisprudence under the FAA distinguishes between two types of disputes over arbitration agreements. Merits issues comprise the actual dispute between the two parties, which they (at least at one point) agreed to arbitrate. In addition to merits issues, parties will often disagree over what are called gateway disputes.[11] These disputes are the subject of this Comment. A gateway dispute is a dispute over whether arbitration is appropriate in the first place. Gateway disputes include whether the scope of the arbitration agreement covers the dispute at hand and whether the arbitration agreement between the parties is valid.[12] A party mounting a validity challenge tends to rely on the traditional contract defenses preserved in § 2 of the FAA, such as unconscionability, fraud, and duress.[13] Their contention is that the agreement between the parties has been formed, but should not be enforced. The validity challenge raises the question of whether the dispute between the parties is arbitrable at all.[14] In addition to scope and validity challenges, courts have recognized other potential gateway

[11] *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).
[12] *Id.* at 84. FAA caselaw draws a distinction between whether a contract had never been formed, or whether it is merely invalid. *See* Eiess v. USAA Fed. Sav. Bank. 404 F. Supp. 3d 1240, 1247–48 (N.D. Cal. 2019). An agreement can exist between the parties and be invalid at the same time. *Id.*
[13] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).
[14] International arbitration law relies on a much narrower definition of arbitrability: whether a matter is "reserved by law exclusively for judicial fora and thus legally incapable of being arbitrated". *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.16 PFD (2019). This Comment will use the term "arbitrability" as U.S. courts do.

disputes to arbitration, including whether class action arbitration is available;[15] what law applies to the question of arbitrability;[16] whether a contract between the parties has been formed;[17] and the applicability of procedural rules such as a time-bar, waiver, delay, or similar.[18]

Understandably, resolution of gateway questions will affect the resolution of the merits of an arbitration dispute. If an arbitration agreement is invalid, or if a dispute falls outside the scope of an arbitration agreement, the dispute cannot be arbitrated.[19] It will be decided in court. And if a party is averse to litigation, this may lead to a settlement where an arbitration might have taken place. Gateway questions have become hotly contested sites in modern arbitration jurisprudence, and the Supreme Court has taken an active interest in guiding lower courts.[20]

B. *First Options*

In *First Options of Chicago, Inc. v. Kaplan*,[21] Manual and Carol Kaplan challenged the applicability of an arbitration agreement to their dispute with First Options of Chicago, Inc.[22] The Kaplans had signed four "workout" agreements on behalf of themselves and their

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[15] *See* Oxford Health Plans v. Sutter, 569 U.S. 564, 569 n.2 (2013) ("[T]his court has not yet decided whether the availability of class arbitration is a question of arbitrability."); Cobarruviaz v. Maplebear, Inc., 143 F. Supp. 3d 930 (N.D. Cal. 2015) ("Of the two circuit courts to address the issue, both have held that the availability of class arbitration is a gateway question of arbitrability.") (citing Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 332 (3d Cir. 2014); Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013)).

[16] *See* Cape Flattery Ltd. v. Titan Maritime, LLC, 647 F.3d 914, 921 (9th Cir. 2011).

[17] *See* Granite Rock v. International Brotherhood of Teamsters, 561 U.S. 287, 300–302 (2010).

[18] *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002). The Court has distinguished this gateway question from the others as a question of *procedural* arbitrability, rather than *substantive* arbitrability.

[19] Under the FAA, there is a presumption in favor of construing the scope of an arbitration agreement in favor of arbitration for this very reason. *See* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24–25 (1983).

[20] *See, e.g.*, Rent-A-Center W., Inc. v. Jackson, 561 U.S. 63 (2010); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019).

[21] 514 U.S. 938 (1995).

[22] *Id.* at 940.

investment company, MKI.[23] But only one of the four workout documents contained an arbitration clause and only MKI—not the Kaplans—had signed it.[24] At an arbitration, the Kaplans argued that their dispute with First Options was not arbitrable because they had not signed the relevant document.[25]

The Kaplans and First Options also disagreed over who should decide whether their dispute was arbitrable.[26] The Court noted that since arbitration is "simply a matter of contract between the parties," courts should defer to the arbitrator if the parties agreed to arbitrate "the arbitrability question."[27] But if "the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question . . . independently."[28]

But how should courts decide if the parties agreed to submit arbitrability questions to an arbitrator? The Court drew on "state-law principles that govern the formation of contracts," but with a twist: Courts should look to whether the parties "objectively revealed an intent" to arbitrate arbitrability, but this intent needed to be shown with "'clea[r] and unmistakabl[e]' evidence."[29] Unlike questions about the scope of an arbitration agreement,[30] questions about arbitrating arbitrability are "rather arcane," and a party "often might not focus upon" them.[31]

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[23] *Id.*
[24] *Id.* at 941.
[25] *Id*.
[26] *Id.* at 942.
[27] *Id.* at 943. The Court noted that if properly submitted to the arbitrator, the question of arbitrability was like any other issue resolved in arbitration. *Id.* In such a situation, "the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. *Id*.
[28] *Id.*
[29] *Id.* at 944 (quoting AT&T Techs. v. Communications Workers of America, 475 U.S. 643, 649 (1986).)
[30] It is a longstanding principle of the Court's FAA jurisprudence that "any doubts concerning the scope of arbitrable issue should be resolved in favor of arbitration." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).
[31] *First Options*, 514 U.S. at 945.

Further, giving an arbitrator that level of jurisdictional power "might too often force unwilling parties to arbitrate a matter they reasonably thought a judge, not an arbitrator, would decide."[32] Applying this analysis to the Kaplans, the Court held that they had not clearly and unmistakably agreed to arbitrate arbitrability, upholding the decision of the Third Circuit.[33]

In *Moses H. Cone*,[34] the Supreme Court articulated a broad presumption in favor of arbitration when courts rule on questions of arbitrability. *First Options* reverses this presumption for one specific question: who decides questions of arbitrability. The clear and unmistakable standard has been widely applied by lower courts,[35] and endorsed several times at the Supreme Court.[36] The benefits of the standard are obvious: it provides a test that courts can apply on a "rather arcane" issue, and provides guidance to both those who draft arbitration agreements and those who seek to challenge them. But there are challenges too. The clear and unmistakable standard collapses several distinct legal issues—scope, validity, availability of class arbitration, etc.—into one inquiry.[37] The only gateway issue that is not regularly assessed under the standard is the question of formation, because if an arbitration agreement was never formed, then an arbitrator lacks any authority to decide disputes between the parties.[38]

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[32] *Id.*
[33] *Id.* at 947.
[34] Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24–25 (1983).
[35] *See, e.g.*, *supra* notes 12–17.
[36] *See* Howsam v. Dean Witter Reynolds, Inc., 538 U.S. 79, 83 (2002); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69 n.1 (2010) (characterizing the clear and unmistakable rubric as a "heightened standard" for questions of who decides arbitrability); Henry Schein Inc. v. Archer & White Sales, Inc., 39 S. Ct. 524, 531 (2019).
[37] *See* Steven H. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues:* First Options v. Kaplan *Revisited*, 20 AM. REV. INT'L ARB. 159, 166 (2010). Reisberg argues that the clear and unmistakable standard was originally used in labor arbitrations only for questions of scope, and that its broader use in the FAA caselaw is inappropriate. *Id.*
[38] *See* Eiess v. USAA Fed. Sav. Bank., 404 F. Supp. 3d 1240, 1248 (N.D. Cal. 2019); *cf.* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019) ("[A]rbitration is a matter of contract.").

C. PROVING CLEAR & UNMISTAKABLE EVIDENCE OF INTENT

First Options purports to create a presumption against arbitrating questions of arbitrability, but the clear and unmistakable standard actually made it easier for parties to agree to arbitrate arbitrability.[39] After *First Options*, arbitration agreements began to include delegation clauses, which "expressly allow the arbitrator to decide any issue relating to the agreement to arbitrate the merits," and purport to supply the requisite clear and unmistakable evidence of intent to arbitrate arbitrability.[40]

There are two main types of delegation clauses: textual delegation clauses and incorporated delegation clauses.[41] Textual delegation clauses are explicit provisions in the arbitration agreement that manifest the agreement of both parties to arbitrate questions of arbitrability. As an example, the Eighth Circuit has held the following to be a valid textual delegation clause: "Any controversy concerning whether an issue is arbitrable shall be determined by the arbitrator(s)."[42] As long as their terms are unambiguous, courts typically find textual delegation clauses to be clear and unmistakable evidence of intent to arbitrate questions of arbitrability. This result is fairly intuitive. If terms within the four corners of the arbitration agreement clearly provide for delegation, then courts ought to enforce the terms as written and allow the arbitrator to decide questions of arbitrability.

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[39] *See* David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 391–92 (2018) ("*First Options*'s legacy was not its analysis of the facts of that case, but rather its strong suggestion that the FAA did not bar contractual partners from unambiguously 'agree[ing] to submit the arbitrability question itself to arbitration.'").

[40] Horton, *supra* note 39, at 393. The term "delegation clause" first appeared in the Court's arbitration jurisprudence in *Rent-A-Center West v. Jackson*, 561 U.S. 63 (2010), but the concept underlying the term had been widely litigated before 2010. Horton, *supra* note 39, at 393.

[41] Both terms are mine and used as shorthand.

[42] Sadler v. Green Tree Servicing, LLC, 466 F.3d 623, 624, 626 (8th Cir. 2006).

Incorporated delegation clauses are more complex but theoretically ought to obtain the same result as textual delegation clauses. In the years following *First Options*, major arbitration providers like the American Arbitration Association began to modify their arbitration rules to include provisions granting arbitrators to rule on their own jurisdiction.[43] Today, most major rules of arbitration include similar rules, enshrining the power of the arbitrator.[44] Most courts interpret these incorporated delegation clauses in arbitral rules as clear and unmistakable evidence of the parties' intent to arbitrate questions of arbitrability.[45] This incorporation can be as simple as:

> In the event the parties are unable to arrive at a resolution, such controversy shall be determined by arbitration . . . in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA") or any organization that is the successor thereto.[46]

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[43] *See* Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent is Not Clear and Unmistakable*, 17 AM. REV. INT'L ARB. 545, 563 (2008) ("It was only with the 1999 revision that *compétence-compétence* made its appearance in what was then Rule R-8 (now Rule R-7) of the AAA Commercial Rules."); AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R-7, 2013, accessed 3/5/20, https://www.adr.org/sites/default/files/CommercialRules_Web.pdf ("The arbitrator shall have the power to rule on his or her own jurisdiction . . . .").

[44] *See, e.g.*, JAMS Comprehensive Arbitration Rules & Procedures, Rule 11(b) ("Jurisdictional 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. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter."); AMERICAN ARBITRATION ASSOCIATION, CONSUMER ARBITRATION RULES AND MEDIATION PROCEDURES, Rule 14(a) ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."); AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, Rule R-7(a) (same).

[45] *See, e.g.*, Contec Corp. v. Remote Solution, Co., Ltd., 398 F.3d 205 (2d Cir. 2005) ("When, 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.").

[46] *See id.* at 208.

While the mechanics of incorporation by reference are a matter of state contract law, the result is roughly uniform: If the arbitration agreement clearly refers to a specific set of arbitral rules, the arbitral rules become part of the terms of the arbitration agreement and bind the parties.[47]

D. INSIGHTS FROM THE LAST DECADE: *RENT-A-CENTER* AND *SCHEIN*

In the last decade, the Court has cemented the importance of delegation clauses as a feature of modern arbitration law through two main points of law: First, the Court held that litigants must defeat a putative delegation clause before challenging the validity of the container arbitration agreement. Second, the Court indicated that one of the only ways to defeat a putative delegation clause was to show that as a matter of contract interpretation there was no clear and unmistakable evidence of the parties' intent.

In *Rent-A-Center, W., Inc. v. Jackson*,[48] the Court held that if an arbitration agreement contains a valid delegation clause, any gateway disputes—such as scope or validity—must be argued before an arbitrator, not a court.[49] Drawing on principles of severability,[50] the Court held that delegation clauses were standalone agreements to arbitrate specific issues of enforceability and validity, contained within a broader agreement to arbitrate the merits.[51] The Court also noted that the clear and unmistakable standard was fundamentally one of contract interpretation, albeit a "heightened" standard compared to ordinary contract questions.[52] Therefore, while the plaintiff argued that he did not subjectively intend to delegate questions of arbitrability to the

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[47] *See, e.g.*, PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1201 (2d Cir. 1996) (explaining the doctrine of incorporation by reference under New York contract law).
[48] 561 U.S. 63 (2010).
[49] *Id.* at 72.
[50] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
[51] *Id.* at 71.
[52] *Id.* at 69 n.1.

arbitrator, his objective manifestations in the contract controlled.[53] The result leaves those who challenge arbitration agreements with few options: They must first convince a court that a delegation clause is either not clear and unmistakable evidence of intent, or invalid.[54]

In *Henry Schein, Inc. v. Archer and White Sales, Inc.*,[55] the Court revisited delegation clauses and re-emphasized the limited role for judicial review. In *Schein*, the Court struck down the "wholly groundless" exception, where courts would decline to enforce a clear and unmistakable delegation clause on the grounds that the dispute clearly fell outside the scope of the arbitration agreement.[56] If the parties had in fact delegated questions of arbitrability to an arbitrator (which the Court assumed without deciding), then the FAA required an arbitrator to decide whether a particular dispute fell within the scope of the carve-out.[57] The wholly groundless exception contravened this rule because it allowed a court to rule on the arbitrability of the dispute even if the parties had contracted for an arbitrator to make that decision.[58] The Court tasked the Fifth Circuit on remand with determining whether the delegation clause was clear and unmistakable in the first place.[59]

Rent-A-Center and *Schein* combine to sketch a Court that is skeptical of attempts to restrict the application of delegation clauses. Given the infeasibility of proving a delegation

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[53] *Id.*
[54] *But see Rent-A-Center*, 561 U.S. at 74 (noting that validity challenges against a delegation clause would be "a much more difficult argument to sustain than" similar challenges mounted against the arbitration agreement as a whole).
[55] 139 S. Ct. 524 (2019).
[56] *See* Douglas v. Regions Bank, 757 F.3d 460, 463–64 (5th Cir. 2014) (citing Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366 (Fed. Cir. 2006)), *abrogated by* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019).
[57] *Id.*
[58] *Id.* at 531 ("[The wholly groundless exception] confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability.").
[59] *Id.*

clause is invalid, *i.e.* unconscionable, the main avenue of challenge preserved for litigants is to argue that a delegation clause is not clear and unmistakable evidence of intent. And since the (heightened) standard is one of objective contract interpretation, textual delegation clauses will almost always clear the bar. But some courts paint a murkier picture when assessing incorporated delegation clauses, especially as applied against unsophisticated parties.

II. SOPHISTICATION AND INCORPORATED DELEGATION CLAUSES

I argue that sophistication ought to be a factor courts consider in assessing whether an incorporated delegation clause is clear and unmistakable evidence of a party's intent to arbitrate questions of arbitrability. The history surrounding the FAA's origins suggests arbitration was conceived of as a tool to regulate the conduct of discrete groups that share normative commitments and whose members repeatedly deal among themselves.[60] An unsophisticated party to an arbitration agreement is less likely to be a member of the same self-regulating community as the drafting party. There is a marked difference between (1) two firms that frequently deal with each other choosing to arbitrate disputes according to the norms and practices of their shared industry and (2) a firm requiring unsophisticated employees and consumers to sign arbitration agreements as a condition of employment or access to the firm's services. For one, the firms that regularly deal with each other each play a role in shaping the industry's norms and each have an interest in upholding shared norms to ensure smooth dealing. It is unlikely that firms that wish to arbitrate employment and consumer disputes are similarly motivated, if only because unsophisticated employees and consumers are much less likely to be repeat players in the same industry as the firm. Sophistication can thus serve as a useful proxy for courts to assess whether an arbitration is between insiders, or between an insider and an

[60] *See* Katherine V.W. Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999).

outsider. Unsophisticated parties are much more likely to be outsiders to a given industrial community's shared norms and practices and may not even know the import of an arbitration agreement or a delegation clause. On the other hand, a sophisticated party is more likely attuned to the shared norms of a particular community and has the ability to meaningfully assess the commitments to arbitration that they are making.[61]

In this Part, I assess the circuit split that has developed on the question of whether the effectiveness of an incorporated delegation clause depends on the sophistication of the parties. I first examine the majority rule: that it does not.[62] Then I turn to the circuits where lower courts have disagreed with the majority rule and explicitly leave room for sophistication in the analysis of whether a delegation clause meets the clear and unmistakable standard.[63]

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[61] Consider, for example, an employment arbitration dispute between a high-ranking executive and her firm. In such a situation the executive's sophistication directly relates to her status as an insider: She is more likely to be a long-time member of the self-regulating community at issue, knows what arbitration entails, and has access to legal counsel.

[62] *See* Awuah v. Coverall N. Am., Inc., 554 F.3d 7 (1st Cir. 2009) (holding that incorporation of AAA rules is effective delegation clause); Contec Corp. v. Remote Sol. Co., 398 F.3d 205 (2d Cir. 2005) (same); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671 (5th Cir. 2012) (same); McGee v. Armstrong, 941 F.3d 859 (6th Cir. 2019) (same); Fallo v. High–Tech Inst., 559 F.3d 874 (8th Cir. 2009) (same); Belnap v. Iasis Healthcare, 844 F.3d 1272 (10th Cir. 2017) (same, but JAMS rules); Terminix Int'l Co. v. Palmer Ranch LP, 432 F.3d 1327 (11th Cir. 2005) (AAA rules); 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) (AAA rules)

[63] Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069 (9th Cir. 2013) (holding incorporation of UNCITRAL arbitration rules to be an effective delegation clause when both parties to the agreement are sophisticated); Brennan v. Opus Bank, 796 F.3d 1125 (9th Cir. 2015) (same holding, with AAA rules); 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) (same holding, with JAMS rules); Tompkins v. 23andMe, Inc., Nos. 5:13-CV-05682-LHK *et al*, 2014 WL 2903752, at *10 (N.D. Cal. Jun. 25, 2014) (incorporation of AAA rules into consumer arbitration agreement did not establish consumer's clear and unmistakable intent to arbitrate questions of arbitrability); Allstate Ins. Co. v. Toll Bros., Inc., 171 F. Supp. 3d 417, 428–29 (E.D. Pa. 2016) (same).

A. MAJORITY RULE: NO SOPHISTICATION ANALYSIS

Among most circuits in the country, a majority rule on incorporation by reference has coalesced: If arbitral rules contain a delegation clause, incorporation by reference of these arbitral rules is clear and unmistakable evidence of intent to allow an arbitrator to decide questions of arbitrability.[64] Unlike the Ninth and Fourth Circuits, where some courts explicitly assess the sophistication of the parties in determining whether the delegation was clear and unmistakable,[65] the majority of circuits adopt a formalist approach. They apply incorporation doctrine and assess the manifestations of the parties as contained within the four corners of the arbitration agreement.[66] Sophistication is not explicitly referenced, nor does it factor into the decisions of these courts.

In at least one circuit, this rule emerged in cases where arguably unsophisticated parties challenged arbitration agreements imposed on them by a defendant with superior knowledge and sophistication.[67] And in several other circuits, the rule has emerged as a result of individual

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[64] *See* Awuah v. Coverall N. Am., Inc., 554 F.3d 7 (1st Cir. 2009) (AAA rules, but see below in II.C); Contec Corp. v. Remote Solution Co., 398 F.3d 205 (2d Cir. 2005) (AAA rules); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671 (5th Cir. 2012) (AAA rules); McGee v. Armstrong, 941 F.3d 859 (6th Cir. 2019) (AAA rules); Fallo v. High–Tech Inst., 559 F.3d 874 (8th Cir. 2009) (AAA rules); Belnap v. Iasis Healthcare, 844 F.3d 1272 (10th Cir. 2017) (JAMS rules); Terminix Int'l Co. v. Palmer Ranch LP, 432 F.3d 1327 (11th Cir. 2005) (AAA rules); 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) (AAA rules).

[65] *See infra* Parts II.D, II.F.

[66] *See, e.g.*, *Contec*, 398 F.3d at 211 ("We therefore conclude that as a signatory to a contract containing an arbitration clause and incorporating by reference the AAA Rules, Remote Solution cannot now disown its agreed-to obligation to arbitrate all disputes, including the question of arbitrability."); *see also* Upton v. Tribilcock, 91 U.S. 45, 50 (1875) ("It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained.").

[67] *See* Fallo v. High-Tech Inst., 559 F.3d 874, 876–80 (8th Cir. 2009). In *Fallo*, a group of students sued a for-profit vocational school, but the Eighth Circuit found the incorporation of AAA rules a clear and unmistakable delegation nevertheless.

plaintiffs challenging arbitration agreements.[68] In these circuits, sophistication challenges fail. Lower courts point to *Fallo* as evidence that an unsophisticated plaintiff can still manifest clear and unmistakable evidence of intent to delegate.[69]

However, half of the leading cases arose in disputes between two sophisticated organizations, where no sophistication-based objection could be raised.[70] For instance, in *Petrofac*, the parties were a prime contractor who operated the U.S. Department of Energy's Strategic Energy Reserve, and a subcontractor tasked with installing equipment to service the Reserve.[71] Similarly, the parties in *Contec* were two business entities engaged in international commerce, a field where arms-length bargaining is likely to occur.[72]

Even in these circuits—where there is arguably room to distinguish the leading cases on their facts—courts tend to reject sophistication challenges.[73] Typically, these courts deny that anything other than the text of the agreement should be considered in determining whether the

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[68] *See* McGee v. Armstrong, 941 F.3d 859 (6th Cir. 2019) (Ohio National Guard member challenging discharge due to military leave); Belnap v. Iasis Healthcare, 844 F.3d 1272 (10th Cir. 2017) (Doctor challenging suspension of medical privileges at hospital following sexual harassment allegations). *See also* Awuah v. Coverall N. Am., Inc., 554 F.3d 7 (1st Cir. 2009).
[69] *See, e.g.*, Giddings v. Media Lodge, Inc., 320 F. Supp. 3d 1064, 1070, n.3 (D.S.D. 2018).
[70] Contec Corp. v. Remote Solution Co., 398 F.3d 205 (2d Cir. 2005); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671 (5th Cir. 2012); Terminix Int'l Co. v. Palmer Ranch LP, 432 F.3d 1327 (11th Cir. 2005); 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).
[71] *Petrofac*, 687 F.3d at 673. The facts of *Petrofac* illustrate that the parties engaged in several rounds of bargaining before they agreed to incorporate AAA rules into their arbitration agreements. *Id.* at 673–74. The parties entered into a contract in 2003 where they agreed to seek binding arbitration if negotiations failed. *Id.* at 673. In 2006, the parties entered into an Agreement for Arbitration and for Location and Methodology of Arbitration after the failure of negotiations. *Id.* at 674. The AAA rules only appear in this later agreement. *Id.*
[72] *Contec*, 398 F.3d at 207.
[73] *See, e.g.*, Arnold v. Homeaway, Inc., 890 F.3d 546, 552 (5th Cir. 2018); Doctor's Assocs., Inc. v. Pahwa, No. 16-cv-00446, 2016 WL 7635748, at *19, n.14; Davis v. USA Nutra Labs, 303 F. Supp. 3d 1183, 1199 (D.N.M. 2018); In re Checking Account Overdraft Litig., No. 1:08-CV-22463-JLK, 2019 WL 6838631 (S.D. Fla. Sept. 26, 2019).

intent of the parties is clear and unmistakable; the intent of the parties must be objectively determined from their written manifestations only.[74] Courts also point to the lack of in-circuit caselaw on the topic as a justification for rejecting a sophistication analysis,[75] or that the "clear weight of authority" rejects sophistication as an analytical tool in this inquiry.[76] Finally, courts reason that because the leading cases did not cabin their holdings in terms of sophistication, they did not believe it a necessary element of the clear and unmistakable inquiry.[77]

B. MINORITY RULE: SOPHISTICATION MATTERS

Courts in the Ninth, Fourth, and Third Circuits have carved out an exception to the majority rule: Incorporation of arbitral rules does not satisfy the clear and unmistakable standard when one party to the agreement is unsophisticated.

The Ninth Circuit opened the door to this exception in a pair of cases decided in 2013 and 2015.[78] In both *Oracle America* and *Brennan*, the court found that incorporation of arbitral rules amounted to a clear and unmistakable manifestation of intent to arbitrate questions of arbitrability.[79] But in both cases, the Ninth Circuit expressly limited its holding to sophisticated

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[74] *See Arnold*, 890 F.3d at 552 ("[In] *Rent-A-Center*, the Court rejected the plaintiff's claim that, although the text of the parties' agreement was clear and unmistakable with respect to the parties' intent to delegate, the plaintiff's agreement to that text was not because the arbitration provision was unconscionable. While Arnold does not use the term 'unconscionable,' the premise of his argument is essentially the same as that of the plaintiff in *Rent-A-Center*, namely that his intent to delegate is unclear because he did not, in fact, assent to the purported delegation provision. We therefore cannot adopt Arnold's proposed policy-based exceptions to the *Petrofac* rule." (citations omitted)).

[75] Doctor's Assocs., Inc. v. Pahwa, No. 16-cv-00446, 2016 WL 7635748, at *19, n.14 (noting that the Second Circuit does not distinguish between sophisticated and unsophisticated parties in determining clear and unmistakable intent to delegate)

[76] Davis v. USA Nutra Labs, 303 F. Supp. 3d 1183, 1199 (D.N.M. 2018) (quoting Cordas v. Uber Techs., Inc., 228 F. Supp. 3d 985, 992 (N.D. Cal. 2017)).

[77] *See* In re Checking Account Overdraft Litig., No. 1:08-CV-22463-JLK, 2019 WL 6838631 (S.D. Fla. Sept. 26, 2019); *Arnold*, 890 F.3d at 552.

[78] *See* 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).

[79] *Oracle Am*., 724 F.3d at 1075 (UNCITRAL rules); *Brennan*, 796 F.3d at 1131 (AAA rules).

parties.[80] The Fourth Circuit followed the Ninth Circuit in 2017, when it adopted the same limited holding.[81] And the Third Circuit has yet to issue any binding precedent on the broader question of incorporation by reference of arbitral rules as effective delegation clauses.[82]

Some lower courts in these three circuits deviate from the majority rule on incorporated delegation clauses when one of the parties to the agreement is unsophisticated.[83] These courts tend to share a similar rationale for rejecting the majority rule: First, the Supreme Court has made clear that the clear and unmistakable standard is a heightened interpretive standard,[84] appropriate for a "rather arcane" [85] question that the parties may not have thought about.[86] And not only is the question arcane, but the reference to the incorporated delegation clause tends to be hidden inside a boilerplate arbitration agreement, within a boilerplate contract.[87] Thus, the enforceability of incorporated delegation clauses against unsophisticated parties implicates "the

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[80] In *Oracle*, the parties were both corporate entities dealing at arms-length, *Oracle*, 724 F.3d at 1071, while in *Brennan* the plaintiff was a former partner at Jones Day and longtime bank executive. *Brennan*, 796 F.3d at 1131. The *Brennan* court acknowledged the majority rule described above, *supra* Part II.A, did not consider the sophistication of the parties, and noted that "[o]ur holding today should not be interpreted to require that the contracting parties be sophisticated or that the contract be 'commercial' before a court may conclude that incorporation of the AAA rules constitutes 'clear and unmistakable' evidence of the parties' intent." *Brennan*, 796 F.3d at 1130.

[81] *See* 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).

[82] *But see* Richardson v. Coverall N. Am., Inc., No. 18-3399, 2020 WL 2028523, at *2–3 (3rd Cir. Apr. 28, 2020) (nonprecedential opinion) (rejecting sophistication as a factor to be considered in assessing whether an incorporated delegation clause is clear and unmistakable).

[83] *See, e.g.*, Tompkins v. 23andMe, Inc., Nos. 5:13-CV-05682-LHK *et al*, 2014 WL 2903752, at *10 (N.D. Cal. Jun. 25, 2014); Eiess v. USAA Fed. Sav. Bank, 404 F. Supp. 3d 1240, 1247–48 (N.D. Cal. 2019); Allstate Ins. Co. v. Toll Bros., Inc., 171 F. Supp. 3d 417, 428–29 (E.D. Pa. 2016); Stone v. Wells Fargo Bank, N.A., 361 F. Supp. 3d 539 (D. Md. 2019).

[84] *See* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69 n.1 (2010) (characterizing the clear and unmistakable inquiry as a "heightened standard" for questions of who decides arbitrability).

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

[86] *See Tompkins*, 2014 WL 2903752, at *11.

[87] *See id.* at *12; *Allstate*, 171 F. Supp. 3d at 428–29.

fundamental tension in contract law between enforcing only those agreements that parties intended to make . . . and enforcing the letter of the documents that they sign . . . ."[88]

Faced with this tension, these courts decline to find a consumer or employee's clear and unmistakable intent to arbitrate arbitrability in an incorporated delegation clause. The *Allstate* court read the clear and unmistakable standard as

> an application of [unconscionability doctrine] to this specific context [of deciding who decides questions of arbitrability]. Under that view, because an agreement to arbitrate arbitrability is an 'arcane' concept that a party would not likely expect to find in a larger agreement, see *First Options* . . , an agreement to do so should not be enforced if the parties' intent is not clear.[89]

And when a party signs onto boilerplate, "the most that person can be said to have intended is his or her willingness to be bound to the terms that lie within, whatever they may be, provided that those terms are reasonable in light of the object of the contract."[90] This analysis left the court with two conclusions: (1) "it may be a difficult proposition to say that the text of an arbitration clause itself, when found among contract boilerplate, may constitute clear and unmistakable evidence of an unsophisticated party's intentions," and (2):

> incorporating forty pages of arbitration rules into an arbitration clause is tantamount to inserting boilerplate inside of boilerplate, and to conclude that a single provision contained in those rules amounts to clear and unmistakable evidence of an unsophisticated party's intent would be to take 'a good joke too far.'[91]

How courts assess sophistication varies.[92] Some appear to consider the type of commercial relationship, such as that between a consumer and a company or between a

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[88] *Allstate*, 171 F. Supp. 3d at 428.
[89] *Id.* at 428 n.12.
[90] *Id.* at 429 (citing Restatement (Second) of Contracts § 211 & cmts. b, f; Karl N. Llewellyn, The Common Law Tradition 370 (1960)).
[91] *Id.* (quoting Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948)).
[92] *See* Eiess v. USAA Fed. Sav. Bank, 404 F. Supp. 3d 1240, 1247–48 (N.D. Cal. 2019) (consumer challenging bank's overdraft fees policy should be considered unsophisticated party in absence of any proof of her sophistication); Ingalls v. Spotify USA, Inc., No. C 16-03533 WHA, 2016 WL 6679561, at *4 (N.D. Cal. Nov. 14, 2016) (incorporation of AAA rules into agreement to arbitrate did not clearly and unmistakably delegate gateway questions of

franchisee and a franchisor, to determine sophistication.[93] One court that relied on this analysis seemed to create a rebuttable presumption against sophistication when confronted with a consumer challenging her bank's overdraft fee practice.[94] Others determine sophistication on the facts, assessing whether the parties had business experience, legal education, or professional certification.[95] Even pro-se plaintiffs can be sophisticated based on their business experience.[96]

The pro-sophistication caselaw faces several challenges and critiques from courts that decline to consider sophistication in considering incorporation by reference. First, some district courts reject a sophistication analysis on policy grounds. In *Hernandez v. United Healthcare Services*, the court refused to distinguish between sophisticated and unsophisticated parties to an

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arbitrability because unsophisticated parties to an arbitration agreement "could not be expected to appreciate the significance of incorporation of the AAA rules"); Money Mailer, LLC v. Brewer, No. 15-1215, 2016 WL 1393492, at *2 (W.D. Wash. Apr. 8, 2016) (small business owner with no legal experience was an unsophisticated party); Galilea, LLC v. AGCS Marine Ins. Co., No. 15-0084, 2016 WL 1328920, at *3 (D. Mont. Apr. 5, 2016) (members of LLC who did not have legal training or experience in the insurance industry were unsophisticated parties when buying an insurance policy), *overruled by* 879 F.3d 1052, 1062 (9th Cir. 2018) (district court erred in considering owners of yacht and financial services company to be unsophisticated parties); Vargas v. Delivery Outsourcing, LLC, No. 15-03408, 2016 WL 946112, at *8 (N.D. Cal. Mar. 14, 2016) (luggage delivery driver considered unsophisticated employee); Aviles v. Quik Pick Express, LLC, No. 15-5214, 2015 WL 9810998, at *6 (C.D. Cal. Dec. 3, 2015) (independent contractor with a trucking business considered unsophisticated because he was "untrained in the law" and inexperienced), *vacated on other grounds* by 703 Fed. Appx. 631, 632 (9th Cir. 2017) (noting that question of whether sophistication of parties was relevant to a delegation analysis was open in the circuit); Meadows v. Dickey's Barbecue Rests. Inc., 144 F. Supp. 3d 1069, 1078 (N.D. Cal. 2015) (franchisee was unsophisticated party as compared to franchisor).

[93] *See Meadows*, 144 F. Supp. 3d at 1078; *Eiess*, 404 F.Supp.3d at 1254.

[94] *See Eiess*, 404 F.Supp.3d at 1254.

[95] *Galilea*, 2016 WL 1328920, at *3; Galen v. Redfin Corp., No. 14-CV-05229-TEH, 2015 WL 7734137, at *7 (N.D. Cal. Dec. 1, 2015) (plaintiff real estate agents displayed a "modicum of sophistication" because they were "required to obtain a license in order to practice their profession").

[96] *See* Kin Wah Kung v. Experian Info. Sols., Inc., No. C 18-00452 WHA, 2018 WL 2021495 (N.D. Cal. May 1, 2018) (pro-se "savvy business owner" was sophisticated because he was challenging arbitration agreements his businesses had entered into and had filed over 20 prior lawsuits).

arbitration agreement because "the factors that might make someone 'sophisticated' are poorly suited to a standard definition upon which parties can rely to avoid uncertainty or surprise in the meaning of the instrument they signed."[97] Other courts reject sophistication on simpler grounds—*Brennan* and *Oracle* both contain dicta that suggest that sophistication of the parties may not matter to the issue of incorporation by reference.[98] Finally, other critiques of a sophistication-centric analysis of incorporation by reference rest on California contract interpretation principles.[99]

As this Subpart has demonstrated, a sophistication analysis reflects unease among judges that an overly formalist approach to the clear and unmistakable standard unduly jeopardizes the rights of consumers and employees when they challenge often-adhesive arbitration agreements. In the next Part, I argue that these concerns are well-founded, and provide some theoretical justifications to support the use of sophistication as a factor in assessing whether an incorporated delegation clause is effective.

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[97] Hernandez v. United Healthcare Servs., Inc., No. SA CV 18-0420-DOC, 2018 WL 7458649, at *5 (C.D. Cal. Jul. 26, 2018); *accord* McLellan v. Fitbit, Inc., No. 16-cv-36-JD, 2017 WL 4551484, at *3 ("A party-by-party assessment of sophistication under some loose amalgam of personal education, line of work, professional knowledge, and so on would undermine contract expectations in potentially random and inconsistent ways. Applying such an individualized inquiry in the class action context would likely raise additional problems.").

[98] *See, e.g.*, Miller v. Time Warner Cable, Inc., No. 8:16-cv-00329-CAS, 2016 WL 7471302, at *5 (C.D. Cal. Dec. 27, 2016) ("[T]he greater weight of authority has concluded that the holding of *Opus Bank* applies similarly to non-sophisticated parties."); Bloom v. ACT, Inc., No. CV 18-6749-GW, 2018 WL 6163128, at *4, n.2 ("Though Plaintiffs here may epitomize unsophisticated parties compared to a large corporation like ACT, the aforementioned trend disregards sophistication of parties, so the degree to which Plaintiffs are unsophisticated is of no moment.").

[99] Razzaghi v. United Health, No. SACV 18-01223 AG, 2018 WL 7824552, at *2 (C.D. Cal. Sept. 17, 2018) ("[U]nder California law, the sophistication of contracting parties doesn't bear on the question of whether the parties 'clearly and unmistakably' intended to delegate arbitrability. To decipher such intent, the Court need look no further than the agreement itself. 'When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible.'" (quoting Cal. Civ. Code § 1639)).

III. CHALLENGING INCORPORATED DELEGATION CLAUSES AS APPLIED TO UNSOPHISTICATED PARTIES

A. MANY CONSUMER ARBITRATION AGREEMENTS ARE CONTRACTS OF ADHESION

A contract of adhesion is typically defined to include the following: standardized terms used over a large quantity of identical transactions, drafted by a party with greater bargaining power, presented to the other party in dense fine print, and providing that other party with little or no opportunity to bargain over terms.[100] And the non-drafting party may be unable to shop around for better terms, because either "the author of the standard contract has a monopoly . . . or because all competitors use the same clauses."[101] Due to the near-total absence of choice, the non-drafting party's "contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party."[102]

Many arbitration agreements in the consumer and employment spaces are contracts of adhesion under this definition. An illustrative example: When a consumer signs up for cell phone service, they will sign an arbitration agreement as a condition of activating their account. This same agreement will likely be signed by every consumer seeking cell phone service from the same firm. The consumer cannot bargain over the terms of the agreement,[103] which are drafted by corporate counsel to minimize risk.[104] The agreement is also likely to be denser than even the rest of the container contract.[105] And in the wireless sector, there is no realistic

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[100] *See, e.g.*, Xuan-Thao Nguyen, *Disrupting Adhesion Contracts with #MeToo Innovators*, 26 VA. J. SOC. POL'Y & L. 165, 168 (2019).
[101] *See* Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).
[102] *Id.*
[103] *See* Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2839 (2015).
[104] *See* Kessler, *supra* note 101 at 631 ("[U]niformity of terms of contracts typically recurring in a business enterprise is an important factor in the exact calculation of risks.").
[105] *See Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street and Consumer Protection Act § 1028(a)*, CONSUMER FIN. PROTECTION BUREAU § 2.4, at 27 (2015),

opportunity to shop around if a consumer wants to avoid arbitration: 87.5% of wireless carriers covering 99.9% of the market require consumers to arbitrate claims.[106] 85.7% of these carriers, covering 84.5% of the market, require delegation of some or all claims.[107] And the majority of these delegation clauses are incorporated delegation clauses.[108]

B. UNCONSCIONABILITY DOCTRINE & THE CLEAR AND UNMISTAKABLE STANDARD

The law of unconscionability, stemming from equity and codified in the U.C.C., has long been a tool used by courts and consumer-minded attorneys to challenge adhesive agreements in the consumer and employment setting.[109] A party seeking to demonstrate that an agreement is unconscionable must show both that the agreement is (1) procedurally unconscionable, and (2) substantively unconscionable.[110] Procedural unconscionability can also be considered "an absence of meaningful choice:"[111] Factors in determining whether an agreement is procedurally unconscionable include "the employment of sharp bargaining practices," "the use of fine print

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https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [hereinafter *CFPB 2015 Arbitration Study*] (consumer arbitration agreements across a variety of sectors tend to have higher Flesch-Kincaid grade levels than the container contract).

[106] *CFPB 2015 Arbitration Study*, *supra* note 105, § 2.3 at 8.

[107] *CFPB 2015 Arbitration Study*, *supra* note 105, § 2.5.4 at 43–44.

[108] *CFPB 2015 Arbitration Study*, *supra* note 105, § 2.5.4 at 44. This practice is not only limited to the wireless sector. *See also id.*, at 42 ("Because *almost all* of the arbitration clauses without [textual] delegation clauses in the sample (ranging from 9.1% of the credit card arbitration clauses covering 5.3% of credit card loans outstanding to 71.4% of mobile wireless arbitration clauses covering 51.3% of subscribers) nonetheless selected one or more administrators, those clauses have the same practical effect as a delegation clause, at least under current court decisions." (emphasis added)).

[109] *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

[110] E. ALLAN FARNSWORTH & ZACHARY WOLFE, FARNSWORTH ON CONTRACTS § 4.29 (4th ed., 2020-2 Supp. 2018).

[111] *Id.*

and convoluted language," "a lack of understanding, and an inequality of bargaining power."[112] In other words, a party must show they have signed a contract of adhesion.[113]

Courts assessing the procedural unconscionability are empowered to look to the sophistication of the parties in their analysis. In the leading case of *Williams v. Walker-Thomas Furniture Company*,[114] the D.C. Circuit expressly weighed the consumer plaintiff's sophistication in assessing the procedural unconscionability of the rent-to-own form contract she had entered into with the defendant.[115] The court noted that a plaintiff's "obvious education or lack of it" would impact whether the plaintiff had a "reasonable opportunity to understand the terms of the contract:" Terms "hidden in a maze of fine print and minimized by deceptive sales practices" were unlikely to bear either "his consent, or even an objective manifestation of his consent," and greater judicial scrutiny of the contract was warranted.[116] Judicial scrutiny of the procedure of contracting, paired with scrutiny of the substantive terms, protects consumers from excessively one-sided terms, or terms they may not have expected the agreement to contain.[117]

Unconscionability is used as a common challenge to consumer arbitration agreements. After all, the Supreme Court has made clear that arbitration is but a matter of contract. But an effective delegation clause forces plaintiffs to argue even their unconscionability challenges before the arbitrator as they challenge the validity of the arbitration agreement.

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[112] *Id.*
[113] *But see id.* (requiring both substantive and procedural unconscionability: "[T]he mere fact that the contract is one of adhesion is not generally regarded as fatal, especially when there is no element of surprise in the term.").
[114] 350 F.2d 445 (D.C. Cir. 1965).
[115] *Id.* at 447.
[116] *Id.* at 449–50.
[117] *See* 8 WILLISTON ON CONTRACTS § 18.13 (4th ed., 2020 update)

But the presence of a delegation clause need not put an end to the matter. A delegation clause is only effective if it is clear and unmistakable evidence of the parties' intent to delegate. This is a higher bar than ordinary questions of contract interpretation,[118] stemming from the Court's concern that questions surrounding who decides arbitrability are "rather arcane" and not ordinarily considered by any party, let alone an unsophisticated one.[119] These concerns, like those of courts policing unconscionable agreements, stem from a desire to balance the competing interests of holding parties only to agreements they actually entered into and enforcing the terms of the contracts they signed.[120] And this is why some courts read the clear and unmistakable standard in *First Options* to allow for applying principles of unconscionability.[121]

Despite some disagreement among scholars as to whether contracts of adhesion are contracts at all,[122] it is widely acknowledged that a non-drafting party to a contract of adhesion has agreed to be bound to the agreement as an objective matter.[123] But, as Randy Barnett recognizes, even if a party has manifested an intention to be legally bound, not all terms in the

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[118] *See, e.g.*, Rent-A-Center W., Inc. v. Jackson, 561 U.S. 63, 69 n.1 (2010) (recognizing that clear and unmistakable evidence is a "heightened standard").
[119] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995). The Kaplans were clearly sophisticated—sole owners of a company that handled their investments—yet the Court still felt comfortable deeming the question "rather arcane." *Id.*
[120] *Id.* ("[O]ne can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."); *see also* Allstate Ins. Co. v. Toll Bros., Inc., 171 F. Supp. 3d 417, 428–29 (E.D. Pa. 2016).
[121] *See Allstate*, 171 F. Supp. 3d at 428 n.12 ("The doctrine of *First Options* that there be clear and unmistakable evidence of the parties' intent to arbitrate arbitrability before such an agreement will be enforced can be viewed as an application of [the unconscionability] framework to this specific context.").
[122] *See* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 142–43 (1970); *see generally* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).
[123] Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV 627, 635 (2002).

form contract are necessarily enforceable: "there are limits to what the obligation can be."[124] There are certain terms to which a non-drafting party might say "while I did agree to be bound by terms I did not read, I did not agree to that."[125] In other words, terms in a form contract that fall outside of the reasonable expectations of the non-drafting party should not be enforced unless they are brought to that party's attention.[126]

Barnett's framework clarifies the objective nature of the clear and unmistakable inquiry and highlights the problematic nature of incorporated delegation clauses as measures of intent. First, a party to a consumer arbitration agreement manifests an agreement to be bound to terms that do not exceed some bound of reasonableness. Second, the Court has repeatedly made clear that the question of who decides arbitrability is "rather arcane," and it cannot be assumed that both parties were thinking about it. In other words, delegation provisions are presumptively outside the bounds of reasonable expectations absent notice. Third, incorporation by reference of arbitral rules into an arbitration agreement fails to give notice to a consumer that they will be bound to arbitrate questions of arbitrability. Rather, it amounts to "inserting boilerplate inside of boilerplate;" in addition to the fine print of the container contract, the agreement now purports to bind the consumer to over forty pages of additional terms and conditions.[127] These incorporated delegation clauses fail to provide any notice to the non-drafting party of their contents. If anything, they are the polar opposite of notice: A consumer would need to (1) understand that

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[124] Barnett, *supra* note 123, at 637; *see also* Horton, *supra* note 39, at 404–05 ("[B]oilerplate clauses occupy a twilight zone between consensual and nonconsensual…only after a court has determined that a boilerplate provision is not unconscionable can it truly be said to fall within the 'circle of assent'").
[125] Barnett, *supra* note 123, at 637.
[126] Barnett, *supra* note 123, at 638.
[127] *See Allstate*, 171 F. Supp. 3d at 429; *see also* AMERICAN ARBITRATION ASSOCIATION, CONSUMER ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 44 (42 pages in length).

incorporating arbitral rules gives them legal heft, (2) locate the appropriate set of rules, (3) locate the relevant rule containing the delegation clause, and (4) understand that by agreeing to an incorporation of arbitral rules, she is agreeing to delegate all arbitrability disputes.[128] Therefore, Barnett's objective analysis of form contracts strongly suggests that an unsophisticated consumer does not manifest any intent to delegate questions of arbitrability, let alone a clear and unmistakable manifestation of intent, when she agrees to arbitrate disputes under AAA rules..

Reading unconscionability law into the clear and unmistakable standard would not greatly disrupt the state of arbitration law outside of the specific question of unsophisticated parties and incorporated delegation clauses. For one, it is highly unlikely that bargained-for arbitration agreements between sophisticated parties would be disrupted. Firms bargaining at arms-length could tailor delegation clauses to fit their needs, and their access to counsel and experience with arbitration would obviate any claims of unfairness. And even in consumer situations a textual delegation clause would likely be considered fair.[129] If a drafter provides sufficient notice to a consumer that they are sacrificing their right to bring a validity challenge in court, it is likely that a court would not find the delegation clause unconscionable.

Some may argue that it is inappropriate for courts to dabble in extrinsic matters to determine the intent of the parties to an arbitration agreement. But the Supreme Court has lent its support to this practice. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[130] the Supreme Court upheld an award of punitive damages. The defendant brokerage firm argued that the

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[128] *See* Tompkins v. 23andMe, Inc., No. 5:13-CV-05682-LHK, 2014 WL 2903752 (N.D. Cal. June 25, 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016).

[129] The notice requirement suggests that a textual delegation clause would be less problematic for Barnett. A consumer would be able to—at minimum—identify the term outright in the arbitration agreement, suggesting something closer to an objective manifestation of intent. But an inquiry into textual delegation clauses is a task for another day.

[130] 514 U.S. 52 (1995).

arbitrator could not do that because the standard form agreement incorporated New York law, which barred arbitrators from awarding punitive damages.[131] The Court held the incorporation ambiguous at best and construed the ambiguity against the drafter.[132] The Court continued:

> As a practical matter, it seems unlikely that petitioners were actually aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right. In the face of such doubt, we are unwilling to impute this intent to petitioners.[133]

And if the Court was willing to look to the background of the plaintiffs to determine their intent in a situation where there was no heightened interpretive standard[134] in place, it stands to reason that such an inquiry is permissible under the Court's clear and unmistakable standard.[135]

Critics may also argue that the text of the FAA does not allow courts to assess consumer arbitration agreements with a closer look than other types of agreements. But the clear and unmistakable standard itself cannot be found within the bounds of the FAA either. It is judge-made law, reflective of a concern that the question of who decides arbitrability is deserving of special scrutiny.[136] This Comment simply proposes to add clarity to this standard and develop an understanding of what, exactly, should be considered clear and unmistakable. A clearer understanding of the clear and unmistakable standard is especially beneficial to drafters of arbitration agreements as it will reduce uncertainty, risk, and the potential for legal expense.

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[131] *Id.* at 54.
[132] *Id.* at 62–63.
[133] *Id.* at 63.
[134] *See* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69 n.1 (2010).
[135] *Id*.
[136] *First Options* stands in tension with *Perry v. Thomas*, 482 U.S. 483 (1987), and its teachings on preemption. The clear and unmistakable standard is couched in terms of state contract law but is a creation of the Court's FAA jurisprudence. As a result, *First Options* either calls for states to develop common law that may stymie the enforcement of arbitration agreements (and thus run afoul of *Perry*), or it sets the stage for a federal common law on the specific question of how a delegation clause ought to be interpreted.

C. ARE INCORPORATED DELEGATION CLAUSES EFFECTIVE INCORPORATIONS?

Courts generally consider incorporated delegation clauses as effective incorporations of arbitral rules. But incorporated delegation clauses may be insufficient as an incorporation of a separate writing, especially when one party is unsophisticated. There are three main requirements for a separate writing to be incorporated into a contract.[137] First, the contract must make clear reference to the extrinsic document.[138] Second, the identity of the document "may be ascertained beyond doubt."[139] Third, the "parties to the agreement had knowledge of and assented to the incorporated terms."[140] Incorporated delegation clauses implicate the third requirement.

Courts assessing incorporated arbitration clauses have strongly suggested incorporations are not as effective against consumers as they are against merchants.[141] In *Standard Bent Glass Corp. v. Glassrobots Oy*,[142] the Third Circuit held an arbitration clause was successfully incorporated into a contract between two merchants, even if the buyer did not receive the arbitration clause. The court relied on the buyer's experience as a merchant in an industry where arbitration is common, and explicitly noted that had the buyer been "a non-merchant individual . . . , or if the reference to arbitration had been buried, the analysis might very well be different," because merchants should "exercise a level of diligence that might not be appropriate to expect

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[137] *See* 11 WILLISTON ON CONTRACTS § 30.25 (4th ed.)
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *See* U.C.C. § 2-104(1) (AM. LAW INST. & UNIF. LAW COMM'N 2019). The UCC justifies this distinction on the grounds that "transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer." U.C.C. § 2-104, cmt. 1. *See also* U.C.C. § 2-207.
[142] 333 F.3d 440 (3d Cir. 2003)

of a non-merchant."[143] The court's heavy implication was that it would enforce incorporated terms less stringently against non-merchants.

The *Glassrobots* court's implication obtains even greater salience in light of the clear and unmistakable standard. It is highly unlikely that an unsophisticated consumer or employee has knowledge of, or assets to, delegation of arbitrability when the delegation clause is incorporated through arbitral rules. Assuming a consumer or employee takes the time to read an agreement containing an incorporated delegation clause prior to signing it, a phrase like "this arbitration agreement will be governed by AAA Consumer Arbitration Rules" does not impart knowledge of its terms or their effect: The reader would not understand that mere mention of the rules serves to rebut the presumption against arbitrating questions of arbitrability.[144]

Courts could police delegation clauses as ineffective incorporations: If an arbitration agreement referred to arbitral rules but failed to notify the non-drafting party that this was a delegation clause, that party would lack knowledge of the delegation clause's terms.[145] This ineffective incorporation certainly would not be clear and unmistakable evidence of intent.[146]

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[143] *Id.* at 447 n.10, 448; *see also* Weiner v. Mercury Artists Corp., 284 A.D. 108, 109, 130 N.Y.S.2d 570 (App. Div. 1954) (rejecting incorporation of arbitration agreement found on page 66 of a 207-page booklet incorporated into a one page contract that did not mention arbitration).
[144] *See* Willie Gary LLC v. James & Jackson LLC, No. Civ.A. 1781, 2006 WL 75309, at *8 (Del. Ch. Jan. 10, 2006) (Strine, V.C.) (describing the majority rule regarding incorporated delegation clauses as turning a reference to AAA rules into a "term of art on the subject of arbitrability")
[145] *See* Horton, *supra* note 39, at 420.
[146] This theory would not be preempted by the FAA, as courts police terms purportedly incorporated into contracts outside of the arbitration context as well. *See* Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 535–36, 983 A.2d 604 (App. Div. 2009) (incorporation of law firm's master retainer agreement into contract with firm client was ineffective because clients did not have knowledge of or assent to its terms).

D. PROPOSAL: A REBUTTABLE PRESUMPTION OF UNSOPHISTICATION IN CERTAIN CONTEXTS

This Comment has argued that incorporated delegation clauses are not clear and unmistakable evidence of an unsophisticated party's intent. But when is a party unsophisticated? Courts have loosely grappled with this question across several circuits, but no coherent test has emerged. And absent a limiting principle, this approach would admittedly lead to uncertainty for drafters and plaintiffs alike.[147]

This Comment proposes a rebuttable presumption of unsophistication for certain classes of contracts, such as contracts of employment and consumer contracts. Courts could presume that the employee or consumer is an unsophisticated party, unless the party seeking to compel arbitration can rebut the presumption. Such an analysis remains faithful to the *First Options* guidance that questions of arbitrability are "rather arcane" and restores some heft to the "clear and unmistakable evidence" standard and its presumption against arbitrability. This analysis would undeniably remain somewhat fact-specific but provides certainty where none currently exists. Those who draft these classes of contracts would be on notice that if they wish to delegate issues of arbitrability, an incorporated delegation clause alone is not enough.

CONCLUSION

Virtually every American consumer is likely party to at least one arbitration agreement, and the same is true for many employees. Yet the use of arbitration in either context raises questions of consent: A consumer or employee presented a boilerplate arbitration agreement on a take-it-or-leave-it basis can be said to have consented in only the most rigid of senses. The absence of meaningful consent helps explain why so many consumers and employees seek to

[147] *See* Hernandez v. United Healthcare Servs., Inc., No. SA CV 18-0420-DOC, 2018 WL 7458649, at *5 (C.D. Cal. Jul. 26, 2018).

invalidate these agreements. And in the case of Jennifer Howard, incorporated delegation clauses compel arbitration when the validity or scope of the agreement itself is at issue. The end result is troubling. A plaintiff like Howard is completely shut out of the civil litigation system: She could not challenge the validity of her arbitration agreement in court, and cannot seek post-award review unless she meets one of the four narrow exceptions under the FAA.

Arbitration, the Court has taught time and time again, is a matter of contract. But that does not excuse deference to arbitrators in all situations. Courts must still interpret agreements to determine who should decide questions of arbitrability and have been instructed that the presumption should weigh in favor of courts. To blindly defer to an incorporated delegation clause undermines the *First Options* presumption and threatens the broader legitimacy of our civil justice system. This Comment has sought to build on this core premise and has illustrated why incorporated delegation clauses should not overcome the *First Options* presumption when invoked against an unsophisticated party. This result respects the contractual nature of arbitration while revitalizing *First Options*.