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# ADJUDICATING "ARBITRABILITY" IN THE FOURTH CIRCUIT

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## I. ARBITRABILITY: AN OVERVIEW

Arbitrability is whether parties to a transaction have submitted a particular dispute to be resolved via arbitration rather than by courts.[1] In the arbitrability domain, a question that follows is "who decides" whether parties have determined arbitrators or judges should decide the arbitrability question. Such questions raised at the very early stages of arbitration are referred to as "gateway"[2] or "threshold"[3] issues.

The Federal Arbitration Act (FAA)[4] supports the proposition that parties may submit disputes to arbitration and, the Supreme Court applies it consistently, for the most part. However, the Act does not address whether arbitrators or judges should decide the "question of arbitrability." Congress enacted the FAA after decades of hostility towards arbitration in English and American courts.[5] The "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which the parties had entered."[6] And, of course, we can trace the underlying logic—whether parties may submit disputes to arbitration—back to the contractual nature of arbitration, and that parties must interpret contracts and enforce them in line with parties' stipulations.[7]

This paper aims to discuss the most fundamental and recent issues in re arbitrability through a survey of the Fourth Circuit cases in light of the Supreme Court's precedent on arbitrability. It specifically discusses arbitrability (the question—Who decides?), interpretive tools that the Court developed to cope with questions of arbitrability, the separability rule, the "clear and unmistakable" test, and the "wholly groundless" exception.

1. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 (2002) (quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

2. *See id.* at 83–84 (discussing gateway issues).

3. *See* Rent-a-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67–70 (2010) (discussing threshold issues).

4. Federal Arbitration Act, ch. 213, §§ 2–4 , 43 Stat. 883, 883–84 (1925) (current version at 9 U.S.C. §§ 2–4 (2018)).

5. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974).

6. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985).

7. *See, e.g.*, *Rent-A-Ctr.*, 561 U.S. at 67 ("The FAA reflects the fundamental principle that arbitration is a matter of contract."); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.").

## II. GATEWAY ISSUES IN THE FOURTH CIRCUIT

### *A. "Who Decides" What?*

After Congress adopted the FAA, federal courts have repeatedly emphasized that arbitration is a matter of contract.[8] Thus, just like any other aspect of arbitration, parties are free to agree to arbitrate gateway arbitrability issues such as whether the parties have agreed to arbitrate, or whether their agreement covers a particular dispute.[9] Moreover, they are free to choose whether they want an arbitrator or a judge to decide those gateway arbitrability questions.[10] Of course, absent such contractual agreement over who decides the arbitrability question, courts are entitled—as the default venue—to decide the matter.[11] The inquiry went further to address circumstances where parties had stipulated an arbitration clause but were either silent on the issue of arbitrability or some ambiguity existed with respect to the question of arbitrability and the delegation of deciding the arbitrability questions to the arbitrator.[12]

#### *1. Presumption of Arbitrability in Light of the "Federal Pro-Arbitration Policy"*

As mentioned earlier, Congress enacted the FAA so federal courts would pause hostility towards enforcing arbitration agreements and enforce them according to parties' contractual terms like any other contract.[13] To that end, federal courts adopted a pro-arbitration policy where "when construing arbitration agreements, every doubt is to be resolved in favor of arbitration."[14] Due to widespread consensus among the circuits, the Supreme Court also ruled that "as a matter of federal law, any doubts concerning the scope of

8. *Rent-A-Ctr.*, 561 U.S. at 69.

9. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (citing AT&T Techs., Inc. v. Comm. Workers of Am., 475 U.S. 643, 649 (1986)).

10. *See AT&T Techs.*, 475 U.S. at 649; *First Options*, 514 U.S. at 944.

11. *Howsam*, 537 U.S. at 84 (quoting *AT&T Techs.*, 475 U.S. at 649) ("The question whether parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'").

12. *First Options*, 514 U.S. at 944–45.

13. *See Rent-A-Ctr.*, 561 U.S. at 67; *see also* Glass v. Kidder Peabody & Co., 114 F.3d 446, 451 (4th Cir. 1997).

14. Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 643 (7th Cir. 1981) (citing Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 714 (7th Cir. 1967); Hanes Corp. v. Milliard, 531 F.2d 585, 597 (D.C. Cir. 1976); Controlled Sanitation Corp. v. Dist. 128, Int'l Ass'n of Machinists, 524 F.2d 1324, 1328 (3d Cir. 1975)).

arbitrable issues should be resolved in favor of arbitration."[15] But the Supreme Court did not intend for the presumption to apply to all aspects of the arbitrability question. The presumption of arbitrability is merely applicable to the scope of arbitrable issues and not the *who decides* questions of arbitrability, as courts should not assume that parties have delegated the question to the arbitrator.[16]

### 2. *Reverse Presumption: Applicable to Who Decides Questions of Arbitrability*

The Supreme Court in *First Options of Chicago, Inc. v. Kaplan* once again emphasized that the question of who decides arbitrability was up to the parties, as arbitration is a matter of contract.[17] The Court stated: "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter,"[18] as parties are free to make that choice.[19] Otherwise, "the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently."[20]

The next question is—What if the parties are ambiguous about the *who decides* question? Would the federal interpretive rule and its presumption of arbitrability favor arbitration? Unlike the presumption of arbitrability over scope of an arbitration agreement, the Supreme Court in *First Options* clarified that: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[21] In other words,

> the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a

15. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

16. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone*, 460 U.S. at 24–25) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."); *see also* Carson v. Giant Food, Inc., 175 F.3d 325, 329 (4th Cir. 1999).

17. *First Options*, 514 U.S. at 943.

18. *Id.*

19. *See* Rent-A-Ctr., W., Inc., v. Jackson, 561 U.S. 63, 68–69 (2010); *see also Carson*, 175 F.3d at 329.

20. *First Options*, 514 U.S. at 943; Peabody Holding Co. v. United Mine Workers Am., Int'l Union, 665 F.3d 96, 102 (2012) (quoting *Carson*, 175 F.3d at 329).

21. *First Options*, 514 U.S. at 943 (citing AT&T Techs., Inc. v. Comm. Workers of Am., 475 U.S. 643, 649 (1986)).

> valid arbitration agreement"—for in respect to this latter question the law reverses the presumption.[22]

The reason for this reverse presumption is that parties may be inclined to enter into arbitration agreements "if a labor arbitrator had the 'power to determine his own jurisdiction,'"[23] and that a "party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers."[24]

### 3. *A Presumptive Distinction, an "Interpretive Rule": Substantive Versus Procedural Questions of Arbitrability*

Courts have made distinctions as to what they initially consider to be decided by the courts or arbitrators.[25] Such distinction is based upon parties' likely expectation of who decides a gateway matter.[26] The Supreme Court has concluded that parties *presumptively* expect arbitrators to decide procedural matters "which grow out of the dispute and bear on its final disposition."[27] In other words, "parties to an arbitration contract would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters."[28] Examples of procedural arbitrability issues include "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met."[29]

Judges, however, decide substantive gateway issues, absent parties' clear and unmistakable reflection of intent to arbitrate.[30] This is despite the Court's interpretive rule of "liberal federal policy favoring arbitration agreements."[31]

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22. *First Options*, 514 U.S. at 944–45; *see also Carson*, 175 F.3d at 329 ("This presumption, however, does not apply to the issue of which claims are arbitrable."); Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 117 (4th Cir. 1993) ("[T]he general policy-based, federal presumption in favor of arbitration . . . is not applied as a rule of contract interpretation to resolve questions of the arbitrability of arbitrability issues themselves.").

23. *AT&T Techs.*, 475 U.S. at 651 (quoting Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1509 (1959)).

24. *First Options*, 514 U.S. at 945.

25. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).

26. *Id.* at 83–84.

27. *Id.* at 84 (citing John Wiley & Sons v. Livingston, 376 U.S. 543, 557 (1964)).

28. *Id.* at 86.

29. UNIF. ARBITRATION ACT § 6 cmt. 2, 7 U.L.A. 13 (2009); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

30. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (citing AT&T Techs., Inc. v. Comm. Workers of Am., 475 U.S. 643, 649 (1986)).

31. *Moses H. Cone*, 460 U.S. at 24–25. Over the years, the Fourth Circuit has also addressed this favoring of arbitration agreements. Novic v. Credit One Bank, Nat'l Ass'n, 757 F. App'x 263, 265 (4th Cir. 2019) ("The federal presumption generally favoring arbitration is not applicable when a court determines *who* the parties intended to decide issues of arbitrability."

When it comes to deciding if parties agreed to submit a particular dispute to arbitration (question of arbitrability), courts are the default venue. Issues of substantive arbitrability generally contain disagreements over the scope of an arbitration clause, e.g., whether the arbitration clause binds non-signatories.[32]

When it comes to the application of this "interpretive rule," there is uncertainty about how the courts may distinguish questions of both procedural and substantive arbitrability. In a more recent decision, *Rent-a-Center, West, Inc. v. Jackson* (discussed below), the Court found that the plaintiff's claim regarding the unconscionability of the arbitration agreement (within an employment contract) was an arbitrability question for the arbitrator due to a delegation provision within the arbitration agreement (although the Court based its ruling on the separability principle (discussed below)).[33]

### *B. The "Separability" Principle and Its Impact on the Who Decides Question*

In *Prima Paint v. Flood & Conklin Manufacturing Co.*, the Supreme Court addressed "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators."[34] In its response the Court distinguished between claims that challenge the validity of the arbitration clause itself and claims that challenge the validity of the main contract (the contract that the arbitration clause forms a part).[35] The Court has also established the principle of separability, meaning "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."[36]

Where the contractual validity challenge (due to fraud or other grounds) pertains to the main contract, the Court finds that arbitrators are authorized to

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(first citing Peabody Holding Co. v. United Mine Workers Am., Int'l Union, 665 F.3d 96, 102 (2012); and then citing Carson v. Giant Food, Inc., 175 F.3d 325 (1999))); Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc. 984 F.2d 113, 117 (4th Cir. 1993) ("[T]he general policy-based, federal presumption in favor of arbitration . . . is not applied as a rule of contract interpretation to resolve questions of the arbitrability of arbitrability issues themselves.").

32. *See First Options*, 514 U.S. at 943–46.

33. For another example, see NASDAQ Group, Inc. v. USB Securities, LLC, 770 F.3d 1010 (2d Cir. 2014), in which the parties had an arbitration agreement that referenced the NASDAQ rules. The Second Circuit ruled that reference to the rules in the arbitration clause raised an ambiguity as to whether the parties had clearly intended to provide arbitrators authority to determine the arbitrability of the claims. *Id.* at 1031–32.

34. Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967).

35. *Id.*

36. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006) (citing *Prima Paint*, 388 U.S. at 402–04); *see also* Novic v. Credit One Bank, Nat'l Ass'n, 757 F. App'x 263, 265 (4th Cir. 2019).

make a decision on the validity issue.[37] However, when the validity of the arbitration clause itself is allegedly at stake the Court finds that the FAA authorizes judges to rule on the validity of the arbitration clause first and then allows the arbitration to move forward.[38] The Court based this ruling based on its reading of Section 4 of the FAA.[39] Section 4 mandates courts to hear the parties and refer them to arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."[40] Thus, Section 4 reserves the right for the courts to stay arbitration if a party challenges the existence and validity of the arbitration agreement.[41]

Additionally, the Court later applied an expanded version of the separability principle that it pronounced in *Prima Paint*. In *Rent-a-Center*, which involved an employment discrimination dispute, the arbitration agreement expressly delegated the arbitrator "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of" the arbitration agreement.[42] This delegation provision was imbedded in the arbitration agreement.[43] The employee sued the employer claiming that the arbitration agreement was invalid due to its unconscionability under Nevada law.[44] The Court applied the separability principle, along with its reading of Section 2 of the FAA, to the arbitration agreement (as the main contract, instead of the employment contract) and separated the delegation provision from the arbitration agreement as a whole.[45] Thus, since the employee did not challenge the delegation provision

37. *See Buckeye Check Cashing*, 546 U.S. at 445–46.

38. *See Prima Paint*, 388 U.S. at 403–04.

39. *Id.* at 404.

40. Federal Arbitration Act, ch. 213, § 4 , 43 Stat. 883, 883–84 (1925) (current version at 9 U.S.C. § 4 (2018)).

41. *Prima Paint*, 388 U.S. at 403–04 (1967) ("Under § 4 with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.").

42. Rent-a-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 65–66 (2010).

43. *Id.* at 84 (Stevens, J., dissenting).

44. *Id.* at 66.

45. *Id.* at 70 ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."). Later the Court stated:

> In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract. Section 2 operates on the specific 'written provision'

and only challenged the arbitration agreement and the employment contract as a whole, the Court ruled that the arbitrators had authority under the unchallenged delegation provision to hear the gateway unconscionability claim.[46] The Court expanded its separability ruling in *Prima Paint*. The Court also caused uncertainty regarding how lower courts should apply the presumptive distinction it set forth in *Howsam v. Dean Witter Reynolds, Inc.* There still remains uncertainty involving the Court's ability to identify questions of arbitrability in order to apply the presumptive distinction.

On another note (touching upon the FAA's preemption), in *Buckeye Check Cashing, Inc. v. Cardegna*, while discussing Section 2's "substantive command that arbitration agreements be treated like all other contracts,"[47] the Court emphasized that separability is "a matter of substantive federal arbitration law [that] an arbitration provision is severable from the remainder of the contract."[48] Section 2 states that "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration" is "valid, irrevocable, and enforceable," "save upon such grounds as exist at law or in equity for the revocation of any contract."[49] Thus, the Court has also repeatedly "rejected the view that the question of 'severability' was one of state law, so that if state law held the arbitration provision not to be severable a challenge to the contract as a whole would be decided by the court."[50]

Logically, the result of such conceptual separability between the main contract and its arbitration clause is that the arbitrator may decide a contractual invalidity claim challenging the main contract—and in fact find the main contract invalid—yet the arbitrator's own authority for such ruling remains

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> to "settle by arbitration a controversy" that the party seeks to enforce. Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.

*Id.* at 72.

46. *Id.* at 72–76.

47. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006).

48. *Id.* at 447. The Court has repeatedly stressed this proposition thereafter. *See Rent-a-Ctr.*, 561 U.S. at 70 ("[Section] 2 states that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' without mention of the validity of the contract in which it is contained. Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate."). *Rent-a-Center* is the Court's most recent take on separability which has brought uncertainty regarding how courts ought to identify questions of arbitrability and also a misapplication of *Prima Paint*. *See generally id.* at 77 (Stevens, J., dissenting).

49. Federal Arbitration Act, ch. 213, § 2 , 43 Stat. 883, 883–84 (1925) (current version at 9 U.S.C. § 2 (2018)).

50. *Buckeye Check Cashing*, 546 U.S. at 445 (citing Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400, 402–03); *see also* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); Allied-Bruce Terminix Companies v. Dobson, 513 U.S. 265, 271–72 (1995).

intact.[51] As mentioned above, another effect of such conceptual separability, which pertains specifically to the *who decides* question of arbitrability, is that if a party challenges the validity of the main contract, arbitrators will have authority to take over the case and rule on the challenge.[52] On the other hand, if a party challenges the arbitration clause itself, then courts will have to initially rule on the validity of the arbitration clause and, of course, decide the fate of arbitrators' authority.[53]

### *1. What Constitutes Clear and Unmistakable Evidence of Intent?*

As noted earlier, a condition precedent to arbitrators deciding arbitrability is an arbitration clause that grants arbitrators with such authority.[54] The answer to the question of "who has the primary power to decide arbitrability", "turns upon what the parties agreed about *that* matter."[55]

When providing a framework for gateway arbitrability issues, courts often struggle with what language satisfies and properly grants their intended authority and the scope of authority they grant to arbitrators. In *First Options*, the Court specified that while courts explore such contractual authority in the parties' agreement, they "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[56] But what constitutes "clear and unmistakable evidence that they did so"?

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51. This effect of the separability principle is more recognized in international arbitration, *see, e.g.*, UNCITRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION § 16(1) (UNITED NATIONS COMM'N ON INT'L TRADE LAW 1985 (amended 2006)), which states "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract." And thus, a "decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause." *Id.* For an example of U.S. law, see UNIF. ARBITRATION ACT § 6(d) (UNIF. LAW COMM'N 2000) ("If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.").

52. See the Court's reading of Section 4 of the FAA in *Prima Paint*, 388 U.S. at 403–04.

53. *Id.*

54. *See infra* Section II.A.2.

55. First Options of Chi. v. Kaplan, 514 U.S. 938, 943 (1995).

56. *Id.* at 944 (citing AT&T Techs., Inc. v. Comm. Workers Am., 475 U.S. 643, 649 (1986)).

*a. General Contractual Language*

Courts have consistently rejected general contractual language when the terms *clearly and unmistakably*[57] fail to reflect the parties' evidence of intent to arbitrate gateway arbitrability issues.[58] They have called for "language specifically and plainly reflecting the parties' intent to delegate disputes regarding arbitrability to an arbitrator."[59] Thus, language such as "'any grievance or dispute aris[ing] between the parties regarding the terms of this Agreement' and any 'controversy, dispute or disagreement . . . concerning the interpretation of the provisions of this Agreement,'"[60] does not clearly and unmistakably delegate questions of arbitrability to arbitrators.[61] Courts have suggested that "[t]hose who wish to let an arbitrator decide which issues are arbitrable need only state that 'all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,' or words to that clear effect."[62]

*b. Delegation Provision*

Delegation provisions within arbitration agreements are meant to address arbitrability of threshold issues concerning that arbitration agreement.[63] Such agreements are "simply . . . additional, antecedent agreement[s] the party seeking arbitration asks the federal court to enforce."[64] In *Novic v. Credit One Bank, National Association*, the Fourth Circuit considered whether the

57. *See* Carson v. Giant Food, Inc., 175 F.3d 325, 330 (4th Cir. 1999) ("[B]road arbitration clauses that generally commit all interpretive disputes 'relating to' or 'arising out of' the agreement do not satisfy the clear and unmistakable test.").

58. *See generally* Brown v. Trans World Airlines, 127 F.3d 337 (4th Cir. 1997); Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 117 (4th Cir. 1993) (noting that the precedent indicates that parties must clearly and unmistakably show their intent in regards to the scope of arbitrability itself to arbitration, and that "the typical, broad arbitration clause" is not enough).

59. Novic v. Credit One Bank, Nat'l Ass'n, 757 F. App'x 263, 265 (4th Cir. 2019) (citing Peabody Holding Co. v. United Mine Workers Am., Int'l Union, 665 F.3d 96, 103 (4th Cir. 2012); *Carson*, 175 F.3d at 330–31).

60. *Carson*, 175 F.3d at 330 ("[B]road arbitration clauses that generally commit all interpretive disputes 'relating to' or 'arising out of' the agreement do not satisfy the clear and unmistakable test.").

61. The Fourth Circuit made the same conclusions in *Brown*, 127 F.3d at 338 (ruling on an arbitration clause which stated that all "disputes between the Union, employee, and the Company growing out of the interpretation or application of any of the terms *of this Agreement*"), and in *Va. Carolina Tools*, 984 F.2d at 115 (ruling on an agreement which stated that "[s]hould any dispute arise between the parties they agree to seek resolution through [arbitration].").

62. *Carson*, 175 F.3d at 330–31.

63. Rent-a-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68 (2010).

64. *Id.* at 70.

arbitration clause gave the arbitrators authority to decide which disputes were arbitrable.[65] The arbitration clause was similar to that of the one in *Rent-a-Center*. The cardholder agreement had an arbitration clause, and within the arbitration clause there was also a delegation clause, which read in part: "Claims subject to arbitration include, but are not limited to, disputes relating to . . . the *application, enforceability or interpretation* of this Agreement, including this *arbitration provision*."[66] In referencing its precedent, the Fourth Circuit found the clause to be "precise language [which] stands in direct contrast to the broad wording of general arbitration provisions"[67] that the Circuit had "rejected as not satisfying the 'clear and unmistakable' standard."[68] The Circuit, following the Supreme Court's ruling in *Rent-a-Center*, found that the delegation provision "unambiguously require[d] arbitration of any issues concerning the 'enforceability' of the arbitration provisions entered into by the respective parties."[69] Thus, the Fourth Circuit, like the Supreme Court, finds delegation provisions which expressly and with clearly unmistakable language delegate questions of arbitrability to the arbitrators enforceable under the FAA.

One issue worth mentioning here is that when the contract stipulates that the delegation provision is within an arbitration agreement, per the Supreme Court's decision in *Rent-a-Center*, it requires the parties to apply the separability principle. Thus, if a party challenges both the validity of the arbitration agreement and the main contract on contractual grounds, the arbitrator's authority to rule on the question of arbitrability remains intact, and the only caveat would be if the parties delegated the question via clear and unmistakable language.[70]

### *c. Delegation Through Incorporation in Bilateral Arbitrations*

In the context of bilateral arbitrations, some circuits have concluded that parties can delegate the arbitrability question to the arbitrator through incorporating institutional rules, so long as the delegation satisfies the clear and unmistakable requirement.[71] The Fourth Circuit has yet to weigh in on

65. Novic v. Credit One Bank, Nat'l Ass'n, 757 F. App'x 263, 264 (4th Cir. 2019).
66. *Id.*
67. *Id.* at 266.
68. *Id.*
69. *Id.*
70. On the same point within the Fourth Circuit, see *Novic*, 757 F. App'x at 266–67.
71. *See, e.g.*, Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1071 (9th Cir. 2013); Fallo v. High-Tech Inst., 559 F.3d 874, 880 (8th Cir. 2009); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 10 (1st Cir. 2009); Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 211 (2d Cir. 2005); Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327 (11th Cir. 2005).

whether different standards should apply to bilateral versus classwide arbitrations, as the specific question has not been raised before the court. What remains within the circuit when it comes to addressing that question is should different standards apply to bilateral versus classwide arbitrations? After all, the Supreme Court does recognize that classwide arbitration fundamentally changes the nature of arbitration, thus an indication that perhaps the bar for the clear and unmistakable test should be lower with respect to bilateral arbitrations.[72] This would result in delegating the arbitrability question by incorporating institutional rules in bilateral arbitrations as an approach that is sufficient to satisfy the test. The two lower court rulings in the Fourth Circuit, although on classwide arbitrations (which rejected the idea that arbitrators decide the question of arbitrability through incorporation), indicate that if those cases were of bilateral arbitration in nature, delegation through incorporation would have been satisfactory.[73] Both lower courts, in rejecting delegations through incorporation of institutional rules in classwide arbitrations, recognized the Supreme Court's distinction and recognition of the inherent differences between bilateral and classwide arbitrations.[74] We expect that the Fourth Circuit will follow suit with other circuits if asked to respond to the same question.

### 2. *Arbitrability and Gateway Issues in re Classwide Arbitrations*

Class arbitration has raised controversial issues in regard to arbitrability. The Supreme Court has decided a few cases involving class arbitration and arbitrability, either resolving the issues through a non-binding plurality decision, creating splits among the circuits, or failing to address the issues at all.[75]

#### a. *The Who Decides Question of Arbitrability in Class-Action Arbitrations*

In *Green Tree Financial Corp. v. Bazzle*, the parties asked the Court to decide whether courts or arbitrators should decide the parties' agreement to

72. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685–87 (2010); *see also* Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 875 (4th Cir. 2016); Cent. W. Va. Energy, Inc. v. Bayer Cropscience LP, 645 F.3d 267, 274–75 (4th Cir. 2011) (citing *Stolt-Nielsen*, 559 U.S. at 685).

73. *See* Chesapeake Appalachia, LLC v. Suppa, 91 F. Supp. 3d 853, 864 (N.D.W. Va. 2015); Bird v. Turner, No. 5:14CV97, 2015 WL 5168575, at *8–9 (N.D.W. Va. Sept. 1, 2015).

74. *See infra* Section II.B.2.b.

75. *See, e.g.*, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447 (2003) (deciding not to address the issue of class arbitration because the question was one of state law for an arbitrator to decide).

class arbitration.[76] The arbitration clause did not mention class arbitration.[77] The question to the Justices was "*what kind of arbitration* proceeding the parties agreed to."[78] The Supreme Court, in a plurality decision, decided that the question is of procedural arbitrability, thus presumptively for the arbitrator to decide.[79] In its later decisions, however, the Court has emphasized that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[80] The Court has also stated that "[a]n implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement of arbitrate."[81] Thus, the Court reaffirmed that arbitration is a matter of contract, and if parties agree to class arbitrations, courts must respect the parties' choice. But also, the parties must make such contractual choice explicitly, without ambiguities. The Court has not addressed the question of who decides whether the arbitration clause allows class arbitration, but circuit courts have already decided the matter.

Since the decision in *Bazzle* was a plurality decision (and non-binding)—ruling that class arbitrability gateway issues were procedural matters and, thus, were for the arbitrator to decide—circuit courts have parted their analysis away from that decision in determining who decides the arbitrability question in class arbitrations.[82] In *Del Webb Communities, Inc. v. Carlson*,[83] the Fourth Circuit held that "whether an arbitration clause permits class arbitration is a gateway question of arbitrability for the court."[84] The Fourth Circuit, after recognizing the Supreme Court did not rule on the exact issue, took into account that "the Court has provided some guidance."[85] The court rejected application of the *Bazzle* precedent as it found later Supreme Court decisions "effectively disavow[ing] that rationale" made in *Bazzle*.[86]

76. *Id.*
77. *Id.* at 448.
78. *Id.* at 452.
79. *Id.* at 453.
80. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010).
81. *Id.* at 685.
82. *See, e.g.*, Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013); Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 331–36 (3d Cir. 2014).
83. Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867 (4th Cir. 2016).
84. *Id.* at 873.
85. *Id.* at 874.
86. *Id.* (citing Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 n.2 (2013) (explaining the high bar for overturning an arbitrator's decision on the grounds that he exceeded his powers, but stating, "[w]e would face a different issue if [the petitioner] had argued below that the availability of class arbitration is a so-called 'question of arbitrability.' Those questions . . . are presumptively for courts to decide."); *Stolt-Nielsen*, 559 U.S. at 680 ("Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case . . . . [T]he parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to

The Fourth Circuit relies on the Supreme Court's more established precedent. It makes reference to the rule that questions of arbitrability are for the courts, unless there is clear and unmistakable evidence that parties intended arbitrators to make that call, and that courts should not assume that parties waived judicial determination of gateway arbitrability issues.[87] When it comes to arbitrability in re class actions, the Fourth Circuit implicitly recognizes that the bar to allow arbitrators decide arbitrability questions is even higher than gateway arbitrability issues in re bilateral arbitrations.[88] It recognizes that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator,"[89] and that parties cannot be forced to arbitrate on a class-wide basis absent "a contractual basis for concluding that the party *agreed* to do so."[90]

Therefore, absent clear and unmistakable language—indicating that parties have delegated arbitrability of gateway issues in re class action arbitrations to the arbitrators—the Fourth Circuit has held that courts must determine who decides questions of arbitrability.

### *b. Delegation Through Incorporation in Class-Action Arbitrations: Clear and Unmistakable Evidence of Intent?*

As discussed above, like bilateral arbitrations, class-action arbitrations are a matter of contract.[91] Thus, parties may, through clear and unmistakable

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decide whether a contract permits class arbitration. . . . *In fact, however, only the plurality decided that question.*") (emphasis added).

87. *Id.* at 874–77.

88. *Id.* at 875–76.

89. *Stolt-Nielsen*, 559 U.S. at 685. The Fourth Circuit goes further and makes the following statement:

> When parties agree to forgo their right to litigate in the courts and in favor of private dispute resolution, they expect the benefits flowing from that decision: less rigorous procedural formalities, lower costs, privacy and confidentiality, greater efficiency, specialized adjudicators, and—for the most part—finality. These benefits, however, are dramatically upended in class arbitration, which brings with it higher risks for defendants.

*Del Webb*, 817 F.3d at 875; *see also* Cent. W.Va. Energy, Inc. v. Bayer Cropscience, 645 F.3d 267, 274–75 (4th Cir. 2011) ("[C]onsent to class arbitration did not fall within . . . [the] category of 'procedural' questions. . . . because the class-action construct wreaks 'fundamental changes' on the 'nature of arbitration.'" (quoting *Stolt-Nielsen*, 559 U.S. at 685–86)). For district court cases in the Fourth Circuit reaching the same conclusion—that the question of consent to class arbitration is not a procedural question, thus for the courts to decide—*see, e.g.*, Chesapeake Appalachia, LLC v. Suppa, 91 F. Supp. 3d 853, 861 (N.D.W. Va. 2015); Bird v. Turner, No. 5:14CV97, 2015 WL 5168575, at *7 (N.D.W. Va. Sept. 1, 2015).

90. *Stolt–Nielsen*, 559 U.S. at 684.

91. *See* discussion *supra* Section II.B.2.a.

language, determine that arbitrators may decide the question of arbitrability.[92] However, since the Supreme Court has recognized that class arbitrations are somewhat different in nature than bilateral arbitrations, we must ask whether courts should apply a higher standard than that of the clear and unmistakable test to establish parties' intent in delegating questions of arbitrability to arbitrators. In other words, would there be a requirement for express and clear language to properly delegate gateway arbitrability questions in class-arbitrations? And if so, would delegation through incorporation of institutional arbitration rules be sufficient to satisfy the clear and unmistakable evidence of intent?

In early 2019, the Supreme Court handed down *Henry Schein, Inc. v. Archer & White Sales, Inc.*, in which the Court addressed whether the "wholly groundless" exception to arbitrators' authority to decide questions of arbitrability was consistent with the FAA (this issue is discussed below).[93] Another issue in the case was whether the contract between the parties delegated the arbitrability question to an arbitrator; however, the contract involved a bilateral arbitration.[94] As the Fifth Circuit did not discuss the issue, the Supreme Court expressed no view and asked the Court of Appeals to address it on remand.[95] Later on remand, the Fifth Circuit found that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[96] A contract need not contain an express delegation clause to meet this standard.[97] As the Fifth Circuit held in *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, an arbitration agreement that incorporates the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures (AAA Rules) "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."[98]

In *Del Webb Communities, Inc. v. Carlson* (discussed above), the Fourth Circuit was in fact tasked to cope with an arbitration clause, one which delegated arbitrability questions to arbitrators by incorporating AAA Construction Rules in a class arbitration.[99] However, the Fourth Circuit, in its analysis, did not take into account—or even mention—that the delegation of

92. *See supra* notes 71–75 and accompanying text.

93. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 527–28 (2019).

94. *Id.* at 531.

95. *Id.*

96. Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 279 (5th Cir. 2019) (quoting AT&T Techs., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 649 (1986)).

97. *Archer & White Sales*, 935 F.3d at 279.

98. *Id.* (quoting Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012)).

99. Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 869 (4th Cir. 2016).

the question of arbitrability was through incorporation of the said rules.[100] The court found it sufficient to say, and concluded, that "[i]n this case, the parties did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration. In fact, the sales agreement says nothing at all about the subject."[101] This is while, the arbitration clause, in relevant part, stated:

> After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act. . . . The rules of the American Arbitration Association (AAA), published for construction industry arbitrations, shall govern the arbitration proceeding and the method of appointment of the arbitrator.[102]

In this regard, Rule 9 stated 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."[103] Despite the court's lack of reference and analysis to the arbitration clause in *Del Webb Communities, Inc.*, it did make reference to two lower court decisions within the Fourth Circuit which both had rejected that delegation through incorporation of institutional rules in a class-arbitration would satisfy evidence of clear and unmistakable evidence of intent.[104]

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100. *See generally id.* at 869–77.

101. *Id.* at 877.

102. *Id.* at 869.

103. AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 13 (2013).

104. *See* Chesapeake Appalachia, LLC v. Suppa, 91 F. Supp. 3d 853, 864 (N.D.W. Va. 2015) ("Following a careful weighing of the matter, the Court is unpersuaded that the broad language of the arbitration clause in the subject leases, or even the reference to the AAA rules, clearly and unmistakably evinces the parties' intent to arbitrate the availability of classwide arbitration. . . . Finally, in the Court's view, the Supreme Court's recognition of the fundamental differences between bilateral and class arbitration is significant. Based on those differences, the Court prohibited decision makers from 'presum[ing] . . . that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.' [T]he Court concludes that Chesapeake and the Defendants did not clearly and unmistakably agree to arbitrate the issue of class arbitrability." (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010))); Bird v. Turner, No. 5:14CV97, 2015 WL 5168575, at *9 (N.D.W. Va. 2015) ("Considering the arbitration agreement's language and the reference to the AAA rules, this Court is unconvinced that the parties intended to submit to the arbitrator the question of whether class arbitration is available. The agreement does not mention class arbitration or arbitrability. Its reference to the AAA rules is the only link to the submission of arbitrability issues to the arbitrator. '[A]t best, the agreement is silent or ambiguous as to whether an arbitrator should determine the question of classwide arbitrability; and that is not enough to wrest that decision from the courts.' Therefore, this Court finds that the parties did

However, from the court's precedent and its isolated indications to lower court precedent, one may conclude that the Fourth Circuit would not find mere references to institutional rules to constitute clear and unmistakable evidence that parties have agreed that arbitrators should decide the question of arbitrability in class-wide arbitrations.

### c. *Henry Schein and Rejection of the "Wholly Groundless" Exception to Arbitrability*

As noted above, the main issue before the Supreme Court in *Henry Schein, Inc. v. Archer & White Sales, Inc.* was whether a court could stay arbitration and rule on a matter, despite there being an arbitration agreement that delegated questions of arbitrability to an arbitrator, if the court determined that arbitrability of the claim at stake is "wholly groundless."[105] In an unanimous decision, the Court held that the wholly groundless exception to arbitrability was inconsistent with the language of the FAA and the Supreme Court's precedent and, therefore, the Court was not in a position to change that.[106] The Court noted that the exception "confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability."[107] The Court, however, noted that when there is clear and unmistakable evidence that the parties agreed to arbitrate questions of arbitrability, courts must decide accordingly and refer the parties to arbitration.[108] On remand, the Fifth Circuit found that the parties had not "clearly and unmistakably delegated the question of arbitrability to an arbitrator."[109] The contract expressly excluded "actions seeking injunctive relief" from the arbitration agreement, and, thus, the Fifth Circuit stated that this specific carve-out clause, and the absence of any qualifier, excluded any request for injunctive relief from the arbitration agreement.[110] Eventually, because the plaintiff sought injunctive relief in addition to damages, the Fifth Circuit concluded that the dispute did not fall within the scope of the arbitration clause, and, therefore, the delegation provision did not apply to the issues at stake.[111]

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not intend to submit arbitrability issues to the arbitrator." (quoting Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013))).

105. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 527–28 (2019).

106. *Id.* at 528–29.

107. *Id.* at 531.

108. *Id.* at 530.

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

110. *Id.* at 281–82.

111. *Id.* at 283–84. Following the Supreme Court's pronouncement in *Henry Schein, Inc.* regarding the wholly groundless exception, it is worthy to explore how circuit courts have

There are no reported cases regarding the wholly groundless exception in the Fourth Circuit. However, if the courts in the Fourth Circuit were to face similar cases it is likely, based on the circuit's precedent on arbitrability, that the courts will follow the Supreme Court's unanimous decision that it handed down in *Henry Schein, Inc.* and reject the wholly groundless exception to arbitrability. However, like other circuits, the Fourth Circuit should also reserve such application to circumstance where proper delegation of the arbitrability question is made first—thus applying the clear and unmistakable test.

## III. CONCLUSION

Regardless of whether the approach taken in the United States—mostly through interpretive tools the Supreme Court has adopted—is one suitable to decide questions of arbitrability and arbitral authority, the Fourth Circuit precedent has been quite consistently in line with that of the highest court, in particular those fundamental rules the Court hands down. The courts have accepted that arbitrators have the power to determine questions of arbitrability when that authority has been clearly and unmistakably delegated to them. The courts' application of that test, however, seems somewhat less clearly reflected when compared to its sister circuits. Although some issues in the arbitrability domain have not been raised before the Fourth Circuit Court of Appeals (e.g., delegation of arbitrability questions in bilateral arbitrations through incorporation of institutional rules), the court could address those through dicta. The Fourth Circuit has not even comprehensively addressed issues mentioned before the court in *Del Webb Communities, Inc.* Thus, one may conclude that, at least in the context of arbitrability, the Fourth Circuit applies a consistent understanding of the general and fundamental rules handed down by the Supreme Court; however, the application and analysis of those rules to very detailed and specific circumstances fall short of providing adequate and clear guidance to district courts within the circuit.

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applied the ruling. *Henry Schein, Inc.*, 139 S. Ct. at 527–28. In *Metro. Life Ins. Co. v. Bucsek*, 919 F.3d 184, 196 (2d Cir. 2019), since the parties did not delegate question of arbitrability to the arbitrator, the court refused to apply *Henry Schein, Inc.*, and in *Lloyd's Syndicate 457 v. FloaTEC, LLC*, 921 F.3d 508, 515 n.4 (5th Cir. 2019), the court's reading of *Henry Schein Inc.* was that it "did not change—to the contrary, it reaffirmed—the rule that courts must first decide whether an arbitration agreement exists at all."