Journal of Dispute Resolution

Volume 2005 | Issue 2 Article 11

2005

Arbitrability of Arbitrability, The

Michelle St. Germain

The Arbitrability of Arbitrability

Fox v. Tanner[1]

I. INTRODUCTION

If you can read the following only once and understand it, consider yourself part of a very small minority: "It is the dilemma of the box within a box or, in the case of arbitration, the authority as to the decision as to the authority to make the decision."[2] That is "arbitrability" in a nutshell; not a simple concept. Indeed, at oral argument in *First Options of Chicago, Inc. v. Kaplan*, the confusion occurred to a U.S. Supreme Court Justice:

> QUESTION: Mr. Roberts, when you use the term, arbitrability, you mean the agreement of the parties to, the consent of the parties to have a dispute arbitrated?
>
> MR. ROBERTS: That's arbitrability, and the question in this case is, did the Kaplans agree to arbitrate that question, the question of arbitrability? Did they agree to be bound by the arbitrator's decision on the arbitrator's own jurisdiction?
>
> QUESTION: Then how would you describe a question of whether a particular subject is subject to the arbitration agreement, which the parties concededly agreed to?
>
> MR. ROBERTS: Well, in other words, there is an arbitration contract, and there's a dispute. Is that—that's also called arbitrability.
>
> QUESTION: Yes, that's what confuses me. It seems to me it's two distinct things, and people call them the same thing.
>
> MR. ROBERTS: The term is used simultaneously in both instances. *This case is the question of arbitrability of arbitrability.*[3]

The suffix "-ability" seems to merely denote the "ability" of something to happen. For example, "teachability" is the ability for something to be taught. This is probably intuitive—in contrast, arbitrability does not just mean the ability for the matter to be arbitrated—it is a technical, specific, term of art.[4] "Arbitrabil-

1. 101 P.3d 939 (Wyo. 2004).
2. Perry v. Hyundai Motor Am., Inc., 744 So. 2d 859, 866 n.5 (Ala. 1999).
3. Transcript of Oral Argument at 29-30, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)(No. 94-560), 1995 WL 242250 (emphasis added).
4. At least one scholar finds the term so confusing that it ought to be banned. Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287, 308 (1999).

ity" is the question of whether an arbitrator can decide whether a dispute can be arbitrated.[5]

The answer to the above question about "who decides" is not entirely clear and what that answer *should* be is also in dispute. *Fox v. Tanner*[6] is an example of a state court's attempt to reconcile the U.S. Supreme Court's rulings on these issues.

II. FACTS AND HOLDING

In February 1998, Frank and Maureen Tanner signed four separate Cash Account Agreements for Jeffrey Barber, a stockbroker for The Investment Company (TIC), for investment purposes.[7] The Agreements contained provisions for arbitration which would cover "all controversies or disputes between [the parties] of any kind."[8] The arbitration provision listed specific disputes that would invoke the arbitration provision including "(1) any aspect of this account or any other account . . . ; (2) transactions entered into prior, on, or subsequent to the date of this agreement; and (3) the construction, performance or alleged breach of this or any other agreement entered into between [the parties] at any time. . . ."[9]

After the Tanners gave their money to Barber, he embezzled it.[10] The Wyoming Secretary of State began an investigation of TIC's activities in 1999.[11] Barber pled guilty to four counts of fraud and admitted that he had unlawfully obtained property from the Tanners.[12] The Secretary of State concluded in its final order that TIC had failed to reasonably supervise Barber.[13] During the Secretary

5. *See generally* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

6. 101 P.3d. 939.

7. *Id.* at 940-41. The forms were only signed by the Tanners on a form with TIC's logo on it. *Id.* at 941.

8. *Id.* at 941.

9. *Id.* The full arbitration clause reads as follows:

> Arbitration is final and binding on the parties. The parties are waiving their right to seek remedies in court, including the right to jury trial. . . .
>
> Arbitration—All controversies or disputes between us of any kind shall be settled by arbitration. Without limiting the foregoing, this arbitration agreement specifically applies to all controversies or disputes arising out of or relating to (1) any aspect of this account or any other account in which I now or in the future have or in the past had an interest; (2) transactions entered into prior, on, or subsequent to the date of this agreement; and (3) the construction, performance, or alleged breach of this or any other agreement entered into between us at any time. . . . The award of the arbitrators, or the majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction. I consent to the jurisdiction of the state and federal courts in the City of New York for the purpose of compelling arbitration, staying litigation pending arbitration, and enforcing any award of arbitrators.

Id. (omissions are identical to omissions in the case). The *Fox* court also noted that there was a notice directly above the signature blocks in the Agreements alerting the reader to the existence of the arbitration clause within the Agreement. *Id.*

10. *Id.* at 940.

11. *Id.*

12. *Id.* It appears from the Court's opinion that Barber pled guilty to fraud, as alleged by the Secretary of State, since Barber entered his plea on June 25, 1999 and the investigation by the Secretary of State began some time in 1999. *Id.* The court does not address this matter.

13. *Id.*

of State's proceeding, TIC offered to settle and admitted that it failed to reasonably supervise Barber but refused to admit or deny liability for Barber's actions.[14]

Two years after the Wyoming Secretary of State investigation began, the Tanners[15] filed a complaint against Barber, Dorian Fox (Barber's supervisor) and TIC in Wyoming District Court.[16] The complaint alleged fraud, breach of contract and negligence against defendants.[17]

Fox and TIC responded to the complaint by seeking dismissal of the action based on the arbitration clause contained in the four Cash Account Agreements signed by the Tanners.[18] The Tanners countered the dismissal by arguing that Fox and TIC had previously denied the existence of any contract with the Tanners[19] and that the contract was revocable because of fraud.[20] Fox and TIC countered that the dispute was still arbitrable because the Tanners had not raised the claim that they had been fraudulently induced into the arbitration provision.[21] The Tanners produced evidence from the Wyoming Secretary of State proceeding to prove that TIC had admitted to its failure to reasonably supervise Barber, and therefore, the contracts, including the arbitration provisions, were void as a result of fraudulent inducement.[22]

The District Court concluded that the evidence presented was insufficient to determine whether the Tanner's claims were arbitrable, so it set a date for a further evidentiary hearing.[23] Prior to this hearing, the Tanners attempted to use Barber's guilty plea of fraud as a means to collaterally estop the defendants from denying liability.[24] Fox and TIC responded by stating that they had never admitted liability for Barber's actions in their communications with the Secretary of State.[25] Furthermore, Fox and TIC brought in the depositions of the Tanners to show they indicated that they had not been fraudulently induced into the contracts.[26]

The District Court concluded at the close of the evidentiary hearing that the parties had not clearly agreed to arbitrate their claims.[27] The District Court rea-

14. *Id.*

15. Patricia Clark O'Hearn and Barry Fitzgerald were also plaintiffs, but were not parties to the appeal in the present case. *Id.* at 940 n.2.

16. *Id.* at 940. Barber was not a party to the appeal. *Id.*

17. *Id.*

18. *Id.* at 941.

19. The Court states that in response to the complaint, Fox and TIC had initially "denied they had any relationship with the Tanners whatsoever." *Id.* at 940. The Cash Account Agreement forms were only signed by the Tanners. *Id.* at 941. This did not become an issue for the Court on appeal—however, plaintiffs later used the fact that the Agreements were not signed to buttress their argument that the defendants could not enforce the arbitration agreement under the contract and at the same time deny the existence of a contract. *Id.* at 944.

20. *Id.* at 941.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 941-42. The Tanners asserted in response that there was no consideration for the agreements. *Id.* at 942. While the Tanners' supposed admissions that there was no fraud in the inducement of the contracts and the assertion that there was no consideration for the contracts would seem to be fatal to the complaint—where it was alleged that the defendants committed fraud and breach of contract—these arguments were made as an attempt to avoid arbitration. *Id.* at 941.

27. *Id.* at 942.

soned that since Barber had admitted to fraud, imposing arbitration on the Tanners was inappropriate because, if the contracts were the product of fraud, the Tanners had not contemplated arbitrating their disputes.[28] Therefore, a court, and not an arbitrator, should decide whether the Tanners were fraudulently induced into the contracts, including into the arbitration provision.[29] The court collaterally estopped defendants Fox and TIC—binding them to the Secretary of State's finding that Fox and TIC had failed to reasonably supervise Barber.[30]

Fox and TIC appealed the District Court's denial of their motion to dismiss.[31] They argued that the District Court erred because its result was in conflict with the U.S. Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg.*[32] *Prima Paint* held that when the entire contract is attacked by a general claim of fraudulent inducement, an arbitrator may decide the claim.[33] However, when the claim of fraud is directed to the arbitration provision, a court must hear the claim.[34] Since the Tanners' claims amounted to a general attack on the contract and not specifically the arbitration provision, the dispute should be submitted to arbitration according to the contracts.[35]

The Tanners responded to the appeal by arguing that *Prima Paint* has been modified by later U.S. Supreme Court rulings and the 10th Circuit Court of Appeals.[36] These later cases state that for an agreement to arbitrate to be enforced, the parties must have manifested "a clear and unmistakable consent to arbitrate," including the issue of arbitrability.[37]

The Supreme Court of Wyoming affirmed the District Court's denial of the motion to dismiss.[38] Since there was an issue of fraud raised as to the inducement of the contract, invoking an arbitration clause of a possibly unenforceable contract would not make sense unless all of the parties had manifested clear and unmistakable consent to arbitrate that issue.[39] The court held that there was no evidence that the Tanners had clearly and unmistakably agreed to submit the validity of the arbitration agreement to arbitration, so a court was the appropriate forum for the dispute.[40]

III. LEGAL BACKGROUND

The Wyoming Supreme Court in *Fox v. Tanner* exemplifies an immense problem in the current state of the law on arbitration—how to interpret *First Op-*

28. *Id.*
29. *Id.* at 940.
30. *Id.* at 942.
31. *Id.* at 940.
32. *Id.* at 943
33. *Id.*; *Prima Paint*, 388 U.S. 395 (1967)).
34. *Fox*, 101 P.3d at 943.
35. *Id.*
36. *Id.* Plaintiffs rely on the following cases: *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003).
37. *Id.*
38. *Id.* at 950.
39. *Id.* at 947.
40. *Id.* at 944.

tions.[41] Twenty-eight years after establishing the doctrine of separability in *Prima Paint*, it is unclear whether the U.S. Supreme Court changed its mind in *First Options*.[42] In order to answer that question, it is necessary to examine *Prima Paint*, *First Options* and related cases.

Before looking at case law, a general introduction to arbitrability is helpful, although this is undoubtedly an oversimplification of the U.S. Supreme Court's position on arbitrability. In deciding an issue on arbitrability, first ask whether the issue is a substantive or procedural one in order to determine whether the dispute should be resolved by an arbitrator or by a court.[43] If the issue is a substantive one, the court decides the issue.[44] If the issue is a procedural one, the arbitrator decides the issue.[45] A substantive issue might include fraud, whereas a procedural issue could include timeliness of the arbitration request.[46]

Prima Paint was decided by a split of 6-3 in the U.S. Supreme Court in 1967.[47] Prima Paint Corporation, after it bought Flood & Conklin Manufacturing Corporation's paint business, sued Flood & Conklin in federal court for fraudulent misrepresentation for claiming the business was solvent—when in fact, it was filing for bankruptcy.[48] From the above discussion, we know that fraud is a substantive issue and those issues are decided by the court. In its holding, as we will see, *Prima Paint* carves out another area under the zone of substantive issues where arbitration is enforced. The Court affirmed a motion to compel arbitration by the Second Circuit Court of Appeals.[49] The Court found that a general or broad claim of fraud should go to arbitration.[50] The Court in *Prima Paint* rested its analysis on the statutory language of the FAA, looking predominantly to sections 3 and 4.[51] The Court reasoned that "except where the parties otherwise intend[,] arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded."[52] This is because section 4 of the FAA gives a federal court no jurisdiction to hear the case unless the "making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not

41. *Id*; *First Options*, 514 U.S. 938.

42. *Prima Paint*, 388 U.S. 395; *First Options*, 514 U.S. 938.

43. LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 534 (1997).

44. *Id.* A substantive issue goes to the court "unless the parties provide differently in their agreement." *Id. See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985); First Options, 514 U.S. 938).

45. RISKIN & WESTBROOK, *supra* note 43, at 534. (citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 555-59 (1964)).

46. *See Id.*

47. 388 U.S. at 395. The decision in *Prima Paint* resulted in one concurrence and three impassioned dissents. *Id.* at 407. In his dissent, Justice Black calls the majority's holding "fantastic"—in a bad way. *Id.* Black's dissent centers on his criticism that the majority's holding constitutes judicial legislation—Black reads the Federal Arbitration Act as emphasizing that "nonlawyers designated to adjust and arbitrate factual controversies arising out of valid contracts would not trespass upon the courts' prerogative to decide the legal question of whether any legal contract exists upon which to base an arbitration." *Id.* at 408.

48. *Id.* at 398.

49. *Id.* at 395.

50. *Id.*

51. *See Id.* The focus on these sections is to the exclusion of § 2, as Black's dissent notes. *Id.* at 412.

52. *Id.* at 402 (citation omitted).

in issue."[53] In other words, if there is no issue with the validity of the arbitration agreement itself, the federal court has no jurisdiction to hear the case.[54] But the federal court does have jurisdiction to hear claims concerning fraud in the inducement of the arbitration clause, because that is an issue that "goes to the 'making' of the agreement to arbitrate . . . ."[55]

The idea of separability espoused by *Prima Paint* reversed the practice of the majority of courts.[56] Since *Prima Paint*, courts have completely turned around—some even have "extended separability beyond the fraud context to include other defenses to contract formation . . . ."[57] The notion of separability that comes from *Prima Paint* was joined by the principle of implied consent.[58] In other words, by agreeing to a contract's terms, a party therefore has impliedly agreed to the arbitration provision, which is separably enforceable from the rest of the contract without regard to the enforceability of the rest of the contract.[59]

Twenty-eight years later, without once citing *Prima Paint*, the U.S. Supreme Court unanimously decided *First Options of Chicago, Inc. v. Kaplan* in 1995.[60] The case centered on disputes regarding debt between First Options of Chicago, Inc., "a firm that clears stock trades,"[61] and Manuel and Carol Kaplan and MK Investments, Inc (MKI).[62] The parties entered agreements to take care of the Kaplans' and MKI's debts to First Options.[63] After First Options' demands for payment of debt were unsuccessful, it attempted to take the Kaplans to arbitration, but they refused because only one agreement out of four actually contained the arbitration clause, and that agreement was signed by MK Investments but not by the Kaplans.[64]

The Court stated that the answer about *who* has the power to decide arbitrability differs from the answer to *whether* the dispute should be arbitrated when the agreement itself is ambiguous: there is a presumption in favor of arbitration if the question is *whether* the dispute is arbitrable, but no presumption when the question is *who* should decide arbitrability.[65] The Court reasoned that this distinction was "understandable" because in the *whether* question, "the parties likely gave at least some thought to the scope of arbitration," moreover, the FAA's policy toward arbitration is "permissive."[66] On the other hand, the answer to *who* decides has the opposite presumption because a "party often might not focus upon that

53. *Id.* at 403-04 (citing 9 U.S.C. § 4 (2004)).
54. *Id.* at 404.
55. *Id.* at 403-04 (citing 9 U.S.C. § 4).
56. Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. Rev. 819, 840 (2003).
57. *Id.* at 849. *See also* Gregory v. Interstate/Johnson Lane Corp., No. 98-1840, 1999 WL 674765, at *5 (4th Cir. Aug. 31, 1999).
58. Reuben, *supra* note 56 at 849-50.
59. *Id.*
60. *First Options*, 514 U.S. 938, 938 (1995).
61. *Id.* at 940.
62. *Id.* MK Investments, Inc. was an investment company owned by Manuel Kaplan. *Id.* First Options had cleared its trading account. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 944-45.
66. *Id.* at 945.

question or upon the significance of having arbitrators decide the scope of their own powers."[67] The issue before the *First Options* court was *who* had the power (the arbitrator or the court) to decide whether the parties agreed to arbitration.[68] The Court held that the answer depended on whether the parties agreed to allow an arbitrator decide whether the dispute was arbitrable.[69] But, the Court added, courts cannot just assume that the parties made such an agreement—there must be "'clear and unmistakabl[e]' evidence" that they made that agreement.[70] The reason for this is that arbitration "is simply a matter of contract between the parties."[71] A dispute should never be sent to arbitration unless the parties "have agreed to submit to arbitration."[72]

A few years after *First Options*, the U.S. Supreme Court decided *Howsam v. Dean Witter Reynolds, Inc.*[73] The case arose from a dispute between an investment firm, Dean Witter Reynolds, Inc., and its client, Karen Howsam. Howsam invested in four partnerships at the advice of Dean Witter, but later sought arbitration pursuant to their Client Service Agreement on the basis that Dean Witter had "misrepresented the virtues of the partnerships."[74] Howsam had sought arbitration before the National Association of Securities Dealers (NASD) whose "Code of Arbitration Procedure" required that the dispute could not be more than six years old.[75] Dean Witter brought suit in order to squash the arbitration proceeding because the dispute was more than six years old.[76]

The Court held that the question presented was not within the "pro-court presumption" created by *First Options*, but instead, was a procedural (not substantive) dispute, which an arbitrator would decide.[77] This is the rubric of substantive v. procedural disputes—which *Howsam* explains still exists, even after *First Options*. Indeed, the Court explains that *First Options* did not change that answer; instead, the issue in *First Options* about arbitrability was entirely different and the lower courts had begun to obfuscate the meaning of the word "arbitrability."[78] At issue in *Howsam* was a procedural question (timeliness of the motion to compel arbitration), not the "narrow" question of arbitrability governed by *First Options*.[79] *First Options* gives a pro-court presumption when there is a question about whether an arbitrator can decide that the dispute ought to be arbitrated[80] (the arbitrability of arbitrability).

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67. *Id.*
68. *Id.* at 942.
69. *Id.* at 943.
70. *Id.* at 944. *See also* AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986).
71. *First Options*, 514 U.S. at 943.
72. *Id.*
73. *Howsam*, 537 U.S. 79 (2002).
74. *Id.* at 81-82.
75. *Id.* at 82.
76. *Id.*
77. *Id.* at 84 (citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-47 (1964)); *see* discussion *infra* pp. 9-10.
78. *Id.*
79. *Id.* at 83.
80. *Id.* at 83-84.

Since the decisions of *First Options* and *Howsam*, courts have applied various approaches on their meaning.[81] Some courts have cited to *First Options* but applied *Prima Paint* without noting any possible tension between the cases.[82] Some courts have noted the tension between the cases but rejected any possibility that *First Options* revised *Prima Paint*.[83] "More commonly," courts ignore any tension created by *First Options* and simply apply *Prima Paint*.[84] The courts are in disarray as to the meaning of *First Options*.

There are a few examples of courts facing the issue of what *First Options* means in relation to *Prima Paint*'s separability doctrine. In *Gregory v. Interstate/Johnson Lane*, the Fourth Circuit Court of Appeals found that the two cases conflict, and subsequently held *First Options* operative. The Court related:

> Mrs. Gregory's complaint highlights the tension between two competing lines of authority under the FAA. On the one hand, the Supreme Court has held that arbitration provisions should be broadly construed so that arbitrators may decide all issues encompassed by an arbitration provision. This doctrine has been extended to allow arbitrators to decide issues of fraud in the inducement, mutual mistake, unconscionability, and confusion-issues that go to the enforceability of the contract as a whole. *See infra* section II(B).
>
> On the other hand, the Supreme Court is cognizant of the fact that arbitration may only be compelled where the parties have agreed to arbitrate. The Supreme Court has held that as a general rule the court, and not the arbitrator, must decide whether the parties have agreed that an issue is or is not subject to arbitration. *See infra* section II(C).
>
> We hold that the latter line of authority must prevail in this case. The first principle of arbitration law is that a party cannot be compelled to arbitrate a dispute unless that party has agreed to arbitration.[85]

The first of the three paragraphs above outlines the rule from *Prima Paint* and the second paragraph summarizes *First Options*. So while noting the tension, the court does not do much more with it other than decide its case in accordance with *First Options*.[86]

The result in an Alabama Supreme Court case also reinforces the ruling in *First Options* and addresses the tension with *Prima Paint* precedent.[87] The court stated that at issue was a general claim of fraud in the inducement of the contract, not a specific claim as to fraud with regard to the arbitration provision—which

81. *See* Reuben, *supra* note 56, at 876-78.

82. Reuben, *supra* note 56, at 878. *See Id.* at n.348 for several cases that support this finding.

83. *Id.* (citing Wright v. SFX Entm't Inc., No. 00 CIV 5354 SAS, 2001 WL 103433, at *4 n.7 (S.D.N.Y. Feb. 7, 2001).

84. *Id.* (citing Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 590 (7th Cir. 2002); Sleeper Farms v. Agway, Inc., 211 F. Supp. 2d 197 (D. Me. 2002)).

85. No. 98-1840, 1999 WL 674765, at *3-4 (4th Cir. Aug. 31, 1999).

86. *Id.*

87. *Ex parte Perry*, 744 So. 2d 859 (Ala. 1999).

means the doctrine of separability applies.[88] The court's decision is strange: while it says that *First Options* does not apply because of the separability it decides the issue of fraud anyway—and finds the fraud claim lacking merit.[89] This result is exactly what the application of *First Options* would require.[90]

A recent example of a court struggling with the *Prima Paint* separability doctrine is the Florida Supreme Court in *Cardegna v. Buckeye Check Cashing, Inc.*[91] The result the court reached is in accordance with *First Options*, but the court appears not to rely on it and instead distinguishes *Prima Paint* from the facts before it.[92] The distinction made was that *Prima Paint* dealt with a voidable claim of fraud in the inducement, while *Cardegna* had a possibly void contract on its hands due to violation of state usury laws.[93] The court reasoned, "if the underlying contract is held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well."[94] This distinction from *Prima Paint* leaves the court to deal with the issue as *First Options* would have had it—by making the court decide the issues.

In *Fox v. Tanner*, the court directly confronted the tension between *First Options* and *Prima Paint*. The court's reasoning for deciding the issue in accordance with *First Options* is explored below.

IV. INSTANT DECISION

The Wyoming Supreme Court heard *Fox v. Tanner* on appeal from a Wyoming district court's denial of a motion compelling arbitration.[95] The issues on appeal were 1) whether the appeal should be dismissed because defendants failed to comply with state requirements and procedure in applying for a petition for writ of review and 2) whether the court should compel arbitration.[96] The Wyoming Supreme Court affirmed the district court's decision to deny defendant's motion to compel arbitration.[97]

The court perfunctorily replied to plaintiff's argument that the appeal was not performed correctly before getting to the substantive issues of the case. The court noted that it initially denied plaintiffs' attempt to dismiss the appeal, but did so without prejudice, which allowed plaintiffs to argue again that defendants' appeal lacked conformity with state appellate procedure, making their decision on this matter a part of the final opinion.[98] Specifically, plaintiffs argued that the District Court's decision on arbitration was not a final appealable order.[99] What the defendants should have done, plaintiffs argued, was to apply for a petition for writ of

88. *Id.* at 868.
89. *Id.*
90. Reuben, *supra* note 56, at 876.
91. 849 So.2d 860 (Fla. Jan. 20, 2005).
92. *Id.* at 863-65.
93. *Id.* at 863.
94. *Id.*
95. 101 P.3d 939, 940 (Wyo. 2004).
96. *Id.* at 942, 943-50.
97. *Id.* at 950.
98. *Id.* at 942.
99. *Id.* (citing W.R.A.P. 1.05).

review since the District Court's decision was only an interlocutory order.[100] The court struck down plaintiffs' argument by showing that under Wyoming statutes and *Jackson State Bank v. Homar*, an order denying a motion to compel arbitration could form the basis of an immediate appeal.[101]

The court then grappled with the question of whether the court should allow the dispute to be sent to arbitration. The defendants urged that the doctrine of separability espoused by the U.S. Supreme Court in *Prima Paint* was applicable—"a claim of fraud in the inducement of the entire contract, as contrasted with a claim of fraud in the inducement of the arbitration agreement itself" ought to be submitted to the arbitrator.[102] In addition, court precedent since *Prima Paint*, including *Spahr v. Secco*, a 10th Circuit Court of Appeals decision, has reaffirmed the separability doctrine.[103] The plaintiffs, looking to litigate their claims, argued that the separability doctrine had been modified since *Prima Paint*—therefore, any theory of implied consent would not be enough to waive their day in court.[104] Instead, the defendants had to show the plaintiffs manifested clear and unmistakable consent to arbitrate.[105]

Looking to *First Options of Chicago v. Kaplan*, the court found that ordinarily, a court ought to apply state contract law to decide whether the parties agreed to arbitrate an issue.[106] Stated another way, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the Federal Arbitration Act (FAA)]."[107] What the FAA would *not* allow, the court stated, is application of state law intended to single out arbitration agreements for different, prejudicial treatment.[108] The effect intended by the enactment of the FAA was to remove arbitration agreements from their historically "suspect status" and put them on the "same footing" as other agreements.[109]

The court made a distinction between two kinds of questions about whether the dispute is supposed to be arbitrated when there is "silence or ambiguity" on the question.[110] First, "who" decides (either the arbitrator or the judge of a court) whether the dispute should be arbitrated.[111] Second, "whether" the dispute can be arbitrated—"whether" the dispute is within the scope of the arbitration agreement.[112] The answer to the second question—"whether" the dispute ought to be

100. *Id.* An interlocutory order requires an application for a petition for writ of review under W.R.A.P. 13. *Id.*

101. *Id.* The Wyoming statute is part of the Wyoming Uniform Arbitration Act and states that "[a]n appeal may be taken from: (i) An order denying the application to compel arbitration . . . ." *Id. See* WYO. STAT. ANN. § 1-36-119 (2003). In Jackson State Bank v. Homar, the Wyoming Supreme Court allowed a direct appeal from a denial of a motion to compel arbitration. *Id.; Homar,* 837 P.2d 1081 (Wyo. 1992).

102. *Id.* at 943; Spahr v. Secco, 330 F.3d 1266, 1272-73 (10th Cir. 2003).

103. *Fox,* 101 P.3d at 943.

104. *Id.* at 943-44.

105. *Id.*

106. *Id.* at 944; *First* Options, 514 U.S. 938, 944 (1995)).

107. *Fox*, 101P.3d at 944.

108. *Id.*; Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995); Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987).

109. *Fox*, 101 P.3d at 944 (citation omitted).

110. *Id.* at 945.

111. *Id.*

112. *Id.*

arbitrated—is answered in light of the presumption in favor of arbitration.[113] The court reasons that the answer to this question makes sense because the parties have contemplated that at least some issues would go to arbitration.[114]

The first question of "who" decides is more complex. Contrary to the reasoning the court used above--where it stated that the parties have likely contemplated the scope of arbitration--the parties "often might not focus upon" the question of "who" decides whether a dispute should be arbitrated.[115] Furthermore, giving arbitrators the ability to decide whether the dispute belongs in arbitration bears a weighty risk: "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."[116]

The *Fox* court noted that this result is in accordance with the policy of keeping arbitration a matter of contract.[117] While ordinarily the question of "arbitrability" is construed in favor of compelling arbitration, the question of "who" decides is the exception to the rule.[118] That question has the presumption of going to the judge, *unless* the parties clearly and unmistakably agree to arbitrate that issue.[119]

The *Fox* court relied on *Howsam v. Dean Witter Reynolds, Inc.* in its characterization of the question of "who" decides arbitrability—which *Howsam* refers to as a "gateway dispute."[120] A gateway dispute is a

> narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.[121]

On the other hand, *Howsam* noted that a dispute about arbitration which centers on "procedural" questions are presumptively handled by an arbitrator.[122] These procedural questions include: "time limits, notice, laches, [and] estoppel."[123]

The *Fox* court finds defendants' reliance on *Spahr v. Secco* as an example of a restatement of *Prima Paint* to be misplaced.[124] Instead, *Spahr* emphasizes the

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113. *Id.*; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).
114. *Fox*, 101 P.3d at 945.
115. *Id.*
116. *Id. But cf.* Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1508-09 (1959).
117. *Fox*, 101 P.3d at 945; Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-85 (2002).
118. *Fox*, 101 P.3d at 946; *Howsam*, 537 U.S. at 83-85.
119. *Id.*.
120. *Fox*, 101 P.3d at 945; *Howsam*, 537 U.S. at 84.
121. *Fox*, 101 P.3d at 945; *Howsam*, 537 U.S. at 83-84.
122. *Fox*, 101 P.3d at 946; *Howsam*, 537 U.S. at 84.
123. *Fox*, 101 P.3d at 946; *Howsam*, 537 U.S. at 84-85.
124. *Fox*, 101 P.3d at 947. *See also* Spahr v. Secco, 330 F.3d 1266 (10th Cir. 2003). *Spahr* arose out of claims filed in state court including "breach of fiduciary duty, fraud, constructive trust, and negligence" against a stockbroker and her firm. *Spahr*, 330 F. 3d at 1267. After defendants removed the case to federal district court, the defendants sought to compel arbitration found under the Cash Account Agreement but such order was denied. *Id.* at 1268. At issue in *Spahr* is whether plaintiff's

findings of *First Options*.[125] *Spahr* held that a broad provision of arbitration does not furnish the "requisite clear and unmistakable consent" needed to compel the parties to arbitrate the dispute.[126] Since the dispute established by the plaintiffs contest the validity of the arbitration provision—and therefore is not a general attack against the contract, in fact, the plaintiffs rely on the contract in part—the dispute constitutes a gateway dispute that the court should resolve.[127]

The court rejected the defendants' argument that there was no proof that the plaintiffs were fraudulently induced to agree to the arbitration provision.[128] The defendants stated that if plaintiffs were not fraudulently induced into arbitration, then the claim of fraud should be determined by an arbitrator pursuant to the *Prima Paint* separability doctrine.[129] The *Fox* court remained unpersuaded since the District Court never reached a determination that there was fraud in the inducement of the arbitration provision.[130] Even if the District Court had determined that to be the case, the court found that the District Court was correct not to send the issue to an arbitrator after looking at *First Options* and analogous sources.[131]

V. COMMENT

The *Fox v. Tanner* court properly rejects separability in its interpretation of *First Options*. This comment will argue that the decision was correct for three basic reasons. First, separability and *Prima Paint* represent a derogation of contract law. Second, rejection of separability is consistent with the policy of the FAA. Finally, and perhaps most importantly, the view handles the momentous waiver of access to courts in an appropriate manner.

Before reaching those points, it is helpful to the discussion to look to scholarly analysis of the issues to crystallize the points argued in this comment. As discussed earlier, courts have dealt with the implications of *First Options* in a variety of ways.[132] Scholars have not reached a consensus on the issue, either. Professor of Law, Richard C. Reuben has argued that *First Options* and *Howsam* have created tension against *Prima Paint*'s separability doctrine, so much as to seriously doubt the vitality of *Prima Paint*'s rulings,[133] a position this comment reinforces for the three reasons stated above. On the other end of the spectrum, the notion that *First Options* has undermined separability "escapes" other scholars, including Alan Scott Rau, who believes *First Options* is no more than a re-

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alleged mental deficiency (dementia and Alzheimer's disease) invalidates "*both* the entire contract and the specific agreement to arbitrate in the contract." *Id.* at 1273 (emphasis in original). The court held that it did. *Id.*

125. *Fox*, 101 P.3d at 947.
126. *Id.* at 949; *Spahr*, 330 F.3d at 1271.
127. *Fox*, 101 P.3d at 949.
128. *Id.* at 950.
129. *Id.*
130. *Id.*
131. *Id.*
132. *See* discussion *infra* pp. 9-12 and accompanying notes, 73-94.
133. Reuben, *infra* note 56, at 883.

statement of the law.[134] Rau's position is inventive, but counter-intuitive to any basic reading of *First Options*.

Reuben writes that *First Options* rejected the idea that implied consent could be used to enforce an arbitration agreement against parties—ostensibly the rule from *Prima Paint*.[135] Instead, *First Options* requires more—clear and unmistakable consent.[136] Reuben treats *First Options* and *Howsam* as evidence of a new trend in the U.S. Supreme Court's approach to the question about who decides whether the parties have agreed to arbitrate, in juxtaposition to the old view espoused in *Prima Paint*.[137]

The view of the *First Options* court ought to prevail, according to Reuben, because if a court is "troubled by" concerns regarding the validity of the container contracts, "it borders on the absurd to suggest" that a court should "endorse a rule compelling into arbitration a party to a legally unenforceable contract merely because of the presence of an arbitration provision in the otherwise unenforceable contract."[138] Indeed, the finding that this suggestion is "absurd" is related to our surprise based on the fundamental tenets of contract law, as discussed below.

On the other end of the spectrum, Alan Scott Rau believes that this interpretation of *First Options* results from a misunderstanding of *Prima Paint*.[139] Rau rejects the reading of *Prima Paint* as having imputed the theory of implied consent[140]—instead, *Prima Paint* requires an "agreement" to arbitration, like any other contract provision.[141] Therefore, the notion that *First Options* required "clear and unmistakable consent" to arbitration is no different than a "sensible reading"[142] of *Prima Paint*.[143] In fact, Rau suggests that interpreting *First Options* to say something more is required for enforcement of an arbitration provision "convey[s] that there is something indefinably suspect about the entire notion of arbitration."[144]

Rau provides several illustrations to bolster the doctrine of separability to counter the idea that "defects in the main agreement must [or must not] vitiate the arbitration clause."[145] In *Prima Paint*, Prima Paint resisted arbitration on the grounds that Flood & Conklin had fraudulently misrepresented material facts, including the solvency of the business Prima Paint bought.[146] As we know, the court held that the general claim of fraud did not extend to the validity of the arbi-

134. Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 98 (2003).
135. Reuben, *supra* note 56, at 873.
136. *Id.*
137. *Id.* at 883.
138. *Id.* at 876.
139. Rau, *supra* note 134, at 15, 98-100.
140. *Id.* at 4-5.
141. *Id.* at 4, 8.
142. *Id.* at 4, 95.
143. *Id.*
144. *Id.* at 13. This attack implies that the opposite view does not put arbitration provisions on the same footing as other contractual agreements—a dispute resolution gaffe—since it conflicts with the policy of the FAA to counter judicial hostility to arbitration agreements. Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 140 (2002).
145. Rau, *supra* note 134, at 18-25, 27.
146. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 398 (1967).

tration provision.[147] Rau asserts, "Is it not perfectly plausible under these circumstances [in *Prima Paint*] that they might have chosen to submit to arbitration—not only questions with respect to the quality of F&C's performance—but also questions with respect to whether F&C had misrepresented the quality of its performance?"[148] Rau rejects the conclusion that "'a claimed lack of contract formation by definition includes a claim that the resisting party also did not agree to the arbitration clause.'"[149]

Rau's conclusion is flawed. Although he suggests that anti-separability sentiment is anti-arbitration because it fails to put arbitration on equal footing with other contract provisions,[150] his view has the same problem: the result of enforcing separability is to put arbitration on a pedestal, not equal footing. Consider the following: if a party in a similar situation to Prima Paint sues for fraudulent misrepresentation, seeking to revoke the contract, material provisions of the contract are voided. This means Prima Paint does not have to pay the purchase price under, say, Article I; Flood & Conklin does not have to effectuate the transfer of its assets under Article II; Article III requiring Prima Paint to pay property tax is without effect; and so on. If there is an arbitration provision under Article XXVIII, it may be the only one enforced in the subsequently voided contract under Rau's interpretation. Reuben and the court in *Fox v. Tanner* rightly find no sense in that result.

The result in *Fox* was the correct one since it is in accordance with contract law. Under the law of contracts, fraud voids a contract completely and automatically; no provision under the contract is enforceable due to the fraud.[151] However, *Prima Paint* intruded onto this principle of contracts when it held that an arbitration clause was separable from the rest of the contract, allowing an arbitrator to decide the existence of the contract. Professor Stephen J. Ware believes that the doctrine of separability requires us to merely speculate that the parties consented to arbitration: "Had a contract consisting of just the arbitration clause been presented to the parties, they might have given their voluntary consent to it. But, that is just speculation."[152] Furthermore, to "impos[e] duties" based on that speculation "has no place in contract law."[153]

The result in *Prima Paint* seems to say that the policy of the FAA is blind enforcement of arbitration at all times—even when there might not be an agreement to arbitrate. *Prima Paint*'s decision focused on §§ 3 and 4 of the FAA to the exclusion of § 2 and the rest of the FAA.[154] This was a fatal flaw in the reasoning of the court and resulted in a perversion of the FAA's policy, since § 2 does make an exception for enforcement of arbitration when "law or equity" would result in

147. *Id.* at 403-04.
148. Rau, *supra* note 134, at 18.
149. *Id.* at 27; Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL L. REV. 1377, 1459 (1991).
150. Rau, *supra* note 134, at 13.
151. *See* E. ALLAN FARNSWORTH, WILLIAM F. YOUNG & CAROL SANGER, CONTRACTS: CASES AND MATERIALS 324 (6th ed. 2001).
152. Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 131 (1996).
153. *Id.*
154. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).

"revocation of [the] contract."[155] *Prima Paint* read into § 4 that the "making" of the arbitration agreement was not reviewable by courts.[156] However, "[n]othing would have prevented the court in *Prima Paint* from holding that the making of an arbitration clause is in issue whenever the making of the agreement containing it is in issue."[157] The logical result, and the result taught reached by contract law, is that if the entire agreement is in issue, the arbitration clause is also at issue.[158]

Indeed, the result of the *Prima Paint* rule—a presumptive validity of arbitration clauses at all times—may result in denying unsuspecting people their rights to their day in court. An agreement to arbitration waives the ability of the parties to access a court for settling their disputes. Reuben writes, "Trust in the courts is one of the most precious elements of the social capital of our legal system. Continuing to sacrifice that capital on separability's altar of judicial efficiency is a high price to pay for a doctrine with little other credible justification."[159] Access to the courts for the indigent is protected under the Equal Protection Clause as a

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155. 9 U.S.C. § 2 (2000). Section 2 of the FAA is as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id.

156. Prima Paint Corp., 388 U.S. 395, 403-04 (1967); 9 U.S.C. § 4 (2000). Section 4 of the FAA states:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. *The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.* The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Id. (emphasis added).

157. Reuben, *supra* note 56, at 843. *See* IAN R. MACNEIL, ET AL., 2 FEDERAL ARBITRATION LAW § 15.2 n.13 (1994).

158. Instead, and perhaps due to the increasing favoritism of disposing cases via arbitration, arbitration clauses in a boilerplate contract is "no longer surprising, unexpected or perhaps even 'material'" and therefore do not render a contract or the arbitration clause unconscionable. JOHN E. MURRAY, JR. & HARRY M. FLECHTNER, SALES, LEASES AND ELECTRONIC COMMERCE 177 (2d ed. 2003).

159. Reuben, *supra* note 56, at 848.

fundamental right, and, accordingly, is given strict scrutiny to any infringement of it—the highest scrutiny afforded to citizens' rights.[160] But more generally, our society holds the view that there is a "right to sue": "[t]he most relevant conception of fairness is the idea that individuals who have suffered injuries for which the law provides a remedy should be permitted to sue to recover for their losses. That is, it would be unfair to bar a potential plaintiff with a valid claim from bringing a lawsuit."[161] Without embarking on the discussion of "frivolous lawsuits," the idea is that our society, and of course, our legal system, holds the right to be heard in court in high regard. Therefore, a putative agreement to waive that right is not to be trifled with. Separability flies in the face of what we know about contracts and "right to sue" at the cost of appearing trigger-happy for arbitration.

VI. CONCLUSION

First Options left courts with the question of whether separability was valid. The answer to that question in the *Fox* court's interpretation of *First Options* is that separability is no longer valid, nor should it be. Instead of treating an arbitration clause differently from any other provision in a contract, as would occur as the result of applying *Prima Paint*, the *Fox* court's interpretation of *First Options* does what should never have been novel—applying contract law to contracts by requiring clear and unmistakable consent to arbitration. Here, *First Options* preserves the right of parties to their day in court, a fundamental right. Finally, this reading of *First Options* applies a more sensible interpretation of the FAA to arbitration. Courts struggling with the meaning of *First Options* could learn something from the *Fox* court. The only problem with *Fox v. Tanner*, then, is that it is not a binding U.S. Supreme Court ruling on the issue.

MICHELLE ST. GERMAIN

160. *See* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS, COURT ACCESS, WELFARE, AND THE POOR 1039-80 (11th ed. 2001).

161. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1167-68 (2001).