

ARBITRATION LAW’S SEPARABILITY DOCTRINE AFTER *BUCKEYE CHECK CASHING, INC. V. CARDEGNA*

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The recent case of *Buckeye Check Cashing, Inc. v. Cardegna*,¹ is only the second Supreme Court decision applying the separability doctrine and it comes nearly forty years after the Court’s first separability decision, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*² Arbitration’s tremendous

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¹ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

² *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Lower courts had adopted it earlier. See, e.g., Arthur Nussbaum, *The “Separability Doctrine” in American*

growth during those forty years—and the arrival of *Buckeye*—make this an opportune time to assess the current state of the separability doctrine.³ In doing that, this Article will analyze *Prima Paint* and *Buckeye* and discuss the separability issues they leave unresolved. Finally, this Article will critique the separability doctrine and call for its repeal by Congress.

I. THE SUPREME COURT CASES

A. *Prima Paint*

The separability doctrine can be understood by starting with the facts of the *Prima Paint* case. F&C sold its paint business to Prima Paint.⁴ F&C sold to Prima Paint a list of F&C's customers and promised not to sell paint to these customers for six years.⁵ F&C also promised to act as a consultant to Prima Paint during these six years.⁶ This consulting agreement included an arbitration clause.⁷ Prima Paint did not make payments provided for in the consulting agreement.⁸ Prima Paint contended that F&C had fraudulently represented that it was solvent and able to perform its contract, but, in fact, was insolvent and intended to file for bankruptcy shortly after executing its consulting agreement with Prima Paint.⁹

F&C served upon Prima Paint a “notice of intention to arbitrate.”¹⁰ Prima Paint then sued F&C in federal court seeking rescission of the consulting agreement (due to the alleged misrepresentation) and an order enjoining F&C from proceeding with arbitration.¹¹ F&C cross-moved to stay the suit pending arbitration.¹² The trial court granted F&C's motion, staying Prima Paint's suit pending arbitration.¹³ The Supreme Court affirmed.¹⁴

Although the Court ruled against Prima Paint, the Court did not reject Prima Paint's argument that F&C fraudulently induced Prima Paint to sign the consulting agreement. The Court did not address this argument. In fact, the Court held that no court should address this argument. This argument should be addressed by the arbitrator.

The Court said that its result is compelled by section 4 of the Federal Arbitration Act (“FAA”), which provides that if

and Foreign Arbitration, 17 N.Y.U. L.Q. REV. 609, 615 (1940) (“On the whole, it may be said that the separability doctrine has gained a solid footing in this country.”).

³ See Richard L. Barnes, *Buckeye, Bull's-Eye, or Moving Target: The FAA, Compulsory Arbitration, and Common-Law Contract*, 31 VT. L. REV. 141 (2006); Alan Scott Rau, “*Separability*” in the *United States Supreme Court*, 2006 STOCKHOLM INT'L ARB. REV. 1.

⁴ *Prima Paint*, 388 U.S. at 397.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 398.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 398-99.

¹² *Id.* at 399.

¹³ *Id.*

¹⁴ *Id.* at 404-05.

[a] party [claims to be] aggrieved by the alleged failure . . . of another to arbitrate . . . [t]he 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 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.¹⁵

This provision says that the court shall not order the parties to arbitration if “the making of the arbitration agreement” is in issue.¹⁶ If the making of the arbitration agreement *is* in issue then the court proceeds to trial on that issue. If the trial determines that an arbitration agreement was made then the court orders the parties to arbitration. Conversely, if the trial determines that an arbitration agreement was not made then the court does not order the parties to arbitration. In short, FAA section 4 rests on the basic premise that the parties should be ordered to arbitration if, but only if, they have contracted to be there.

The Supreme Court held in *Prima Paint* that there would be no trial on the question of whether an arbitration agreement was made.¹⁷ *Prima Paint* was not entitled to such a trial because its allegations of fraudulent inducement did not put in issue the question of whether an “arbitration agreement” was made. That is because the term “arbitration agreement,” as used in FAA section 4, refers specifically to the arbitration clause itself, not more broadly to the consulting contract of which the arbitration clause was a part. If *Prima Paint* had argued that there was fraud “directed to the arbitration clause itself,”¹⁸ then the making of the arbitration agreement would have been in issue and *Prima Paint* would have been entitled to a trial on that issue.¹⁹ But FAA section 4, the Supreme Court held, “does not permit the federal court to consider claims of fraud in the inducement of the contract generally.”²⁰

This holding is known as the “separability” doctrine because it treats the arbitration clause as if it is a separate contract from the contract containing the arbitration clause, that is, the “container contract.” The *Prima Paint* Court held that

arbitration clauses as a matter of federal law are “separable” from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.²¹

In other words, the separability doctrine is a legal fiction that, in addition to the container contract, the parties also formed a second contract consisting of just the arbitration clause.²² This fictional second contract requires arbitration of

¹⁵ 9 U.S.C. § 4 (2000).

¹⁶ *Id.*

¹⁷ *Prima Paint*, 388 U.S. at 404.

¹⁸ *Id.* at 402.

¹⁹ See, e.g., *id.* at 404 (citing *Moseley v. Elec. & Missile Facilities, Inc.*, 374 U.S. 167, 171-72 (1963)); *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903 (Cal. 1997).

²⁰ *Prima Paint*, 388 U.S. at 404.

²¹ *Id.* at 402.

²² See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 56 (2d ed. 2001) (“The separability doctrine provides that an arbitration agreement, even though included in and related closely to an underlying commercial contract, is a separate and autonomous agreement.”); John J. Barceló III, *Who Decides The Arbitrators’ Jurisdiction? Separability and*

disputes over whether the container contract was induced by fraud. Courts applying the separability doctrine enforce the fictional second contract when they send to arbitration disputes over whether the container contract was induced by fraud.

B. Buckeye

While fraud was the basis of the challenge to the arbitration agreement in *Prima Paint*, illegality (or “public policy”) was the basis of the challenge in *Buckeye*,²³ the Supreme Court’s second separability decision.²⁴ The container contract in *Buckeye* was a “Deferred Deposit and Disclosure Agreement,” pursuant to which Buckeye provided Cardegna with cash in exchange for a personal check in the amount of the cash plus a finance charge.²⁵ Cardegna sued in Florida state court, “alleging that Buckeye charged usurious interest rates and that the Agreement violated various Florida lending and consumer-protection laws, rendering it criminal on its face.”²⁶ Buckeye moved to stay the litigation and compel arbitration of Cardegna’s claims.²⁷

The Florida Supreme Court ruled for Cardegna. It held that “the Florida courts, and not an arbitrator, must first determine the contract’s legality before [Cardegna] may be required to submit to arbitration under a provision of the contract.”²⁸ The Florida Supreme Court distinguished *Prima Paint* on the ground that

in *Prima Paint*, the claim of fraud in the inducement, if true, would have rendered the underlying contract merely *voidable*. In [*Buckeye*], however, the underlying contract at issue would be rendered void from the outset if it were determined that the contract indeed violated Florida’s usury laws. Therefore, 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.²⁹

The Florida Supreme Court was not alone in making this distinction; several other courts had also applied the separability doctrine to voidable-contract

Competence-Competence in Transnational Perspective, 36 VAND. J. TRANSNAT’L L. 1115, 1119 (2003) (*Prima Paint* “hold[s], in effect, that when parties enter a main contract (container contract) and include in it a broadly worded arbitration clause, a court will treat them as having concluded two separate contracts, the container contract and an arbitration agreement. This means that if a party challenges the validity of the container contract . . . , a court should send that issue to the arbitrators as long as nothing in the claim attacks the validity of the arbitration agreement directly.”).

²³ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

²⁴ *Buckeye* actually uses the term “severability,” *id.* at 445, rather than “separability.” Interestingly, courts seem to have a slight preference for the former term, while scholars seem to have a stronger preference for the latter. On May 31, 2007, searches in Westlaw’s “allcases” database revealed 45 cases with the search “arbitration & ‘severability doctrine’” and 38 cases with the search “arbitration & ‘separability doctrine.’” By contrast, in Westlaw’s “jlr” database (consisting primarily of law review articles), the first search produced 57 entries, while the latter produced 160.

²⁵ *Id.* at 442.

²⁶ *Id.* at 443.

²⁷ *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 861 (Fla. 2005).

²⁸ *Id.* at 865.

²⁹ *Id.* at 863.

arguments (which were sent to the arbitrator) but not to void-contract arguments (which were sent to the court).³⁰

By contrast, the United States Supreme Court held in *Buckeye* that the separability doctrine applies to void-contract arguments as well as to voidable-contract arguments. The Court said:

It is true, as respondents assert, that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' [anti-separability] approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.³¹

Thus, *Buckeye* rejects the void/voidable distinction and reaffirms *Prima Paint*'s distinction between arguments challenging the enforceability of the container contract and arguments directed at the arbitration clause itself.

In addition, *Buckeye* also resolves doubt about whether the FAA requires state, as well as federal, courts to apply the separability doctrine. The pre-*Buckeye* belief that states were free to depart from the separability doctrine followed from the fact that *Prima Paint*'s reasoning rested on FAA sections 3 and 4, which by their terms appear to apply only to proceedings in federal court.³² Nevertheless, *Buckeye* held that the separability doctrine applies in state court and preempts any inconsistent state law because it rests on FAA section 2, which applies to proceedings in state, as well as federal, court.³³

II. RECONCILING *PRIMA PAINT* AND *BUCKEYE* WITH *FIRST OPTIONS* AND *HOWSAM*

A. *The Distinction Between Formation of a Contract and Defenses to Its Enforcement*

As noted above, *Buckeye* ruled that courts must send to arbitrators any “challenge to the validity of the contract as a whole,”³⁴ (the container contract), while courts themselves must resolve any challenge directed “specifically to the

³⁰ See, e.g., *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 488 (6th Cir. 2001) (“The void/voidable distinction is relevant for *Prima Paint* analysis because a void contract, unlike a voidable contract, was never a contract at all.”); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991); *Jolley v. Welch*, 904 F.2d 988, 993-94 (5th Cir. 1990); *Rainbow Invs., Inc. v. Super 8 Motels, Inc.*, 973 F. Supp. 1387, 1390-91 (M.D. Ala. 1997); *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 927 (Ala. 1997).

³¹ *Buckeye*, 546 U.S. at 448-49.

³² *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) (“[W]e have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, . . . are nonetheless applicable in state court.”).

³³ 546 U.S. at 447. *Buckeye* said that, “[a]lthough § 4, in particular, had much to do with *Prima Paint*'s understanding of the rule of severability, . . . this rule ultimately arises out of § 2, the FAA's substantive command that arbitration agreements be treated like all other contracts. The rule of severability establishes how this equal-footing guarantee for ‘a written [arbitration] provision’ is to be implemented.” *Id.*

³⁴ *Id.* at 449.

arbitration clause.”³⁵ While arbitrators hear any challenge to the container contract’s validity, *Buckeye* cautioned:

The issue of the contract’s validity is different from the issue of whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (CA11 1992), whether the signor lacked authority to commit the alleged principal, *Sandvik AB v. Advent Int’l Corp.*, 220 F.3d 99 (CA3 2000); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (CA7 2001), and whether the signor lacked the mental capacity to assent, *Spahr v. Secco*, 330 F.3d 1266 (CA10 2003).³⁶

Thus, *Buckeye* did not decide whether courts or arbitrators rule on arguments denying that any container contract between the alleged obligor and obligee was ever formed (“concluded”). And *Buckeye* recognized that parties have raised such arguments based on lack of (1) assent, (2) agency, and (3) capacity.

While *Buckeye* did not decide whether courts or arbitrators rule on these three arguments, with respect to two of them—assent and agency—the Supreme Court had already spoken. In the 1995 (pre-*Buckeye*) case of *First Options of Chicago, Inc. v. Kaplan*,³⁷ the Supreme Court effectively decided that courts, rather than arbitrators, rule on assent and agency arguments denying that any container contract between the alleged obligor and obligee was ever formed. In other words, *First Options* effectively decided that the separability doctrine does not apply to such arguments because courts must rule on them even though they challenge the container contract as a whole, rather than the arbitration clause specifically. This reading of *First Options* is supported by dicta in a 2002 Supreme Court case, *Howsam v. Dean Witter Reynolds, Inc.*³⁸

Curiously, however, neither *First Options* nor *Howsam* ever mentions the separability doctrine (or *Prima Paint*), and *Buckeye* never mentions *First Options* or *Howsam*. These two lines of cases (*Prima Paint* and *Buckeye* on the one hand, and *First Options* and *Howsam* on the other) have yet to converge into a coherent whole. For the sake of doctrinal coherence and clarity, I hope this article contributes to that convergence.

The *First Options* case involved First Options, Kaplan, and Kaplan’s wholly-owned company, MKI. On a single date, First Options formed four contracts with MKI and one of those four—the only one with an arbitration clause—was also signed by Kaplan.³⁹ When First Options sought to arbitrate

³⁵ *Id.*

³⁶ *Id.* at 444 n.1.

³⁷ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

³⁸ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 82 (2002); see *infra* note 50 and accompanying text.

³⁹ *Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503, 1506-07 (3d Cir. 1994).

On March 24, 1988, the Kaplans, MKI, and First Options separately executed four documents evidencing an overall method of settling the dispute that had resulted from MKI’s October 19, 1987, deficit. They were: (1) a Letter Agreement executed by First Options, MKI, Mr. Kaplan, Mrs. Kaplan, and certain other entities and individuals; (2) a Guaranty executed only by MKI; (3) a Subordinated Loan Agreement executed by First Options, MKI, and a separate entity; and

its claims against both MKI and Kaplan, MKI submitted to arbitration but Kaplan objected to the arbitrators' jurisdiction over him.⁴⁰

MKI, having signed the only workout document (out of four) that contained an arbitration clause, accepted arbitration. The Kaplans, however, who had not personally signed that document, denied that their disagreement with First Options was arbitrable and filed written objections to that effect with the arbitration panel. The arbitrators decided that they had the power to rule on the merits of the parties' dispute, and did so in favor of First Options.⁴¹

Kaplan sought to have the arbitration award vacated, but the district court granted First Options' motion to confirm the award.⁴² By contrast, the Third Circuit and the Supreme Court ruled for Kaplan. The Supreme Court described

three types of disagreement present in this case. First, the Kaplans and First Options disagree about whether the Kaplans are personally liable for MKI's debt to First Options. That disagreement makes up the merits of the dispute. Second, they disagree about whether they agreed to arbitrate the merits. That disagreement is about the arbitrability of the dispute. Third, they disagree about who should have the primary power to decide the second matter. Does that power belong primarily to the arbitrators (because the court reviews their arbitrability decision deferentially) or to the court (because the court makes up its mind about arbitrability independently)? We consider here only this third question.⁴³

The Supreme Court's answer to this third question is that the Third Circuit correctly reviewed the arbitrators' decision (that Kaplan and First Options agreed to arbitrate the merits) "independently," rather than under the deferential standard of review FAA section 10 requires courts to use when reviewing an arbitrator's decisions on matters properly before the arbitrator.⁴⁴ This holding of *First Options* indicates that the separability doctrine does not apply to the issue of whether particular parties "agreed to arbitrate"⁴⁵ because the separabil-

(4) a Subordinated Promissory Note executed by MKI. Only one of these four documents, the Subordinated Loan Agreement, contained an arbitration clause, and only First Options, MKI and the other entity, whose agreement to arbitrate is not material to this case, signed that document.

Id.

⁴⁰ *Id.* at 1508.

⁴¹ *First Options*, 514 U.S. at 941.

⁴² *Id.*

⁴³ *Id.* at 942 (emphasis omitted).

⁴⁴ We believe the answer to the "who" question (*i.e.*, the standard-of-review question) is fairly simple. . . . Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. See, *e.g.*, 9 U.S.C. § 10. If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently.

Id. at 943 (emphasis omitted). "We conclude that, because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts." *Id.* at 947.

⁴⁵ *Id.* at 942.

ity doctrine gives arbitrators the power to decide issues subject only to the deferential standard of review in FAA section 10.⁴⁶

Unfortunately, *First Options* does not mention *Prima Paint* or the word “separability.” But it did clearly hold that “the power to decide” whether Kaplan and First Options “agreed to arbitrate” the merits “belong[s] primarily” to the court rather than to the arbitrators. And the issue of whether particular parties “agreed to arbitrate” can, as *Buckeye* (later) stated, arise when a party argues that no container contract between the alleged obligor and obligee was ever formed (“concluded”) due to the lack of (1) assent, (2) agency, and (3) capacity.⁴⁷ As *First Options* was a case in which Kaplan relied on the first two of these three arguments,⁴⁸ the Court’s opinion in *First Options* should be read as holding that courts, not arbitrators, rule on assent and agency arguments that no container contract between the alleged obligor (Kaplan) and obligee (First Options) was ever formed. In other words, *First Options* should be read as holding that the separability doctrine does not apply to contract-formation arguments, or at least that it does not apply to contract-formation arguments based on lack of assent or agency.⁴⁹

Support for this reading of *First Options* is found in *Howsam*, a 2002 Supreme Court decision, which cites *First Options* for the proposition that “a gateway dispute about whether the parties are bound by a given arbitration clause raises a ‘question of arbitrability’ for a court [rather than an arbitrator] to decide.”⁵⁰ Also reading *First Options* to hold that the separability doctrine does not apply to contract-formation arguments is Judge Easterbrook’s opinion for the Seventh Circuit in *Sphere Drake Insurance Ltd. v. All American Insurance Co.*⁵¹ In this pre-*Howsam*-and-*Buckeye* case, Judge Easterbrook recognized that *Prima Paint* “sits uneasily alongside” *First Options*,⁵² but he

⁴⁶ CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 63 (2d ed. 2006).

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

⁴⁸ See *Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503, 1514-16 (3d Cir. 1994) (finding that Kaplan did not assent to a container contract with First Options and—rejecting application of agency principles—holding that MKI’s assent to a container contract did not constitute Kaplan’s assent to that container contract).

⁴⁹ Capacity is discussed below. See *infra* notes 84-87 and accompanying text.

⁵⁰ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). *Howsam* involved an investor’s claim against her securities broker. The investor asserted her claim in arbitration before the National Association of Securities Dealers (“NASD”), which had a rule providing that “no dispute ‘shall be eligible for submission [to arbitration] . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute.’” *Id.* at 82 (citing NASD CODE OF ARBITRATION PROCEDURE § 10304 (1984)). The broker sued in federal court “ask[ing] the court to declare that the dispute was ‘ineligible for arbitration’ because it was more than six years old.” *Id.* The Supreme Court held that the NASD time-limit rule “falls within the class of gateway procedural disputes” that is presumptively the province of arbitrators, not the courts. *Id.* at 85-86. “[I]n the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.” *Id.* at 85 (emphasis added) (quoting REVISED UNIF. ARBITRATION ACT § 6, cmt. 2 (2000)).

⁵¹ *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 590-91 (7th Cir. 2001).

⁵² *Id.* at 590.

reconciled the two cases with the distinction *Buckeye* would later make between contract formation and defenses to the enforcement of an admittedly-formed contract.⁵³ Judge Easterbrook wrote:

Fraud in the inducement does not negate the fact that the parties actually reached an agreement. That's what was critical in *Prima Paint*. But whether there was any agreement is a distinct question. *Chastain* [*v. Robinson Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992)] sensibly holds a claim of forgery must be resolved by a court. A person whose signature was forged has never agreed to anything. Likewise with a person whose name was written on a contract by a faithless agent who lacked authority to make that commitment. This is not a defense to enforcement, as in *Prima Paint*; it is a situation in which no contract came into being⁵⁴

So, in resolving the “uneas[y]” relationship between *First Options* and the separability doctrine, Judge Easterbrook read *First Options* as holding that the separability doctrine only applies to “defense[s] to enforcement,” not to arguments that “no contract came into being.”⁵⁵

In sum, there is strong support for reading *First Options* as holding that the separability doctrine does not apply to contract-formation arguments. Thus the two lines of cases (*Prima Paint/Buckeye* on the one hand, and *First Options/Howsam* on the other) should be read to converge into a coherent whole consisting of the rule that the separability doctrine does not apply to the question whether a particular party *formed* a contract containing an arbitration clause but does apply to questions about *defenses* to the enforcement of that contract. Under this reading, courts would hear questions about mutual assent,⁵⁶ consideration, and authority to assent on behalf of others,⁵⁷ while

⁵³ Or, to use *Buckeye*'s words, “the issue of whether any agreement between the alleged obligor and obligee was ever concluded” and “[t]he issue of the contract's validity.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006).

⁵⁴ *Sphere Drake*, 256 F.3d at 590-91.

⁵⁵ *Id.* Prior to *Buckeye*, Professor Richard Reuben went even further, reading *First Options* as holding that courts (rather than arbitrators) hear not only arguments disputing contract formation, but also arguments challenging the validity of admittedly-formed contracts. In other words, he read *First Options* as directly conflicting with the separability doctrine.

[T]he Court's unanimous opinions in both *First Options* and *Howsam* were grounded in the need for the law to support the parties' expectations and to prevent the possibility that a court “might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, and not an arbitrator would decide.” Such reasoning leads logically only to one conclusion: that courts should decide the validity of the container contracts, unless the parties clearly and unmistakably agree to allocate that function to the arbitrator. Indeed, it borders on the absurd to suggest that a court troubled by such concerns would 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.

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, 875-76 (2003). As it turned out, of course, *Buckeye* did not find it “absurd” to send to arbitrators the validity of container contracts.

⁵⁶ *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 215 (5th Cir. 2003); *Opals on Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362, 372 (2d Cir. 2003); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 856 (11th Cir. 1992); *Jolley v. Welch*, 904 F.2d 988, 993-94 (5th Cir. 1990); see also *In re Neutral Posture, Inc.*, 135 S.W.3d 725, 728 (Tex. App. 2003) (whether parties' agreement to arbitrate expired by its terms is a question of the very existence of agreement to arbitrate and, thus, an issue of substantive arbitrability reserved for judicial determination, rather than a question to be determined by an arbitrator).

sending to arbitrators questions about misrepresentation (fraud in the inducement),⁵⁸ mistake,⁵⁹ duress,⁶⁰ undue influence,⁶¹ incapacity,⁶² unconscionability,⁶³ impracticability, frustration of purpose,⁶⁴ the statute of frauds,⁶⁵ the statute of limitations,⁶⁶ illegality (or “public policy”),⁶⁷ and expiration or termination.⁶⁸ However, these latter issues are sent to the arbitrator only if they are

⁵⁷ *Sphere Drake*, 256 F.3d at 591; *Sandvik AB v. Advent Int’l Corp.*, 220 F.3d 99, 104, 109 (3d Cir. 2000); *see also* *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 393 (N.J. 2006) (parent had authority to bind minor to arbitration clause); *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 394 (Fla. 2005) (same); *Cross v. Carnes*, 724 N.E.2d 828, 836 (Ohio Ct. App. 1998) (court holds that parent had authority to bind minor to arbitration clause and sends to arbitrators the question whether parent had authority to bind minor to the rest of the container contract).

⁵⁸ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967).

⁵⁹ *Masco Corp. v. Zurich Am. Ins. Co.*, 382 F.3d 624, 629-30 (6th Cir. 2004); *Unionmutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 528-29 (1st Cir. 1985).

⁶⁰ *Serv. Corp. Int’l v. Lopez*, 162 S.W.3d 801, 810 (Tex. App. 2005) (The duress “issue relates to the contract as a whole and not solely the arbitration provision. It is therefore an issue to be decided in arbitration.”).

⁶¹ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 398 (5th Cir. 1981) (duress and undue influence).

⁶² Federal courts have split on the question of mental incapacity. *Compare, e.g., Spahr v. Secco*, 330 F.3d 1266, 1273 (10th Cir. 2003) (court decides defense of mental incapacity), *with* *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) (arbitrator decides defense of mental incapacity). A related question is a minor’s lack of capacity to contract. *See* *H & S Homes, L.L.C. v. McDonald*, 823 So. 2d 627, 630 (Ala. 2001) (limited discovery allowed on minority issue at time of motion to compel arbitration in the trial court). Capacity is discussed further below. *See infra* Part II.B.

⁶³ Substantive unconscionability of contract terms other than the arbitration clause is an issue for the arbitrator, *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726-27 (8th Cir. 2003), while substantive unconscionability of the arbitration clause is generally an issue for the court. *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 433 (5th Cir. 2004).

Allegations of procedural unconscionability require the adjudicator to consider the circumstances surrounding the making of the entire container contract, not just the arbitration clause. So procedural unconscionability may be an issue for the arbitrator, *Jenkins v. First Am. Cash Advance of Georgia, LLC*, 400 F.3d 868, 877 (11th Cir. 2005) (“[T]he FAA does not permit a federal court to consider claims alleging the contract as a whole was adhesive.”), unless combined with allegations that the arbitration clause itself is substantively unconscionable. *See also* *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264 (9th Cir. 2006) (en banc) (The court, rather than arbitrator, addresses procedural unconscionability of a container contract because California law “requires the court to consider, in the course of analyzing the validity of the arbitration provision, the circumstances surrounding the making of the entire agreement.”).

⁶⁴ *Unionmutual*, 774 F.2d at 528-29 (“[T]he arbitration clause is separable from the contract and is not rescinded by [defendant]’s attempt to rescind the entire contract based on . . . frustration of purpose.”); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1271 (7th Cir. 1976).

⁶⁵ *Comprehensive Merch. Catalogs, Inc. v. Madison Sales Corp.*, 521 F.2d 1210, 1213-14 (7th Cir. 1975).

⁶⁶ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002); *Wagner Constr. Co. v. Pac. Mech. Corp.*, 157 P.3d 1029, 1031 (Cal. 2007); *O’Keefe Architects, Inc. v. CED Constr. Partners, Ltd.*, 944 So. 2d 181, 188 (Fla. 2006).

⁶⁷ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442, 449 (2006).

⁶⁸ *ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co.*, 307 F.3d 24, 34 (2d Cir. 2002); *Ambulance Billings Sys., Inc. v. Gemini Ambulance Servs., Inc.*, 103 S.W.3d 507,

challenges to the container contract as a whole; if they are “directed to the arbitration clause itself,”⁶⁹ then they are heard by courts.⁷⁰

To recap, the Supreme Court:

- (1) (in *First Options, Howsam* and *Buckeye*) distinguishes arguments that no container contract was formed from arguments asserting defenses to the enforcement of an admittedly-formed container contract, and
- (2) (in *Prima Paint* and *Buckeye*) distinguishes defenses to the container contract as a whole from defenses directed “specifically to the arbitration clause” itself.

The first of these distinctions leads courts, rather than arbitrators, to rule on arguments that no container contract was formed.⁷¹ The second of these distinctions leads courts to rule on defenses directed specifically to the arbitration clause itself, while sending to arbitrators defenses to the container contract as a whole.

B. *Professor Rau's Rejection of the Supreme Court's Distinctions*

Both of the Supreme Court's distinctions are criticized by a leading arbitration scholar, Alan Scott Rau. Whereas the Court says, “The issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and obligee was ever concluded,”⁷² Professor Rau questions the “abstract distinction between ‘invalidity’ and ‘nonexistence.’”⁷³ “These are,” he says, “nothing but word balloons.”⁷⁴ In addition, while both *Prima Paint* and *Buckeye* distinguish between arguments challenging the enforceability of the container contract and arguments directed at the arbitration clause itself,⁷⁵ Professor Rau questions whether they really mean it. He argues that *Buckeye's* statement—“a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator”—is “an unfortunate turn of phrase, sloppy and unguarded.”⁷⁶ In his view, “it should be obvious that a challenge can be ‘to the arbitration clause itself’ without being ‘specifically to the arbitration provision.’”⁷⁷ He gives, as examples, challenges alleging:

- (1) “that the signature on a document was forged,”

514-15 (Tex. App. 2003) (arbitrators decide “dispute regarding whether a settlement agreement was reached replacing or canceling” original agreement).

⁶⁹ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967); *accord Buckeye*, 546 U.S. at 449 (“[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”).

⁷⁰ *See supra* note 63 (discussing *Nagrampa*).

⁷¹ Or if the arbitrator hears them (as in *First Options*) the courts review them “independently,” rather than under the deferential standard of review FAA section 10 requires courts to use when reviewing an arbitrator's decisions on matters properly before the arbitrator.

⁷² *Buckeye*, 546 U.S. at 444 n.1.

⁷³ Rau, *supra* note 3, at 17.

⁷⁴ *Id.* The quoted language from *Buckeye* is also criticized as “slightly loose” by Adam Samuel, *Separability and the US Supreme Court Decision in Buckeye v. Cardegna*, 22 *ARB. INT'L* 477, 487 (2006).

⁷⁵ *See supra* notes 18-20, 31 and accompanying text.

⁷⁶ Rau, *supra* note 3, at 14 (emphasis omitted).

⁷⁷ *Id.* (footnote omitted).

- (2) “that the signature was that of a corporation’s janitor with no authority whatever,”
- (3) “that the signature was induced by a representation that this piece of paper—which turned out to be an agreement—was merely a receipt or an autograph,”
- (4) “that one of the parties was mentally incompetent,”
- (5) “that one of the parties was a minor.”⁷⁸

In “none of these cases,” Professor Rau says, “is the challenge aimed ‘specifically’ at the arbitration clause,” but “it must be *the court rather than the arbitrator* which is to pass on the challenge.”⁷⁹ As he understands the separability doctrine, it “does not merely preserve for the courts challenges that are ‘restricted’ or ‘limited’ to ‘just’ the arbitration clause alone—this would be senseless; *it preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question.*”⁸⁰

Professor Rau has published several articles on the separability doctrine,⁸¹ and has thought long and hard about the subject.⁸² By contrast, he says, “the subject obviously sparked no intense interest” on the part of Justice Scalia, who wrote the Court’s “short and perfunctory” opinion in *Buckeye*.⁸³ So it is possible that Professor Rau’s thinking about separability is simply more advanced than the Supreme Court’s because the Court has not thought about the separability doctrine any more than necessary to decide the cases that have come before it. If so, as the Court hears additional separability cases, its thinking may catch up to Professor Rau’s and then the Court will adopt his approach.

One hint that this might occur is *Buckeye*’s treatment of capacity to contract. Incapacity has long been a defense to the enforcement of a contract formed by a minor or mentally incompetent person.⁸⁴ Such incapacity does not

⁷⁸ *Id.* at 14-16.

⁷⁹ *Id.* at 16.

⁸⁰ *Id.*; see also Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1, 17 (2003) [hereinafter Rau, *Seventeen Simple Propositions*].

In the (relatively infrequent) cases where the party resisting arbitration calls into question his assent to arbitrate, it will always be for a court to verify whether there has in fact been such assent. These cases will include

- the cases raising contract formation issues . . . ;
- the cases where “the particular challenge to the existence of the contract is such as necessarily also to put the existence of the arbitration agreement in issue.” . . .
- the cases where the party resisting arbitration makes some attempt to identify “a defect in the arbitration clause itself.”

Id. at 30.

⁸¹ Rau, *supra* note 3; Rau, *Seventeen Simple Propositions*, *supra* note 80; Alan Scott Rau, “*The Arbitrability Question Itself*,” 10 AM. REV. INT’L ARB. 287 (1999).

⁸² Perhaps he did not need to think hard about it. Describing the separability doctrine, Professor Rau said, “I don’t think that at bottom this really very difficult,” Rau, *supra* note 3, at 27, and he has at least twice used the word “simple” to describe it. First, he wrote an article entitled *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, Rau, *Seventeen Simple Propositions*, *supra* note 80, at 4, and then a few years later he said that “the whole architecture of ‘separability’ rests on just four simple propositions.” Rau, *supra* note 3, at 27.

⁸³ Rau, *supra* note 3, at 14.

⁸⁴ E. ALLAN FARNSWORTH, *CONTRACTS* 228-29 (3d ed. 1998).

prevent the formation of a contract.⁸⁵ So under the Supreme Court's distinction between a contract's formation ("whether any agreement . . . was ever concluded") and defenses to enforcement ("the contract's validity"), incapacity plainly falls in the latter category and thus should be resolved by arbitrators rather than courts. Yet the Supreme Court in *Buckeye* grouped incapacity together with lack of assent and agency, both of which fall into the former category (formation) and both of which, *First Options* held, are resolved by courts rather than arbitrators.⁸⁶ So it is possible that—when presented with an incapacity case—the Court will continue to group incapacity with lack of assent and agency and treat them all as questions for courts, rather than arbitrators, and thus join Professor Rau in rejecting the distinction between a contract's formation and defenses to its enforcement.⁸⁷ Time will tell.

III. REPEAL THE SEPARABILITY DOCTRINE

A. *The Separability Doctrine Is Incompatible with the Contractual Approach to Arbitration Law*

I have argued that the separability doctrine should be repealed because I believe that no dispute should be sent to arbitration unless the parties have formed an *enforceable* contract requiring arbitration of that dispute.⁸⁸ Prior to contracting, parties start with a right to litigate, rather than arbitrate, their dis-

⁸⁵ *Id.*

⁸⁶ See *supra* Part II.A (discussing *First Options*).

⁸⁷ See Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit: Round IV*, 39 TEX. TECH L. REV. 463, 471-78 (2007).

⁸⁸ Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, in EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 88, 90-102 (2006) [hereinafter Ware, *Interstate Arbitration*]; Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 128-38 (1996) [hereinafter Ware, *Employment Arbitration*]. The related doctrine of competence-competence, at least as adopted by some countries, also violates the principle that a court should not send a dispute to arbitration unless the parties have formed an enforceable contract requiring arbitration of that dispute.

The concept referred to as *compétence-compétence* (literally "jurisdiction concerning jurisdiction") links together a constellation of disparate notions about when arbitrators can rule on the limits of their own power. In its simplest formulation, *compétence-compétence* means no more than that arbitrators can look into their own jurisdiction without waiting for a court to do so. In other words, there is no need to stop arbitral proceedings to refer a jurisdictional issue to judges. However, under this brand of *compétence-compétence*, the arbitrators' determination about their power would be subject to judicial review at any time, whether after an award is rendered or when a motion is made to stay court proceedings or to compel arbitration.

French law goes further and delays court review of arbitral jurisdiction until *after* an award is rendered. If an arbitral tribunal has already begun to hear a matter, courts must decline to hear the case. When an arbitral tribunal has not yet been constituted, court litigation will go forward only if the alleged arbitration agreement is clearly void (*manifestement nulle*).

William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 19, 46-47 (1998) (footnotes omitted). The French version of *compétence-compétence* may be inconsistent with the principle that a court should not send a dispute to arbitration unless the parties have formed an enforceable contract requiring arbitration of that dispute. The French version is inconsistent with this principle to the extent the French version prevents a court from considering challenges to an arbitration agreement's existence or scope until after the arbitrator has done so.

putes. The right to litigate—access to a court of law—generally exists in the international, as well as the domestic, context but may be of less practical value internationally depending on the reliability of the court system(s) with jurisdiction over the parties.⁸⁹ In the domestic context, the right to litigate is basic to our system of government and, with respect to many disputes, is a constitutional right guaranteed by the Seventh Amendment and its counterparts in state constitutions.⁹⁰

The right to litigate is alienable. A party can alienate it by forming an arbitration agreement.⁹¹ Contemporary arbitration law generally makes the right to litigate alienable through the standards of ordinary contract law, thus treating the right to litigate like other rights that are alienable through contract.⁹² Some critics of contemporary arbitration law contend that the right to litigate is especially important so, they argue, it should only be alienable under law requiring a higher standard of consent than is required by contract law.⁹³ As an advocate of the contractual approach to arbitration law, I have defended contemporary arbitration law from these critics.⁹⁴ Now, in the following pages, I defend the contractual approach to arbitration law against those who attack it from the other direction; that is, those who argue that the right to litigate should be alienable under a *lower* standard of consent than is found in contract law.

Who are these people? They include most of the leading scholars of international arbitration and countless courts around the world, including the United States Supreme Court.⁹⁵ They are the advocates of the separability doctrine. The separability doctrine makes the right to litigate alienable under a *lower* standard of consent than is found in contract law. It does so by removing from the right to litigate the protection provided by contract law's defenses to

By contrast, the simple version of competence-competence (in the first quoted paragraph) is consistent with the principle. Also consistent with this principle is court enforcement of agreements submitting to the arbitrator the power to decide the arbitrator's jurisdiction. Such enforcement is blessed by *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946-47 (1995), and *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986). On the other hand, if the parties dispute whether their agreement *does* submit to the arbitrator the power to decide the arbitrator's jurisdiction, then a court must resolve *that* dispute or it risks sending a dispute to arbitration even though the parties have not formed an enforceable contract requiring arbitration of that dispute.

⁸⁹ See *infra* notes 143-146 and accompanying text.

⁹⁰ Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 169 (2004).

⁹¹ *Id.*; see also Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law*, 29 MCGEORGE L. REV. 195 (1998) [hereinafter Ware, *Consumer Arbitration*].

The particular rights [contemporary arbitration law] makes alienable are those enforced in court, but not (necessarily) in arbitration. These include rights specified by rules of civil procedure and evidence, and the right to a *government-selected* adjudicator (judge or jury) to decide questions of fact. I shall refer to this set of rights as the "right to government adjudication." An enforceable arbitration agreement alienates this right to government adjudication and creates, instead, a right to private adjudication.

Id. at 209 (footnotes omitted).

⁹² Ware, *supra* note 90, at 170-72.

⁹³ *Id.* at 172-74 (citing critics of contractual approach).

⁹⁴ Ware, *Consumer Arbitration*, *supra* note 91; Ware, *supra* note 90.

⁹⁵ Internationally, "the separability doctrine is widely accepted in most jurisdictions." BORN, *supra* note 22, at 67 (citing authority).

enforcement. Under the contractual approach to arbitration law, the right to litigate (like other rights) would be alienable through an *enforceable* contract, but not a contract that is unenforceable due to misrepresentation, duress, illegality, or any other contract-law defense. By contrast, the separability doctrine holds that a party alienates its right to litigate when that party forms a contract containing an arbitration clause *even if that contract is unenforceable*. For example, if F&C did, in fact, fraudulently induce Prima Paint to sign the consulting agreement, then the Supreme Court deprived Prima Paint of its right to litigate even though Prima Paint did not form an *enforceable* contract to arbitrate. The separability doctrine separates arbitration law from an important part of contract law—the defenses to enforcement—and thus fails to provide the right to litigate with the protection of those defenses.

The only way to fix this problem is to repeal the separability doctrine and allow courts to hear defenses to the enforcement of the contract containing the arbitration clause. Courts should send cases to arbitration only after rejecting any such defenses. This repeal of the separability doctrine can be accomplished in the United States by changing the wording of FAA section 4.⁹⁶ Instead of section 4 sending cases to arbitration when the court is “satisfied that the making of the agreement for arbitration . . . is not in issue,” a revised section 4 should send cases to arbitration when the court is “satisfied that the making of the *contract containing the* agreement for arbitration . . . is not in issue.”⁹⁷

B. *Consent-Based Arguments for the Separability Doctrine*

1. *Professor Rau and the Gunpoint Example*

The previous subsection of this article argued that the separability doctrine should be repealed because it deprives the right to litigate of the protection provided by contract defenses and thus separates arbitration law from an important part of contract law. The injustice of the separability doctrine is highlighted by the hypothetical case of an individual who signs an arbitration

⁹⁶ No change in the wording of FAA section 3 is necessary because *Prima Paint* held that the procedures of section 4 also apply to stay motions under section 3. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). With respect to international arbitration, scholars disagree about whether the New York Convention adopts the separability doctrine or leaves it to national law. Compare ALBERT JAN VAN DEN BERG, *THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 145-46 (1981) (Convention is “indifferent” as to existence of separability doctrine), with STEPHEN M. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* 22 (1987) (Convention adopts separability doctrine “by implication”).

⁹⁷ Under this anti-separability procedure I propose here:

- (1) Courts would continue to rule, as they currently do, on defenses focused only on the arbitration clause, e.g., an argument that only the arbitration clause is unconscionable. Although such challenges focus only on the arbitration clause, they are arguments that the contract containing the arbitration clause is unenforceable;
- (2) Arbitrators would continue to rule, as they currently do, on defenses that do not relate to the *making* of the container contract. Such defenses include impracticability, frustration of purpose, the statute of limitations, material breach, and termination of the contract. Defenses that relate to the making of the container contract include misrepresentation, mistake, duress, undue influence, incapacity, unconscionability, the statute of frauds, and illegality.

agreement with a gun to her head. If an arbitration claim is brought against this individual and she moves the court to stay arbitration on the ground that “the making of the agreement for arbitration . . . is . . . in issue,”⁹⁸ the separability doctrine requires the court to deny her motion and compel arbitration. As *Buckeye* stated, “a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”⁹⁹ In the gunpoint example, the individual’s challenge, duress, is plainly a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause. Thus application of the separability doctrine to this case deprives the individual’s right to litigate of the protection provided by contract defenses, here, the defense of duress.

Alan Scott Rau disagrees. As noted above, he thinks the just-quoted language from *Buckeye* was merely “an unfortunate turn of phrase, sloppy and unguarded.”¹⁰⁰ In his view, “it should be obvious that a challenge can be ‘to the arbitration clause itself’ without being ‘specifically to the arbitration provision.’”¹⁰¹ He believes the separability doctrine, properly understood, would send the duress argument in the gunpoint example to the court, rather than the arbitrator.¹⁰² Of course, I hope his prediction is correct.

Where Professor Rau and I disagree is whether the separability doctrine ought to treat the contract defense of duress (as in the gunpoint example) differently from other contract defenses, such as the contract defense of misrepresentation (as in *Prima Paint*). Professor Rau would distinguish between *Prima Paint* and the gunpoint example, sending the misrepresentation claim to arbitration, while allowing a court to hear the duress claim. His basis for this distinction is that he would send to “the courts any claim at all that necessarily calls an agreement to arbitrate into question.”¹⁰³

But how does one determine whether a particular claim “necessarily calls an agreement to arbitrate into question”? Professor Rau would send the misrepresentation claim to arbitration because he does not believe F&C’s alleged misrepresentation about its financial condition necessarily calls into question *Prima Paint*’s agreement to arbitrate.¹⁰⁴ By contrast, he has stated that “[t]here

⁹⁸ 9 U.S.C. § 4 (2000).

⁹⁹ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006).

¹⁰⁰ Rau, *supra* note 3, at 14.

¹⁰¹ *Id.* (footnote omitted).

¹⁰² *Id.* at 31.

¹⁰³ *Id.* at 16 (emphasis omitted).

¹⁰⁴ “*Prima Paint* . . . preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question.” Rau, *Seventeen Simple Propositions*, *supra* note 80, at 17 (emphasis omitted). “However, quite often the unenforceability of the container agreement need not affect the validity of the consent to arbitrate at all.” *Id.* at 18 (emphasis omitted). In *Prima Paint*,

[a] number of representations had inevitably been made by F&C on which *Prima Paint* relied by entering into the deal—representations, for example, concerning the current list of F&C customers whose patronage was to be taken over by the successor company, and the financial ability of F&C to perform its contractual obligations. Both parties, represented by counsel, certainly understood that these representations were material to *Prima Paint*; they also understood that should any of them turn out to be false, *Prima Paint* might ultimately be entitled to seek rescission and perhaps even the recovery of damages. The parties might also have been aware that the falsity of any representations—and whether any falsehoods were intentional—might turn out to

is simply no agreement to anything, for example, where a signature has been forged, or where an authentic signature was obtained at gunpoint.”¹⁰⁵

While this is true with respect to forgery,¹⁰⁶ it is not with respect to the signature obtained at gunpoint. The individual who signs with a gun to her head does agree to arbitration, she does manifest assent to the terms on the document she is signing; however, she does so under circumstances in which the law properly declines to enforce her agreement. Just as when she signs a container contract in reliance on a misrepresentation regarding, say, F&C's financial condition, she does agree to arbitration, but she does so under circumstances in which the law properly declines to enforce her agreement.¹⁰⁷

require difficult factual inquiries. Is it not perfectly plausible under these circumstances 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?

...

Now if we can imagine reasons why the parties might have wished to extend arbitral jurisdiction so far—and if we think they did so—then concerns about the “validity” of the underlying agreement become completely irrelevant. In such a case, deference to the parties' choice means that the defense—whether of misrepresentation, or indefiniteness, or frustration—is not something with which a court need concern itself.

Id. at 18-20.

¹⁰⁵ *Id.* at 14 (emphasis omitted) (quoting Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT'L ARB. 213, 253 n.173 (1996)).

¹⁰⁶ The Supreme Court cases discussed above indicate that forgery arguments, like other arguments that no container contract was formed, should be heard by the court, rather than the arbitrator. See *supra* Part II.

¹⁰⁷ This is why the separability doctrine cannot be defended on the ground that it is a “default rule.” See Richard E. Speidel, *International Commercial Arbitration: Implementing the New York Convention*, in EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 185, 260 n.284 (2006) (characterizing the separability doctrine as a “default rule”); Barceló III, *supra* note 22, at 1119-22 (2003) (same); Rau, *supra* note 3, at 4 (same); see also BORN, *supra* note 22, at 73 (using the phrase “separability presumption” rather than default rule, but apparently to the same effect). A default rule is a rule that governs in the absence of an enforceable contract term to the contrary. Rules about what constitutes an enforceable contract cannot be default rules because they are logically prior to the concept of “default rule.” See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 119-20 (1989) (“[B]efore implementing any default standard, courts need to establish, as a logically prior matter, rules for deciding . . . what is sufficient to contract around a default.”). Characterizing the separability doctrine as a default rule begs the very question at issue: Why should an *unenforceable* contract be sufficient to contract around the default rule that disputes are litigated rather than arbitrated, when the law ordinarily requires an *enforceable* contract to contract around other default rules? See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999).

The only way parties could “contract around” the “law on contracting around” would be to form a contract specifying the requirements for forming later contracts among them. The original contract though, would have to be governed by mandatory rules on the formation of enforceable contracts. The mandatory rules specifying the requirements for forming an enforceable contract differ from other mandatory rules in that the former must, as a matter of logic, be mandatory.

Id. at 750. For example, suppose that parties X and Y form two contracts a year apart, and in the second contract there is no arbitration clause, but in the first contract there is a clause providing for arbitration, not only of disputes arising out of that contract, but also disputes arising out of any later contracts between the parties. What if X and Y have a dispute about

In this regard, the case of the signature at gunpoint is different from the example in which “A grasps B’s hand and compels B by physical force to write his name” on the signature line of a contract containing an arbitration clause.¹⁰⁸ As the current *Restatement of Contracts* says, “B’s signature is not effective as a manifestation of his assent, and there is no contract.”¹⁰⁹ By contrast to this example, in which there is no contract because there is no agreement, the signature obtained at gunpoint *is* an agreement, albeit one induced by an improper threat, and there is a contract, albeit one voidable at the option of the victim. The *Restatement* treats the A-grasps-B’s-hand example in its section 174 and the gunpoint example in its section 175 for good reason; they are conceptually quite distinct, with the A-grasps-B’s-hand example far more analogous to fraud in the factum and the gunpoint example far more analogous to the sort of fraud alleged in *Prima Paint*, fraud in the inducement.¹¹⁰ In the A-grasps-B’s-hand example and in fraud in the factum, there is no agreement. In the gunpoint example, as in *Prima Paint*, there is an agreement.

This foray into the doctrinal nuances of contract defenses is important because it cuts against Professor Rau’s view that there is less of an agreement to arbitration in the gunpoint example than in a fraud-in-the-inducement case like *Prima Paint*. It thus undermines Professor Rau’s contention that he can reconcile his preferred results in *Prima Paint* (arbitrator hears misrepresentation defense) and the gunpoint example (court hears duress defense) with his principle that would send to “the courts any claim at all that necessarily calls an agreement to arbitrate into question.”¹¹¹ I believe consistency requires Professor Rau to abandon that principle or change sides on either *Prima Paint* or the gunpoint example. I hope he changes sides on *Prima Paint*.

The gunpoint example has been the subject of a long and (I think) friendly and respectful exchange between Professor Rau and me. I first used the example in 1996.¹¹² Professor Rau’s first published reply was, “There is simply no agreement to anything, for example, where a signature has been forged, or where an authentic signature was obtained at gunpoint.”¹¹³ Returning to the gunpoint example a few years later, he added, “[N]o court that understood the consensual basis of *Prima Paint* could ever dream of sending such a dispute to arbitration.”¹¹⁴ Then, in 2003, he said that he was “exceedingly puzzled” by my assertion that the separability doctrine requires courts to send the gunpoint

the second contract and whether X fraudulently induced Y to enter the second contract? Each party should have the duty to arbitrate that dispute because Y has alleged a misrepresentation defense only to the second contract, but not to the first contract, the one through which Y assumed the duty to arbitrate.

Parties who want to contract around the anti-separability doctrine proposed in this article should follow this procedure. They should enter a truly separate contract.

¹⁰⁸ RESTATEMENT (SECOND) OF CONTRACTS § 174 cmt. a, illus. 1 (1981).

¹⁰⁹ *Id.*

¹¹⁰ *See id.* §§ 163-64 (distinguishing between misrepresentation that prevents formation of a contract and misrepresentation that makes a contract voidable).

¹¹¹ Rau, *supra* note 3, at 16 (emphasis omitted).

¹¹² Ware, *Employment Arbitration*, *supra* note 88, at 134-35.

¹¹³ Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT’L ARB. 213, 253 n.173 (1996) (emphasis omitted).

¹¹⁴ Rau, *supra* note 81, at 336 n.129.

case to arbitration,¹¹⁵ and he reiterated his statement that “[t]here is simply no agreement to anything, for example, where a signature has been forged, or where an authentic signature was obtained at gunpoint.”¹¹⁶

After a decade of holding my fire, in 2006, I returned to the gunpoint example and published an argument, which (like this article) contrasted the gunpoint example with the A-grasps-B’s-hand example and concluded that “[i]n the gunpoint example, as in *Prima Paint*, there is an agreement.”¹¹⁷ That same year, Professor Rau also returned to the gunpoint example, but with a changed view. Rather than sticking for a third time with his previously-expressed view that “there is simply no agreement to anything” in the gunpoint example, Professor Rau’s 2006 article says:

Consider the inevitable chestnut—I’m afraid I can’t find an actual example of this in the reports—of the agreement (arbitration clause included) entered into at gunpoint under threat of having one’s brains blown out. I have no idea whether the rather dicey nature of the “consent” given here would render the overall contract “void,” or “voidable,” or “nonexistent”—and while greater minds than mine have dwelled on the issue, for my part I really don’t much care. As usual, the verbal formulation hardly matters. But surely nothing in the Court’s opinion in [*Buckeye*] warrants any deference whatever—prospective or retrospective—to the decision of any individual in such a case who purports to act as an “arbitrator.”¹¹⁸

I applaud Professor Rau’s movement from the view that “there is simply no agreement to anything” in the gunpoint example to the view that the consent given in that example is “rather dicey.” I credit Professor Rau (perhaps alone among separability advocates¹¹⁹) for repeatedly engaging with my contention that the separability doctrine cannot accommodate a principled distinction between the gunpoint example and a misrepresentation case like *Prima Paint*. The challenge for Professor Rau remains how he can reconcile his preferred

¹¹⁵ Rau, *Seventeen Simple Propositions*, *supra* note 80, at 15 n.40.

¹¹⁶ *Id.* at 14 (emphasis omitted).

¹¹⁷ Ware, *Interstate Arbitration*, *supra* note 88, at 101.

¹¹⁸ Rau, *supra* note 3, at 31 (footnotes omitted). The “greater minds” cited are the drafters of the Uniform Commercial Code and Restatement (Second) of Contracts.

¹¹⁹ Professor Park writes:

One occasionally hears scholarly attacks on separability suggesting that the doctrine facilitates enforcement of agreements that are unconscionable or not based on informed consent.

Properly understood, however, separability should not prevent a party from resisting arbitration on the grounds of duress, unconscionability, lack of informed consent or arbitrator excess of authority. Notwithstanding the separability doctrine, courts can and do refuse to enforce an arbitration agreement tainted by duress, unconscionability, or a signatory’s lack of authority, which render the clause itself void, voidable or otherwise inoperative.

William W. Park, *Arbitration in Banking and Finance*, 17 ANN. REV. BANKING L. 213, 271-72 (1998) (footnote omitted). Unlike Professor Rau, whose argument for distinguishing between duress and misrepresentation is addressed in the text, Professor Park provides no argument for his view that the separability doctrine should apply to misrepresentation but not duress. Nor does Professor Park cite any authority for the proposition that courts, in fact, “refuse to enforce an arbitration agreement tainted by duress.” For contrary authority, see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 398 (5th Cir. 1981) (sending to arbitrator claims of duress and undue influence); *Serv. Corp. Int’l v. Lopez*, 162 S.W.3d 801, 810 (Tex. App. 2005) (The “duress . . . issue relates to the contract as a whole and not solely the arbitration provision. It is therefore an issue to be decided in arbitration.”).

outcomes in those two cases with his principle of sending to “the courts any claim at all that necessarily calls an agreement to arbitrate into question.”¹²⁰

Professor Rau acknowledges that the circumstances surrounding the agreement in the gunpoint example make the consent given “rather dicey.”¹²¹ Why isn’t the consent given in *Prima Paint* equally “dicey”? Why is consent more “dicey” in a duress case than a misrepresentation case? What are the “diceyness” criteria courts should use in deciding what arguments ought to be sent to arbitrators?

Trying to identify such criteria would be like reinventing the wheel.¹²² The common law of contracts has, over centuries, developed doctrines (like misrepresentation and duress) to serve precisely this purpose of describing circumstances that deprive consent of “its normal moral, and therefore legal, significance.”¹²³ Why not use the accumulated wisdom embodied in those doctrines? Doing so requires only that courts apply these doctrines to contracts containing arbitration clauses in the same way courts already apply them to other contracts. Again, the problem with the separability doctrine is that it separates arbitration law from an important part of contract law, the defenses to enforcement. It thus deprives the right to litigate of the protection provided by those defenses and thus makes the right to litigate alienable under lower standards of consent than contract law provides for the alienation of other rights. For this reason, I continue to believe the separability doctrine should be repealed.

2. *A Limited Separability Doctrine Compatible with Contract Law?*

Although I am not sure I see it in Professor Rau’s writings, I think he has a reply to my question of why the consent given in a misrepresentation case (like *Prima Paint*) is less “dicey” than the consent given in the gunpoint example. I think his reply is that when one signs a document with a gun to one’s head the duress eliminates the moral significance of one’s consent to *all* of the terms on the document, whereas when one signs a document induced by a misrepresentation about F&C’s financial condition the misrepresentation only eliminates the moral significance of one’s consent to the terms relating to F&C’s financial condition. In other words, the party who signs with a gun to her head alleges duress with respect to *all* of the contract’s terms, while *Prima Paint*’s allegation was that F&C only made a misrepresentation with respect to *some* of the contract’s terms.¹²⁴ Perhaps this is what Professor Rau means when he says that “there is simply no agreement to anything” in the gunpoint example while in *Prima Paint* it is “perfectly plausible . . . that [F&C and *Prima Paint*] might have chosen to submit to arbitration—not only questions with respect to the

¹²⁰ Rau, *supra* note 3, at 16 (emphasis omitted).

¹²¹ *Id.* at 31.

¹²² Ware, *Employment Arbitration*, *supra* note 88, at 112 n.138.

¹²³ Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 318 (1986) (“Traditional contract defenses can be understood as describing circumstances that, if proved to have existed, deprive the manifestation of assent of its normal moral, and therefore legal, significance.”).

¹²⁴ Similar to *Prima Paint*, Cardegna’s allegation in *Buckeye* was that only *some* of the contract’s terms were illegal.

quality of F&C's performance—but also questions with respect to whether F&C had misrepresented the quality of its performance.”¹²⁵ Perhaps Professor Rau and I could agree on a separability doctrine that distinguishes between contract defenses that prevent enforcement of *all* the contract's terms and contract defenses that only prevent enforcement of *some* of the contract's terms. Courts would rule on the former while arbitrators would rule on the latter. This would confine the separability doctrine to defenses that do not (under contract law) necessarily prevent enforcement of *all* of the contract's terms.¹²⁶ Thus enforcing the arbitration clause (and perhaps other clauses) notwithstanding the assertion of such a defense would be consistent with contract law outside the arbitration context. This limited separability doctrine would meet my goal of harmonizing arbitration law with contract law and thus providing the right to litigate with the same protection contract law provides other rights.

In contract law outside the arbitration context, for example, if a particular term of a contract is unconscionable, “a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term.”¹²⁷ If the court chooses the latter option then it is holding that the defense to enforcement (unconscionability) only prevents enforcement of *some* of the contract's terms, rather than *all* of its terms. What has just been said about unconscionable terms is also true of terms unenforceable due to public policy.

If the parties' performances can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents and one pair is not offensive to public policy, that portion of the agreement is enforceable by a party who did not engage in serious misconduct.¹²⁸

So the public policy (or illegality) doctrine, like the unconscionability doctrine, sometimes treats a defense as only preventing enforcement of *some* of the contract's terms, rather than *all* of the contract's terms. Thus, the limited separability doctrine described here would permit courts to continue sending to arbitrators arguments that the container contract is unenforceable due to public policy or unconscionability.

By contrast, my research revealed no cases in which courts held that a misrepresentation only prevented enforcement of some of the contract's terms when the victim of the misrepresentation sought to prevent enforcement of all the contract's terms.¹²⁹ Courts seem united in holding that the victim of a misrepresentation may make the entire contract voidable. In fact, one court expressly rejected the argument that misrepresentation should only prevent enforcement of some of the contract's terms.

Since a divisible contract is still only a single contract, the customary rules regarding contract formation are applicable. Those rules provide that a contract

¹²⁵ Rau, *Seventeen Simple Propositions*, *supra* note 80, at 18 (emphasis omitted).

¹²⁶ As noted above, I believe arbitrators should continue to rule on defenses that do not relate to the *making* of the container contract. *See supra* note 97. This is so even with respect to such defenses that prevent enforcement of *all* the contract's terms.

¹²⁷ RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

¹²⁸ *Id.* § 183; *see also id.* § 184(1).

¹²⁹ If the victim of the misrepresentation wants to avoid only some of the contract's terms, the court may allow it when the contract is divisible. *See id.* § 383 cmt. b.

induced by fraud renders the entire agreement voidable Since the jury here found that the Contract was induced by misrepresentations made with the intent to defraud cross-complainants, the Contract, whether divisible or not, was voidable. FMI's action to collect on it could thus be defended on the ground that the Contract had been procured by fraud.

. . .

Any other conclusion would be anomalous since even a party simply breaching a divisible portion of a contract could not enforce its unperformed portions that he or she did not breach. (Rest.2d Contracts, § 240, com. b.) Similarly, a party who has defrauded another into entering a portion of a divisible contract can not enforce the other parts not so induced. We have found no authority, and none has been cited to us, permitting a defrauder to enforce the balance of a divisible contract not induced by fraud.¹³⁰

In sum, contract law outside the arbitration (and other dispute-resolution¹³¹) context seems to treat misrepresentation (like duress) as a defense that (if proven) makes *all* the terms of the contract unenforceable, while treating unconscionability and public policy as defenses that (if proven) could make some or all of the terms unenforceable. Similarly, a limited separability doctrine would have a court rule on defenses to contract enforcement that prevent enforcement of *all* the contract's terms while enforcing the arbitration clause to have the arbitrator rule on defenses to contract enforcement that only prevent enforcement of some of the contract's terms.¹³² This limited separability doctrine would treat arbitration clauses no different from other terms of the contract and thus provide the right to litigate with the same protection contract law provides other rights.

C. *Other Arguments for the Separability Doctrine*

1. *Arguments Applicable to Both Domestic and International Arbitration*

The previous subsection of this article responds to Professor Rau's consent-based argument for the separability doctrine. This subsection responds to other arguments by separability advocates, most of which emphasize the doctrine's purported importance to arbitration.¹³³ For example, it is commonly said that the separability doctrine "permits arbitrators to invalidate the main contract (*e.g.*, for illegality or fraud in the inducement) without the risk that their decision will call into question the validity of the arbitration clause from

¹³⁰ *Filet Menu, Inc. v. C.C.L. & G., Inc.*, 94 Cal. Rptr. 2d 438, 444 (Ct. App. 2000).

¹³¹ The separability doctrine is applied to misrepresentation with respect to choice of law clauses, as well as arbitration clauses. *See, e.g.*, *Rio Props., Inc. v. Stewart Annoyances, Ltd.*, 420 F. Supp. 2d 1127, 1131-32 (D. Nev. 2006); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 201 cmt. c (1971).

¹³² Unless, of course, the arbitration clause is among the contract's terms made unenforceable by the defense, such as an unconscionable arbitration clause.

¹³³ Rau, *Seventeen Simple Propositions*, *supra* note 80, at 82 n.197; Adam Samuel, *Stephen M. Schwebel, International Arbitration: Three Salient Problems*, 5 J. INT'L ARB. 119, 120 (1988) (book review) ("Schwebel starts by setting out the justifications for the separability doctrine. He rightly points out that it is designed to reduce court interference in the arbitral process and the arbitrator's decision on the merits.").

which they derive their power."¹³⁴ Suppose, for example, that when Prima Paint receives F&C's demand for arbitration, Prima Paint decides not to go to court to allege F&C's fraudulent inducement, but instead complies with F&C's demand to submit the case to arbitration. In other words, suppose that Prima Paint participates in arbitration without ever addressing explicitly whether the arbitrator has jurisdiction to decide whether Prima Paint formed an enforceable contract containing an arbitration clause. Prima Paint's participation in arbitration consists solely of arguing the merits, that is, arguing that the contract it formed was unenforceable due to F&C's misrepresentation. Suppose further that the arbitrator concludes that F&C fraudulently induced Prima Paint to sign the consulting agreement so the arbitrator issues an award rejecting F&C's claim for payment from Prima Paint and even awarding damages to Prima Paint. The separability doctrine's advocates seem to worry that—without the doctrine—this arbitration award in favor of Prima Paint would have no legal force (that is, could not be confirmed and enforced by a court) because the arbitrator's only power to render the award came from a contract, the consulting agreement, that the arbitrator held unenforceable.

In fact, however, the arbitrator's power came, not just from the consulting agreement, but also from a post-dispute agreement to arbitrate. When (in the hypothetical) F&C demanded arbitration and Prima Paint complied with that demand by participating in arbitration, the parties formed a post-dispute agreement to arbitrate. The agreement was formed, not by mutual assent to a writing, but by conduct. By arguing the merits to the arbitrator, without questioning the arbitrator's jurisdiction to decide the merits, Prima Paint conferred that jurisdiction on the arbitrator, that is, Prima Paint agreed to arbitrate the merits. More importantly, this post-dispute agreement is not an executory agreement, but rather one that has been performed; both sides participated in the arbitration and the arbitrator rendered an award. What could be the ground for vacating such an award? None of the grounds for vacatur in the FAA would be satisfied.¹³⁵ And even before enactment of the FAA, when courts generally refused to enforce executory arbitration agreements, they did enforce arbitration awards.¹³⁶ It is unlikely a contemporary court would refuse to enforce an arbitration award—rendered after both sides manifested assent to arbitration by participating in it—on the ground that the arbitrators deprived

¹³⁴ William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133, 143 (1997); see also BORN, *supra* note 22, at 68 ("Another possible consequence of the separability doctrine is that, if an arbitral tribunal or court concludes that the parties' entire underlying contract was void, that conclusion would not necessarily deprive the parties' arbitration agreement—and hence, in a Catch-22 turn, the arbitrators' award—of validity."); Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Come from Nothing?*, 13 AM. REV. INT'L ARB. 19, 20-21 (2002) ("[S]eparability means that . . . a party's challenge to the validity of the underlying contract does not automatically deprive the arbitral tribunal of jurisdiction to resolve the parties' dispute concerning the challenged contract.").

¹³⁵ 9 U.S.C. § 10 (2000).

¹³⁶ IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* ch. 4 (1994); see also IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 19 (1992).

themselves of the power to render the award by the very act of rendering it, that is, holding that the container contract is unenforceable.¹³⁷ So the separability doctrine is not necessary to avoid that unfortunate quandary.

Perhaps in response to such arguments, one of the separability doctrine's prominent advocates, William Park, writes:

Occasionally one hears suggestions that an estoppel doctrine could achieve the same goal [as the separability doctrine], by deeming a party who participated in the arbitration to have waived the right to challenge the award. Such an approach, however, would not deal adequately with the common situation in which an arbitrator rules on several claims and/or counterclaims, but has jurisdiction only over some of them. Moreover, an estoppel or waiver doctrine would likely encourage boycott of arbitral proceedings.¹³⁸

¹³⁷ It is true that both the FAA and the New York Convention require a *written* arbitration agreement for a court to confirm an arbitration award. See 9 U.S.C. § 13 (2000) (stating that the party moving for an order confirming an award shall file the arbitration agreement); United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 4, § 1(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. But contemporary courts are likely to hold that parties who participate in arbitration without questioning the arbitrator's jurisdiction are estopped from relying on the absence of a written agreement to arbitrate. See *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580 (7th Cir. 2001).

Assuming that this case had come to the district court and the IAAF had sought to compel Slaney to arbitrate her claims, a determination as to whether there had been a writing might pose a barrier to the IAAF's position. However, that is not the case. Here, an arbitration has already taken place in which, as we have determined, Slaney freely participated. Thus, the fact that Slaney suggests there is no written agreement to arbitrate, as mandated by Article II of the New York Convention is irrelevant. See *e.g.*, *Coutinho Caro & Co., U.S.A., Inc. v. Marcus Trading Inc.*, Nos. 3:95CV2362 AWT, 3:96CV2218 AWT, 3:96CV2219 AWT, 2000 WL 435566 at *5 n.4 (D. Conn. March 14, 2000) (recognizing a difference between the situation where a party seeks to compel arbitration and a situation in which one attempts to set aside an arbitral award that has already been issued). What is highlighted here is the difference between Article II of the Convention, which dictates when a court should compel parties to an arbitration, and Article V, which lists the narrow circumstances in which an arbitration decision between signatories to the Convention should not be enforced.

Id. at 591. "The [*Slaney*] court went on to apply ordinary rules of contract law in holding that the plaintiff was estopped from arguing that the lack of a binding written agreement precluded enforcement because she had participated freely in the arbitration proceeding, had not argued that she never agreed to the arbitration clause during those proceedings, and had let the opportunity to do so pass by when she withdrew from those proceedings." *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 284 (3d Cir. 2003); see also *id.* at 285 n.11 (reconciling *Slaney* with *First Options*). Any doubt about whether all courts would use *Slaney*'s estoppel reasoning counsels for repeal of the language in the FAA and New York Convention requiring a written arbitration agreement for confirmation of an arbitration award. See JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* (2003).

Many modern arbitration laws consider any participation in proceedings on the merits without challenging the jurisdiction of the tribunal as a submission to arbitration. For example, Article 16(2) [UNCITRAL] Model Law [on International Commercial Arbitration] provides that any objection to the jurisdiction of an arbitration tribunal has to be raised no later than the statement of defence. After this time there is a deemed acceptance of the arbitration and a later challenge to jurisdiction would be estopped.

Id. at 330-31.

¹³⁸ Park, *supra* note 119, at 270 n.224.

Whether the arbitrator has jurisdiction over some or all claims is determined by interpreting the agreement submitting the dispute to arbitration.¹³⁹ In the case of an agreement formed by conduct, rather than assent to a writing, the parties take the risk that the arbitrator and any reviewing court will interpret the agreement to give the arbitrator jurisdiction over all claims the arbitrator thought to rule on. If a party does not like that risk then it should not participate in arbitration without a written agreement specifying which claims are, and are not, being submitted to the arbitrator.¹⁴⁰ Similarly, in the absence of the separability doctrine, a party who does not want to comply with the arbitrator's rulings on challenges to the enforceability of the container contract should not participate in arbitration until a court rules on such challenges.¹⁴¹ If this is what Professor Park calls "encourag[ing] boycott of arbitral proceedings," then such encouragement is positive. After all, it ensures that parties who want a court to rule on the enforceability of the container contract get such a ruling¹⁴² and rightly allocates to parties who go to arbitration without such a ruling the consequences of leaving the question to the arbitrator.

2. *Arguments Applicable to International Arbitration Only*

In the international arbitration context, some argue, the previous paragraph's reasoning does not apply "[f]or normally there is no international court with compulsory jurisdiction to determine and enforce the validity of the inter-

¹³⁹ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986).

¹⁴⁰ Such agreements are, in arbitration before the International Chamber of Commerce, called "Terms of Reference." See W. LAURENCE CRAIG ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* (3d ed. 2000).

Even if no longer necessary to ensure compliance with national procedural laws requiring a *compromis* [post-dispute arbitration agreement], the preparation of the Terms of Reference at the outset of the proceeding clarifies the issues to be decided by the arbitrators and the rules and powers they are to use in conducting the case. The existence of such a document further serves as a protection against attacks on an award on the grounds that the arbitrators had exceeded their authority or had ruled on issues not submitted to them.

Id. at 274.

¹⁴¹ *First Options*, 514 U.S. at 946-47, can be read to the contrary. However, the facts of *First Options* differ in an important respect from the hypothetical facts discussed in the text. In the hypothetical, Prima Paint's participation in arbitration (arguing the merits of the case without questioning the arbitrator's jurisdiction to decide the merits) is a manifestation of assent to the arbitrator deciding, among other things, whether Prima Paint formed an enforceable contract containing an arbitration clause. In *First Options*, by contrast, the Kaplans' participation in arbitration consisted primarily of arguing that they had never manifested assent to the arbitrator deciding whether they had formed an enforceable contract to arbitrate. *Id.* Thus *First Options*' holding that the Kaplans' participation in arbitration did not constitute a waiver of the right to have a court decide whether they had formed an enforceable contract to arbitrate can be reconciled with a holding in the hypothetical that Prima Paint has waived its right to have a court decide whether it had formed an enforceable contract to arbitrate. That said, under the anti-separability doctrine I propose, the safer course for those in the Kaplans' position is to stay out of arbitration because any participation in arbitration could be (mis?)interpreted by a court as waiver of the right to have a court decide whether an enforceable contract to arbitrate was formed.

¹⁴² It thus vindicates the principle that a court should not send a dispute to arbitration unless the parties have formed an enforceable contract requiring arbitration of that dispute. See *supra* Part III.A.

national [arbitration] agreement.”¹⁴³ But the national court of the party opposing arbitration has likely jurisdiction over that party.¹⁴⁴

The separability doctrine’s advocates’ likely worry is that that national court would be biased in favor of the party opposing arbitration and thus refuse to enforce an executory arbitration agreement that it really should enforce. But avoiding that biased court at the stage of enforcing an executory arbitration agreement does no good if that same biased court can later prevent enforcement of an arbitration award against its preferred party.

In some cases, of course, a biased court cannot prevent enforcement of an arbitration award because, for example, the assets necessary to satisfy the award are outside that court’s jurisdiction and within the jurisdiction of a court willing to enforce the award (the “good court”). But if the good court is willing to defy the biased court at the award-enforcement stage, it should also be willing to defy the biased court at the executory-agreement stage.¹⁴⁵ Ultimately, whether international arbitration decisions are more than hortatory turns on whether good courts are willing and able to enforce such decisions, not whether courts get involved only at the end of the process (as required by the separability doctrine) or also earlier (as would sometimes occur without the separability doctrine).¹⁴⁶

IV. CONCLUSION

While I believe this article refutes many of the common arguments for the separability doctrine, I concede that the “anti-separability” rule I propose has downsides. Having a court available to resolve disputes over whether the parties have formed an enforceable container contract (before an arbitrator resolves the merits of the claims) would add an extra procedural step that would often make arbitration slower and costlier than it is under the separability doctrine, which resolves in one forum disputes about both the enforceability of the container contract and the merits.¹⁴⁷ In addition, this anti-separability

¹⁴³ SCHWEBEL, *supra* note 96, at 4.

¹⁴⁴ Otherwise, how would that party have access to any court system?

¹⁴⁵ The good court’s standards of personal jurisdiction may, however, be more stringent at the executory-agreement stage than the award-enforcement stage. See William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 268-84 (2006) (discussing split of authority among courts in the United States).

¹⁴⁶ The reasoning in the text also responds to other arguments for the separability doctrine in the international context. An example is the argument that in cases

in which the agreement runs not between two persons or companies of different nationality but between a foreign contractor and a government, not only would the contractor be loath to seek enforcement of his arbitral remedy [enforcement of the executory arbitration agreement] in national courts; often national courts would lack the authority to require the executive branch to arbitrate contrary to its will, its executive order or national legislation.

SCHWEBEL, *supra* note 96, at 4. Again, whether international arbitration decisions are more than hortatory turns on whether good courts are willing and able to enforce such decisions, not whether courts get involved only at the end of the process (as required by the separability doctrine) or also earlier.

¹⁴⁷ The anti-separability procedure would allow a party who expects to lose in arbitration to delay arbitration by fabricating an allegation that the container contract is unenforceable.

procedure would have a court resolving issues that will often be intertwined with the merits that will go to the arbitrator if the court finds that the parties have formed an enforceable container contract.¹⁴⁸ In short, repealing the separability doctrine will come at a price to both disputants and adjudicators. That price, however, must be paid to ensure that no dispute is sent to arbitration unless the parties have formed an enforceable contract requiring arbitration of that dispute. In short, the practical advantages the separability doctrine provides should be sacrificed in order to ensure that the right to litigate receives the protection of contract-law's defenses to enforcement. The latter is worth sacrificing the former.

I do not think it is a coincidence that advocates of the separability doctrine are found most commonly among those who have written extensively on *international* arbitration.¹⁴⁹ Whether to have the separability doctrine is, at bottom, a question of how much importance one places on (1) the right to litigation and (2) the protection provided by contract-law's defenses to enforcement. Each of these factors is generally less important in the international context than in the domestic context. In the international context, the right to litigation is of less practical value because courts, and the enforcement of judgments, tend to be less reliable. And the types of parties typically forming international arbitration agreements (governments and large corporations) can generally be expected to protect themselves from the conduct that would give rise to a contract defense better than the ordinary individuals who often form domestic arbitration agreements. So I can understand why international arbitration specialists would reject my call for repeal of the separability doctrine. I ask only that, in doing

See *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 590 (7th Cir. 2001) (“[I]t is easy to cry fraud.”); *W. MICHAEL REISMAN ET AL.*, *INTERNATIONAL COMMERCIAL ARBITRATION* 540 (1997) (“[I]t is all too easy for a party seeking to derail an arbitration at its inception to claim that the main agreement was or had become invalid.”). Perhaps parties who refuse to go to arbitration without a court's determination that the container contract is enforceable should, if they lose on that determination, be required to pay the other side's legal fees and costs. Additional sanctions might also be imposed. *See* FED. R. CIV. P. 11(c).¹⁴⁸ For example, in *Prima Paint*, if a court had sent F&C's claim for payment to arbitration only after determining that Prima Paint's consent to the consulting agreement was not induced by misrepresentation, the court would have already decided much of the dispute it was sending to arbitration because Prima Paint's argument on the merits, its defense to payment, was misrepresentation.

In the absence of the separability doctrine, courts deciding whether to send disputes to arbitration often would, as in this example, become entangled with the merits of the dispute. If the court sent a dispute to arbitration after effectively ruling on the merits, the arbitrator would have two choices. The arbitrator could reconsider the merits *de novo*, which would require the parties to adjudicate the merits twice and create the possibility of inconsistent results. Or the arbitrator could rubber-stamp the court's view of the merits, which would make the arbitration agreement effectively unenforceable because the parties would get a court's, rather than an arbitrator's, decision on the merits.

¹⁴⁹ *See* SCHWEBEL, *supra* note 96; Speidel, *supra* note 107; Barceló, *supra* note 22; Park, *supra* note 119; Rau *supra* note 3; Smit, *supra* note 134. By contrast, the only scholars I can recall criticizing the separability doctrine are people who have written more on domestic, than international, arbitration. In addition to me, that short list includes Kenneth R. Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 *FORDHAM URB. L.J.* 167, 195-96 (1998); Reuben, *supra* note 55; and Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 *TUL. L. REV.* 1377, 1456-59 (1991).

so, they acknowledge that they are depriving the right to litigate of the protection provided by contract-law's defenses to enforcement. In other words, I ask that they acknowledge that the separability doctrine—unlike nearly all the rest of arbitration law—is incompatible with, and thus cannot be justified as an application of, contract law.