
ESSAY

FOLLOWING THE LETTER OF THE LAW INTO ABSURDITY: WHY THE SUPREME COURT'S SEVERABILITY RULE DOES NOT PRECLUDE DETERMINING AN ARBITRATION PROVISION'S ENFORCEABILITY UNDER THE LAW SUPPLIED BY AN AGREEMENT'S GENERAL CHOICE-OF-LAW CLAUSE

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INTRODUCTION

A new hire signs an employment agreement. The agreement contains an arbitration provision. Embedded in the arbitration provision is a one-sentence delegation clause granting the arbitrator exclusive authority to decide threshold issues of arbitrability, including whether the arbitration provision is valid and enforceable. The agreement has a general choice-of-law clause providing that California law applies to the entire agreement, including the arbitration provision and delegation clause. An employee based outside California sues the employer in court and argues that the arbitration provision and delegation clause are unenforceable. Should the court apply California law or the law of the employee's home state to the enforceability analysis? Several courts have confronted and wrongly answered that question in recent litigation involving Uber. Why they got it wrong—their misapplication of the Supreme Court's severability rule—is the subject of this essay.

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Specifically, these courts held that the California choice-of-law clause in the agreement between Uber and its drivers does not apply to the arbitration provision and delegation clause because, under *Buckeye Check Cashing, Inc. v. Cardegna*¹ and *Rent-A-Center, West, Inc. v. Jackson*,² these provisions are severable from the rest of the agreement. Because the arbitration provision and delegation clause, once severed, do not contain their own choice-of-law clauses, the courts applied the law of the drivers' home states to determine their enforceability. In other words, the courts interpreted the severability rule as requiring them to treat the arbitration provision and delegation clause as separate, standalone contracts. But the severability rule requires no such thing.

Rather, the severability rule applies only to determine whether a court may properly adjudicate a challenge to the enforceability of an arbitration provision or delegation clause. A court may not consider a non-specific challenge to the validity of the overall agreement in which an arbitration provision or delegation clause is contained, but may consider a direct challenge to the enforceability of those provisions. As such, “[w]hen a party challenges a contract, ‘but not specifically its arbitration provision [or delegation clause], those provisions are enforceable apart [i.e., severable] from the remainder of the contract,’”³ and the dispute is sent to arbitration. This is “akin to a pleading standard, whereby a party seeking to challenge the validity of an arbitration agreement [or delegation clause] must expressly say so in order to get his dispute into court.”⁴ “All that matters is whether the party seeking to present the issue to a court has brought a discrete challenge to the validity of the . . . arbitration [provision or delegation] clause.”⁵ Accordingly, so long as a plaintiff specifically challenges the enforceability of the arbitration provision or delegation clause, such that the severability rule is satisfied, a court should determine their enforceability under the law supplied by an agreement’s choice-of-law clause.

Part I of this essay discusses the severability rule, including its origin and proper application. Part II addresses several recent Uber decisions where courts misinterpreted the severability rule and held that it prevented them from applying California law to determine whether the driver agreement’s

1 546 U.S. 440 (2006).

2 561 U.S. 63 (2010).

3 *Id.* at 76 (Stevens, J., dissenting) (quoting *Buckeye Check Cashing*, 546 U.S. at 446).

4 *Id.* at 80.

5 *Id.* at 84 (citations omitted) (internal quotation marks omitted). *See also id.* at 83-84 (“[W]e consider whether the parties are actually challenging the validity of the arbitration agreement, or whether they are challenging, more generally, the contract within which an arbitration clause is nested. In the latter circumstance, we assume there is no infirmity *per se* with the arbitration agreement, *i.e.*, there are no grounds for revocation of the arbitration agreement itself under § 2 of the [Federal Arbitration Act]. Accordingly, we commit the parties’ general contract dispute to the arbitrator, as agreed.”).

arbitration provision and delegation clause are enforceable. Part III explains that these courts' construction of the severability rule is also inconsistent with basic principles of contract law. This essay concludes by noting the absurd consequences that result from the courts' misapplication of the severability rule.

I. THE SEVERABILITY RULE

The severability rule is concerned with whether a court may hear a challenge to the enforceability of an arbitration provision or delegation clause: a court may consider a direct challenge to those provisions, but not a nonspecific challenge to the agreement as a whole.

The rule originated in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, which held that

if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the “making” of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language [of the Arbitration Act] does not permit the federal court to consider claims of fraud in the inducement of the contract generally.⁶

Buckeye Check Cashing expanded *Prima Paint's* holding beyond the fraudulent-inducement context: “[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract . . . [U]nless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”⁷

Rent-A-Center took the severability rule one step further by applying it to a delegation clause: “Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2 [of the Federal Arbitration Act], and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.”⁸ Prior to coming to its conclusion, the Court explained the rationale underlying the severability rule:

There are two types of validity challenges under § 2: “One type challenges specifically the validity of the agreement to arbitrate [or delegation clause],” and “[t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract’s

⁶ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

⁷ *Buckeye Check Cashing*, 546 U.S. at 445-46; *id.* at 446 (“[W]e conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.”).

⁸ *Rent-A-Center*, 561 U.S. at 72.

provisions renders the whole contract invalid.” In a line of cases neither party has asked us to overrule, we held that only the first type of challenge is relevant to a court’s determination whether the arbitration agreement at issue is enforceable. That is because § 2 states that a “written provision” “to settle by arbitration a controversy” is “valid, irrevocable, and enforceable” *without mention* of the validity of the contract in which it is contained. Thus, a party’s challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate [or delegation clause]. “[A]s a matter of substantive federal arbitration law, an arbitration provision [or delegation clause] is severable from the remainder of the contract.”

But that agreements to arbitrate are severable does not mean that they are unassailable. If a party challenges the validity under § 2 of the precise agreement to arbitrate [or delegation clause] at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4.⁹

Put differently, the severability rule merely “require[s] the basis of [the] challenge to be directed specifically to the agreement to arbitrate [or delegation clause] before the court will intervene.”¹⁰

In short, the severability rule is akin to a pleading standard, and it is no longer applicable once a plaintiff specifically challenges the enforceability of the arbitration provision or delegation clause.¹¹ The severability rule does not require the court to treat the arbitration provision and delegation clause as distinct contracts—separated from the remainder of the agreement—during the enforceability analysis. Significantly, the Supreme Court made this clear in *Rent-A-Center* when it endorsed the application of “common procedures” from the rest of the arbitration provision to argue the unconscionability of a delegation clause (which is severable from the arbitration provision and surrounding agreement):

Jackson’s other two substantive unconscionability arguments assailed arbitration procedures called for by the contract—the fee-splitting

⁹ *Id.* at 70-71 (footnote omitted) (citations omitted).

¹⁰ *Id.* at 71.

¹¹ See *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 20-21 (2012) (“[I]t is a mainstay of the Act’s substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a federal or state court. *For these purposes*, an arbitration provision is severable from the remainder of the contract” (emphasis added) (internal quotation marks and citations omitted)); *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 301 (2010) (noting that, in *Buckeye Check Cashing*, the Court “simply applied the requirement in § 2 of the FAA that courts treat an arbitration clause as severable from the contract in which it appears and enforce it according to its terms *unless* the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself” (emphasis added)).

arrangement and the limitations on discovery—procedures that were to be used during arbitration under *both* the agreement to arbitrate employment-related disputes *and* the delegation provision. It may be that had Jackson challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court.¹²

Numerous other courts have similarly held that the severability rule does not require courts to treat delegation clauses and arbitration provisions as separate contracts, isolated from the agreements that house them.¹³

II. DECISIONS MISAPPLYING THE SEVERABILITY RULE

There is a line of decisions involving Uber that misconstrue the meaning and purpose of the severability rule. Instead of applying the rule according to the Supreme Court's instructions in *Buckeye Check Cashing* and *Rent-A-Center*, the courts, apparently overly focused on the literal meaning of the word “sever,” use the rule as an excuse to excise the arbitration provision and delegation clause from the surrounding agreement and treat them as separate, freestanding contracts.

For example, in *Zorilla v. Uber Technologies, Inc.*, driver plaintiffs from Texas asserted a variety of unfair competition and employment-related claims against Uber.¹⁴ Uber moved to compel arbitration under the November 10, 2014 driver agreement.¹⁵ The agreement contains several relevant provisions. On the first page, it expressly provides that the arbitration provision (which includes the delegation clause) is part of the agreement: “By virtue of your electronic execution of this Agreement, you will be acknowledging that you have read and understood all of the terms of this Agreement (including the arbitration provision)[.]”¹⁶ It has a California choice-of-law clause that applies

¹² *Rent-A-Center*, 561 U.S. at 74.

¹³ See, e.g., *Senior Mgmt., Inc. v. Capps*, 240 Fed. Appx. 550, 553 (4th Cir. 2007) (“Plaintiffs’ assertions to the contrary, *Prima Paint* does not stand for the proposition that the district court may look to an arbitration provision in isolation”); *Glazer v. Lehman Bros.*, 394 F.3d 444, 453 (6th Cir. 2005) (“[A]rbitration provisions, although severable insofar as they are considered in determining whether a contractual dispute should be submitted to arbitration, are not ‘separate, independent and distinct contracts.’ Although *Prima Paint* clearly requires courts to separately examine arbitration clauses, those clauses should not be considered as ‘separate contracts’ outside of the underlying agreement.”); *Yaroma v. Cashcall, Inc.*, 130 F. Supp. 3d 1055, 1067 (E.D. Ky. 2015) (“[A]n arbitration provision is severable from the remainder of the contract, although not in the sense that such provisions are considered *separate and distinct contracts*.” (internal quotation marks and citations omitted)).

¹⁴ *Zorilla v. Uber Techs., Inc.*, No. 4:16-CV-615, 2017 WL 3278061, at *3 (S.D. Tex. Mar. 16, 2017).

¹⁵ *Id.*

¹⁶ *Rasier, LLC, Software License and Online Services Agreement* pmlb. (Nov. 10, 2014), https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/Partner%20Agreement

to “[t]he interpretation of this Agreement[.]”¹⁷ The arbitration provision “applies to any dispute arising out of or related to this Agreement[.]”¹⁸ Finally, the arbitration provision contains a delegation clause stating that “[s]uch disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision[.]”¹⁹

Plaintiffs contended that the delegation clause was unconscionable.²⁰ The parties disputed whether California or Texas law applied to the enforceability analysis. “Plaintiffs argue[d] that California law applies because the general choice-of-law provision should apply to the delegation provision.”²¹ Uber, on the other hand, “argue[d] that Texas law applies because the delegation provision must be severed from the arbitration agreement as a whole, and that the choice-of-law provision thus has no effect on the delegation provision.”²²

The court agreed with Uber:

If the arbitration agreement—which includes no choice-of-law provision—is separate from the rest of the November 2014 Agreement, and the delegation provision is antecedent to the arbitration agreement, then the delegation provision includes no choice-of-law provision. Thus, the choice-of-law provision has no effect on this Court’s determination of the enforceability of the delegation provision.²³

It then went on to find that the delegation clause was not substantively or procedurally unconscionable under Texas law.²⁴ Because the delegation clause was enforceable, there was no reason for the court to examine the arbitration provision—that was a job for the arbitrator.²⁵

The court in *Zawada v. Uber Technologies, Inc.*, conducted a similar analysis.²⁶ The court found, relying on *Buckeye Check Cashing*, that “the arbitration clause must be construed independent from the remainder of the contract” because, “[a]s a matter of substantive federal arbitration law, an arbitration provision is severable from the rest of the remainder of the contract.”²⁷ The court applied Michigan law because “the Arbitration

²⁰November%2010%202014.pdf [https://perma.cc/8WYG-WKH7] (emphasis removed).

¹⁷ *Id.* at § 15.1.

¹⁸ *Id.* at § 15.3.i.

¹⁹ *Id.*

²⁰ *Zorilla*, 2017 WL 3278061, at *3.

²¹ *Id.* at *5.

²² *Id.*

²³ *Id.* (footnote omitted).

²⁴ *Id.* at *6-7.

²⁵ *Id.* at *7.

²⁶ *Zawada v. Uber Techs., Inc.*, No. 16-cv-11334, 2016 WL 7439198 (E.D. Mich. Dec. 27, 2016).

²⁷ *Id.* at *5 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006)).

Provision . . . does not itself contain a choice of law provision.”²⁸ The court then determined that neither the delegation clause nor arbitration provision were unconscionable under Michigan law.²⁹

But, as provided above, *Rent-A-Center* itself makes clear that the severability rule does not require courts to treat arbitration provisions and delegation clauses as completely separate contracts, isolated from the rest of the agreement in which they are contained.³⁰ As such, there is nothing preventing the application of California law to these provisions, as the choice-of-law clause requires. Significantly, other courts have addressed this choice-of-law issue and reached the conclusion advocated in this essay.

For example, in *Overstreet v. Contigroup Cos.*, the Fifth Circuit addressed the severability rule immediately before applying the law from an agreement’s choice-of-law clause to determine whether an arbitration provision is unconscionable:

As an initial matter, the parties disagree on whether, in deciding the unconscionability issue, Mississippi or Georgia law applies. The district court decided that Mississippi and Georgia law are “essentially the same” and used both in its analysis. To the extent that the court relied on Mississippi law in addressing the unconscionability issue, it erred.

As we discussed above, the only issue properly before us is the validity of the arbitration clause itself, not the validity of the contract in its entirety. See *Buckeye Check Cashing* As a result, at least for the purposes of our analysis, the validity of the Georgia choice of law provision applicable to the parties’ contract has not been called into question. Therefore, we see no reason to disregard the parties’ agreement to apply Georgia law to their contract.³¹

After similarly noting the applicability of *Buckeye Check Cashing*, the Third Circuit explained its rationale for enforcing a choice-of-law provision in *Gay v. CreditInform*:

The cardinal principle of the law of arbitration is that “under the [FAA arbitration] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. That freedom extends to choice-of-law provisions governing agreements, including agreements to arbitrate.

. . . .

Inasmuch as we have determined that we should enforce the . . . choice-of-law provision selecting the application of Virginia law, we

²⁸ *Id.* at *6 (citing *Buckeye*, 546 U.S. at 445).

²⁹ *Id.* at *5-7.

³⁰ *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 74 (2010).

³¹ *Overstreet v. Contigroup Cos.*, 462 F.3d 409, 411 (5th Cir. 2006).

consider whether the arbitration provision in the Agreement is unconscionable under that law.³²

In fact, courts throughout the country *routinely* apply the law supplied by an agreement's choice-of-law clause to evaluate the enforceability of an arbitration provision or delegation clause in a separate section of the same agreement.³³ The Uber courts' failure to do so is a result of their fundamental misunderstanding and misapplication of the severability rule. Indeed, the decisions—which have built on one another to form a small body of erroneous case law³⁴—appear to be supported by nothing more than the dictionary definition of the word “sever.”

³² *Gay v. CreditInform*, 511 F.3d 369, 388-91 (3d Cir. 2007) (citation omitted).

³³ *See, e.g., Dziubla v. Cargill, Inc.*, 214 Fed. Appx. 658, 659 (9th Cir. 2006) (“Also unconvincing is Dziubla’s claim that the JVA’s [Joint Venture Agreement] arbitration clause is unconscionable. Under New York law per the JVA’s choice of law clause, Dziubla must show both procedural and substantive unconscionability.”); *Suburban Leisure Ctr., Inc. v. AMF Bowling Prods., Inc.*, 468 F.3d 523, 526 (8th Cir. 2006) (applying Virginia law pursuant to choice-of-law provision after determining that both Virginia and the forum state of Missouri enforce choice-of-law provisions); *Leafguard of Kentuckiana, Inc. v. Leafguard of Kentucky, LLC*, 138 F. Supp. 3d 846, 853-54 (E.D. Ky. 2015) (upholding a choice-of-law provision in evaluating a challenged arbitration clause); *Duncan v. Banks*, No. SA-15-CV-148-XR, 2015 WL 5511253, at *6-8, *14-16 (W.D. Tex. Sept. 16, 2015) (applying Delaware law from an agreement’s choice-of-law clause to determine enforceability of delegation clause and arbitration provision); *Burton’s Pharm., Inc. v. CVS Caremark Corp.*, No. 1:11CV2, 2015 WL 5430354, at *4-7 (M.D.N.C. Sept. 15, 2015) (applying Arizona law from an agreement’s choice-of-law clause to evaluate whether an arbitration provision is unconscionable); *Hopkinton Drug, Inc. v. CaremarkPCS, LLC*, 77 F. Supp. 3d 237, 245-48 (D. Mass. 2015) (using, without specific discussion, the state law indicated in the choice-of-law provision to rule on a challenged arbitration clause); *Champion Auto Sales, LLC v. Polaris Sales Inc.*, 943 F. Supp. 2d 346, 351-52 (E.D.N.Y. 2013) (applying Minnesota law from an agreement’s choice-of-law clause to evaluate whether arbitration provision is unconscionable); *Effio v. Fedex Ground Package*, No. cv-08-1522-PHX-ROS, 2009 WL 775408, at *1-5 (D. Ariz. Mar. 20, 2009) (applying Pennsylvania law from an agreement’s choice-of-law clause to determine whether an arbitration provision is unconscionable); *Oyler v. Fin. Indep. & Res. Educ.*, No. 1:07-CV-0982, 2008 WL 275729, at *2 (M.D. Pa. Jan. 30, 2008) (“The contract in the instant case contains a choice of law clause stating that Florida law governs the agreement between the parties. Accordingly, Oyler’s unconscionability defense will be evaluated using principles of Florida law.” (footnote and citation omitted)); *Rex v. CSA-Credit Sols. of Am., Inc.*, 507 F. Supp. 2d 788, 794-95 (W.D. Mich. 2007) (evaluating unconscionability of arbitration provision under Texas law as required by an agreement’s choice-of-law clause).

³⁴ Like a snowball rolling downhill, other courts have relied on the same faulty analysis and ruled the same way. *See, e.g., Carey v. Uber Techs., Inc.*, No. 1:16-cv-1058, 2017 WL 1133936, at *6 (N.D. Ohio Mar. 27, 2017) (“The Agreement generally provides that California law applies, but challenges to the validity of an arbitration provision are considered independently from the rest of the Agreement. As a matter of substantive federal arbitration law, an arbitration provision is severable from the rest of the remainder of the contract *Rent-A-Center* extended the separability rule . . . to delegation provisions within arbitration agreements. Neither the arbitration provision nor the delegation provision contain[s] a choice-of-law clause. Absent an effective choice of law provision, Ohio courts apply the law of the state with the most significant relationship to the contract.” (internal quotation marks and citations omitted)).

More is at stake here than just a few erroneous decisions involving an unusually prominent defendant. As *Rent-A-Center* and *Buckeye Check Cashing* make clear, the purpose of the severability rule is to preserve, insofar as possible, the parties' agreement to arbitrate. The Uber courts' misguided fixation on literally "severing" a challenged arbitration provision into an entirely new and freestanding agreement frustrates the entire object of the doctrine they purport to apply.

III. PRINCIPLES OF CONTRACT INTERPRETATION

The Uber courts' erroneous application of the severability rule also runs afoul of basic contract law. "[T]he object in interpreting or construing a written contract is to ascertain the meaning and intent of the parties as expressed in and determined by the words they used[.]"³⁵ It is a "well-established principle that it is not the function of the judiciary to change the obligations of a contract which the parties have seen fit to make."³⁶ In other words, "the court must enforce it as drafted by the parties, according to the terms employed, and may not make a new contract for the parties or rewrite their contract while purporting to interpret or construe it."³⁷ That means that "a court is not at liberty to revise, modify, or distort an agreement while professing to interpret or construe it and has no right to make a different contract from that actually made by the parties."³⁸

But the Uber courts disregarded these rules and rode roughshod over the parties' agreement. As provided above, the parties expressly agreed to apply California law to the *entire* agreement, including the arbitration provision and delegation clause. Nonetheless, the courts paid no mind to the parties' decision to have one general choice-of-law clause and used an improper interpretation and application of the severability rule to gut their agreement.

CONCLUSION

Adopting the interpretation of the severability rule articulated in the Uber decisions discussed above is inconsistent with the Supreme Court precedent establishing the rule, as well as other district and circuit court decisions across the country applying the rule. It also does not pass the smell test because it results in absurd consequences. For example, if the parties wanted California law to apply they would be required to include three identical choice-of-law clauses: one in the agreement, one in the arbitration

35 11 WILLISTON, CONTRACTS § 31:4 (4th ed. 1990).

36 *Id.* § 31:5.

37 *Id.* (footnotes omitted).

38 *Id.* (footnote omitted).

provision, and one in the delegation clause. Given that the delegation clause is itself only one sentence embedded in the arbitration provision it is a struggle to imagine what such a choice-of-law clause would even look like. Moreover, walling the arbitration provision and delegation clause off from the rest of the agreement also means that none of the other general provisions—such as the parties’ identifying information, details of the transaction, definitions, effective dates, consideration, signature page, etc.—would apply. The lesson is clear: when the application of a rule leads to nonsensical results, like here, the application is usually wrong. At the very least, it is a red flag that should prompt a court to do a deeper dive. Had the Uber courts done so, binding precedent, widespread practice, and common sense would have counseled them against their mistaken application of the severability rule.

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