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What a Contract Has Joined Together Let No Court Cast Asunder: Abolishing Separability and Codifying the Scope of the Provisions of Arbitration Agreements

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WHAT A CONTRACT HAS JOINED TOGETHER LET NO COURT CAST ASUNDER: ABOLISHING SEPARABILITY AND CODIFYING THE SCOPE OF THE PROVISIONS OF ARBITRATION AGREEMENTS

Taylor Payne & Richard Bales*

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ABSTRACT

The doctrine of separability states that a contract containing an arbitration agreement is “separable” from the arbitration agreement such that the arbitration agreement is enforceable even if terms of the “container” contract would otherwise make the entire contract unenforceable. However, the federal circuits are split on how to apply this doctrine when terms of the arbitration agreement itself are unenforceable. Circuits that follow the Severance approach sever unenforceable provisions from arbitration agreements and enforce the remainder of the arbitration agreement. Circuits that follow the Stand or Fall Together approach void arbitration agreements with unenforceable provisions and enforce the container contract without the arbitration agreement.

This Article argues that Congress should abolish the separability doctrine and amend the Federal Arbitration Act to render specific types of arbitration agreement provisions as void ab initio. Codifying certain types of provisions as void ab initio would make those types of provisions unenforceable as a matter of law. This proposal would reduce litigation over unenforceable provisions, create easily applicable rules for drafting arbitration agreements, settle expectations, and allow parties to a contract to utilize all contract defenses.

I. INTRODUCTION

A construction firm headquartered on the Eastern Seaboard builds schools all across the country. The standard form contract the firm uses contains an arbitration agreement which sends all disputes to arbitration in a location of the firm’s choosing. An issue arises over a subcontractor’s materials cost, and the firm attempts to initiate arbitration. The subcontractor sues in federal court, alleging that the forum-selection provision in the arbitration agreement is unenforceable under a theory of unconscionability. If the court finds the forum-selection provision in the arbitration agreement unconscionable, should the court strike the forum-selection clause and enforce the rest of the arbitration agreement? Or should the court rule that the entire arbitration agreement is tainted by the unconscionable provision and, therefore, is unenforceable? The resolution of this issue depends on how the court applies separability.

The “separability doctrine” states that arbitration agreements are separable from their container contracts (called “container contracts” because they “contain” arbitration agreements) when the container contract has
provisions that are unenforceable because of public policy, equitable defenses, or illegality. The separability doctrine is not statutory: it is a judicially created doctrine. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Supreme Court held that arbitration agreements were separable from their container contracts and could be enforced if the container contract contains unenforceable provisions. If an arbitration agreement is found to be enforceable, the court must send the dispute to arbitration and let the arbitrator decide all other contract complaints. Though the Supreme Court required separability to be applied to arbitration agreements, the Court has never given clear instructions as to how to apply the doctrine. As a result, circuit courts have taken different approaches.

The Fourth, Ninth, Tenth, and Eleventh Circuits follow the Stand or Fall Together approach. These circuits will void an entire arbitration agreement if it contains unenforceable provisions. Arbitration agreements rendered void are considered void *ab initio*, or void from the beginning, meaning that the arbitration agreement is treated as if it never were part of the container contract. These circuits reason that the terms of an arbitration agreement are integrated, and cannot be individually severed, so even a single unenforceable term will taint and negate the entire arbitration agreement.

The Fifth, Sixth, Eighth, and the District of Columbia Circuits follow the severance approach. These circuits will sever, or remove, the unenforceable terms from an arbitration agreement and enforce the remainder of the arbitration agreement.

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1 *See, e.g., Mincks Agri Center, Inc. v. Bell Farms, Inc., 611 N.W.2d 270, 281 (Iowa 2000).*

2 *See, e.g., Nagrampa v. Mailcoups, Inc., 469 F.3d 1257, 1257 (9th Cir. 2006).* Equitable defense challenges are typically advanced via a claim of unconscionability. *See id.*


5 *Id.* at 403–04.

6 *See id.*

7 The Supreme Court uses the term “separability” to refer to this doctrine. *Id.* at 402. Lower courts may occasionally call this doctrine “severability.” *See Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 637 (4th Cir. 2002); Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 479 (9th Cir. 1991).* Though lower courts use the term “severability,” this Article will refer to the doctrine as “separability” to follow Supreme Court precedent.

8 *See, e.g., Hayes v. Delbert Servs. Corp., 811 F.3d 666, 676 (4th Cir. 2016); Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1287 (11th Cir. 2001); Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1235 & n.6 (10th Cir. 1999); Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1249 (9th Cir. 1994).*

9 *Ab Initio, BLACK'S LAW DICTIONARY (10th ed. 2014).*

10 *See supra note 8.*

agreement. These circuits reason that because the parties entered into an arbitration agreement, their intent to arbitrate should be preserved.

This Article will argue that Congress should abolish the separability doctrine and amend the Federal Arbitration Act ("FAA") to codify specific types of provisions in arbitration agreements as void ab initio. These codified provisions would never become terms of arbitration agreements and would be unenforceable as a matter of law.

Part II will explain the background of separability starting with common law contract defenses, the early analysis of separability immediately following the adoption of the FAA, and the cases decided by the United States Supreme Court which formalized separability. Part III will explain the split between the Circuits. Section III.A will discuss the Severance approach. Section III.B will discuss the Stand or Fall Together approach. Section III.C will discuss the District of Columbia Circuit's conclusion that no split exists among the circuits and how this conclusion is inseparably tied to state law. Part IV will analyze the split and propose that Congress enact legislation abolishing the separability doctrine and codifying specific types of provisions as void ab initio when placed into arbitration agreements.

II. BACKGROUND

First, this section will discuss the common law defenses available in a contract action. This section will then discuss the history and the origins of the FAA, focusing on the factors that created the current circuit split as to the application of the separability doctrine. Next, this Section will detail the development of arbitration jurisprudence through the primary United States Supreme Court decisions addressing the subject. Finally, this Section will provide a commentary discussing the benefits of abolishing the separability doctrine.

A. Contract Defenses at Common Law

At common law, a party may avail itself of multiple contract defenses to avoid enforcement of a contract. Contract defenses include undue influence, duress, incapacity, mistake, unconscionability, and misrepresentation. These defenses can be grouped together into different categories. Most contract defenses allege that no valid contract was formed, whereas unconscionability alleges that certain provisions are unenforceable.

12 See supra note 11.
13 Id.
14 See generally WILLISTON ON CONTRACTS (4th ed.), Westlaw (database updated May 2017) (providing a broad overview of contract law with chapters specifically addressing defenses).
1. Undue Influence and Duress

Undue influence and duress can be grouped as defenses that allege that some pressure was exerted by one party upon the other during contract formation.\(^1\) Duress historically involved threats of physical harm or imprisonment to coerce a party into signing a contract.\(^1\) Courts expanded the duress theory to include other kinds of threats, such as threats of personal disgrace or economic loss.\(^1\) Duress is a subjective determination based on what a party believed at the time of contracting.\(^1\)

Undue influence is defined as the “unfair persuasion of a party who is under the domination of the person exercising the persuasion” or one party’s reliance that another party will not act contrary to its best interest.\(^2\) In making a determination, courts look to the mental condition of the parties as well as their relationship and the sufficiency of consideration between the parties.\(^3\) Undue influence does not require someone to be persuaded through force, as with duress, but it requires an imbalance of power or reliance by a vulnerable party upon the statements of another.\(^4\)

2. Incapacity

Incapacity is a defense that alleges that a party does not have the legal or mental capacity to enter into a contract.\(^5\) Incapacity is determined by the law of the place where a contract is formed.\(^6\) Mental incapacity is a question of fact regarding whether a person has the capacity to enter into a contract and is capable

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\(^2\) Id. § 71:1. A well-known example of duress in popular culture is the procurement of the release of a music contract with the signature of a bandleader who was threatened with imminent harm when a mob boss “press[ed] a pistol to the forehead of the band leader and assur[ed] him with the utmost seriousness that either his signature or his brains would rest on that document in exactly one minute.” MARIO PUZO, THE GODFATHER 37 (1969).

\(^3\) See 28 WILLISTON, supra note 16, § 71:2; see, e.g., Alaska Packers’ Ass’n v. Domenico 117 F. 99, 102–03 (9th Cir. 1902) (holding that threats of great economic loss constituted duress); Tallmadge v. Robinson, 109 N.E.2d 496, 501 (Ohio 1952) (holding the threat of false testimony of an incestuous affair to be duress).

\(^4\) 28 WILLISTON, supra note 16, § 71:2.


\(^6\) See id.

\(^7\) 22 WILLISTON ON CONTRACTS § 60:44 (4th ed.), Westlaw (database updated Nov. 2017).

\(^8\) 17 C.J.S. Contracts § 19, Westlaw (database updated Sept. 2017); see, e.g., Williamson v. Matthews, 379 So.2d 1245, 1247 (Ala. 1980) (holding that contracts of insane persons are absolutely void); Erkins v. Alaska Tr., LLC, 355 P.3d 516, 519–20 (Alaska 2015) (holding that incapacity of a party during the formation of a contract renders the contract voidable).
of understanding and deciding upon its terms.\textsuperscript{25} This may seem similar to a claim of undue influence, which may examine a party’s mental faculties at the time of contracting and is often brought simultaneously with a claim of incapacity.\textsuperscript{26} Incapacity and undue influence differ in that incapacity is a claim that a party lacked any capacity to enter into a contract, whereas undue influence claims that a party was coerced, perhaps due to deficiency in mental capacity, into entering a contract.\textsuperscript{27}

Legal incapacity arises when a certain individual is unable to enter into a contract as a matter of law.\textsuperscript{28} Certain classes of individuals may be statutorily barred from entering into a contract. For instance, many statutes hold contracts entered into by minors to be void or voidable as a matter of law.\textsuperscript{29}

3. Mistake and Misrepresentation

Mistake and misrepresentation are defenses that go to the content of a contract’s provisions at the time a contract is formed. A mistake is some intentional act, unintentional omission, or error arising from ignorance, surprise, or misplaced confidence regarding fact or law and may be unilateral or mutual.\textsuperscript{30} A material mistake may render a contract void, whereas an immaterial mistake will not affect the enforceability of a contract.\textsuperscript{31}

A misrepresentation is a statement, of fact or law, which is not true.\textsuperscript{32} The legal effect of a misrepresentation depends on whether the misrepresentation is of fact or of opinion and whether the misrepresentation was made

\textsuperscript{25} Sparrow v. Demonico, 960 N.E.2d 296, 301 (Mass. 2012).
\textsuperscript{26} 17A C.J.S. Contracts § 250, Westlaw (database updated Sept. 2017) (discussing mental weakness in the context of undue influence).
\textsuperscript{29} McCall v. Reed, 107 F. Supp. 3d 1249, 1251 (M.D. Ala. 2015) (finding, under Alabama law, a minor is not responsible for any contract he makes and may disaffirm the same); I.C. ex rel. Solovsky v. Delta Galil USA, 135 F. Supp. 196, 208 (S.D.N.Y. 2015) (finding, under New York law, an infant’s contract is voidable, and the infant has an absolute right to disaffirm); 5 WILLISTON ON CONTRACTS § 9:5 (4th ed.), Westlaw (database updated May 2017).
\textsuperscript{31} See id.
intentionally. A material misrepresentation of fact may render a contract void or voidable, depending on state law.

4. Unconscionability

The defense of unconscionability alleges that the terms of a contract are oppressive against one party. Unconscionability has two elements. First, there must be an absence of meaningful choice for one party, called procedural unconscionability. Second, there must be contract terms that are unreasonably favorable to the other party, called substantive unconscionability.

Most challenges to arbitration agreements are made under the theory of unconscionability and use the Uniform Commercial Code's definition. Though the Uniform Commercial Code ("UCC") makes unconscionability applicable only to sales and leases of goods, courts have expanded the UCC standard to contracts not involving goods. Many cases with holdings outside the articulated scope of the UCC invoke the concept of unconscionability.

As will be discussed in greater detail later in this Article, if the arbitration clause of a contract itself is enforceable, the validity of other provisions of the contract must be decided through arbitration. Defenses other than unconscionability look to the formation of the contract as a whole. A claim of duress in the formation of an arbitration agreement would be a defense to the enforcement of the entire contract. Likewise, a defense of incapacity would be raised against the entire contract because a claim of incapacity alleges that one party was unable to enter the contract. Mistake and misrepresentation are more specific than incapacity or duress but are still formation defenses. A defense of
mistake would claim that a party did not agree to the text of the contract. A claim of misrepresentation would claim that a party was not completely truthful in the way it presented certain provisions of the contract, and, therefore, the contract is unenforceable. Unconscionability is the defense most widely used when attacking arbitration agreements because it attacks the oppressive nature of the arbitration agreement itself and not its formation. Unconscionability is a defense that alleges that a party agreed to a provision but for some reason that provision is unenforceable. Though often utilized, unconscionability is poorly defined, and its application can be difficult.

For example, the Supreme Court of Kentucky has held that substantive unconscionability alone is grounds for finding an agreement or provision unenforceable. California courts use a sliding scale where substantive and procedural unconscionability are balanced but are not required to be equal. Montana applies an adhesion theory of unconscionability to standard form contracts. Adhesion contracts are contracts formed with an imbalance in bargaining power between the parties. Montana will determine that a contract is a contract of adhesion if one of the parties has “no voice” in the bargaining process and will not enforce that contract.

The Wisconsin Court of Appeals has noted that “unconscionability is an amorphous concept that evades precise definition” and is impossible to define. "It is not a concept but a determination to be made in light of a variety of factors not unifiable into a formula." As will be discussed later, the United States Supreme Court has held that the FAA applies uniformly to all arbitration provisions in all courts, but due to the differences in state law, it cannot be applied uniformly. The next Section will examine the text and purpose of the FAA.

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44 See Monet v. PERA, 877 S.W.2d 352, 356–57 (Tex. App. 1994) (finding mutual mistake when the parties agreed that asbestos had been removed from a building but a contractor had not removed the asbestos).
45 See GEISLER, supra note 32.
50 See id. at 146–47.
53 Id.
54 See infra Section II.C.
B. The Federal Arbitration Act

The FAA was enacted in 1925. Section two of the FAA reads in part: “A written provision . . . to settle by arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section four of the FAA requires a court to determine whether there are any issues with the making of the arbitration agreement, and if there are no issues, the court must compel arbitration. Arbitration agreements are enforceable unless a contract defense to enforcement is successfully raised and the arbitration agreement is found unenforceable. A court will hear complaints against the enforcement of an arbitration agreement before the dispute goes to arbitration, but a court will not rule on the container contract. The FAA allows a court to address the arbitration agreement separately from the container contract but provides no direction for how to separate an unenforceable arbitration agreement. This lack of clarity has contributed to the separability split between the circuits. The uncertainty that permeates arbitration law did not originate with the FAA. Arbitration law has been inconsistent since the founding of the United States.

Following the American Revolution, arbitration was called a wide variety of names, including arbitration, common law arbitration, arbitration in pais, reference, appraisal, and others, borrowing from the English arbitration tradition. Historically, arbitration procedure in the United States has been consistent in its inconsistency with different states adopting different approaches to arbitration. Arbitration was applied to disputes involving real property in the Commonwealth of Kentucky, disputes within the Quaker communities of New Jersey, and disputes of mercantile and maritime nature in Massachusetts. Kentucky and New Jersey passed arbitration statutes codifying specific rules.

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56 Id. § 2.
57 Id. § 4.
58 Id. § 2.
59 Id. § 4.
60 See id.
61 See infra Part III.
63 Id. at 65–66.
64 Id. at 70.
65 Id. at 73–74.
governing arbitration, whereas other states relied on common law arbitration, a process with few formal requirements.66

Arbitration agreements were not treated as separate from container contracts before the introduction of the separability doctrine; instead, common law severability applied.67 Under common law severability, if a court found that one unenforceable provision of an agreement tainted an entire contract, the entire contract could be invalidated, or, if possible, a court could sever the offending portion of the agreement and enforce the remainder of the agreement.68 Severability was discretionary.

Arbitration agreements did not have an identity separate from their container contracts. For example, in Polk v. Cleveland Railway Co.,69 Polk sought to enforce an arbitration agreement separately from an unenforceable container contract.70 The Court held that because the container contract was unenforceable, the arbitration agreement, which was integrated into the container contract, was unenforceable as well.71 In the early 20th century, arbitration was still consistent in its inconsistency, and Congress attempted to unify arbitration procedure.

In 1925, Congress passed the FAA as part of a larger movement of procedural reform arising from frustration with the “complex, overburdened court system of the time” and the disparate applications of arbitration among the states.72 With no federal arbitration statute, federal courts applied state law to arbitration questions.73 The FAA sought to unify the way that arbitration was conducted.74 Following the passage of the FAA, arbitration became more commonplace, but even as federal arbitration procedure began to solidify, state courts continued to apply divergent theories when interpreting arbitration agreements.

Before the separability doctrine was definitively applied to arbitration agreements, the United States Supreme Court handed down a decision allowing

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66 Id. at 61, 68, 70.
68 Id.
69 151 N.E. 808 (Ohio Ct. App. 1925).
70 Id. at 809–10.
71 Id. at 810.
73 Id.
74 See id. at 135.
the reformation of an arbitration agreement in *Paramount Famous Lasky v. United States*. As Hollywood emerged as the powerhouse of motion picture production, studios often negotiated form contracts with film exhibitors that included arbitration provisions. In 1929, a movie theater sued Paramount on the grounds that the studio’s standard form arbitration agreement was unconscionable. The arbitration agreement required all claims to be arbitrated by an arbitration board of film industry insiders chosen by Paramount.

On appeal from the District Court for the Southern District of New York, the United States Supreme Court held that though arbitration was well-adapted to the needs of the motion picture industry, arbitration was impermissible “when under the guise of arbitration parties enter into unusual arrangements which unreasonably” favored one party. The Court struck the unconscionable provisions and required the parties to reform the arbitration agreement by agreeing to new enforceable terms. Although this ruling was affirmed by the United States Supreme Court in *Paramount*, the Supreme Court did not hold that reformation was required.

Following *Paramount*, state courts applied three different approaches in separating arbitration agreements while citing to *Paramount*. The Utah Supreme Court held that unenforceable arbitration agreements were separable from container contracts, and the container contract could be enforced without the arbitration agreement. Louisiana courts held that arbitration agreements merely evinced that arbitration was the agreed-to means of dispute resolution, so an unenforceable arbitration agreement could be severed without destroying the entire agreement. The Idaho Supreme Court held that an entire contract would be void if an arbitration agreement contained an unenforceable provision. Following years of uncertainty, the United States Supreme Court formally applied the doctrine of separability to arbitration agreements. The rules created by the Supreme Court will be addressed in the next section.

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75 Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43 (1930).
77 See Paramount Famous Lasky Corp. v. United States, 282 F.2d. 984 (S.D.N.Y. 1929).
78 Id. at 38–41.
79 Id. at 43.
82 Fox Film Corp. v. Ogden Theatre Co., 17 P.2d 294, 297 (Utah 1932).
83 Fox Film Corp. v. Buchanan, 136 So. 197, 198 (La. Ct. App. 1931).
84 Fox Film Corp. v. Tri-State Theatres, 6 P.2d 135, 140 (Idaho 1931).
C. SCOTUS Separability Decisions

The United States Supreme Court first applied the separability doctrine to arbitration in *Prima Paint v. Flood & Conklin Manufacturing*. In *Prima Paint*, the Supreme Court held that a court, not an arbitrator, must decide the validity of the arbitration agreement. Since that case, the Supreme Court has held that an arbitration agreement is enforceable even if all parties in a dispute did not enter an arbitration agreement. Further, the Supreme Court has held that state courts must apply the separability doctrine to disputes in state court, and states may not enact statutes rendering certain kinds of complaints as unarbitratable. The following section will discuss these Supreme Court decisions, beginning with *Prima Paint v. Flood & Conklin Manufacturing*.

1. *Prima Paint Corp. v. Flood & Conklin Manufacturing*

The United States Supreme Court definitively held that separability applied to arbitration agreements in *Prima Paint v. Flood & Conklin Manufacturing*. On October 7, 1964, Flood & Conklin Manufacturing Company ("F & C") entered into a "Consulting Agreement" with Prima Paint Corporation. Less than three weeks later, both parties entered into a contract in which Prima Paint purchased F & C's paint business. The purchase contract included an arbitration agreement which would send "any controversy or claim arising out of" it to arbitration conducted by the City of New York.

Prima Paint determined that F & C had fraudulently represented that it was solvent and able to perform its contractual obligations when it was in fact insolvent and intended to file Chapter XI bankruptcy shortly after execution of the consulting agreement. Prima Paint sued in the District Court for the Southern District of New York, seeking rescission of the consulting agreement on the basis of the alleged fraudulent inducement, but F & C cross-moved to stay

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86 *Id.*
90 388 U.S. 395 (1967).
91 *Id.* at 395.
92 *Id.* at 396.
93 *Id.* at 397.
94 *Id.* at 398.
95 *Id.*
The court proceedings pending arbitration. The District Court granted F & C’s motion to stay the action pending arbitration, holding that a charge of fraud in the inducement of a container contract containing an arbitration clause was a question for the arbitrators and not for the court. The Court of Appeals for the Second Circuit dismissed Prima Paint’s appeal, holding that a claim of fraud in the inducement of a contract generally and not an arbitration clause itself is for the arbitrators and not for the courts.

On petition for certiorari, the Supreme Court held that an arbitrator was to resolve a claim of fraud in the inducement of the container contract, whereas a court will resolve a claim of fraud in the inducement of an arbitration agreement. The Court noted a split between the circuits. The Second Circuit held that arbitration clauses are severable from the contracts in which they are embedded under the FAA while the First Circuit looked to the law of the state where the contract was formed to determine whether the provision was severable. The Court held that because of the powers granted to the federal courts by Congress in the FAA, a federal court could determine the separability of an arbitration provision “based upon and confined to the incontestable federal foundations of ‘control over interstate commerce and over admiralty,’” but only to the complaining party’s formation defenses as to the arbitration agreement. This approach was derived from 9 U.S.C. § 2, which states that arbitration provisions “shall be valid, irrevocable, and enforceable,” holding arbitration provisions to be separate and distinct from the rest of the contract. Were that section to state the opposite, that arbitration clauses were unenforceable, it would be clear that arbitration provisions were separate from the remainder of the contract, so deriving separability from 9 U.S.C. § 2 is no stretch of the statute.

2. Moses H. Cone Memorial Hospital v. Mercury Construction

In Moses H. Cone, the Supreme Court held that arbitration agreements would be upheld even if arbitration created duplicative litigation and failed to
resolve an entire dispute. In that case, a North Carolina hospital contracted with Mercury Construction, an Alabama construction contractor, to construct additions to the hospital beginning in 1975 and ending in 1979. The contract included provisions for resolving disputes by submitting the dispute to the supervising architectural firm whose decision could then be submitted by either party to arbitration per an arbitration agreement.

In 1977, Mercury, the Hospital, and the Architect held a meeting, and Mercury agreed, at the Architect's request, to withhold its claims for extended overhead and increase in construction costs due to delay or inaction by the Hospital until the work was substantially completed. In 1980, Mercury discussed its claims with the Architect, and after a period of negotiations, the Hospital decided that it would pay none of Mercury's claims.

The Hospital sued in state court for declaratory judgment. "[T]he Hospital sought a declaration that there was no right to arbitration; a stay of arbitration; a declaration that the Hospital bore no liability to Mercury; and a declaration that if the Hospital should be found liable in any respect to Mercury, it would be entitled to indemnity from the Architect." Mercury sent a demand for arbitration, and the Hospital obtained an injunction from the state court staying arbitration. Mercury objected to the stay, and, after it was lifted twelve days later, sued in federal court to compel arbitration.

The district court stayed the federal proceeding until the state court action was resolved, but Mercury appealed the stay and sought mandamus to compel arbitration. On appeal, the circuit court decided en banc to remand and compel arbitration. The circuit court decided that the underlying contractual dispute was arbitrable under the FAA and that the arbitration agreement was enforceable. The Hospital sought a rehearing, which was denied, but the Supreme Court granted certiorari.
The Supreme Court noted that the FAA calls for summary and speedy disposition of motions or petitions to enforce arbitration clauses.\textsuperscript{118} When reaching its holding, the circuit court had “full briefs and evidentiary submissions from both parties on the merits of the arbitrability” of their dispute.\textsuperscript{119} The Circuit Court held that there were no disputed issues of fact requiring determination under 9 U.S.C. § 4.\textsuperscript{120} That section requires courts to determine whether any issues bearing on the enforcement of the arbitration agreement are present.\textsuperscript{121} The Circuit Court’s determination that the arbitration agreement was enforceable was upheld.\textsuperscript{122}

Also, the Hospital had asserted that arbitration was not possible because there were two substantive disputes: “one with Mercury, concerning Mercury’s claim for delay and impact costs, and the other with the Architect, concerning the Hospital’s claim for indemnity for any liability it may have to Mercury.”\textsuperscript{123} The dispute with the Architect could not be sent to arbitration because there was no arbitration agreement between the Hospital and the Architect.\textsuperscript{124} If arbitration were compelled between Mercury and the Hospital, the Hospital would be forced to resolve its claim with the Architect in a different forum.\textsuperscript{125} Though unfortunate, this “piecemeal” resolution was required because the FAA required courts to give effect to arbitration agreements.\textsuperscript{126} The Supreme Court noted that arbitration agreements must be enforced “notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.”\textsuperscript{127} The Hospital would have to litigate the arbitrability of the Mercury dispute in federal court rather than state court because Mercury brought its claim there.\textsuperscript{128} Because the Architect was not a party to the arbitration agreement, that dispute must be resolved in court and not before the arbitrator of the Mercury dispute.\textsuperscript{129} The Supreme Court affirmed the circuit court’s determination.

In Moses H. Cone, the Supreme Court reiterated the primacy of arbitration agreements in contracts. Arbitration agreements would be given effect even if they created duplicative hearings. Though Moses H. Cone restated

\begin{itemize}
  \item \textsuperscript{118} Id. at 29.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} See 9 U.S.C. § 4 (2012).
  \item \textsuperscript{122} Moses H. Cone, 460 U.S. at 29.
  \item \textsuperscript{123} Id. at 19.
  \item \textsuperscript{124} Id. at 20.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Id. at 20–21.
  \item \textsuperscript{129} See id.
\end{itemize}
previous Supreme Court rulings holding that arbitration agreements were enforceable barring a contract defense or other issue of enforceability, state courts did not hold arbitration in such esteem. Regardless of federal policy favoring arbitration, the Court stated in a footnote that “enforcement of the [FAA] is left in large part to the state courts.”

State courts formulated a variety of rules regarding arbitration agreements and separability, and this variation was addressed in part in *Buckeye Check Cashing v. Cardegna.*

3. *Buckeye Check Cashing v. Cardegna*

In *Buckeye*, the Supreme Court held that *Prima Paint* applied to state courts as well as federal courts. John Cardegna and Donna Reuter entered into various deferred-payment transactions with Buckeye Check Cashing, which gave cash for personal checks in the amount of the check minus a finance charge. For each separate transaction, they signed a “Deferred Deposit and Disclosure Agreement” which required disputes to be resolved in arbitration. Cardenga and Reuter brought suit in Florida state court, alleging that Buckeye charged usurious interest rates and that the agreement violated various Florida laws making the deferred-payment contract and the arbitration agreement within it *prima facie* illegal. The trial court denied Buckeye’s motion to compel arbitration, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void. The appellate court reversed, but the trial court’s verdict was reinstated by the Florida Supreme Court on the theory that enforcing an arbitration agreement in a contract challenged as unlawful would violate state policy and contract law.

On petition for certiorari, the Supreme Court held that first, as a matter of substantive federal arbitration law, an arbitration agreement is severable from the remainder of the contract. Second, the Court held that “unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.” Third, the Court held that separability

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130 Szalai, *supra* note 72, at 118 (citing Moses H. Cone, 460 U.S. at 25 n.32).
132 *Id.* at 446.
133 *Id.* at 442.
134 *Id.* at 442–43.
135 *Id.* at 443.
136 *Id.*
137 *Id.*
139 *Id.* at 445–46 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967)).
applies to state as well as federal courts. The Court determined that because Cardegna’s claim attacked the agreement as a whole, the complaint must be considered by an arbitrator, not a court. The Court reversed the Florida Supreme Court because the conclusion that the separability doctrine did not apply in state court ran contrary to Prima Paint. Buckeye applied separability to all state courts and federal courts, where it had been applied following Prima Paint. Buckeye did not explain how to apply separability, whether a court could void an arbitration agreement under certain circumstances, or whether only specific provisions must be severed. Separability became universally applicable to all courts, but because Buckeye merely restated the rule in Prima Paint, no rule for applying separability to the agreements themselves was provided.

In footnote one of Buckeye, the Supreme Court noted that the question of the contract’s validity is different from the question of whether any agreement was ever created. Buckeye allows courts to address entire container contracts when the issue is whether the signatures on the contract were valid, whether the signor lacked authority to sign the contract, or whether the signor lacked the mental capacity to assent. The Louisiana Court of Appeal, Second Circuit, suggested that this footnote, "as well as other federal and state jurisprudence, indicates that in [the latter situations above], there would be no agreement at all between the parties, including an agreement to arbitrate," and the dispute would not be sent to arbitration by a court regardless of the presence of an arbitration agreement.

Buckeye does not require state courts to send every claim brought against a container contract to arbitration. Buckeye only requires a court to send a complaint directly to arbitration when a claim is made that the container contract is unconscionable. Claims that a contract is void will be heard by a court. Even though the parties have entered an arbitration agreement, a court will always hear

140 Id. at 446.
141 Id.
142 Id.
143 Id. at 445–46.
144 Courts still hold arbitration agreements as void while not merely separating the unenforceable provisions. See, e.g., Hayes v. Delbert Servs. Corp., 811 F.3d 666, 673–74 (4th Cir. 2016) (invalidating an arbitration agreement that renounced the application of federal law to any claims); Nino v. Jewelry Exch., Inc., 609 F.3d 191, 196 (3d Cir. 2010) (invalidating arbitration agreement that was so one-sided that the enforcing party was seeking an advantage and not a legitimate mechanism for dispute resolution); O’Connor v. Uber Techs., Inc., 311 F.R.D. 547, 558 (N.D. Cal. 2015) (invalidating provision that could not be severed without undermining arbitration itself).
145 Buckeye, 546 U.S. at 444 n.1.
146 Id.
complaints of whether a valid contract was formed to determine whether a contract actually exists. The Supreme Court has not revisited this footnote to clarify. Besides the issue of when separability is applicable, another issue yet to be ruled on by the Supreme Court is to what extent a court may examine the container contract in determining the enforceability of the arbitration agreement.

After Buckeye, in Bank of the Ozarks, Inc. v. Walker, the Arkansas Supreme Court held that a court may examine an entire container contract in order to determine the validity of the arbitration agreement. In Ozarks, the Arkansas Supreme Court determined that the “NO WAIVER” and “OUR WAIVER OF RIGHTS” clauses in the container contract destroyed the parties’ mutual assent to the arbitration agreement. The court explained that while Buckeye held that it was improper for a court to consider claims regarding a container contract as a whole, “a court is [neither] constrained to the clause itself [nor] prohibited from considering other parts of the contract relating to the agreement to arbitrate disputes arising from the contract,” a position long held by the Arkansas Supreme Court and also addressed by the Fourth Circuit.

The United States Supreme Court has offered no guidance on whether or not a court may examine a container contract when ruling on an arbitration agreement. When most courts apply separability, courts only examine the arbitration agreement to determine its validity. Cases like Bank of the Ozarks seem to circumvent the separability doctrine.

When a party resisting arbitration attacks the arbitration agreement, a court can examine the container contract, find unconscionable provisions, and effectively use the container contract’s unenforceability to find the arbitration agreement unenforceable. Once the arbitration agreement is separated, the entire contract would then be placed under a judicial lens. Following this approach allows a court to determine the container contract’s enforceability under the guise of examining the arbitration agreement. Buckeye sought to expand separability into state courts, but state courts have found ways to circumvent separability. Though Buckeye has been resisted in some respects, the Supreme Court further expanded separability into state courts by striking down state laws barring certain types of arbitration agreements.

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150 Id. at 813.
151 Id. (citing Advance Am. Servicing of Ark., Inc. v. McGinnis, 289 S.W.3d 37, 45 (2008)); see also Hayes v. Delbert Servs. Corp., 811 F.3d 666, 676 (4th Cir. 2016) (holding that although the court’s focus must be on the arbitration agreement and not the container agreement, “it is only natural for us to interpret the arbitration agreement in light of the broader contract in which it is situated”).
152 The United States Supreme Court denied to hear this case. Bank of the Ozarks, Inc. v. Walker, 137 S. Ct. 126 (2016) (mem.).
153 Id.
4. **AT&T Mobility v. Concepcion**

In *Concepcion*, the Supreme Court ruled that state laws which held certain types of arbitration provisions unconscionable were invalid. The Court held that arbitration agreements must be treated the same as any other contract. The Concepcions entered into a new cell phone contract that included free phones, but they were charged sales tax on the retail value of the free phones. The contract between the Concepcions and AT&T required all disputes to be arbitrated but did not permit class-wide arbitration. When the Concepcions sued AT&T in federal court, their suit was consolidated with a class action alleging that AT&T had engaged in false advertising and fraud by charging sales tax on free phones. The district court denied AT&T’s motion to compel arbitration under the Concepcions’ contract because California’s *Discover Bank* rule voided arbitration provisions that disallowed class-wide arbitration. The Ninth Circuit agreed and held that the FAA, which makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract” did not preempt its ruling.

On petition for certiorari, the United States Supreme Court held that “when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” The Court held that California’s *Discover Bank* rule, which barred class action waivers, was preempted by the FAA. The Court went further, suggesting that “[t]he same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury.” Through *Concepcion*, the Court abrogated all state laws which rendered specific types of arbitration provisions invalid. State laws may not treat arbitration agreements differently than other types of contracts.

Though the Court struck down state laws which barred certain types of arbitration provisions, unconscionability as a contract defense to arbitration

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155 Id. at 352.
156 Id. at 336.
157 Id. at 337.
158 Id. at 337–38.
159 Id. at 333 (quoting 9 U.S.C. § 2 (2012)).
160 Id. at 341 (quoting Preston v. Ferrer, 552 U.S. 346, 353 (2008)).
162 Concepcion, 363 U.S. at 352.
163 Id. at 342.
164 See id. at 351–52.
165 Id.
agreements still exists and can render arbitration clauses invalid on a case-by-case basis. To raise unconscionability, a plaintiff must challenge the arbitration agreement—and only the arbitration agreement—in court and raise the defense under general state contract law. Concepcion only struck down state laws which treated arbitration agreements differently than other contracts. Though there is disagreement among commentators, Concepcion did not eliminate the unconscionability defense as to arbitration agreements because unconscionability is still allowed as a defense within Section 2 of the FAA, which allows any defense in contract law or equity to be raised against an arbitration agreement. Further, federal arbitration law leaves the definition of unconscionability in the hands of the states.

The only effect Concepcion had on plaintiffs was to limit their ability “to take the easy way out” by claiming that certain provisions were invalid under state law instead of having to prove unconscionability under general contract law. To raise unconscionability after Concepcion, a plaintiff must prove the elements of unconscionability under the laws of the jurisdiction where the action is brought. The legal community has written extensively about the doctrine of separability, and the next Section will examine some of the commentary on the doctrine.

D. Commentary on Separability

Though the Supreme Court heavily favors separability, the doctrine of separability is not without its detractors. Professor Stephen Ware argues for

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166 Id.
169 Id. at 211.
171 Id. at 665.
the abolition of the separability doctrine in favor of applying general contract law. Prior to contracting, parties have a right to access the courts to resolve a dispute. The right to litigate is alienable through normal contract channels, such as creating an arbitration agreement. "The separability doctrine makes the right to litigate alienable under a lower standard of consent than is found in contract law... by removing from the right to litigate the protection provided by contract law’s defenses to enforcement." Under severability, entering into an arbitration agreement removes the protections of the courts, especially the protections provided by contract defenses. Courts, being unable to adjudge anything beyond the arbitration agreement, cannot defend the enforcement of otherwise unenforceable provisions beyond the arbitration agreement.

Professor Ware would like to see separability abolished in favor of applying general contract law to all contracts and contract provisions, including arbitration agreements. By abolishing separability, an entire contract could be adjudged by a court, taking into account all contract defenses and claims before heading to arbitration and ensuring that a complaining party has all contract defenses available to them.

Abolishing separability would work to mend the circuit split between the Stand or Fall Together and Severance circuits by making the split unnecessary. The next Section will analyze the circuit split. Section A will explain the Severance approach. Section B will explain the Stand or Fall Together approach. Section C will discuss the District of Columbia Circuit’s opinion that no split exists.

III. THE CIRCUIT SPLIT

This Part will first introduce the Severance approach as applied by the Fifth, Sixth, Eighth and District of Columbia Circuit Courts. Then, it will present the Stand and Fall Together approach applied by the Fourth, Ninth, Tenth and Eleventh Circuit Courts. The final Section will discuss the District of Columbia Circuit’s theory that the differing approaches are not a circuit split but are simply the product of interpreting differing types of arbitration agreements.

174 Id. at 120.
175 Id. at 120–21.
176 Id.
A. The Severance Approach

The Fifth, Sixth, Eighth and District of Columbia Circuits follow the Severance approach. In these circuits, unenforceable provisions of an arbitration agreement are separated from the remainder of the agreement, and the remainder of the arbitration agreement is enforced with the container contract. Disputes in these circuits will be arbitrated, regardless of the objections of the party resisting arbitration, unless the entire arbitration agreement is found to be unenforceable. This approach is best illustrated by the Eighth Circuit in Circuit City Stores v. Gannon.

1. Gannon v. Circuit City Stores

In May 1998, Marken Gannon applied for employment with a Circuit City store in Missouri. As a part of her employment paperwork, Circuit City presented Gannon with its Dispute Resolution Agreement requiring that Gannon agree to settle all employment-related claims exclusively through arbitration. She was advised through a clause in the agreement to familiarize herself with the rules and procedures of settling a dispute by arbitration prior to signing. The agreement contained bold type terms informing Gannon the agreement affected her legal rights and suggested she seek legal advice before signing. “It also stated that she could withdraw her consent up to three days after signing the agreement and specified how she could effectuate a withdrawal.” Gannon signed the agreement, and she was hired.

One year later, Circuit City terminated Gannon. Following her termination, she filed charges with the Equal Employment Opportunity

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177 See Hadnot v. Bay, Ltd., 344 F.3d 474, 478 (5th Cir. 2003); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 675 (6th Cir. 2003); Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 683 (8th Cir. 2001).


179 Borstein, supra note 178, at 1259.

180 262 F.3d 788 (8th Cir. 2001).

181 Id. at 679.

182 Id.

183 Id.

184 Id.

185 Id.

186 Id.

187 Id.
Commission and the Missouri Commission on Human Rights, alleging that during her employment with Circuit City, she had encountered sexual harassment, a hostile work environment, sex discrimination, and retaliation. She then brought suit in federal court. “Circuit City responded by filing a motion to dismiss the case and to compel arbitration based on the arbitration agreement Gannon had signed.” The district court declined to compel arbitration because the clause limiting punitive damages rendered the entire arbitration agreement unenforceable. Circuit City filed a motion for reconsideration on the grounds that it no longer enforced the punitive damages clause in its arbitration agreements and that the severability clause served to automatically strike terms judicially determined to be unenforceable. The district court denied the motion, and Circuit City appealed. Circuit City did not challenge the ruling that the punitive damages clause was unenforceable. Rather, Circuit City argued that the illegal clause should be severed and Gannon should be compelled to arbitrate her claims under the remaining terms of the agreement.

Gannon argued that because the arbitration provision was invalid, the entire agreement should be found invalid; Circuit City argued that the arbitration provision was severable from the rest of the agreement. The court noted that its role was to determine only “whether the parties have entered a valid agreement to arbitrate and, if so, whether the existing dispute falls under the coverage of the agreement.” If the court were to conclude that the parties had reached a valid agreement, then Section 2 of the FAA would compel judicial enforcement of the arbitration agreement. The illegal provision of the arbitration agreement did not constitute an essential part of the arbitration agreement, and in looking to Missouri law and the general contract principle of severability, the court held that “[t]he essence of the contract between Circuit City and Gannon is an agreement to settle their employment disputes through binding arbitration,” and “[t]he punitive-damages clause represents only one aspect of their agreement and can be severed without disturbing the primary intent of the parties to arbitrate their disputes.”

188 Id.
189 Id.
190 Id.
191 Id.
192 Id.
193 Id.
194 Id.
195 Id. at 681.
196 Id. at 679.
197 Id. at 680 (citing Larry’s United Super, Inc., v. Werries, 253 F.3d 1083, 1085 (8th Cir. 2001)).
198 Id. at 681.
The court stated that the agreement itself was not undermined by the invalidity of a small portion of the arbitration agreement. The court cited to *Hooters of America v. Phillips*, where the Fourth Circuit had held an entire arbitration agreement unenforceable because Hooters promulgated “so many biased rules” that it created “a sham system unworthy even of the name of arbitration.” Specifically, Hooters conditioned eligibility for raises, transfers, and promotions upon an employee signing an “Agreement to arbitrate employment-related disputes . . . including any claim of discrimination, sexual harassment, retaliation, or wrongful discharge, whether arising under federal or state law.” Hooters also implemented a mechanism by which it would select its own three-person board of arbitrators, ensuring a biased result. The entire Hooters arbitration agreement was found to be unenforceable due to the sheer number of unenforceable provisions as well as the compulsory nature of the arbitration agreement. Once the illegal provisions were redlined, nothing remained of the arbitration agreement.

The arbitration agreement in *Hooters* was permeated with far more illegal terms than the Circuit City agreement. *Hooters* was not comparable to *Circuit City*. The Eighth Circuit found in favor of Circuit City and severed the unenforceable provision of the arbitration agreement. Severing the punitive damages clause, in the opinion of the court, did not work against the intent of the parties and did not substantially alter the agreement. The next Section will demonstrate how circuits that follow the Stand or Fall Together approach apply separability.

**B. The Stand or Fall Together Approach**

The Fourth, Ninth, Tenth, and Eleventh Circuits hold that arbitration agreements containing unenforceable provisions are entirely void. Either the entire arbitration agreement is enforced or the entire arbitration agreement is rendered void. This approach is analogous to the common law contract doctrine of voidance which allowed courts to void contracts which contained unenforceable provisions. Parties who resist arbitration in these circuits will litigate if unenforceable provisions are found in the arbitration agreement. Per 9 U.S.C. § 4, a 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

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199 *Id.*

200 173 F.3d 933 (4th Cir. 1999).

201 *Id.* (quoting *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999)).

202 *Hooters*, 173 F.3d at 936.

203 *Id.* at 938.

204 *Gannon*, 262 F.3d at 681.

205 See cases cited *supra* note 8.
in issue, the court shall make an order directing the parties to proceed to arbitration.”

In these circuits, including an unenforceable provision in an arbitration agreement is an “issue” under 9 U.S.C. § 4 which sends the dispute to litigation. These circuits seek to deter the insertion of any illegal provisions into arbitration agreements.\textsuperscript{206} This approach ensures that a complaining party is protected and can raise all relevant contract defenses, but the parties may be forced into unbargained for litigation. The Ninth Circuit case of \textit{Graham Oil Company v. ARCO Products Company},\textsuperscript{207} illustrates the Stand or Fall Together approach to arbitration agreements.

1. \textit{Graham Oil v. ARCO Products}

In \textit{Graham Oil}, Graham Oil and ARCO entered into a Branded Distributor Gasoline Agreement effective from January 1, 1991, to December 31, 1993; this agreement included an arbitration agreement.\textsuperscript{208} The parties agreed that Graham Oil would purchase a minimum amount of gasoline each month during the period of the Agreement.\textsuperscript{209} Eleven months into the agreement period, “ARCO notified Graham Oil that it intended to terminate the Agreement” because “Graham Oil had not been purchasing the required minimum amount of gasoline as specified in the Agreement.”\textsuperscript{210} Graham Oil filed a motion for a preliminary injunction, and the district court issued a preliminary injunction that prohibited ARCO from terminating the Agreement for 90 days.\textsuperscript{211} Instead of reaching the merits of Graham Oil’s claims, the court found that arbitration, per the agreement, was Graham Oil’s exclusive remedy.\textsuperscript{212} The district court required the parties to complete the arbitration within 90 days.\textsuperscript{213} Graham Oil appealed and refused to submit to arbitration, arguing that the arbitration clause in the agreement was invalid and that a court had to hear its case.\textsuperscript{214}

The arbitration provision required Graham Oil to surrender various rights under the Petroleum Marketing Practices Act (“PMPA”).\textsuperscript{215} The arbitration agreement forfeited Graham Oil’s statutorily-mandated rights to recover exemplary damages from ARCO, to recover reasonable attorney’s fees

\textsuperscript{206} See Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1249 (9th Cir. 1994).
\textsuperscript{207} 43 F.3d 1244 (9th Cir. 1994).
\textsuperscript{208} Id. at 1246.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
from ARCO if Graham Oil prevailed on certain claims, and to a one-year statute of limitations on its claims against ARCO. Finding that the arbitration provisions circumvented the protectionist purpose of the PMPA, the circuit court moved on to the issue of separability.

The circuit court noted that arbitration agreements must be treated as separable from their container contracts unless the parties clearly intend the agreement not be separable. No evidence was presented that the parties did not wish the agreement to be separable or that parties had not intended to enter into arbitration. Because of policy favoring the separability of arbitration agreements, the circuit court found the arbitration agreement to be separable. The only open question was to what extent the clause was separable.

The court examined the history of contract integration. Integration is a "well-known principle in contract law [which holds] that a clause cannot be severed from a contract when it is an integrated part of the contract." A contract should be treated as a whole and is integrated when by "consideration of its terms, nature and purposes each and all of the parts appear to be interdependent and common to one another." If the contract is integrated then individual, "interdependent" provisions cannot be separated.

ARCO's arbitration agreement contained more than a single, isolated unenforceable term. The arbitration clause "was a highly integrated unit containing three different illegal provisions" and established "a unified procedure for handling all disputes, and its various unlawful provisions [were] all a part of that overall procedure." ARCO had intended "to achieve through arbitration what Congress has expressly forbidden" by using an arbitration agreement to achieve an unlawful end. These provisions and ARCO's goal served to "taint" the entire arbitration agreement. Following this determination, the court severed the entire arbitration agreement from the container contract and sent the parties to litigation. The next section will discuss

216 Id. at 1247–48.
217 Id. at 1248.
218 Id. (citing Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 476 (9th Cir. 1991)).
219 Id.
220 Id.
221 Id.
222 Id. (quoting JOSEPH D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 478 & n.76 (3d ed. 1987)).
223 Id. (quoting Hudson v. Wylie, 242 F.2d 435, 446 (9th Cir. 1957)).
224 Id. at 1248.
225 Id. at 1248–49.
226 Id. at 1249.
227 Id.
the District of Columbia Circuit's suggestion that the above split does not exist along clean circuit lines.

C. The District of Columbia Circuit Theory

In Booker v. Robert Half International, the District of Columbia Circuit suggested that there may be no circuit split. The court noted that the differing results among the circuits "may well reflect not so much a split among the circuits as variety among different arbitration agreements." Decisions voiding arbitration agreements entirely often involved agreements without a severability clause or agreements that were pervasively infected with illegality. Decisions severing illegal provisions and compelling arbitration, on the other hand, typically considered agreements that contained a severability clause and discrete unenforceable provisions. Both approaches to separability and the District of Columbia Circuit’s theory will be analyzed in the next Section.

IV. ANALYSIS AND PROPOSAL

First, this Section will analyze the policies and rationales of each side of the circuit split as well as the District of Columbia Circuit’s claim that no split exists when rendering a decision regarding an arbitration dispute in an arbitration agreement. Then, this Section will present proposed solutions abolishing the separability doctrine in its entirety and harmonizing the treatment of arbitration agreements among the circuit courts.

A. Analysis

The Circuits which follow the Severance approach and the Stand or Fall Together approach justify their chosen position with a variety of policy considerations. Each of these policies prioritizes a different element of contract law. This Section will analyze the policies of both Severance and Stand or Fall Together. The District of Columbia Circuit has suggested that there is no split between the circuits. This Section will also analyze the District of Columbia Circuit’s claim. Finally, this section will propose that Congress abolish the separability doctrine and amend the FAA to codify certain types of provisions as void ab initio when placed into arbitration agreements. The first Section will analyze the Severance approach.

228 413 F.3d 77 (D.C. Cir. 2005).
230 Id. at 84.
231 Id. (citing Perez v. Globe Airport Sec. Servs., Inc., 294 F.3d 1280, 1287 (11th Cir. 2001)).
232 Id. (citing Graham Oil Co., 43 F.3d at 1247).
233 Id. (citing Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 675 (6th Cir. 2003)).
1. Analysis of the Severance Approach

The Fifth, Sixth, Eighth and District of Columbia Circuits, which follow the Severance approach,\textsuperscript{234} have stated two primary reasons for their policy: preserving the intent of the parties and upholding federal policy favoring arbitration.\textsuperscript{235} First, these circuits seek to "[give] effect to the intent of the contracting parties."\textsuperscript{236} When parties enter into an arbitration agreement, they choose arbitration as their means of dispute resolution, and, therefore, their wishes should be preserved. Unenforceable provisions can be severed from an arbitration agreement without disturbing the parties' intent to arbitrate.\textsuperscript{237} Second, these circuits uphold the federal policy of favoring arbitration. By adopting the FAA, Congress sought to enforce private arbitration agreements.\textsuperscript{238} Severance enforces arbitration agreements by removing only the unenforceable provisions and enforcing the remainder of the arbitration agreement.

Contract interpretation principles require courts to follow the unambiguous language of a contract to fulfill the parties' intentions.\textsuperscript{239} Entering into an arbitration agreement evinces the intention of the parties to resolve their disputes through arbitration regardless of the enforceability of the other provisions of the contract. Severance preserves the intention of the parties. Severance functions to enforce arbitration agreements except in cases where unenforceability cannot be rectified by severance.\textsuperscript{240} Though severance preserves both the intent of parties to arbitrate and the federal policy favoring arbitration, it functions as judicial reformation.

When creating a contract and agreeing to its terms, the parties bind themselves to the contract as a whole. Severing any terms effectively alters the bargain. When parties agree to one set of terms and a court severs the unenforceable terms and sends the dispute to arbitration, the parties are arbitrating a new contract. A court cannot enforce unenforceable terms, so a court can either void the entire agreement containing the unenforceable terms or sever the unenforceable provisions. These circuits find severing unenforceable provisions and effectively reforming the contract to be the better means of

\textsuperscript{234} Borstein, supra note 178, at 1259.
\textsuperscript{235} Id. at 1259–60.
\textsuperscript{236} Booker, 413 F.3d at 84 (citing Frankenmuth Mut. Ins. Co. v. Escambia Cty., 289 F.3d 723, 728–29 (11th Cir. 2002)).
\textsuperscript{237} Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 681 (8th Cir. 2001).
upholding the federal policy favoring arbitration when compared to the Stand or Fall Together approach.

The Severance approach effectively preserves the intent of the parties to arbitrate but creates a new contract for both parties through judicial reformation. While preserving the intent of the parties to arbitrate, it does not preserve the unambiguous intent of the parties to enforce the agreed-upon contract as written.

2. Analysis of the Stand or Fall Together Approach

The Fourth, Ninth, Tenth, and Eleventh Circuits hold arbitration agreements containing unlawful provisions as entirely void. These circuits have three policy justifications for their approach. First, these circuits void entire arbitration agreements because the presence of unlawful provisions taints an arbitration agreement, rendering the agreement completely unenforceable. Second, the severance of specific provisions functions as judicial reformation, and courts are hostile to the reformation remedy. Third, there can be no assent to an illegal contract.

The first policy justification for Stand or Fall Together is that Stand or Fall Together deters a party from inserting unenforceable provisions into arbitration agreements. Unenforceable provisions taint arbitration agreements with illegality and render them completely void, and the threat of total voidance of an arbitration agreement deters parties from using arbitration as a means of circumventing the law. Unenforceable provisions will not be scrutinized absent a complaint. By inserting unenforceable provisions, a party is gambling that these provisions will be upheld in arbitration. The Stand or Fall Together approach prevents this. If parties wish to arbitrate, they must do so in a legally enforceable manner or not at all.

The second policy justification for Stand and Fall Together is that the circuits following that approach resist judicial contract reformation by holding that arbitration agreements are integrated agreements. The separability doctrine holds that arbitration agreements are separate from their container contracts. Were there no separability doctrine, unenforceable arbitration agreements would void entire contracts in Stand or Fall Together circuits. Because there is a separability doctrine, the container contract itself is one integrated agreement and the arbitration agreement is separate integrated agreement. A court cannot void an entire container contract without first addressing its arbitration agreement. Therefore, unenforceable terms in the arbitration agreement do not taint and void the container contract—only the arbitration agreement is voided.

241 Borstein, supra note 178, at 1259.
243 Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 896 (9th Cir. 2002).
244 WILLISTON & LORD, supra note 239, § 12:3.
The third policy justification for Stand or Fall Together is that because illegal contracts are unenforceable, an arbitration agreement with unenforceable provisions is not a contract. A contract is an agreement, and an agreement is “a manifestation of mutual assent” of two or more persons. There can be no mutual assent to illegality, and, therefore, there can be no contract.

Both Stand or Fall Together and Severance prioritize different elements of contract law, and neither is particularly preferable over the other. Underpinning this split is the great variety amongst state laws. The District of Columbia Circuit has suggested that the diversity of arbitration agreements has merely created the appearance of a split. The next Section will analyze the District of Columbia Circuit’s contention.

3. Analysis of the District of Columbia Circuit Theory

In its opinion in Booker, the District of Columbia Circuit Court suggested that the different interpretations of arbitration agreements among the circuits “may well reflect not so much a split among the circuits as variety among different arbitration agreements.” The court suggested that the Stand or Fall Together approach is applied when the arbitration agreement in question lacks a severability clause or is “pervasively infected with illegality;” severance is applied when an arbitration agreement includes a severability clause. The District of Columbia Circuit’s assertion is not completely accurate though.

Mere variation in arbitration agreements cannot account for the policies of entire circuits. When analyzing arbitration agreements, circuit courts must apply state law because “in placing arbitration agreements on an even footing with all other contracts, the FAA makes general state contract law controlling.” The Supreme Court stated in Moses H. Cone that the “enforcement of the [FAA] is left in large part to the state courts.” Booker, though asserting that no split exists, actually demonstrates the issue which this
Article is attempting to remedy. The next two Sections will analyze the *Booker* court’s assertion, demonstrating the negative impact that diverse state laws have upon the FAA and the need of an FAA amendment.

### i. Pervasively Infected with Illegality

The District of Columbia Circuit stated that *Stand or Fall Together* was applied when an arbitration agreement is “pervasively infected with illegality.” The determination that a contract is “pervasively infected with illegality” is a judicial determination. No statutes define what “pervasively infected with illegality” entails. In *Graham Oil*, the arbitration agreement was “pervasively infected with illegality” due to the inclusion of three illegal provisions, one of which sought to remove statutory protections given specifically to petroleum companies. The container contract and arbitration agreement also lacked severability clauses. The court provided no rule for determining whether an arbitration agreement was permeated with illegality. Its determination was based upon the facts of *Graham Oil* and those facts alone. Other cases also fail to give a clear rule for determining whether an arbitration agreement is pervasively infected with illegality.

For example, in the Fifth Circuit case *Iberia Credit Bureau v. Cingular Wireless*, most of the provisions of the arbitration agreement at issue contained a severability clause and referred to both parties waiving certain rights, but “the critical sentence” required cell phone customers to arbitrate disputes against Cingular while allowing Cingular to litigate disputes against its customers. Iberia sued in Louisiana court, and the Fifth Circuit cited Louisiana cases which had held that such a “disproportionate dispensation” of rights and remedies was arbitrary and lacked good faith. The Fifth Circuit found that severability, regardless of the presence of a severability clause, would not remedy the unenforceable provisions and, therefore, found the entire arbitration agreement void. In *Ferguson v. Countrywide Credit Industries*, even though the arbitration agreement included a severability clause, the clause was ignored due to a lack of mutuality regarding the type of claims that must be arbitrated, the fee

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254 *Booker*, 413 F.3d at 84.
255 *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247–48 (9th Cir. 1994).
256 *Id.*
257 379 F.3d 159 (5th Cir. 2004).
258 *Id.* at 168.
260 *Iberia*, 379 F.3d at 176.
261 298 F.3d 778 (9th Cir. 2002).
provision, and the discovery provision. The unenforceable provisions were found to permeate Countrywide’s arbitration agreement to the extent that severability would not remedy them. In Newton v. American Debt Services, an arbitration agreement including four non-essential, unconscionable provisions was found to be permeated with illegality. In Net Global Marketing v. Dialtone, the Fifth Circuit applied California law to determine that a unilateral modification provision tainted an entire arbitration agreement with illegality that could not be cured by severing the term. There is no standard to determine whether an arbitration agreement is permeated with illegality or not. The determination that an arbitration agreement is “permeated with illegality” is a case-by-case determination.

 Courts have formulated general rules to determine the extent of the illegality, like a “multitude of unconscionable provisions in an agreement to arbitrate will preclude severance and enforcement of arbitration” if the agreement is one sided. Though helpful, these general rules give no clear definition of “permeated with illegality.” Finding that an agreement is permeated with illegality is a case by case determination. In circuits that often find agreements to be permeated with illegality, precedent determines how a court will rule. Circuits determine what “permeated with illegality” means in their own circuit based on precedent. The aforementioned cases show this determination does not turn on whether or not there is a severability clause in the contract. State law is also a determining factor in applying separability.

 Circuit courts apply state laws to separability determinations. For example, Iberia and Net Global were decided on the laws of Louisiana and California, respectively. Though it is true that some cases have turned on whether an arbitration agreement was “permeated with illegality,” it is more correct to say that courts have found arbitration agreements “permeated with illegality” on the basis of state law or based on prior cases in their circuit. Due to the variation among state laws, there can be no uniform application of the separability doctrine. Because separability is not applied uniformly, the FAA is not applied uniformly across every jurisdiction even though the FAA intended to unify arbitration law.

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262 Id. at 788.
263 Id.
264 549 F. App’x. 692 (9th Cir. 2013).
265 Id. at 694–95.
266 No. 04-56685, 2007 WL 57556 (9th Cir. Jan. 9, 2007).
267 Id. at *3 (citing Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 895 (9th Cir. 2002)).
ii. Effect of Severability Clauses

Contracts need not contain severability clauses for courts to sever unenforceable provisions. Though some cases have turned on the presence of severability clauses, courts have held that a severability clause is non-essential to severing unenforceable provisions. At common law, courts may sever unenforceable provisions without a severability clause. Even without a severability clause, arbitration agreements that are unconscionable or those that violate public policy may be enforced if the objectionable terms can be severed. Courts have voided entire arbitration agreements in the presence of severability clauses, such as in Iberia. Courts have also severed individual provisions in the absence of separability clauses, such as in Schreiber v. K–Sea Transportation. Courts do not differentiate between severability clauses in container contracts and severability clauses in arbitration agreements when severing provisions from arbitration agreements. Severability clauses are not the only factor in determining whether a provision is severable or not.

As stated above, state statutes and state interpretation of the common law of contracts are followed by the circuit courts. State law plays a huge role in determining how separability is applied because circuit courts look to state law for the law they apply. State laws regarding contract interpretation are not universal. Buckeye required the states to apply separability but did nothing to make the application of separability uniform.

When circuit courts apply separability, they are not applying a federal common law doctrine. Rather, circuit courts are looking to the laws of the states which fall within their circuit and the precedent the circuit has developed. This leads to a lack of uniformity between circuits. The most direct solution to this issue is to allow courts to circumvent separability completely by abolishing it. The next Section will propose amending the FAA to abolish separability as well.

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271 See, e.g., Kepas v. eBay, 412 F. App’x 40, 49 (10th Cir. 2010).

272 Iberia Credit Bureau, 379 F.3d at 168.


274 Bodine v. Cook’s Pest Control Inc., 830 F.3d 1320, 1328 (11th Cir. 2016) (holding that because the contract contained an express severability provision applicable to all portions of the contract, unenforceable terms of the arbitration agreement could be severed).
as codifying specific types of provision as void *ab initio* when inserted into arbitration agreements.

**B. Proposal**

Professor Stephen Ware wants to abolish separability so that general contract law may govern all contracts. He concedes that the “anti-separability” rule he proposes has downsides. Professor Ware’s proposal does not resolve every issue surrounding separability. Even with separability abolished, the inconsistency of general state contract law as it applies to arbitration agreements is not resolved. Though there is no single solution to resolving this inconsistency, arbitration law can be made *more* consistent than it is now.

With the current state of separability, federal courts, by the general nature of the judiciary, must apply divergent state laws. When creating an amendment to the FAA which abolishes separability, as Professor Ware proposes, it would also be helpful to unify the variations in state law regarding arbitration for the sake of consistency. Without a separability doctrine, state contract law would still differ, and the goal of the FAA was to improve the consistency of arbitration law. An effective means of improving consistency would be to implement a default mechanism that applies uniform law in specific circumstances. Essentially, in addition to abolishing separability, the FAA should adopt default rules.

The FAA already contains a default rule. For example, Section 5 of the FAA allows a court to appoint an arbitrator when the arbitration agreement fails to provide an arbitrator or a means to determine who the arbitrator will be. This provision functions as a default rule and ensures that a missing provision is not fatal to an arbitration agreement, effectively preserving the intent of the parties to arbitrate. New default rules should be codified to prevent certain types of provisions from becoming a part of arbitration agreements.

The FAA needs to clearly codify what sorts of provisions are unenforceable. This can be accomplished by codifying the holdings of the various courts that have barred certain type of provisions. Such a statute could read:

> An arbitration agreement shall not:
> waive statutory protections;{277}
> waive employment benefits upon the arbitration of a claim.{278}

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275 Ware, *supra* note 173, at 132.
277 See *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248–49 (9th Cir. 1994).
designate a forum not within the domicile of either party; 279 allow for an appellate arbitration proceeding; 280 impose a statute of limitations to arbitrate claims; 281 or allow for unilateral amendments to the arbitration agreement. 282

Any provision included in section (1) which is included in an arbitration agreement is void ab initio.

No provision of an arbitration agreement is integral to any contract. 283

Such a statute would further the goals of the FAA. It could be argued that such a statute would run in contravention to the current broad application of the FAA. It would not. Litigation abounds regarding the enforceability of the provisions of arbitration agreements. Section two of the FAA allows for all contract defenses to be asserted against an arbitration agreement, so an amendment which automatically bars certain types of provisions merely applies a sort of uniform contract defense by default. By defining what exactly is permissible in an arbitration agreement, arbitration agreements are easily analyzed by courts, and contracting parties will know exactly what an arbitration agreement may contain. Further, because the bar on these specific provisions is statutory, courts will not be at risk of reforming the contract. Specific illegal provisions should be codified by the FAA, rendering such provisions void ab initio. Not only would this settle expectations, but this would also mend the circuit split by endorsing the policies of both the Stand or Fall Together and Severance circuits.

The FAA would endorse the policies of both Stand or Fall Together and Severance approaches by rendering certain types of unenforceable provisions void ab initio. Stand or Fall Together seeks to bar any unenforceable provisions

279 See Britvan v. Cantor Fitzgerald, L.P., No. 2:16-cv-04075-ODW (JPRx), 2016 WL 3896821, *3 (C.D. Cal. July 18, 2016) (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 16 (1972) (“(1) if the inclusion of the clause in the agreement was the product of fraud or overreaching; 2) if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and 3) if enforcement would contravene a strong public policy of the forum in which suit is brought”)).


281 Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1180 (9th Cir. 2003).


283 “Thus, before deciding whether a contract provision is severable, a court must determine whether that provision is integral to the contract. And the severance of an essential contract term ‘is not allowed,’ even where the contract contains a severance clause.” Miller v. GGNSC Atlanta, LLC, 746 S.E.2d 680, 688 (2013) (emphasis omitted) (citing AMB Property, L.P. v. MTS, Inc., 551 S.E.2d 102 (Ga. Ct. App. 2001); Nolley v. Maryland Cas. Ins. Co., 476 S.E.2d 622 (Ga. Ct. App. 1996)). It is only necessary to ensure that arbitration agreements are never integral to a contract to ensure that no court allows the argument to be made that certain unenforceable provisions are not void due to integration.
from being inserted into an arbitration agreement. The theory that illegal provisions taint an entire agreement \(^{284}\) is a deterrent to inserting unenforceable provisions into arbitration agreements, but if these provisions are void \textit{ab initio}\) such terms can never be inserted. They would never be part of the contract, and this would be an absolute deterrent. Because these provisions are void \textit{ab initio}, they are statutorily red lined, and inserting them into an arbitration agreement would be useless. The policies behind Stand or Fall Together would be codified. Also, the Severance approach could also be codified.

The Severance approach seeks to preserve the parties’ intent to arbitrate. Under this proposal, the intent to arbitrate will be preserved unless a court applying general contract law finds the arbitration agreement unenforceable. The validity of arbitration agreements would be much easier to determine because there would be no need for severance. With certain types of provisions automatically unenforceable in arbitration agreements, parties who have previously sought to use arbitration as an extra-judicial tool to leverage an advantage against a complaining party will lose that advantage. Arbitration would be only a tool to expedite dispute resolution without a significant burden on resources, just as Congress intended. With separability abolished, parties would enter into arbitration agreements because they actually intended to arbitrate their dispute. The policies of the Severance Circuit would be codified. The policies of both Severance and Stand or Fall Together would be codified. Though the separability doctrine would be no more, arbitration under this proposal would still function in largely the same way as it does under separability.

If a party were to challenge a contract with an arbitration agreement under a system which has abolished separability and codified specific unenforceable provisions, the process would not appear entirely dissimilar to the current system. A court would first examine all challenged provisions, including the arbitration agreement, under general contract law. At this stage, a court using general contract law could find the entire arbitration agreement, the entire contract, or any provisions thereof unenforceable. If a court is satisfied that the contract and the arbitration agreement are valid and enforceable, the court would then sever any statutorily void provisions in the arbitration agreement. The FAA requires arbitration agreements to be enforced unless the agreement to arbitrate is unenforceable. Unless the arbitration agreement was found unenforceable, the dispute will be sent to arbitration. Arbitration would be uniformly applied in all jurisdictions. After red lining the unenforceable provisions, an arbitration agreement could be a mere shell of its former self, simply an agreement to settle disputes through arbitration, but the gap fillers in the FAA would fill these gaps, and the dispute would move to arbitration. This proposal would not only unify the application of severability, but it would also expedite contract complaints.

\(^{284}\) Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1248–49 (9th Cir. 1994).
Abolishing separability and codifying which sorts of provisions are unenforceable would allow a court to address all contract issues simultaneously. This proposal is efficient and allows courts to come to a conclusion after a much more thorough examination of the entire contract. As the Arkansas Supreme Court has noted, not all answers to questions regarding an arbitration agreement are found in the agreement itself.\textsuperscript{285} When a party claims a contract is unenforceable, the entire contract could be examined, and a determination could be reached regarding its various provisions. Both parties would have the protections of general contract law, and the process of arbitration would be further expedited by dispensing with legal determinations that an arbitrator would be otherwise required to make. Further, it allows the court’s determination to be appealed, adding an extra layer of protection for both parties not provided by arbitration. Arbitration agreements brought before courts would be treated uniformly, regardless of where the contract was formed and regardless of any other provision in the contract. Though this proposal would unify how courts treat arbitration agreements, it would not unify all state contract law.

All state law is not uniform, but the goal of the FAA is not to settle expectations for all laws in all jurisdictions. The law regarding arbitration agreements will be settled, allowing for the laws of any jurisdiction to govern arbitration agreements in a consistent way. This distinction is subtle but important. For instance, the FAA is not concerned with uniform remedies for contracts claims in all states. The FAA is concerned with ensuring that arbitration agreements are used the same way in Kansas as they are in Kentucky. Certain provisions will never be allowed in arbitration agreements in any jurisdiction. How courts handle the remainder of the contract is left up to state laws, and state laws will always vary based on the needs or preferences of that jurisdiction. Still, arbitration agreements would be treated uniformly. Amending the FAA to abolish separability and codified specific types of provisions as void \textit{ab initio} will make the enforcement of arbitration agreements consistent in all states and meet the goals of the FAA.

V. CONCLUSION

The FAA should be amended to abolish separability and codify unenforceable provisions to render them void \textit{ab initio}. In doing so, courts will be able to address every contract defense, allowing parties to the contract to use all contract defenses. Parties could avail themselves of all contract defenses and, by statutorily severing the unenforceable provisions of the arbitration agreement, the intent of the parties to arbitrate would be preserved. The best solution to the quagmire that is separability is to abolish it by statute and codify which sorts of provisions are permitted in arbitration agreements.
