DIGGING A DEEPER HOLE IN THE DOUGHNUT'S HOLE: SCOTUS AND WHO DECIDES ARBITRABILITY

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The Supreme Court has swiftly ended the eight-year long court battle in Henry Schein, Inc. v. Archer & White Sales, Inc. by dismissing the writ of certiorari, the second granted in this case, "as improvidently granted" ("DIG"). The question on appeal from the Fifth Circuit was who should decide whether a particular claim falls within the scope of an arbitration clause—that is, whether it is "arbitrable" —the court or the arbitrator. The answer to this question impacts parties' right to access the courts as well as their freedom to reserve certain decisions for an arbitrator. The DIG order issued by the Supreme Court in Schein is only the third to have ever been issued by the Court in an arbitration-related case. More importantly, it leaves in place a decision of the Fifth Circuit that departs from the principles that the Supreme Court has established in previous arbitration cases. In this Essay, I explain these principles within a "doughnut framework" that presents the different levels of the arbitrability analysis. I also provide an alternative to the Supreme Court's DIG order and illustrate how the Court could have rendered a meaningful ruling in Schein's second appeal that would have been in line with this "doughnut framework." Finally, I discuss the wider implications that the Court's DIG order may have for parties to commercial arbitration agreements.

INTRODUCTION

The Supreme Court has recently ended the eight-year-long court battle in *Henry Schein, Inc. v. Archer & White Sales, Inc.* ("*Schein*") by issuing a one-line opinion dismissing the writ of certiorari "as improvidently granted" after hearing oral arguments.[1] The Court had granted certiorari in order to determine the relationship between two provisions in the parties' arbitration agreement. The first was a "carve-out" provision, which operates to exempt certain claims from arbitration (*i.e.,* it makes them "non-arbitrable").[2] The second was a "delegation" provision, which operates to refer the decision of what precisely these exempt

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1. Henry Schein, Inc. v. Archer & White Sales, Inc., 141 S. Ct. 656, 656 (2021).
2. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530 (2019).

claims are (*i.e.*, the question of "arbitrability") to the arbitrator.[3] The Fifth Circuit had found that the carve-out provision in the parties' agreement negated the delegation provision so that the question of which claims were in fact arbitrable was to be decided by the court rather than the arbitrator. It then proceeded to determine that the entire action brought by Archer against Schein was non-arbitrable.[4] The Supreme Court's dismissal of the writ of certiorari as improvidently granted allows the Fifth Circuit's decision to stand.[5]

An order dismissing a writ of certiorari as improvidently granted, known as a "DIG," is a relatively uncommon occurrence in the Supreme Court's practice.[6] But this is not the only noteworthy aspect of the *Schein* litigation saga. To begin with, this was the parties' second round before the Supreme Court in this case. In 2019,[7] the Court granted Schein certiorari and reversed the Fifth Circuit's first decision in this case, in which the Fifth Circuit had dismissed Schein's motion to compel arbitration for being "wholly groundless."[8]

The Supreme Court's DIG order is also particularly unusual, albeit not unprecedented, in the arbitration context. The Court had only issued two such orders in arbitration-related cases previously. The first was in a 1935 case that concerned an allegedly invalid arbitration clause in a standard form contract.[9] The DIG order in that case was issued on a technical ground, namely that no final judgment had been entered by the state Supreme Court.[10] The second DIG order was issued in 1972 in a labor dispute involving claims under the Fair Labor Standards Act ("FLSA").[11] The Court had granted certiorari to decide whether the employee in that case was bound by an arbitration clause in a collective-bargaining agreement and therefore could not pursue his claims of FLSA violations in court. The Court issued a DIG order after hearing oral argument since it became clear that the arbitration provision in the collective bargaining agreement had a narrow scope and did not apply to FLSA violations but only to alleged violations of the collective-bargaining agreement.[12] Moreover, the Court found that it had no occasion to address an additional question that arose but was not argued by the parties, namely whether the employee was barred from pursuing the FLSA claims in court on the basis of other provisions of the collective bar-

3. *Id.*

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

5. This, in turn, means that the case will now return to the federal district court in Texas, where the action was first filed in 2013.

6. One study of the Court's 1990 to 2011 terms reported 39 DIGs in total, at a rate of about 2 per year. Mary-Christine Sungaila, *And After All That Work!: The Dreaded U.S. Supreme Court "DIG"*, WASH. LEGAL FOUND. (Jan. 31, 2013), https://www.wlf.org/2013/01/31/wlf-legal-pulse/and-after-all-that-work-the-dreaded-u-s-supreme-court-dig/ [https://perma.cc/4UAU-KWH7].

7. Henry Schein, Inc. v. Archer & White Sales, Inc. (*Schein*), 139 S. Ct. 524, 529 (2019).

8. Archer & White Sales, Inc. v. Henry Schein, Inc. (*Schein* I), 878 F.3d 488, 497 (5th Cir. 2017).

9. Fox Film Corporation v. Muller, 294 U.S. 696 (1935).

10. *Id.* ("As it appears that no final judgment has been entered, the writ of certiorari is dismissed as improvidently granted."); *see also* Fox Film Corp. v. Muller, 296 U.S. 207, 209 (1935).

11. Iowa Beef Packers, Inc. v. Thompson, 405 U.S. 228 (1972).

12. *Id.* at 230.

gaining agreement. The Court therefore concluded that "[i]n these circumstances, which were not fully apprehended at the time certiorari was granted, the writ of certiorari will be dismissed as improvidently granted."[13]

Whatever the reason for the Supreme Court's DIG order in *Schein*, its practical effect is to preserve a Fifth Circuit decision that departs from the Court's established approach to the question of who decides arbitrability—the court or the arbitrator—which I will present in this Essay in the form of a "doughnut framework."[14] This question does not present a mere narrow jurisdictional issue. Rather, it determines whether a party has in fact relinquished its right to a judicial decision by consenting to arbitration.[15] If such a determination is made by an arbitrator, it will only be subject to a limited review by the courts rather than a *de novo* review of questions of law by an appellate court.[16] If such a determination is made by a court, it risks allowing parties to defer or evade their commitment to arbitrate, resulting in needless and costly litigation.[17] It remains to be seen whether the Supreme Court's refusal to address this question in *Schein* signals a shift away from its long-standing pro-arbitration jurisprudence.[18]

In this Essay, I propose an alternative to the Supreme Court's DIG order in the second *Schein* appeal. This alternative presents a way in which the Court could have rendered a meaningful ruling that would have brought the Fifth Circuit's decision in line with established arbitrability principles. In Part I, I provide a brief overview of the *Schein* case in the Fifth Circuit and its first iteration before the Supreme Court. In Part II, I explain the "doughnut framework" and the principles established by the Supreme Court with respect to the question of who decides arbitrability. In Part III, I discuss how the Fifth Circuit departed from these principles in its second decision in *Schein* and set out my proposed alternative path that the Supreme Court could have taken to decide the appeal from this decision on its merits and in accordance with established principles. I conclude with the potential wider implications of the Supreme Court's DIG order in *Schein* in Part IV.

13. *Id.* at 232 (Douglas, J., dissenting) ("[T]here is no conflict between statutory remedy and remedy by arbitration and the difficulty posed is imaginary.").

14. For a similar "doughnut framework" for arbitrability-related questions and the principles established by the Supreme Court in this regard, see Tamar Meshel, *A Doughnut Hole in the Doughnut's Hole": The* Henry Schein *Saga and Who Decides Arbitrability*, 73 RUTGERS U. L. REV. 101 (2021).

15. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 87 (2010) (Stevens, J., dissenting) ("[W]hen questions of arbitrability are bound up in an underlying dispute . . . there is actually no gateway matter at all: The question 'Who decides' is the entire ball game." (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967))).

16. Sections 10 and 11 of the United States Federal Arbitration Act provide only limited grounds for vacating, modifying, or correcting an arbitral award. 9 U.S.C. §§ 10–11.

17. George A. Bermann, *The Enforceability of the Arbitration Agreement: Who Decides and Under Whose Law?, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS, 154, 155 (Arthur W. Rovine ed., 2010).

18. *See, e.g.*, Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1120 (2019) ("It seems universally acknowledged that Supreme Court decisions demonstrate a 'pro-arbitration' policy.").

I. *SCHEIN*: PRE-2021 DEVELOPMENTS

Schein and Archer concluded a contract that included the following arbitration clause: "Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association . . . ."[19]

Archer sued Schein in the Federal district court in Texas, alleging violations of federal and state antitrust laws and seeking both monetary damages and injunctive relief.[20] Schein filed a motion to compel arbitration pursuant to the contract's arbitration clause. Archer challenged the motion on the basis of the carve-out provision in the arbitration clause ("except for actions seeking injunctive relief . . ."). [21] It argued that this provision excluded from the scope of arbitration actions, such as that filed by Archer, in which the plaintiff seeks injunctive relief. Therefore, according to Archer, its action was not subject to the arbitration clause and should be decided by the court.

Schein argued in response that it was for the arbitrator and not the court to determine whether Archer's claim for injunctive relief indeed fell outside the scope of the parties' arbitration agreement and that, even if it did, Archer was still obligated to arbitrate its claim for damages.[22] Schein based this argument on the delegation provision in the arbitration clause—the incorporation of the Arbitration Rules of the American Arbitration Association ("AAA rules").[23] Since these rules empower the arbitrator to determine arbitrability questions, their incorporation, according to Schein, evidenced the parties' intention to delegate the question of the scope of their arbitration clause to the arbitrator.

Archer, in turn, submitted that the carve-out provision negated the delegation provision. In other words, Archer argued that the carve-out provision not only excluded from arbitration Archer's action in light of its claim for injunctive relief, but also excluded from arbitration the determination of whether this action was, in fact, so excluded. According to Archer, therefore, the court and not the arbitrator was to decide whether its action was arbitrable.

The district court accepted Archer's arguments and rejected Schein's motion to compel arbitration.[24] Schein appealed to the Fifth Circuit, which dismissed the appeal. The Fifth Circuit did not decide whether the carve-out provision in the parties' arbitration clause negated the delegation provision. Instead, it held that Schein's motion to compel arbitration should not be granted in any event because its argument that Archer's claim for injunctive relief was arbitra-

19. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 528 (2019).

20. *Id.* at 528–29.

21. *Id.*

22. *Id.*

23. AM. ARB. ASS'N, COM. ARB. RULES AND MEDIATION PROCS. R-7(a) (2013) ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.").

24. *Schein*, 139 S. Ct. at 528.

ble was "wholly groundless," *i.e.*, there was no "plausible argument for the arbitrability of the dispute."[25] Schein filed a petition for a writ of certiorari to the Supreme Court, which was granted. The Supreme Court vacated the Fifth Circuit's decision and remanded the case back for further proceedings.[26] The Supreme Court also did not address in its opinion the disputed relationship between the carve-out and delegation provisions. Rather, the Court held only that the "wholly groundless" reasoning of the Fifth Circuit was inconsistent with the United States Federal Arbitration Act ("FAA")[27] and with the Court's precedent.[28] Since the Fifth Circuit had not decided whether the parties' arbitration clause in fact delegated the arbitrability question to the arbitrator, the Supreme Court left this question for the Fifth Circuit to address.

On remand, the Fifth Circuit accepted that the parties' incorporation of the AAA rules evidenced their intent to arbitrate arbitrability "for at least some category of cases."[29] Yet the court proceeded to find that the plain language of the arbitration clause "incorporates the AAA rules—and therefore delegates arbitrability—for all disputes *except* those under the carve-out."[30] The court accordingly concluded that the carve-out provision excluded from arbitration not only claims for injunctive relief, but also the determination of the arbitrability of such claims, leaving it to the court.[31] It then held that since the parties' arbitration clause carved out "actions seeking injunctive relief" rather than "actions seeking *only* injunctive relief," Archer's entire action, both for monetary damages and injunctive relief, was non-arbitrable.[32] The Fifth Circuit therefore dismissed Schein's motion to compel arbitration for the second time.[33]

Both Archer and Schein filed petitions for a writ of certiorari to the Supreme Court. Archer sought to appeal the Fifth Circuit's finding that, absent the carve-out provision, the parties' incorporation of the AAA rules would have evidenced their intent to delegate arbitrability questions to the arbitrator.[34] The Supreme Court denied Archer's petition.[35] Schein sought to appeal the Fifth Circuit's finding that the parties' carve-out provision negated their intent to arbitrate arbitrability questions, which was evidenced by their inclusion of the AAA

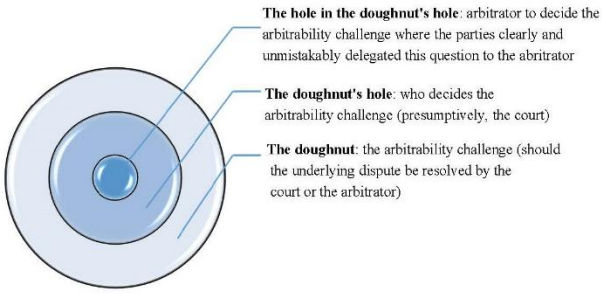
25. Archer & White Sales, Inc. v. Henry Schein, Inc., 878 F.3d 488, 492 (5th Cir. 2017).
26. *Schein*, 139 S. Ct. at 528.
27. 9 U.S.C. §§ 1–16.
28. *Id.* at 529.
29. Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 280 (5th Cir. 2019).
30. *Id.* at 281.
31. *Id.* at 281–82.
32. *Id.* at 283.
33. *Id.* at 282–83.
34. This question was phrased by Archer as follows: "[w]hether an arbitration agreement that identifies a set of arbitration rules to apply *if* there is arbitration clearly and unmistakably delegates to the arbitrator disputes about *whether* the parties agreed to arbitrate in the first place." Conditional Cross-Petition for a Writ of Certiorari, 935 F.3d 274 (5th Cir. 2019) (No. 19-1080), 2020 WL 1391910.
35. Archer & White Sales, Inc. v. Henry Schein, Inc., 141 S. Ct. 113 (2020).

rules.[36] The Court granted Schein's petition for a writ of certiorari,[37] but issued the DIG order a few weeks after hearing oral arguments. In the next Part, I will explain the principles established by the Supreme Court to determine arbitrability issues such as those arising in the *Schein* case, and present these principles in the form of a "doughnut framework."

II. THE "DOUGHNUT FRAMEWORK" FOR DETERMINING ARBITRABILITY

According to the FAA, a court should refer a dispute to arbitration once it finds that "a valid arbitration agreement exists."[38] Issues of arbitrability arise where the parties disagree over "[t]he status of a dispute's being or not being within the jurisdiction of arbitrators to resolve."[39] The concept of arbitrability encompasses challenges to both the enforceability (*e.g.*, validity) and the application (*e.g.*, scope) of an arbitration agreement with respect to particular parties or claims. In the *Schein* case, Schein argued that Archer's claims should be resolved in arbitration pursuant to the parties' arbitration clause, while Archer argued that its claims were non-arbitrable pursuant to the arbitration clause's carve-out provision and should therefore be resolved by the court. But the parties' dispute did not end there. They also disagreed over *who* should decide whether Archer's claims were arbitrable (*i.e.*, the effect of the carve-out provision)—the court or the arbitrator.

The question of who decides arbitrability must be answered before the arbitrability question itself may be answered. A useful way to understand this complex arbitrability analysis, and the principles established by the Supreme Court to guide it, is through the following "doughnut framework":



36. This question was phrased by Schein as follows: "[w]hether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator." Petition for Writ of Certiorari, 935 F.3d 274 (No. 19-963), 2020 WL 529195.

37. Henry Schein, Inc. v. Archer & White Sales, Inc., 141 S. Ct. 107 (2020).

38. Pursuant to § 2 of the FAA, "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A court can stay proceedings in favor of arbitration pursuant to § 3 of the FAA and compel arbitration pursuant to § 4. 9 U.S.C. §§ 3–4.

39. *Arbitrability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

The first level of analysis, or the "doughnut," concerns the parties' arbitrability dispute. In the present case, this dispute concerns whether Archer's action, including its claim for injunctive relief, falls within the arbitration clause—and should therefore be resolved by the arbitrator, or is excluded from it—and should therefore be resolved by the court.

The second level of analysis, or the "doughnut's hole," concerns *who* is to decide this arbitrability question—the court or the arbitrator? The Supreme Court has held that if a party challenges the underlying contract containing the arbitration clause (by claiming, for instance, that the contract was induced by fraud), rather than the arbitration clause itself, it is for the arbitrator to resolve.[40] However, if such a challenge is directed at the scope or validity of the arbitration clause itself (as in the *Schein* case), it is presumptively for the court to resolve.[41]

The third level of analysis, or the "hole in the doughnut's hole," concerns an exception created by the Supreme Court to the presumption that arbitrability challenges directed at the arbitration clause itself are for the court to resolve.[42] According to this exception, if there is "clear and unmistakable" evidence that the parties intended to arbitrate arbitrability, *i.e.*, to have the arbitrator decide challenges to the validity or scope of the arbitration clause, then it is the arbitrator who should resolve such challenges rather than the court.[43] While courts should not assume such intention and "silence or ambiguity" do not suffice, where there is clear and unmistakable evidence of such intention "a court must defer to an arbitrator's arbitrability decision."[44]

Parties may express their clear and unmistakable intention to have the arbitrator resolve arbitrability challenges directed at the arbitration clause by way of a delegation provision, that is, "an agreement to arbitrate threshold issues concerning the arbitration agreement."[45] Being "an additional, antecedent agreement," a delegation provision must in itself be valid in order to be enforced, yet such validity is presumed unless directly challenged by the parties.[46] If the validity of a delegation provision is not challenged, as in the *Schein* case,[47] or once a delegation provision is found by the court to be valid, the court is to refer the arbitrability question(s) to the arbitrator. The Supreme Court has yet to opine on whether incorporating institutional arbitration rules such as the AAA rules constitutes a delegation provision that clearly and unmistakably evidences the parties' intention to arbitrate arbitrability questions. However, virtually all circuit

40. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967)

41. *Id.* at 402–04, 404 n.12. The court must then apply a strong presumption in favor of arbitrability, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995).

42. *First Options of Chicago*, 514 U.S. at 943–44.

43. *Id.*

44. *Id.* at 943–46.

45. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68 (2010).

46. *Id.* at 70, 72.

47. Archer did not seem to dispute the validity of the delegation provision (*i.e.*, the incorporation of the AAA rules) but rather its scope. It asserted that "the AAA rules (and resulting delegation) only apply to disputes that fall outside of the arbitration clause's carve-out for actions seeking injunctive relief." Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 279 (5th Cir. 2019).

courts, including the Fifth Circuit, have found that the incorporation of institutional arbitration rules that empower the arbitrator to determine arbitrability questions constitutes clear and unmistakable evidence of the parties' intent to arbitrate arbitrability.[48]

My proposed "doughnut framework" for determining who decides arbitrability gives rise to three distinct questions. At the first "doughnut" level, the question is what the parties' carve-out provision in fact carves out (*i.e.*, what is the scope of the parties' arbitration clause). At the second "doughnut's hole" level, the question is who should decide this scope question—the arbitrator or the court. At the third "hole in the doughnut's hole" level, the question is whether the parties have validly delegated the scope question to the arbitrator so that the presumption that it is for the court to decide is negated. In *Schein*, the first question is governed by the parties' carve-out provision, while the second and third questions are governed by their delegation provision. Therefore, if the court finds that incorporating the AAA rules constitutes clear and unmistakable evidence that the parties intended to delegate arbitrability questions, the court should refer the scope question to the arbitrator. If the court determines there is no such evidence, it is to decide this question. Accordingly, the third question must be determined before the second question, which must be decided before the first.

III. THE SUPREME COURT'S DIG ORDER—AN ALTERNATIVE PATH

The Fifth Circuit did not apply these principles in its second decision in *Schein*. Regarding the third question (the hole in the doughnut's hole), the Fifth Circuit determined that "an arbitration agreement that incorporates the AAA Rules 'presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'"[49] This determination should have led the court to conclude that the answer to the second question (the doughnut's hole) of who decides the first scope question (the doughnut) is "the arbitrator." Instead, the court proceeded to find that Archer's action, in light of its claim for injunctive relief, fell outside the scope of the arbitration clause as a result of the carve-out provision and, therefore, that the AAA rules (*i.e.*, the delegation provision) did not apply to it.[50] The court then concluded, in a rather circular conclusion that, since the AAA rules did not apply, it was for the court and not the arbitrator to determine what the court had already determined—that Archer's action was non-arbitrable.

As noted above, both Schein and Archer filed petitions for a writ of certiorari to the Supreme Court. Archer sought to appeal the Fifth Circuit's finding that, absent the carve-out provision, the parties' incorporation of the AAA rules

48. Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."). For a review of circuit courts' jurisprudence in this regard, see Meshel, *supra* note 14, at 139.

49. Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 279–80 (5th Cir. 2019).

50. *Id.*

would constitute clear and unmistakable evidence of their intent to delegate arbitrability questions to the arbitrator. Schein sought to appeal the Fifth Circuit's finding that the carve-out provision negated this delegation. The Supreme Court denied certiorari to Archer but granted Schein's petition, only to issue a DIG order a few weeks after hearing oral arguments.

Some commentators have suggested that the DIG order in this case was likely motivated by the Supreme Court's realization that it was imprudent, or even impossible, to separate the two questions that the parties had sought appeal on.[51] This difficulty was also alluded to by Justice Alito during oral argument, noting that "I really don't know how to answer the question that we granted review on, because it does seem to turn on the degree of the delegation to the arbitrator of the power to decide whether the arbitrator can decide."[52] However, this difficulty is artificial, at least in the *Schein* case. Assuming that the parties' incorporation of the AAA rules constitutes clear and unmistakable evidence of an intention to arbitrate arbitrability, as the Fifth Circuit itself found, the principles that the Supreme Court has established provide a clear answer to the question before the Court, namely the relationship between the carve-out and delegation provisions. Answering this question did not require the Court to determine whether the assumption that incorporating the AAA rules constitutes clear and unmistakable evidence of an intention to arbitrate arbitrability was in itself appropriate, which the Court had decided to leave for another day. In fact, the principles discussed in the previous Part should have led the Court to the same conclusion it had reached in its first decision in *Schein*.

In that decision, the Supreme Court held that the "wholly groundless" reasoning of the Fifth Circuit "confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability [the doughnut]."[53] Moreover, the Court found that the question of who decides arbitrability (the doughnut's hole) was a question of contract that a court could not decide where the parties had clearly and unmistakably delegated it to an arbitrator (the hole in the doughnut's hole), "even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless."[54] The Court reached these conclusions without having to determine whether incorporating the AAA rules in fact constituted clear and unmistakable evidence of delegation.

51. *See, e.g.*, Ronald Mann, *Justices Dismiss Arbitrability Dispute*, SCOTUSBLOG (Jan. 25, 2021, 5:25 PM), https://www.scotusblog.com/2021/01/justices-dismiss-arbitrability-dispute/ [https://perma.cc/XZ2S-Q53N] ("[I]t seems likely that the justices ultimately decided that they couldn't sensibly say anything about this matter without addressing the question of whether the contract called for arbitration of the gateway question."); George H. Friedman, *SCOTUS on* Henry Schein *II Certiorari Grant: "Never Mind!"*, SEC. ABR. ALERT (Jan. 25, 2021), https://www.secarbalert.com/blog/scotus-on-henry-schein-ii-certiorari-grant-never-mind/#disqus_thread [https://perma.cc/HHW7-RULT] ("[A] very obvious common theme was the sense that members of the Court realized that, in retrospect, they might have taken up the related issue of whether incorporating the AAA's Rules constitutes clear and unmistakable evidence of delegation.").

52. Henry Schein, Inc. v. Archer & White Sales, Inc., Oral Argument Transcript, No. 19-963, 48 (Dec. 8, 2020).

53. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530–31 (2019).

54. *Id.* at 529.

The same outcome would have been possible, and appropriate, in the second *Schein* appeal, as the Fifth Circuit had again conflated the question of who prevails on arbitrability (the doughnut) with the separate question of who decides arbitrability (the doughnut's hole). Once the Fifth Circuit found that the parties' incorporation of the AAA rules clearly and unmistakably evidenced their intention to arbitrate arbitrability (the hole in the doughnut's hole), the principles set out by the Supreme Court required the Fifth Circuit to refer Archer's scope challenge to the arbitrator. Instead, the Fifth Circuit proceeded to analyze the scope question itself, finding that the carve-out provision (the doughnut) operated to carve out not only Archer's claims for injunctive relief but also the parties' delegation of the arbitrability of such claims to the arbitrator (the doughnut's hole).[55] As noted above, this allowed the court to conclude that because the AAA rules did not apply to Archer's claim for injunctive relief, the parties did not clearly and unmistakably intend to submit the question of its arbitrability to the arbitrator. Once it dispensed with the delegating effect of the AAA rules, the Fifth Circuit reached the same result it had reached in its first decision: it found that the parties' entire dispute was non-arbitrable.[56]

The Supreme Court could have applied existing principles to correct the Fifth Circuit's analysis and preserve the jurisdictional division of power it has created between courts and arbitrators on arbitrability questions, as it did in the first *Schein* appeal. Pursuant to this division of power, the court is to determine whether the parties clearly and unmistakably delegated arbitrability questions to the arbitrator, and if not then the court is to decide such arbitrability questions. But if a court determines that clear and unmistakable evidence of delegation exists, its jurisdiction ends and that of the arbitrator begins. This should be the case whether a party's claim is allegedly "wholly groundless" or whether a carve-out provision exists. Such a carve-out provision may limit the substantive scope of the parties' arbitration clause (the doughnut) but it does not apply to the presumption that the court decides arbitrability (the doughnut's hole) unless the parties delegated arbitrability to the arbitrator (the hole in the doughnut's hole). Moreover, keeping these distinct questions, or "doughnut" levels, separate in *Schein* would not have required the Supreme Court to decide whether incorporating the AAA rules should in fact constitute clear and unmistakable evidence of the parties' intention to arbitrate arbitrability, which the Fifth Circuit and virtually all other Circuit Courts have answered in the positive.

The wisdom of considering the incorporation of institutional arbitration rules such as those of the AAA as evidence of a clear and unmistakable intention to arbitrate arbitrability may fairly be questioned. It may be argued, for instance, that such institutional rules are not designed to provide for the exclusive competence of arbitrators to resolve arbitrability questions to the exclusion of the courts. It may also be argued that the ubiquitous use of institutional arbitration rules in arbitration agreements effectively turns all such agreements into clear

55. Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 279–80 (5th Cir. 2019).
56. *Id.*

and unmistakable evidence that the parties intended to arbitrate arbitrability, rendering the "clear and unmistakable" standard ineffectual.[57] Such arguments should certainly be considered in the context of arbitration agreements contained in standard form contracts, such as those involving employees or consumers, or invoked in the context of class claims. These situations, however, are a far cry from a case such as *Schein*, where the only issue is the scope of a bilateral commercial arbitration agreement negotiated by sophisticated parties. There is no doubt that the parties in this case had validly agreed to arbitrate at least *some* claims, and the sole question before the courts has been *who* is to determine what those claims are.

Therefore, the Supreme Court's dismissal of Archer's petition for certiorari did not frustrate its ability to decide the question that it did agree to hear, namely the Fifth Circuit's finding that the parties' carve-out provision negated their delegation provision. Moreover, the Supreme Court had another opportunity to decide substantially the same question presented by Archer in an appeal from the Sixth Circuit's decision in *Piersing v. Domino's Pizza*, an employment class action case.[58] The plaintiff in that case denied that the parties' incorporation of the AAA rules clearly and unmistakably evidenced their intention to arbitrate arbitrability questions.[59] Much like Archer in *Schein*, the plaintiff in *Piersing* contended that the arbitration agreement incorporated the AAA rules only with respect to claims that *already* fell within the scope of the agreement.[60] Therefore, the circular argument went, the court must first determine whether a particular claim was arbitrable (the doughnut) before it could determine whether the presumption that the court should determine arbitrability (the doughnut's hole) is negated by clear and unmistakable evidence that the parties intended for the arbitrator to make this determination (the hole in the doughnut's hole).

The Sixth Circuit rejected this argument, noting that it would require reading "the agreement to say that the arbitrator shall have the power to determine the scope of the agreement *only* as to claims that fall within the scope of the agreement. Yet that reading would render the AAA's jurisdictional rule superfluous."[61] Although the plaintiff in *Piersing* did not base his arguments on the presence of a carve-out provision, the Sixth Circuit noted that, "to the extent that Piersing's arbitration agreement carves out certain claims from arbitration, it

57. *See, e.g.*, RESTATEMENT (THIRD) OF U.S. L. OF INT'L COM. ARB. § 2.8 (AM. L. INST. 2015); Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent Is Not "Clear and Unmistakable"*, 17 AM. REV. INT'L ARB. 545 (2008); Guy Nelson, Note, *The Unclear "Clear and Unmistakable" Standard: Why Arbitrators, Not Courts, Should Determine Whether a Securities Investor's Claim is Arbitrable*, 54 VAND. L. REV. 591 (2001). For a contrary view, see Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 117–118 (2004) ("The AAA Commercial Arbitration Rules, for example, have been amended to accomplish precisely this result of giving most determinations of scope to the arbitrators. Other widely used bodies of rules may have the same effect. If the regime of contract is to mean anything, such provisions must end all further questioning—I am quite unable to understand any suggestions to the contrary.").

58. Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842 (6th Cir. 2020).

59. *Id.* at 851.

60. *Id.* at 847–52.

61. *Id.* at 847.

does so from the agreement in general, not from the provision that incorporates the AAA Rules."[62] Plaintiff filed a petition for a writ certiorari to the Supreme Court,[63] yet the Court dismissed the petition on the same day that it issued the DIG order in *Schein*.

Therefore, as things currently stand, incorporating institutional arbitration rules is likely to continue evidencing clear and unmistakable intention to arbitrate arbitrability by the vast majority of circuit courts, but a court may nonetheless find that such intention has been negated where certain claims are carved out from the scope of the parties' arbitration clause.

IV. CONCLUSIONS

There are many possible reasons for the Supreme Court's DIG order in *Schein*. It may be that the Court realized that this case did not present the best opportunity to address the relationship between carve-out and delegation provisions in arbitration clauses, or perhaps the Court was unable to reach a consensus and preferred to avoid a fractured opinion.[64] Whatever its motivation, the fact that the Court had not granted certiorari on the question presented by Archer did not frustrate its ability to decide Schein's appeal. It would have been possible for the Court to rule on the question before it without having to also decide whether incorporating the AAA rules constitutes clear and unmistakable evidence of an intent to arbitrate arbitrability. These two questions are distinct and address different levels of the arbitrability analysis, or "doughnut framework." While the Fifth Circuit's decision stands, its reasoning concerning the relationship between carve-out and delegation provisions is problematic for several reasons.

62. *Id.* at 848. The Sixth Circuit distinguished the Fifth Circuit's second decision in *Schein* on the basis of the placement of the delegation provision in the parties' respective arbitration agreements. While in *Schein* the carve-out provision was placed prior to the incorporation of the AAA rules (the delegation provision), in *Piersing* the delegation provision was entirely separate. *Id.* at 847–48. However, the placement of particular provisions should not affect their enforcement since, regardless of such placement, carve-out and delegation provisions engage different stages of the analysis, or "doughnut" levels.

63. Piersing v. Domino's Pizza Franchising LLC, 141 S. Ct. 1268 (2021). The question presented to the Court was: "[i]n the context of a form employment agreement, is providing that a particular set of rules will govern arbitration proceedings, without more, 'clear and unmistakable evidence' of the parties' intent to have the arbitrator decide questions of arbitrability?" Petition for a Writ of Certiorari at i, *Piersing*, 141 S. Ct. 1268 (No. 20-695). A similar petition for writ of certiorari from the Third Circuit's decision in Richardson v. Coverall N. Am., Inc., 811 Fed. Appx. 100 (3d Cir. 2020), a putative employment class action, was filed on the following question: "[w]hether incorporation by reference of a separate set of arbitration rules constitutes clear and unmistakable evidence of intent to delegate the threshold question of arbitrability to an arbitrator in a case involving an unsophisticated party presented with an adhesive agreement[.]" Petition for a Writ of Certiorari at i, Richardson v. Coverall N. Am., Inc., No. 20-763, 2021 WL 1072291 (U.S. Mar. 22, 2021). The Third Circuit had decided that the parties' incorporation of the AAA rules constituted "clear and unmistakable" evidence of their intention to delegate arbitrability questions to the arbitrator, notwithstanding the involvement of "unsophisticated parties." *Id*. at 104. The Supreme Court denied the Petition. Richardson v. Coverall N. Am., Inc., No. 20-763, 2021 WL 1072291 (U.S. Mar. 22, 2021).

64. *See generally* Kevin Russell, *Practice Pointer: Digging into DIGs*, SCOTUSBLOG (Apr. 25, 2019, 1:21 pm), https://www.scotusblog.com/2019/04/practice-pointer-digging-into-digs/ [https://perma.cc/NSY6-BF76].

First, the principles set out by the Supreme Court clearly establish that parties are free to agree to arbitrate arbitrability questions. The Fifth Circuit's decision undermines this freedom. Indeed, notwithstanding their explicit incorporation of the AAA rules, which has been held by the Fifth Circuit both in this case and in others to evidence clear and unmistakable intention to arbitrate arbitrability questions, the Fifth Circuit's decision rendered the parties' valid delegation provision inoperable.

Second, the Fifth Circuit's reasoning opens the door for parties to rely on carve-out provisions or claims that are arguably outside the scope of their arbitration agreement (the doughnut) in order to have the courts determine this scope question rather than the arbitrator (the doughnut's hole). As already mentioned, who decides arbitrability is not merely a procedural question—it enforces the parties' intentions and contractual obligations and implicates parties' right to access the courts. Were the mere inclusion of a carve-out provision or an arguably non-arbitrable claim sufficient in itself to negate a valid delegation provision, it is difficult to imagine any case in which the arbitrability determination would be made by an arbitrator. Such an outcome would defeat the purpose of including carve-out and delegation provisions in arbitration agreements and undermine the complementary jurisdictional spheres created by the Supreme Court for courts and arbitrators.

Third, the Fifth Circuit's reasoning creates uncertainty for parties to commercial arbitration agreements regarding their ability to arbitrate arbitrability questions by including a delegation provision. If courts proclaim that the incorporation of institutional arbitration rules constitutes a clear and unmistakable delegation of arbitrability questions to the arbitrator but then nonetheless proceed to decide arbitrability where a carve-out provision is present, "contract-drafting would be made needlessly, if not impossibly, complex."[65] Parties would be left guessing (and litigating) which words, or order of words, in their arbitration agreement might be interpreted by a court as negating, in whole or in part, their delegation provision. This, in turn, would result in precisely the "time-consuming sideshow" that the Supreme Court sought to avoid in its first opinion in *Schein*.[66]

The principles established by the Supreme Court, which I have presented in this Essay in the form of a "doughnut framework," should guide courts' arbitrability analysis. Pursuant to these principles, a court should not be permitted to get around its own finding that a delegation provision clearly and unmistakably evidences the parties' intention to arbitrate arbitrability questions. Rather, the court's "work [will] then have been done"[67] and it should refer any arbitrability questions to the arbitrator. This is so even if the arbitrability argument is "wholly groundless" or a carve-out provision is present. Notwithstanding the Supreme Court's DIG of the second appeal in *Schein*, it is hoped that the Court will soon

65. JPay, Inc. v. Kobel, 904 F.3d 923, 943 (11th Cir. 2018).

66. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530–31 (2019).

67. VRG Linhas Aereas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P., 717 F.3d 322, 326 (2d Cir. 2013).

have another opportunity to confirm and reinforce its previous jurisprudence and the distinction between the doughnut (arbitrability questions), the doughnut's hole (who decides arbitrability questions), and the hole in the doughnut's hole (whether the parties have clearly and unmistakably delegated the arbitrability question to the arbitrator).