UNTANGLING ARBITRATION: A THREE-PART SOLUTION

Isy Kristick[*]

ABSTRACT

Over the past century, the Supreme Court has expanded the authority of arbitrators. When both parties have equal bargaining power and sophistication, this expansion of authority raises few concerns. However, when corporations include arbitration clauses in their consumer agreements, the corporation usually holds most of the power and is more legally sophisticated. Today, crafty corporations are expanding the scope of their arbitration agreements to non-signatories by referencing undefined groups of third parties, essentially creating a limitless arbitration agreement. The use of these types of arbitration agreements shines a light on the entangled, unclear, and inconsistent state of arbitration law. The limitless expansion of arbitration agreements has raised questions about how broad arbitration agreements can and should be, the role of the courts in policing these agreements, and what restrictions the Federal Arbitration Act (FAA) places on them.

To resolve these questions, this Note proposes a three-part solution. First, courts should enforce parties' expansion of arbitration agreements only when they meet the "clear and unmistakable" standard because it balances restrictive contract principles with expansive agency principles and the presumption in favor of arbitration. Second, courts should determine which non-signatories are parties to the agreement in the first step of the analysis, rather than allowing an arbitrator to decide in the second step, because it ensures that the parties agreed to arbitrate before compelling arbitration. Third, courts should enforce the FAA's textual requirement that the dispute "arise out of" the underlying contract in order to be subject to arbitration despite that portion of the FAA having long been forgotten by courts.

Finally, this Note applies these solutions to Piccolo*. On February 22, 2024, Jeffrey Piccolo, as personal representative of Kanokporn Tangsuan's estate, brought a negligence suit against Raglan Road Irish Pub and Restaurant and Disney Springs (collectively, Disney). This case highlights several of the issues identified in this Note during Disney's initial attempt to compel arbitration based on a Disney+ subscription.*

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INTRODUCTION

On October 5, 2023, Kanokporn Tangsuan died from an allergic reaction at Disney Springs.[1] Kanokporn's husband, Jeffrey Piccolo, subsequently filed suit on behalf of her estate against Raglan Road and Walt Disney Parks and Resorts alleging multiple counts of negligence.[2] In response, the defendants filed a motion to compel arbitration primarily based on an arbitration clause contained in Piccolo's Disney+ subscription, which Piccolo disputed on multiple accounts.[3] *Piccolo* demonstrates the ever-entangled state of law that governs arbitration agreements today and calls for the Supreme Court to clarify and reform arbitration law. *Piccolo* outlines three major issues within arbitration law: (1) whether signatory parties expand the scope of parties encompassed by the arbitration agreement by referencing "affiliates"; (2) at what step and who should consider the scope of the parties to the agreement; and (3) whether the claim must arise out of the initial agreement in order to be arbitrable.

These issues will be untangled by building upon existing case law, arbitration principles, and contract law. Then, aspects of *Piccolo* will be analyzed as applied to the identified issues and proposed solutions. Section III of this Note addresses the first question and proposes that parties can include affiliates and other non-signatories as parties to arbitration clauses; however, they must meet a "clear and unmistakable" standard. Section IV tackles the second question and proposes that the court should be the one to determine which parties are included in the arbitration agreement in the first step of analysis. Finally, Section V addresses the third question and proposes that the FAA requires the dispute to "arise out of" the agreement.

I. BACKGROUND

A. The Federal Arbitration Act

Arbitration is an alternative form of dispute resolution, where outside of a formal court a neutral third party, the arbitrator, hears each party's

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[1] Complaint at 4–7, Piccolo v. Great Irish Pubs Fla., Inc., No. 2024-CA-001616-O, 2024 WL 3842742 (Fla. Cir. Ct. Feb. 22, 2024).

[2] Plaintiff's Response in Opposition to Defendant, Walt Disney Parks and Resorts U.S., Inc.'s Motion to Compel Arbitration and Stay Case at 2–3, Piccolo v. Great Irish Pubs Fla., Inc., No. 2024-CA-001616-O, 2024 WL 3874695 (Fla. Cir. Ct. Aug. 2, 2024) [hereinafter Opposition to Motion to Compel Arbitration].

[3] Defendant Walt Disney Parks and Resorts U.S., Inc.'s Motion to Compel Arbitration and Stay Case at 2, 4, Piccolo v. Great Irish Pubs Fla., Inc., No. 2024-CA-001616-O, 2024 WL 3874700 (Fla. Cir. Ct. May 31, 2024) [hereinafter Motion to Compel Arbitration and Stay Case]; Opposition to Motion to Compel Arbitration, *supra* note 2, at 5–6.

perspective and issues a binding decision.[4] Arbitration has been utilized for centuries to resolve disputes.[5] In the United States, the use of arbitration dates back to the Commonwealth of Massachusetts prior to independence, and even among Native Americans prior to colonization.[6] However, as formal government and courts took shape, tension was created between legislatures, courts, and arbitration.[7] Up until the passage of the Federal Arbitration Act (FAA), courts did not enforce arbitration agreements with specific performance while the legislature limited arbitrators' statutory authority to specific subject matters.[8]

However, in 1925 Congress shifted the judicial and legislative attitude towards arbitration by passing the FAA.[9] Legislative history indicates that Congress passed the FAA to ensure that "[a]n arbitration agreement is placed on the same footing as other contracts."[10] In order to compel arbitration under the FAA, a court must determine whether an arbitration agreement exists and whether the dispute is arbitrable under the agreement.[11] Since its passage, courts have embraced arbitration by granting arbitrators broad authority, so long as the court finds that an enforceable arbitration agreement exists.[12] Courts have done so by allowing parties to delegate the question of arbitrability to arbitrators, and by allowing parties to expand the scope of their arbitration agreements to non-signatories.[13]

The passage of the FAA has enabled parties to take advantage of the benefits of arbitration: increased control over the settlement process, reduced costs and time to settle disputes, privacy, finality, and arbitrators who are experts in the subject matter.[14] However, arbitration is not without its critics.

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[4] *See Arbitration Forms*, US LEGAL, https://www.uslegalforms.com/arbitration/?msclkid=a9698e932750135f12b4e7ec685388d6&utm_source=bing&utm_medium=cpc&utm_campaign=USLF_Category_Arbitration&utm_term=what%20is%20arbitration&utm_content=Arbitration%20Forms [https://perma.cc/L9VA-N4U4] (last visited Feb. 1, 2026).

[5] Daniel Bernard Centner & Megan Cifrese Ford, *A Brief History of Arbitration*, ABA (Sep. 19, 2019), https://www.americanbar.org/groups/tort_trial_insurance_practice/resources/brief/archive/brief-history-arbitration/ [https://perma.cc/CJ77-H8LM].

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* (quoting Kulukundis Shipping Co., v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).

[11] Revitch v. DIRECTV, LLC, 977 F.3d 713, 716 (9th Cir. 2020).

[12] Centner & Ford, *supra* note 5.

[13] Henry Schein, Inc. v. Archer and White Sales, Inc., 586 U.S. 63, 69 (2019) (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)); Thomson-CSF v. Am. Arb. Ass'n, 64 F.3d 773, 776 (2d Cir. 1995).

[14] *See Why Arbitrate*, COLL. COM. ARBS., https://www.ccarbitrators.org/why-arbitrate/#:~:text=Arbitration%20has%20many%20advantages%20over,desired%20characte

Recently, arbitration has been criticized for being unfair when it is compelled through mandatory arbitration clauses in employer-employee contracts and business-consumer agreements, as seen in *Piccolo*, due to the "take-it-or-leave-it" nature of the contracts, where the employees and consumers have little to no say in the terms of their contracts.[15]

While the FAA sets the framework for arbitration law, the Supreme Court has been left to interpret its provisions and detail its requirements while also adhering to state laws governing arbitration.[16] Arbitration agreements are subject to applicable state laws, but "[w]hen state law prohibits outright the arbitration of a particular type of claim, the . . . conflicting rule is displaced by the FAA."[17] One example of this was when the Supreme Court held that the FAA displaced a state law prohibiting the arbitration of wrongful death claims.[18]

The intricacies of arbitration law are placed center stage in *Piccolo*.

B. Piccolo

On October 5, 2023, Kanokporn Tangsuan; her husband, Jeffrey Piccolo; and mother-in-law, Jackie Piccolo dined at Raglan Road, a restaurant in Disney Springs.[19] Kanokporn suffered from an extreme allergy to dairy and nuts.[20] They chose to dine at Raglan Road because of representations made by Disney and Raglan Road that "accommodation of persons with food allergies is a top priority."[21] Throughout the dinner Kanokporn asked the waiter about allergy concerns and the restaurant's ability to accommodate,

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ristics%20and%20experience%3B%20and [https://perma.cc/FFZ3-KVEB] (last visited Jan. 26, 2025).

[15] *Mandatory Arbitration Clauses are Discriminatory and Unfair*, PUB. CITIZEN, https://www.citizen.org/article/mandatory-arbitration-clauses-are-discriminatory-and-unfair/ [https://perma.cc/YNJ6-HU9Q] (last visited Jan. 26, 2025); Edmund L. Andrews, *Why the Binding Arbitration Game Is Rigged against Customers*, STAN. GRADUATE SCH. BUS. (Mar. 8, 2019), https://www.gsb.stanford.edu/insights/why-binding-arbitration-game-rigged-against-customers [https://perma.cc/3MDA-HBER]; Opposition to Motion to Compel Arbitration, *supra* note 2.

[16] The following is a list of United States Supreme Court decisions regarding arbitration and the FAA: Henry Schein, Inc. v. Archer and White Sales, Inc., 586 U.S. 63 (2019); Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995); AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643 (1986); Coinbase, Inc. v. Suski, 602 U.S. 143 (2024); Lamps Plus, Inc. v. Varela, 587 U.S. 176 (2019).

[17] Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 533 (2012) (quoting AT&T Mobility v. Concepcion, 563 U.S. 333, 341 (2011)).

[18] *Id.*

[19] Complaint, *supra* note 1, at 4.

[20] *Id.*

[21] *Id.* at 3.

to which they were reassured that the restaurant could serve Kanokporn safely.[22] After finishing dinner, Kanokporn and Jackie decided to go shopping.[23] Kanokporn then suffered from an extreme allergic reaction and was rushed to the hospital.[24] Kanokporn later died from the allergic reaction which was determined to be caused by "elevated levels of dairy and nut in her system."[25]

As a result of these events, on February 22, 2024, Jeffrey Piccolo, as the personal representative of the estate of Kanokporn Tangsuan, brought a complaint against Raglan Road Irish Pub and Restaurant and Disney Springs[26] in the Ninth Judicial Circuit of Florida for negligence.[27] Subsequently, Disney filed a motion to compel arbitration and stay proceedings.[28] The motion to compel arbitration alleged that the claims brought by Piccolo were subject to arbitration because of a Disney account Piccolo created in order to subscribe to Disney+, supplemented by the My Disney Experience Terms and Conditions.[29]

To create the account Piccolo had to agree to the Subscriber Agreement which linked Disney's Terms of Use. The Subscriber Agreement explicitly stated "that 'any dispute between You and Us . . . must be resolved by individual binding arbitration'" while the linked Terms of Use included an arbitration clause that covers "'all disputes' including those involving 'The Walt Disney Company or its affiliates.'"[30] The Terms of Use further defined dispute as "any dispute, action, or other controversy, whether based on past, present, or future events, between you and us concerning the Disney Services or this Agreement, whether in contract, tort, warranty, statute, regulation, or other legal or equitable basis."[31] The Terms of Use also delegated the arbitrator the authority to address concerns regarding "the arbitrability of any dispute."[32]

Piccolo agreed to the My Disney Experience Terms and Conditions, while purchasing Epcot tickets, on behalf of himself and "all persons . . . for whom [he was] purchasing or otherwise securing benefits and/or managing

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[22] *Id.* at 4–5.
[23] *Id.* at 5.
[24] *Id.* at 6.
[25] *Id.* at 6–7.
[26] Defendants collectively will be referred to as Disney.
[27] Opposition to Motion to Compel Arbitration, *supra* note 2, at 2–3.
[28] Motion to Compel Arbitration and Stay Case, *supra* note 3.
[29] *Id.* at 2–4.
[30] *Id.* at 3–4.
[31] *Id.* at 4.
[32] *Id.*

those benefits and entitlements such as tickets" and to have said terms "apply in addition to, and not in lieu of, the Disney Terms of Use."[33]

Piccolo responded and argued that Disney waived its right to arbitration.[34] He further asserted that even if Disney did not waive its right, there is no agreement to arbitrate because Piccolo could not bind a party that did not exist, his wife's estate.[35] Piccolo also argued that it "borders on the surreal" to think "any person who signs up for a Disney+ account, . . . forever . . . agreed (on behalf of other survivors and the estate itself) to arbitrate any and all disputes against any and all Disney entities and affiliates, no matter how far removed from use of the Disney+ streaming service."[36]

He then argued that if the Disney+ agreement exists, it is limited to the Subscriber Agreement, for there was no notice for the Disney Terms of Use because the hyperlink was not provided on the Disney+ registration page and instead was buried in the Subscriber Agreement.[37] Thus, he only agreed to claims that concern Disney+ streaming service and argued that the Subscriber Agreement does not extend arbitration to affiliates.[38] He also argued that the Disney Terms of Use conflict with the My Disney Experience Terms and Conditions because the Terms and Conditions do not require arbitration and instead describe court jurisdiction and where lawsuits may be filed.[39] His final argument was that even if a valid arbitration agreement exists it would be unconscionable.[40]

Although Disney later withdrew its motion to compel, *Piccolo* still demonstrates the increasing amounts of disputes being raised regarding expansive arbitration agreements including those addressed in this Note: whether signatory parties expand the scope of parties encompassed by the arbitration agreement by referencing "affiliates"; at what step and who should consider the scope of the parties to the agreement; and whether the claim must arise out of the initial agreement in order to be arbitrable.[41]

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[33] *Id.* at 5; Opposition to Motion to Compel Arbitration, *supra* note 2, at 3.
[34] Opposition to Motion to Compel Arbitration, *supra* note 2, at 3 ("[Disney] has waived its alleged right to seek arbitration by filing its Answer without raising arbitration as an affirmative defense and by serving two separate Requests for Copies under Rule 1.351(e).").
[35] *Id.* at 4.
[36] *Id.* at 4.
[37] *Id.* at 5.
[38] *Id.*
[39] *Id.* at 5–6.
[40] *Id.* at 6.
[41] Notice of Withdrawing Motion to Compel Arbitration and Stay Case, Piccolo v. Great Irish Pubs Fla., Inc., No. 2024-CA-001616-O, 2024 WL 3889994 (Fla. Cir. Ct. Aug. 20, 2024); *see* Motion to Compel Arbitration and Stay Case, *supra* note 3; Opposition to Motion to Compel Arbitration, *supra* note 2.

II. EXPANDING THE SCOPE OF AN ARBITRATION AGREEMENT: THE "CLEAR AND UNMISTAKABLE" STANDARD

Since the passage of the FAA, courts have continually refined their approach to arbitration issues, which has been further complicated by the growing scope of arbitration agreements.[42] When settling disputes regarding arbitration agreements, the first step in a court's analysis is to determine whether a valid arbitration agreement exists between the parties.[43] One key aspect of this analysis is determining who the parties are. The answer to that question is simple when the parties to the dispute are the parties that signed the arbitration agreement; however, that is not always the case.[44] Today, some drafters expand the scope of arbitration agreements by utilizing "affiliates," and other expansive language, to incorporate non-signatories into the agreement.[45] This was done in *Piccolo* where the terms of the agreement expanded its scope to non-signatories who are "affiliates" and to "all persons . . . for whom you are purchasing or otherwise securing benefits."[46] Using undefined terms in this way creates disputes as to whether parties can expand the scope to non-signatories and, if so, who is an acceptable non-signatory.[47] This forces the court to balance the parties' opposing interests in order to determine the scope of the agreement. One set of interests, usually the consumer that is compelled to arbitrate, wants to limit the agreement to the signatories and is supported by restrictive contract principles.[48] The other set, usually the corporation that compels arbitration, is in favor of expansive language and is supported by expansive agency principles and the presumption towards arbitration.[49]

Generally, it has been accepted that parties can expand the scope of arbitration agreements through incorporation by reference, or in other words applying the agreement to a non-signatory simply by stating the signatory is subject to the agreement. However, courts and the law have failed to define a universal standard that parties must meet in order to expand the scope of the agreement to a non-signatory.[50] Courts often turn to state law to define

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[42] *See* Coinbase, Inc. v. Suski, 602 U.S. 143, 143–44 (2024); Revitch v. DIRECTV, LLC, 977 F.3d 713, 715–17 (9th Cir. 2020); Mey v. DIRECTV, LLC, 971 F.3d 284, 287–88 (4th Cir. 2020).
[43] Henry Schein, Inc. v. Archer and White Sales, Inc., 586 U.S. 63, 69 (2019).
[44] *See Revitch*, 977 F.3d at 715–16; *Mey*, 971 F.3d 287–88.
[45] *Mey*, 971 F.3d at 287.
[46] Motion to Compel Arbitration and Stay Case, *supra* note 3, at 3–5.
[47] David Horton, *Accidental Arbitration*, 102 WASH. U. L. REV. 1381, 1425–26 (2025).
[48] *See Revitch*, 977 F.3d at 715–16; *Mey*, 971 F.3d at 287–88; Horton, *supra* note 47, at 1383–87, 1425–26.
[49] *See Revitch*, 977 F.3d at 715–16; *Mey*, 971 F.3d at 287–88; Horton, *supra* note 47, at 1383–87, 1425–26.
[50] *See* E.I. DuPont De Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187, 194–95 (3d Cir. 2001); *Revitch*, 977 F.3d at 715–16; *Mey*, 971 F.3d at 287–88.

the scope of the agreement; however, in today's interconnected society, this may result in two people signing identical agreements and a variance in enforceability, which depends on the state where an individual seeks enforcement of the agreement.[51] Instead, a universal standard balances these opposing interests by allowing parties to expand the scope of arbitration agreements through incorporation by reference so long as they meet the "clear and unmistakable" standard as to who is encompassed by the expansive language.[52] The "clear and unmistakable" standard would create a rebuttable presumption that non-signatories are not parties to the agreement. When analyzing whether parties have overcome this presumption, courts would look to the text of the agreement, the parties' conduct, whether the parties object to arbitration, the relationship between the parties, the circumstances around the formation of the agreement, and any other relevant factors. This standard balances restrictive contract principles with expansive agency principles and the current presumption towards arbitration.

A. Extending the "Clear and Unmistakable" Standard to Determine the Scope of Parties

The "clear and unmistakable" standard reverses the usual presumption towards arbitration.[53] While it is traditionally used to resolve the question of who determines whether an issue is arbitrable, courts should apply this reverse presumption when determining the scope of the parties.[54] In its traditional application, in order for parties to delegate the question of arbitrability to an arbitrator rather than a court, the parties must do so with "clear and unmistakable" language.[55] Thus, when parties delegate the question of arbitrability to the arbitrator, the presumption is against arbitration.[56] When applying this standard to determine the scope of the parties, a court would presume that non-signatories are not included as parties to the arbitration agreement. Some parties would want to rebut this presumption in order to force the opposing non-signatory party into arbitration, rather than litigating in court.

This presumption against inclusion could only be overcome by "clear and unmistakable" language indicating the parties intend to include the non-

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[51] *Mey*, 971 F.3d at 294–95 (expanding the scope of the AT&T arbitration agreement to include DIRECTV relying on the state's "absurd results" rule); *Revitch*, 977 F.3d at 718 (declining to expand the scope of the AT&T arbitration agreement to include DIRECTV).
[52] First Options of Chi., Inc. v. Kaplan, 514 U.S. 943, 944–45 (1995) (explaining the concept of the clear and unmistakable standard in the context of arbitrating arbitrability).
[53] *First Options of Chi., Inc.*, 514 U.S. at 944–45.
[54] Henry Schein, Inc. v. Archer and White Sales, Inc., 586 U.S. 63, 69 (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).
[55] *Id.*
[56] *First Options of Chi., Inc.*, 514 U.S. at 944–45.

signatory in the arbitration agreement when referencing "affiliates." To determine if the language was "clear and unmistakable" in the context of delegating the question of arbitrability, courts turn to what the parties "reasonably would have thought a judge, not an arbitrator, would decide."[57] Courts should use this same test to determine the scope of the parties involved by determining who the parties "reasonably would have thought" were included in the agreement.[58]

Like in the context of delegating the question of arbitrability, courts should analyze the scope of the parties on a case-by-case basis.[59] Courts have largely failed to identify specific factors to consider in order to meet the "clear and unmistakable" standard in the context of delegating the question of arbitrability, besides the reference to arbitrator provider rules.[60] One factor courts have identified is whether the parties are currently objecting to the arbitration.[61] Another factor courts have considered is "whether the dispute in question was an immediate, foreseeable result of the performance of contractual duties."[62] In addition to these factors, courts should consider other factors typically used to determine the intent of parties in contract. Some examples include the text of the agreement, the parties' conduct, the relationship between the parties, and the circumstances around the formation of the agreement.[63] The most important of these factors is the text of the agreement because the terms of the contract control when the agreement is unambiguous.[64] Therefore, when an agreement is unambiguous, it meets the "clear and unmistakable" standard.

Courts in most jurisdictions allow the incorporation of arbitrator provider rules, like the rules provided by the Judicial Arbitration and

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[57] *Id.* at 945.
[58] *Id.*
[59] *See* Gilbert A. Samberg, *The Bermann Objection: Re-Thinking the "Clear and Unmistakable" Manifestation Test re Who Decides Arbitrability Issues*, MINTZ (Jan. 18, 2019), https://www.mintz.com/insights-center/viewpoints/2196/2019-01-bermann-objection-re-thinking-clear-and-unmistakable [https://perma.cc/V5XS-5VAK].
[60] *See id.* Parties to arbitration can establish their own rules governing their arbitration. Arbitrator provider rules are a set of procedural guidelines created by independent organizations for alternative dispute resolution, such as arbitration, which parties can incorporate into their agreements rather than creating their own comprehensive list of rules and procedures. Butler Snow, *Arbitration Agreements: Make Your Own Rules of Civil Procedure*, BUTLER SNOW (May 24, 2016), https://www.butlersnow.com/news-and-events/arbitration-agreements-make-your-own-rules-of-civil-procedure# [https://perma.cc/P8ND-7KWM].
[61] *First Options of Chi., Inc.* 514 U.S. at 943–47.
[62] Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1213 (11th Cir. 2021) (quoting Hearn v. Comcast Cable Comm'ns, LLC, 992 F.3d 1209, 1213 (11th Cir. 2021)).
[63] *Contract Law-Intention*, CHAMBERLAINS (Sep. 24, 2021), https://chamberlains.com.au/contract-law-intention/ [https://perma.cc/RC5Q-LUWU].
[64] *See* Foothill Cap. Corp. v. East Coast Bldg. Supply Corp., 258 B.R. 840, 845 (E.D. Va. 2001).

Mediation Services, Inc. (JAMS), to serve as a "clear and unmistakable" delegation of arbitrability.[65] However, the inclusion of JAMS rules would not meet the "clear and unmistakable" standard when determining the scope of "affiliates."[66] Here, a court is determining whether the non-signatories consented to the agreement and whether the signatories intended to arbitrate with the non-signatory as an "affiliate." It is a question of arbitrability based on formation rather than a question of arbitrability based on the merits.[67] Incorporating the JAMS rules would not satisfy the "clear and unmistakable" standard because "it can hardly be said that contracting parties clearly and unmistakably agreed to have an arbitrator decide the existence of an arbitration agreement when one of the parties has put the existence of that very agreement in dispute."[68] Instead, the application of the "clear and unmistakable" standard to the determination of the scope of the term "affiliates" would only mean that courts reverse the presumption towards arbitration and consider the factors proposed above.

In sum, the "clear and unmistakable" standard would presume that the non-signatories in question are not parties to the agreement unless the agreement includes them clearly and unmistakably. In applying this presumption, courts would first consider whether the text is ambiguous, then consider whether the parties object to arbitration, the parties' conduct, the relationship between the parties, the circumstances around the formation of the agreement, and any other relevant factors. This standard should be applied universally, rather than courts utilizing state law to define the scope of the agreement, to help ensure that identical agreements are interpreted consistently regardless of which state the interpreting court lies in, which is especially important given the number of corporations that use how many corporations utilizing arbitration agreements span across multiple states.[69]

B. Limiting v. Expanding the Scope of Arbitration Agreements

When faced with the issue of expanding the scope of arbitration agreements to non-signatories, courts must balance restrictive contract principles with expansive agency principles and the current presumption

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[65] Joyce B. Klemmer, *Who Decides, Court or Arbitrator, Whether a Nonsignator May or Must Arbitrate?*, ALM, May 16, 2024, at 2, https://www.jamsadr.com/insight/2024/who-decides-court-or-arbitrator-whether-a-nonsignator-may-or-must-arbitrate [https://perma.cc/3W58-5CAU].

[66] *See* JAMS COMPREHENSIVE ARB. RULES & PROC. (JAMS 2021); Klemmer, *supra* note 65, at 2.

[67] *See* Klemmer, *supra* note 65.

[68] *See* MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 401 (3d Cir. 2020).

[69] *Compare* Revitch v. DIRECTV, LLC, 977 F.3d 713 (9th Cir. 2020) (declining to expand the scope of the AT&T arbitration agreement to include DIRECTV); *with* Mey v. DIRECTV, LLC, 971 F.3d 284 (4th Cir. 2020) (expanding the scope of the AT&T arbitration agreement to include DIRECTV relying on the state's "absurd results" rule).

towards arbitration. The "clear and unmistakable" standard strikes this balance by reversing the presumption towards arbitration and only enabling parties to expand the scope of arbitration agreements when it is done with clear and unmistakable language so as to prevent parties from expanding their agreements through ambiguous language.

1. Restrictive Contract Principles and the Supreme Court's Call for Consistency

The "clear and unmistakable" standard aligns with contract principles which call for limiting the scope of the arbitration agreements due to the universal requirements of manifested assent and meeting of the minds, and some states' "absurd results" rule.

Fundamentally, arbitration is a matter of contract.[70] Under contract law an individual or entity can be a party or a non-signatory, but not both.[71] A party is a signatory that "manifested assent to a transaction through some mechanism" while non-signatories are entities that never manifested their assent or "their willingness to be bound."[72] Those in favor of limiting the scope of arbitration agreements believe that courts should undergo a strict analysis of whether the entity agreed to the arbitration agreement, to determine whether an entity should be bound by the contract.[73] Evidence of an entity's agreement "could consist of communications between executives or counsel . . . that verifies their intent 'to enter [the] contract[] collectively.'"[74] Practically, this approach would only extend arbitration agreements to non-signatories that are "closely related" to the drafters and would not allow "gigantic classes of potential defendants to [exist as] 'parties.'"[75]

In some situations involving employees or subsidiaries, this strict standard can be cumbersome and redundant.[76] This is especially true today due to the increase in mergers and acquisitions which has increased the number of once independent businesses now controlled by a few larger

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[70] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995); John R. Vales, *Expanding the Reach of Arbitration Agreements: A Pennsylvania Federal Court Opinion Applies Principles of Agency and Contract Law to Require a Subsidiary-Reinsurer to Arbitrate Under Parent's Agreement*, RIKER DANZIG LLP (Apr. 2022), https://riker.com/wp-content/uploads/2022/04/article-11243.pdf [https://perma.cc/4EHQ-8R3G].
[71] Horton, *supra* note 47, 1425.
[72] *Id.* at 1425–26.
[73] *Id.* at 1429–32; Thomson-CSF v. Am. Arb. Ass'n., 64 F.3d 773, 776 (2d Cir. 1995).
[74] Horton, *supra* note 47, at 1426.
[75] *Id.*
[76] *See id.* at 1425–26.

parent companies.[77] This trend has led corporations to utilize broad terms within arbitration agreements in order to encompass their growing number of subsidiaries, sister corporations, and employees.[78] But by limiting the scope of arbitration agreements to signatories, corporations will be forced to have all of their related entities sign the agreement, or have explicit evidence of agreement even when they are operated within arm's length, which places an undue burden on the parties and drafters.[79] The proposed "clear and unmistakable" standard acknowledges the dangers of ambiguous language while balancing the burden of limiting the agreements only to signatories by allowing drafters to expand the scope of arbitration agreements so long as they are doing so clearly and unmistakably.

Contract principles also mandate a "meeting of the minds" before an agreement can be formed, in which all parties have objectively manifested assent to the terms of the agreement.[80] While a signature is not required to satisfy the "meeting of the minds," it is strongly indicative; the absence of a signature and lack of clarity on the scope of "affiliates" used to expand arbitration agreements to non-signatory parties calls into question whether the entity manifested assent and achieved a meeting of the minds.[81] However, under the "clear and unmistakable standard," a court would only expand the scope of the agreement when it is "clear and unmistakable" that the entity falls under the use of "affiliates" in the agreement, ensuring a meeting of the minds and consent from the parties to arbitrate.

The meeting of the minds limitation is also reflected in some states' contract law that uses the "absurd results" rule, where a contract's language will "govern its interpretation" as long as "the language is clear and explicit, and does not involve an absurdity."[82] The Ninth Circuit used the absurd results rule in *Revitch* to determine that DIRECTV was not an affiliate to the arbitration agreement between Revitch and AT&T because at the time

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[77] Gregory Daco & Mitch Berlin, *M&A Outlook Signals Firming US Deal Market Activity in 2025*, EY PARTHENON (Nov. 21, 2024), https://www.ey.com/en_us/insights/mergers-acquisitions/m-and-a-outlook#:~:text=Corporate%20M&A%20outlook,-Our%20baseline%20scenario&text=Over%20the%20pre%2Dpandemic%20decade,2021%20to%20around%201%2C900%20deals [https://perma.cc/N4CJ-F49K].
[78] Horton, *supra* note 47, at 1406.
[79] *Id.* at 1427.
[80] *Meeting of the Minds*, LEGAL INFO. INST. (July 2023), https://www.law.cornell.edu/wex/meeting_of_the_minds [https://perma.cc/8ZK6-E4E6].
[81] *Id.*; Daniel Liberto, *What is a Meeting of the Minds? Definition and Use With Contracts*, INVESTOPEDIA (Apr. 28, 2024), https://www.investopedia.com/terms/m/meeting-of-the-minds.asp#:~:text=In%20legal%20terms%2C%20the%20phrase,agreement%20need%20not%20occur%20simultaneously [https://perma.cc/PKX3-U3Q3]; *see* Revitch v. DIRECTV, LLC, 977 F.3d 713, 716 (9th Cir. 2020); Mey v. DIRECTV, LLC, 971 F.3d 284, 289–91 (4th Cir. 2020).
[82] CAL. CIV. CODE § 1638; *see also Revitch*, 977 F.3d at 717 (applying CAL. CIV. CODE § 1638).

AT&T and Revitch entered into the contract, DIRECTV had not been acquired by AT&T.[83] It would be an absurd result to believe that a reasonable person at the time would "have expected that he would be forced to arbitrate an unrelated dispute with DIRECTV."[84] In *Revitch*, when deciding not to expand the scope of the agreement, the court conceded that had the drafters made clear that the term "affiliates" was to include "any affiliates, both present and future," the court may have come to a different conclusion.[85] This concession indicates that the lack of clarity in the definition of "affiliates" as used in the agreement failed to result in a meeting of the minds as to whether "affiliates" included future AT&T affiliates.

The proposed "clear and unmistakable" standard provides a safeguard similar to the "absurd results" rule. It helps to ensure a reasonable person's understanding that the contract clearly and unmistakably intends to extend the scope of the agreement to the specific entity in question. Under the proposed "clear and unmistakable" standard, the use of "affiliates" in *Revitch* would fail for the same reasons it failed under the "absurd results" rule.[86]

The Supreme Court's recent decision regarding arbitration also emphasizes the importance of contract principles when interpreting and enforcing arbitration agreements. In *Coinbase, Inc. v. Suski*, the dispute involved two conflicting contracts: the first contract included an arbitration clause that delegated issues of arbitrability to the arbitrator while the second contained a forum selection clause.[87] A class action was brought against Coinbase according to terms of the forum selection clause; however, Coinbase sought to compel arbitration based on the arbitration clause in the first contract.[88] As such the Supreme Court had to decide when there are conflicting agreements, one with a forum selection clause and the other delegating arbitrability, who should decide arbitrability, the court or the arbitrator.[89] The Court held that "[a]rbitration is a matter of contract and consent . . . disputes are subject to arbitration if, and only if, the parties actually agreed to arbitrate those disputes," thus the court should be the one to determine which contract governs before compelling arbitration.[90] The Supreme Court's reliance on contract principles further reflects the "clear and unmistakable" standard because the standard only compels arbitration when the parties have agreed to do so through clear and unmistakable language.

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[83] *Revitch*, 977 F.3d at 717–18.
[84] *Id.* at 718.
[85] *Id.*
[86] *Id.*
[87] Coinbase, Inc. v. Suski, 602 U.S. 143, 145 (2024).
[88] *Id.*
[89] *Id.*
[90] *Id.*

2. Expansive Principles: The FAA, the Presumption Towards Arbitration, and Agency Principles

The "clear and unmistakable" standard balances the scope of the FAA, the presumption towards arbitration, and agency principles, which advocate for expanding the scope of arbitration agreements by still allowing parties to expand the scope of their agreements to non-signatories through "clear and unmistakable" language.

Under the FAA, an arbitration agreement's scope is not limited to the signatories.[91] Many courts expand arbitration agreements to non-signatories through "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel,"[92] and 6) when the non-signatory is an intended third party beneficiary.[93] These theories require courts to undergo a sort of balancing test to determine how far to extend the agreement.[94] However, balancing tests have been criticized in other contexts for their lack of explanation, potential abuse of power, and inconsistency in application.[95] By instilling a universal "clear and unmistakable" standard, the burden would rest on the parties to clearly define the scope of their agreement, rather than having a court define the ambiguous language used in the agreement by balancing each parties' interests.

Additionally, the FAA was designed to "ensur[e] that private agreements to arbitrate are enforced according to their terms."[96] When courts enforce terms that expand the scope of arbitration agreements to affiliate non-signatories, the court is fulfilling the FAA's purpose of "enforc[ing agreements] according to their terms."[97]

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[91] Thomson-CSF v. Am. Arb. Ass'n, 64 F.3d 773, 776 (2d Cir. 1995).
[92] *Id.* The decision has been subsequently cited by the majority of federal circuits: Ouadani v. TF Final Mile LLC, 876 F.3d 31 (1st Cir. 2017); Bel-Ray Co. V. Chemrite Ltd., 181 F.3d 435 (3d Cir. 1999); R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157 (4th Cir. 2004); Sapic v. Gov't of Turkmenistan, 345 F.3d 347 (5th Cir. 2003); Javitch v. First Union Sec., Inc., 315 F.3d 619 (6th Cir. 2003); A.D. v. Credit One Bank, N.A., 885 F.3d 1054 (7th Cir. 2018); Reid v. Doe Run Res. Corp., 701 F.3d 840 (8th Cir. 2012); Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042 (9th Cir. 2009); Emps. Ins. Of Wausau v. Bright Metal Specialties Inc., 251 F.3d 1316 (11th Cir. 2001). The 10th and DC Circuits are yet to address this; however, their district courts have cited *Thomson-CSF*.
[93] E.I. DuPont De Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187, 194–95 (3d Cir. 2001). District courts in the majority of the circuits use this rule.
[94] *See Thomson-CSF*, 64 F.3d at 776–80; *E.I. Dupont De Nemours and Co.*, 269 F.3d at 194–95.
[95] Joseph M. Capobianco, *Rethinking the Right to Counsel-of-Choice Balancing Test: An Originalist Approach*, 68 S.D. L. REV 1, 1 (2023).
[96] Volt Info. Scis. v. Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).
[97] *See id.*

The Supreme Court has also established a presumption towards arbitration when determining "whether a particular merits-related dispute is arbitrable" under an existing arbitration agreement.[98] However, courts do not extend this presumption to ambiguities that try "to encompass claims and parties that were not intended by the original contract."[99] Currently, courts apply this presumption differently, whereby some courts expand the scope of arbitration agreements to non-signatory parties, while others fail to expand identical agreements.[100] A universal "clear and unmistakable" standard will help reduce the number of circuit splits created when courts interpret the same contract in different states. The standard also ensures that the presumption towards arbitration is only extended to those parties that the original agreement intended, which aligns with the principle that the presumption towards arbitration does not extend when there are ambiguities as to the intended parties.[101]

3. The "Clear and Unmistakable" Standard as the Solution

Balancing restrictive contract principles with opposing expansive interests does not require courts to choose between mutually exclusive solutions: one in which arbitration agreements should be limited purely to signatories, or the other where these agreements can be drafted without limits, as some scholars suggest.[102] This approach oversimplifies the parties and their interests. The "clear and unmistakable" standard strikes a middle ground between these rival approaches. This standard allows parties to expand the scope of the agreement while ensuring that only those disputes "that the parties have agreed to submit to arbitration" actually go to

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[98] First Options of Chi., Inc. v. Kaplan, 514 U.S. 943, 944–45 (1995); *see also* AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986) ("Finally, it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability…"); and Lamps Plus, Inc. v. Varela, 587 U.S. 176, 189 (2019) ("[W]e have repeatedly held that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration."); and Mey v. DIRECTV, LLC, 971 F.3d 284, 294 (4th Cir. 2020) (following *Lamps Plus, Inc.*).

[99] *Thomson-CSF*, 64 F.3d at 776; *see also* Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1213–14 (11th Cir. 2021) ("Sixt hasn't demonstrated that Florida law independently requires us to resolve 'any doubts' about the scope of an arbitration provision in favor of arbitrability.").

[100] *Mey*, 971 F.3d at 294–95 (extending the AT&T arbitration agreement to include DIRECTV, a future affiliate non-signatory, when the agreement did not clearly state that "affiliates" included future affiliates that were not affiliates at the time the agreement was formed); Revitch v. DIRECTV, LLC, 977 F.3d 713, 718 (9th Cir. 2020) (declining to expand the scope of the AT&T arbitration agreement to include DIRECTV).

[101] *See Thomson-CSF*, 64 F.3d at 776 (establishing while "there is a strong and 'liberal federal policy favoring arbitration agreements,' such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract.") (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985)).

[102] Horton, *supra* note 47, at 1425–26.

arbitration.[103] The "clear and unmistakable" standard ensures there is a meeting of the minds evidenced by clear and unmistakable language that indicates the parties' intent. Furthermore, the Supreme Court's reliance on contract principles to promote clarity in arbitration agreements supports the imposition of the "clear and unmistakable" standard.

C. "Clear and Unmistakable" as Applied to Piccolo

In *Piccolo*, the court would likely find that the parties satisfied the "clear and unmistakable" standard when using "affiliates" to include the restaurant as a party but failed to satisfy the standard when using "all persons . . . for whom you are purchasing or otherwise securing benefits" to expand the agreement to the estate.[104]

The court would likely find that the agreement clearly and unmistakably indicated that "affiliates" unrelated to the Disney+ subscription, such as restaurants located in Disney Springs, would be encompassed by the agreement.[105] The text of the agreement clearly states that individuals "also agree to the Walt Disney Company's Terms of Use" which governs their "use of other Disney Services."[106] The Disney Terms of Use apply to "any related disputes involving The Walt Disney Company or its affiliates."[107] This indicates that the agreement unambiguously covers "affiliates" relating to "other Disney Services," which clearly and unmistakably makes Raglan Road an affiliate of the agreement as it is a service provider located at Disney Springs.[108] Because the text is unambiguous, the court would likely not look to the other factors in applying the clear and unmistakable standard.

Piccolo argues that he only consented to arbitrate claims relating to Disney+ because he formed the agreement while subscribing to Disney+.[109] He also asserts that he did not agree to arbitrate with non-signatories.[110] However, these arguments are only relevant when the language of the agreement is ambiguous, in which case the court would look to the other

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[103] *First Options of Chi.*, 514 U.S. at 943.
[104] Motion to Compel Arbitration and Stay Case, *supra* note 3, at 3–4, 5. This determination assumes the court found initial agreement encompassing the Subscriber Agreement terms and the Walt Disney Company's Terms of Use between Piccolo and Disney to exist.
[105] This Note assumes that an agreement was created between the signatories under these terms and is not analyzing the arguments raised by Piccolo that he did not have actual or inquiry notice as to the Disney Terms of Use. Opposition to Motion to Compel Arbitration, *supra* note 2, at 5.
[106] Motion to Compel Arbitration and Stay Case, *supra* note 3, at 3.
[107] *Id.* at 4 (emphasis omitted).
[108] *See* Complaint, *supra* note 1, at 2–3.
[109] Opposition to Motion to Compel Arbitration, *supra* note 2, at 19.
[110] *Id.*

relevant factors, such as the circumstances around the formation of the agreement. Since the agreement here was unambiguous, the court would likely not take such factors into account. Piccolo's argument points to the concern that the "clear and unmistakable standard" still allows a party to compel arbitration when the other party did not intend to agree to arbitrate the claim. The FAA imposes an additional requirement that the dispute in question must "arise out of the agreement," as will be discussed later.[111] This requirement instills an additional safeguard to protect parties from arbitrating claims they did not intend to submit to arbitration, and would apply here. However, the focus of this stage of the analysis is on ascertaining the scope of the parties, not the relation of the disputes to the original agreement.

While Kanokporn likely would have been considered a beneficiary to the tickets and subject to the agreement had she been living, the agreement was not clear and unmistakable that her estate would be subject to the agreement. The My Disney Experience Terms and Conditions apply to "all persons (including minors) for whom [one is] purchasing or otherwise securing benefits and/or managing those benefits and entitlements such as tickets."[112] While this text unambiguously applies to benefactors that are living, it does not clearly and unmistakably apply to the estate of a benefactor, as the estate itself is not benefiting from the tickets.

The text as well as other factors do not indicate that a reasonable person would be subject to the agreement as a benefactor. Other portions of the agreement do not indicate that the parties include future estates.[113] The Disney Terms of Use only mention that they apply to "past, present, or future events," but this does not contemplate estates.[114] Looking beyond the text at the other relevant factors, Piccolo objects to the agreement's application to the estate.[115] Additionally, the parties' conduct and relationship, up until Kanokporn's death, only governed activities associated with the living.[116] Together the ambiguity of the text, Piccolo's objection to the agreement's application, and the context of the agreement do not satisfy the clear and unmistakable standard because a reasonable person would not conclude that the estate was to be included as a benefactor.

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[111] *See* discussion *infra* Section V.
[112] Motion to Compel Arbitration and Stay Case, *supra* note 3, at 5 (emphasis omitted).
[113] *See generally* Motion to Compel Arbitration and Stay Case, *supra* note 3 (lacking a reference to text of the agreement that would cover future estates); *and* Opposition to Motion to Compel Arbitration, *supra* note 2 (lacking a reference to text of the agreement that would cover future estates).
[114] Opposition to Motion to Compel Arbitration, *supra* note 2, at 4 (emphasis omitted).
[115] Opposition to Motion to Compel Arbitration, *supra* note 2, at 23.
[116] *See generally* Motion to Compel Arbitration and Stay Case, *supra* note 3 (addressing agreements to watch streaming content and attend theme parks); Opposition to Motion to Compel Arbitration, *supra* note 2 (addressing agreements to watch streaming content and attend theme parks).

III. THE FIFTH LEVEL OF DISAGREEMENT

While parties should be allowed to expand the scope of their agreements under the "clear and unmistakable" standard, the question remains as to which step of the FAA analysis this determination should be made. Under the FAA, a court should undergo a three-step analysis when faced with arbitration issues and determine: (1) whether a valid written agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration has been waived.[117] Courts have broken this analysis down further into four levels of disagreement to describe the types of disputes that arise in arbitration agreements: disputes over the (1) initial merits, (2) arbitrability of the merits, (3) the identity of who decides arbitrability, and (4) which contract governs that decision.[118] Parties may delegate the second step of the FAA's analysis to the arbitrator instead of the court so long as they meet a "clear and unmistakable" standard as to their intent to arbitrate.[119]

The use of vague terms such as "affiliates" or "all persons . . . otherwise securing benefits" to expand the scope of the agreement has created a possible fifth level of disagreement: whether the entity is considered an "affiliate" or benefactor as used in an established arbitration agreement, thus subjecting them to the agreement. While entities may be included as "affiliates" so long as they meet the "clear and unmistakable" standard, the question remains whether this level of disagreement should be resolved in the first or second step of the FAA's analysis. Which step of the FAA's analysis the fifth level is undertaken in is crucial to determine who addresses the fifth level when the arbitration agreement also delegates the question of arbitrability to the arbitrator instead of the court. As previously discussed, for parties to delegate the question of arbitrability to an arbitrator they must meet the "clear and unmistakable" standard.[120]

Courts have yet to face the issue of whether fifth-level disagreements should be addressed in the first or second step of the FAA's analysis. However, because it is becoming more common for drafters to utilize these and similar terms, it is inevitable that this issue will appear before a court in the future.[121] *Piccolo* presented facts that raised this issue; however, Disney

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[117] Motion to Compel Arbitration and Stay Case, *supra* note 3, at 5 (first citing Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013); and then citing Lambert v. Austin Ind., 544 F.3d 1192, 1195 (11th Cir. 2008)).

[118] Coinbase, Inc. v. Suski, 602 U.S. 143, 143–44 (2024).

[119] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 939 (1995); *see* Henry Schein, Inc. v. Archer and White Sales, Inc., 586 U.S. 63, 69 (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).

[120] *First Options of Chi., Inc.*, 514 U.S. at 939.

[121] The facts here presented this issue, but the court never had the opportunity to decide it. Motion to Compel Arbitration and Stay Case, *supra* note 3, at 5.

withdrew its motion to compel before the court was forced to address it.[122] The fifth-level disagreement should be addressed in the first step of the FAA's analysis. Thus, a court should determine whether an entity is included as an affiliate even when there is a delegation of arbitrability to an arbitrator because, if there is a question as to whether the non-signatory is an affiliate, the question of arbitrability between the non-signatory and the signatory party trying to compel arbitration has not been delegated clearly and unmistakably.

In *Rent-A-Center*, the Supreme Court established that courts should enforce arbitration agreements that grant the arbitrator "exclusive authority to resolve any dispute relating to . . . interpretation, applicability, enforceability or formation."[123] Some argue this type of delegation clause also grants the arbitrator the power to address disputes on whether an entity or individual is an affiliate and thus subject to the arbitration agreement, and that courts should enforce this delegation.[124] However, the FAA and the Supreme Court have established that, at its core, "arbitration is a matter of contract and consent."[125] With this, the Supreme Court has "long held that disputes are subject to arbitration if, and only if, the parties actually agreed to arbitrate those disputes."[126] Unlike the dispute in *Rent-A-Center*, where the dispute involved two signatories, the dispute in *Piccolo* is whether a non-signatory is a party to the agreement as a signatory's "affiliate" or benefactor.[127] Because it is unclear whether the non-signatory is a party, it has not been determined whether "the parties actually agreed to arbitrate."[128] It is only once the court has determined that the non-signatory is an "affiliate" or benefactor, as defined by the agreement, that it is established that "the parties actually agreed to arbitrate," and only then can a court enforce any delegation clauses present and compel arbitration.[129] If the arbitrator were to decide whether the non-signatory was an affiliate or benefactor, then the signatory would possibly be forced to arbitrate with an entity that it did not agree to arbitrate with.

Some agreements also incorporate already existing arbitration rules and procedures, such as the JAMS Comprehensive Arbitration Rules &

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[122] *See id.* at 8–11; Notice of Withdrawing Motion to Compel Arbitration and Stay Case, *supra* note 41.
[123] Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 66, 69 (2010); Motion to Compel Arbitration and Stay Case, *supra* note 3, at 9 (citing Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 66, 69 (2010)).
[124] Motion to Compel Arbitration and Stay Case, *supra* note 3, at 9.
[125] Coinbase, Inc. v. Suski, 602 U.S. 143, 145 (2024); *Rent-A-Center, W., Inc.*, 561 U.S. at 67 ("The FAA reflects the fundamental principle that arbitration is a matter of contract.").
[126] *Coinbase, Inc.*, 602 U.S. at 145 (emphasis added).
[127] *Rent-A-Center, W., Inc.*, 561 U.S. at 65–67; Motion to Compel Arbitration and Stay Case, *supra* note 3, at 9–10.
[128] *See Coinbase, Inc.*, 602 U.S. at 145 (emphasis added).
[129] *See id.*

Procedures.[130] Courts have held that the incorporation of JAMS rules into an arbitration agreement serves as a "clear and unmistakable" delegation of arbitrability to the arbitrator.[131] Some argue that this precedent supports having the arbitrator decide whether the non-signatory is an "affiliate" or benefactor to the agreement when the agreement incorporates JAMS rules because Rule 11(b) indicates "that '[j]urisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement . . . be submitted to and ruled on by the Arbitrator.'" [132] However, this argument fails to acknowledge the entirety of Rule 11(b). In full, JAMS Rule 11(b) states:

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.[133]

The JAMS rule does "clearly and unmistakably" delegate to the arbitrator the power to determine arbitrability over disputes regarding formation; it only does so when the dispute involves the "proper Parties to the Arbitration".[134] In a fifth-level disagreement, it has not yet been determined whether the non-signatory is one of the "proper Parties to the Arbitration." Thus, it is the court's place to determine whether the affiliate or benefactor is a party to the agreement, not the arbitrator, because it is not clear and unmistakable that the parties in question agreed to arbitrate or agreed to the JAMS rules used in the agreement. The JAMS rules cannot be forced on the parties in question if they have not agreed to them because arbitration requires consent.[135] Thus, the court should address fifth-level disagreements even when there is a delegation clause.

There is also an argument that having the court determine fifth-level disagreements even in the presence of a delegation clause goes against Supreme Court precedent that there is no "wholly groundless" exception to

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[130] *See* Motion to Compel Arbitration and Stay Case, *supra* note 3, at 10; Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522, 525 (4th Cir. 2017).
[131] Work v. Intertek Resource Solutions, Inc., 102 F.4th 769, 772 (5th Cir. 2024); *Simply Wireless, Inc.*, 877 F.3d at 527.
[132] Motion to Compel Arbitration and Stay Case, *supra* note 3, at 10 (quoting JAMS COMPREHENSIVE ARB. RULES & PROC. R. 11(b) (JAMS 2021)).
[133] JAMS COMPREHENSIVE ARB. RULES & PROC. R. 11(b) (JAMS 2021) (emphasis added).
[134] *See id.*; *Simply Wireless, Inc.*, 877 F.3d at 525–29.
[135] *See* Coinbase, Inc. v. Suski, 602 U.S. 143, 143, 145 (2024); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010).

delegation clauses.[136] In *Schein*, the Court rejected the argument that when the question of arbitrability is "wholly groundless" and it would waste "time and money" to send the question to the arbitrator, the court should answer the question despite the presence of a delegation clause.[137] The Supreme Court rejected this argument because there is no "wholly groundless" exception in the FAA; the exception would create additional litigation, and "arbitrators can efficiently dispose of frivolous cases."[138] Furthermore, when faced with the argument that a court should always answer the question of arbitrability, the Supreme Court turned to the long held precedent that parties may delegate who determines arbitrability. In doing so, it established that courts must first decide that there is an agreement to arbitrate, and if the agreement delegates arbitrability to the arbitrator, the court must uphold that delegation.[139]

Despite this argument, courts should address fifth-level disagreements even when there is a delegation clause because if a court determines that the entity is not an affiliate or benefactor, then an agreement between the parties to arbitrate or delegate arbitrability never existed. Additionally, having courts address a fifth-level disagreement is different from the "wholly groundless" exception because this decision asks a court to rule on who the proper parties of the agreement are, whereas the "wholly groundless" exception has courts rule based on the merits of the claim between proper parties.[140] This is further supported by the concept that the first step of the FAA's analysis is to determine "[w]hat have these parties agreed to,"[141] and that arbitration is only meant to be used for "disputes–that the parties have agreed to submit to arbitration."[142] Therefore, courts should decide whether a non-signatory is an "affiliate" or benefactor to a signatory, making it a party to the agreement.

A. Who Would Decide the Scope of the Parties in Piccolo *Under the Proposed Approach*

In *Piccolo*, the arbitration agreement in the Disney Terms of Use contained a provision that gave the arbitrator the authority to resolve issues about "interpretation, applicability or enforceability of these terms or the formation of this contract, including the arbitrability of any dispute and any claim."[143] The Disney terms also incorporated the JAMS Comprehensive

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[136] *See* Henry Schein, Inc. v. Archer and White Sales, Inc., 586 U.S. 63, 69–70 (2019).
[137] *Id.* at 70.
[138] *Id.* at 71.
[139] *Id.* at 72.
[140] *See id.* at 68–69.
[141] Coinbase, Inc. v. Suski, 602 U.S. 143, 148 (2024) (emphasis added).
[142] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (emphasis added).
[143] Motion to Compel Arbitration and Stay Case, *supra* note 3, at 4 (emphasis omitted).

Arbitration Rules & Procedures, including JAMS Rule 11(b).[144] This delegation included "disputes involving The Walt Disney Company or its affiliates"[145] and applied to "all persons . . . for whom [one is] purchasing or otherwise securing benefits and/or managing those benefits and entitlements as tickets."[146] The defendants argue that because the claims fall within the arbitration agreement, the arbitrator is the one to decide the arbitrability of the claims, not the court.[147] However this argument fails to account for the preliminary dispute as to whether Piccolo, on behalf of his wife's estate, and Raglan Road are included in the terms of the possible agreement that was formed when Piccolo created his Disney account to subscribe to Disney+. This preliminary dispute falls under the category of fifth-level disagreements. The court should decide whether Piccolo on behalf of his wife's estate and Raglan Road are non-signatory parties to the agreement before the court can enforce the delegation of arbitrability to the arbitrator. A fifth-level dispute does not fall under the delegation to the arbitrator because it is the court's role to first determine that Piccolo, on behalf of his wife's estate, and Raglan Road either are parties that agreed to submit disputes to arbitration, or agree to delegate arbitrability.[148] With this, the delegation of arbitrability only empowers the arbitrator to determine whether or not a dispute is arbitrable based on the merits of the dispute, rather than based on whether the parties of the dispute are included in the arbitration agreement.[149]

IV. FAA'S "ARISE OUT OF" REQUIREMENT

Piccolo also raised the issue of whether, in order for an issue to be subject to the arbitration agreement, it must arise out of the contract at hand.[150] Piccolo argued that even if he and Disney formed an arbitration agreement when he registered for Disney+, he only agreed to arbitrate claims "arising from the Disney+ service."[151] The Subscriber Agreement provided that "any dispute between You and Us, Except for Small Claims, is subject to a class action waiver and must be resolved by individual binding arbitration."[152] The Subscriber Agreement also embedded the Walt Disney Company's Terms of

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[144] *Id.* at 10.
[145] *Id.*
[146] *Id.* at 5 (emphasis omitted).
[147] *Id.* at 9–10.
[148] *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).
[149] It should be noted that there also was dispute over which terms controlled in the agreements because the venue and jurisdiction provisions potentially conflicted with the arbitration clauses. Opposition to Motion to Compel Arbitration, *supra* note 2, at 24–25. This serves as a potential fourth level dispute, however this type of dispute is not being contemplated in this Note and was ignored for the above analysis.
[150] Opposition to Motion to Compel Arbitration, *supra* note 2, at 19.
[151] *Id.*
[152] Motion to Compel Arbitration and Stay Case, *supra* note 3, at 3.

Use.[153] These terms were to apply to other Disney services and required arbitration for "all disputes between you (including any related disputes involving The Walt Disney Company or its affiliates), . . . 'Dispute' includes any dispute . . . based on past, present, or future events, between you and us concerning the Disney Services or this agreement."[154] Accordingly, the Subscriber Agreement and the Disney Terms of Use purport to apply to all disputes between the parties, including those that do not arise out of the contract. Despite this limitless language, the FAA imposes a requirement that the dispute arise out of the contract.

Few cases have spoken on this provision of the FAA; however, a split between the Fourth and Ninth Circuits contemplated this when determining how far an AT&T arbitration agreement can expand the scope of the parties when referencing "affiliates."[155] Additionally, in *Calderon v. Sixt Rent a Car, LLC* the Eleventh Circuit also addressed this provision of the FAA.[156]

In *Revitch v. DIRECTV*, the Ninth Circuit held that there was no agreement to arbitrate with DIRECTV as an affiliate to the agreement between Revitch and AT&T, because DIRECTV became an AT&T affiliate several years after the agreement was formed.[157] The majority in *Revitch* relied on California's absurd results doctrine, however, the concurrence argued that the dispute was not subject to arbitration because the FAA imposes a limitation that the dispute must arise out of the contract, and here it did not.[158]

In *Mey v. DIRECTV*, the Fourth Circuit held that "affiliates," as used in an identical AT&T arbitration agreement, encompassed unknown future third party affiliates, such as DIRECTV, because none of the language in the contract suggests that "affiliates" had a time limitation, and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[159] The dissent in *Mey* emphasized what a reasonable person would believe the contract meant and proposed that the FAA requires the dispute to arise out of the underlying contract.[160] In doing so, the dissent acknowledged that all case precedent governing arbitration involved cases in which the disputes arose out of contract, and these cases did not require the court to consider whether the FAA allows an agreement "to reach claims and

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[153] *Id.*
[154] *Id.* at 4 (emphasis omitted).
[155] *See* Revitch v. DIRECTV, LLC, 977 F.3d 713 (9th Cir. 2020); Mey v. DIRECTV, LLC, 971 F.3d 284 (4th Cir. 2020).
[156] Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1212–14 (11th Cir. 2021).
[157] *Revitch*, 977 F.3d at 718.
[158] *Id.* at 717–18, 721.
[159] *Mey*, 971 F.3d at 291–92 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)).
[160] *Id.* at 305–07 (dissent).

disputes that do not arise under or relate to the underlying contract" as DIRECTV attempted.[161] The dissent believes that the majority was misplaced in relying on the presumption towards arbitration because it should only apply when a dispute arises from the contract, and here the dispute did not.[162]

In *Calderon*, the court's opinion was akin to the concurrence in *Revitch* and dissent in *Mey*.[163] Here, customers making travel reservations through Orbitz had to agree to a contract containing an arbitration provision that covered "any services or products provided."[164] At issue, plaintiff Marin signed the Orbitz agreement for a rental car and later received and returned the rental car to Sixt Rent a Car, where Marin signed a separate contract without an arbitration provision.[165] Marin later sued Sixt, not Orbitz, for wrongly claiming that Marin damaged the rental car.[166] Sixt attempted to compel arbitration based on the contract Marin signed with Orbitz.[167] The court had to determine whether the arbitration provision in the Orbitz contract "refers to services and products provided (1) by Orbitz or (2) by anyone."[168] Relying on contractual interpretation, the court determined the provision only refers to products or services provided by Orbitz.[169] The court also determined that the pro-arbitration canon associated with the FAA does not apply because the dispute did not arise out of the underlying contract.[170] In doing so, the Eleventh Circuit established that a party can only invoke the pro-arbitration canon when the FAA applies, and the "dispute 'arises out of' . . . an underlying contract."[171] This is satisfied when the dispute "was an immediate, foreseeable result of the performance of contractual duties."[172] In *Calderon*, the court held Marin's suit was not "an immediate, foreseeable result of the performance" of the Orbitz agreement, thus the pro-arbitration canon does not apply.[173]

If the Supreme Court were faced with this issue it would likely determine that the FAA requires the dispute to arise out of the underlying contract in

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[161] *Id.* at 305 (dissent).
[162] *Id.* at 305-06 (dissent).
[163] *See* Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1212–14 (11th Cir. 2021).
[164] *Id.* at 1206–07.
[165] *Id.* at 1207–08.
[166] *Id.* at 1208.
[167] *Id.*
[168] *Id.* at 1207.
[169] *Id.* at 1208–12.
[170] *Id.* at 1213.
[171] *Id.*
[172] *Id.* (quoting Hearn v. Comcast Cable Comm'ns, LLC, 992 F.3d 1209, 1213 (11th Cir. 2021)).
[173] *Id.* This analysis is one factor of this Note's proposed clear and unmistakable standard. *See supra* note 62 and accompanying text.

order to be subject to the arbitration provision.[174] The FAA requires that an arbitration agreement be enforced when the dispute is "arising out of such contract or transaction."[175] While this requirement has long been forgotten because most disputes a court faces arise out of the transaction, the requirement is still present in the FAA's text.[176] By imposing this requirement the Court would be taking a textualist approach that is also supported by previous Supreme Court decisions and concerns relating to the consent of the parties and the unconscionability of the agreement.[177] By enforcing the "arising out of" language, the Court would impose a narrow construction of a causal requirement between the dispute and agreement.[178] This narrow construction would be more than just "having connection," but rather would be "closer in meaning to 'originating from.'"[179] Finally, the Supreme Court should draw on the Eleventh Circuit's explanation: that "arises out of" means the dispute "was an immediate, foreseeable result of the performance of contractual duties."[180]

A. "Arising out of" Requirement as Applied to Piccolo

None of these circuits bind the Ninth Judicial Circuit Court of Florida in the *Piccolo* case because it was brought in state court. However, the court would likely have applied the Eleventh Circuit's approach established in

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[174] This issue has been analyzed by several law review articles and sources who have reached the same conclusion. Horton, *supra* note 47; Michael Russo, Note, *A Simple Solution to an Infinite Problem: Curbing Arbitration Provisions that Exceed the Scope of the Federal Arbitration Act*, 97 ST. JOHN'S L. REV. 247 (2023); David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633 (2020); Magdee Besharat, *Infinite Arbitration: How One Click Can Take You Out of Court Forever*, MO. L. REV. (Dec. 8, 2025), https://lawreview.missouri.edu/infinite-arbitration-how-one-click-can-take-you-out-of-court-forever/#_edn55 [https://perma.cc/J84Y-MCQX]. Because other sources explain this issue and reach the same conclusion, this Note focuses on the implications for *Piccolo*.

[175] 9 U.S.C. § 2.

[176] Mey v. DIRECTV, LLC, 971 F.3d 284, 305 (4th Cir. 2020) (dissent) (recognizing that "because the arbitration clause here is so unusually broad, we have not before had occasion to consider whether the presumption of arbitrability could a[pp]ly to an agreement that purports to extend beyond the text of the FAA to reach claims and disputes that do *not* arise under or relate to the underlying contract.").

[177] *See* Horton, *supra* note 47, 1420–21 (explaining that the Supreme Court's decision in Viking River Cruises, Inc. v. Moriana "overruled the state high court's *application* of the contractual nexus principle" but "had no quarrel with the *principle itself*."); *Mey*, 971 F.3d at 295–96, 305 (dissent) (emphasized that arbitration is a "matter of consent" and the expansive use of "affiliate" without the "arising out of" limitation goes against achieving a "meeting of the minds"); Opposition to Motion to Compel Arbitration, *supra* note 2, at 29–30 ("The notion that terms agreed to by a consumer when creating a Disney+ free trial account would forever bar that consumer's right to a jury trial in any dispute with any Disney affiliate or subsidiary, is so outrageously unreasonable . . . as to shock the judicial conscience…").

[178] Russo, *supra* note 174, at 265–67.

[179] *Id.* at 267.

[180] *Id.* at 268 n.159 (quoting Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1213 (11th Cir. 2021)).

Calderon, because Florida lies in the Eleventh Circuit. Regardless of which approach the *Piccolo* court likely would have taken, the *Piccolo* court would be bound by a Supreme Court decision. If the Supreme Court is confronted with clarifying the "arising out of" requirement in the FAA, it should determine that the FAA requires the dispute to arise out of the underlying contract in order to be subject to the arbitration provision. As such if the *Piccolo* court were to find that Piccolo made an agreement to arbitrate and Disney had not abandoned its attempt to compel arbitration, the court would then enforce the FAA's "arising out of requirement" and find the dispute did not arise out of the underlying agreement. This would be because the dispute was not an "immediate, foreseeable result of the performance of contractual duties."[181]

The Subscriber Agreement in *Piccolo* provided that "any dispute between You and Us, Except for Small Claims, is subject to a class action waiver and must be resolved by individual binding arbitration."[182] The Subscriber Agreement also embedded the Walt Disney Company's Terms of Use.[183] These terms were to apply to other Disney services and required arbitration for "all disputes . . . (including any related disputes involving The Walt Disney Company or its affiliates) . . . [including] any dispute . . . based on past, present, or future events, between you and us concerning the Disney Services or this agreement."[184] Accordingly, the Subscriber Agreement and the Disney Company's Terms of Use purport to apply to all disputes between the parties, including those that do not arise out of the contract.

While Piccolo formed an arbitration agreement containing this seemingly limitless language when he registered for Disney+, the FAA requires that, for a dispute to be subject to the arbitration provision, it must arise out of the agreement; thus, the only claims subject to the arbitration agreement are those "arising from the Disney+ service."[185] Using the Eleventh Circuit's interpretation of "arising from" requires this dispute to be an "immediate, foreseeable result of the performance of contractual duties."[186] Here, the claims are associated with the death of Kanokporn at Raglan Road in Disney Springs and the online presentation made regarding Disney's commitment to providing allergen free food on the WDW website.[187] Just because the claims have a connection to Disney providing a

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[181] *Calderon*, 5 F.4th at 1213 (quoting Hearn v. Comcast Cable Comm'ns, LLC, 992 F.3d 1209, 1213 (11th Cir. 2021)); *see also* Besharat, *supra* note 174 (explaining the approach in *Calderon* and that Mr. Piccolo would not have had to arbitrate).
[182] Motion to Compel Arbitration and Stay Case, *supra* note 3, at 3.
[183] *Id.*
[184] *Id.* at 3–4 (emphasis omitted).
[185] Opposition to Motion to Compel Arbitration, *supra* note 2, at 19.
[186] *Calderon*, 5 F.4th at 1213 (quoting Hearn v. Comcast Cable Comm'ns, LLC, 992 F.3d 1209, 1213 (11th Cir. 2021)).
[187] Opposition to Motion to Compel Arbitration, *supra* note 2, at 1–3.

service, they do not rise to the level relation necessary for the claims to be subject to the arbitration agreement. These claims do not arise out of the original agreement because they do not meet the standard of "immediate, foreseeab[ility]" from the original agreement to subscribe for Disney+.[188] Thus, the claims are not subject to the arbitration agreement.

The agreement made when purchasing the Epcot tickets also would not provide an avenue to arbitration independently because it does not contain an arbitration clause.[189] If the court compelled the arbitration of Piccolo's claims based on this agreement, then the court would not only contradict the FAA's requirement that the dispute be one "arising out of such contract or transaction,"[190] but would also contradict the basic principle that "[a]rbitration is a matter of contract and consent."[191] Since the terms of the ticket purchase did not contain an arbitration clause, the parties did not consent to arbitration.

While the *Piccolo* court would likely have extended the protections established by the Eleventh Circuit, other courts facing similar disputes should follow suit and enforce the "arising out of" requirement, and reject the Fourth Circuit's expansive view, in order to prevent the unilateral expansion of arbitration agreements through ambiguous language. Furthermore, should the Supreme Court face a similar dispute, it should establish a universal standard that enforces the "arising out of" requirement.

V. REMAINING SUPPORT AND CONCERNS: BENEFITS OF ARBITRATION, THE PLAIN ENGLISH MOVEMENT, AND UNCONSCIONABILITY

One concern of the "clear and unmistakable" standard reversing the presumption towards arbitration is that it deprives parties of the benefits of arbitration. Arbitration has been praised for granting parties increased control over the process, shorter timelines, reduced expenses, increased flexibility, confidentiality, the ability to select the arbitrators, finality, and more decisive results.[192] Typically, the corporate defendant wants to compel arbitration while the individual plaintiff wants to go to court.[193] This

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[188] *See Calderon*, 5 F.4 at 1213.
[189] *See* Opposition to Motion to Compel Arbitration, *supra* note 2, at 10.
[190] 9 U.S.C. § 2.
[191] Coinbase, Inc. v. Suski, 602 U.S. 143, 143, 145 (2024); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67–68 (2010).
[192] COLL. COM. ARBS., *supra* note 14.
[193] *See Coinbase, Inc.*, 602 U.S. at 147 (2024); Mey v. DIRECTV, LLC, 971 F.3d 284, 286 (4th Cir. 2020); Airbnb, Inc. v. Rice, 518 P.3d 88, 89 (Nev. 2022); Smith v. Walmart, Inc., Civil Action No. 22-cv-00568, 2023 WL 5215376, at *1 (W.D. Va. Aug. 14, 2023); Motion to Compel Arbitration and Stay Case, *supra* note 3, at 1, 2.

proposed solution would restrict arbitration when one party wants to arbitrate. However, this deprivation only occurs when the one party did not actually agree to arbitrate under the proposed standards. This deprivation aligns with the principle that all parties must consent to arbitration for a court to enforce such an agreement, because a court will not force a party to undergo a process that it has not consented to, even if it would benefit the other party.[194]

Furthermore, arbitration is not without its drawbacks. Arbitration has been criticized for sub-par arbitrators, "lack of discovery and appeal rights," "less predictable" results, and a potential bias towards parties with large law firms representing them.[195] Also, some parties may prefer the formalities of traditional litigation.[196] As such, the proposed solution leaves the decision to enter arbitration up to the parties so long as they do so with "clear and unmistakable" language. This standard empowers parties to take advantage of arbitration while ensuring that a party does not expand the scope of the arbitration agreement beyond what another party intended.

One longstanding area of public criticism, encapsulated by the "Plain English Movement" regarding the language used in legal documents, is that they are often complicated by legal jargon and are drafted so that an average consumer cannot understand it.[197] While consumer agreements, like those referenced above, are drafted by lawyers, the consumers are the ones bound by them.[198] Therefore, it is important that the agreements utilize "plain language" to ensure that those bound by the agreements can easily understand them.[199] The proposed three-prong approach aligns with the "Plain English Movement" because the proposed "clear and unmistakable" standard and enforcement of the FAA's requirement would favor agreements that are clear to the consumer as to who is included in the agreement and would align with the consumers expectations as to what claims are covered under the agreement. This solution places the responsibility in the hands of the corporation, who typically draft the agreements and seek arbitration, to make such intentions clear to the consumer, who usually prefers litigation when disputes arise.

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[194] *See Coinbase, Inc.*, 602 U.S. at 143, 145; *Rent-A-Center, W., Inc.*, 561 U.S. at 67–68.
[195] Jay Adkisson, *Is Arbitration Really in your Best Interests?*, FORBES (Sep. 26, 2022, 10:53 ET), https://www.forbes.com/sites/jayadkisson/2022/09/26/is-arbitration-really-in-your-best-interests/ [https://perma.cc/AQS9-TUYS].
[196] *Id.*
[197] Carl Felsenfeld, *The Plain English Movement in the United States*, 6 CAN. BUS. L.J. 408, 408 (1981).
[198] *Id.*
[199] *Id.*

The ability to understand a contract's terms is also paramount in the doctrine of unconscionability. A court will enforce an arbitration agreement unless it is found to be unenforceable or unconscionable.[200] For a court to determine an agreement is unconscionable, the court must find procedural and substantive unconscionability.[201] However, the strong presence of one form of unconscionability can make up for a weaker presence in the other form.[202] Procedural unconscionability considers the presence of unequal bargaining power, surprise terms, and oppression.[203] Conversely, substantive due process turns on whether the terms are "so one-sided that they shock the conscience."[204] Broad and ill-defined terms that expand the scope of arbitration agreements can create an unconscionable agreement.[205] The likelihood that these agreements are procedurally unconscionable depends on how the agreement was formed; however, in the case of click-wrap agreements, courts have found procedural and substantive unconscionability.[206] Click-through agreements, like the one in *Piccolo*, are procedurally unconscionable when they do not provide the consumer the opportunity to negotiate and the drafting company has superior bargaining power.[207] Thus, when an arbitration clause is included in a click-wrap agreement there is a strong likelihood that the agreement is procedurally unconscionable. The agreements can also be substantively unconscionable. For instance, as argued in *Piccolo*:

> [T]he notion that terms agreed to by a consumer when creating a Disney+ free trial account would forever bar that consumer's right to a jury trial in any dispute with any Disney affiliate or subsidiary, is so outrageously unreasonable and unfair as to shock the judicial conscience . . . [i]n effect, WDPR is explicitly seeking to bar its 150 million Disney+ subscribers from ever prosecuting a wrongful death case against it in front of a jury even if the case facts have nothing to with Disney+.[208]

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[200] Jackson Lucky, *Analyzing Unconscionability in Arbitration Agreements*, J. CONSUMER ATT'YS ASSOC. S. CAL. 1, 1 (Sep. 2022).
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.* at 5.
[206] *Click-Wrap Agreement Not Enforced Against Consumers Due to Unconscionable Provisions*, WILMERHALE (Sep. 26, 2002), https://www.wilmerhale.com/en/insights/publications/click-wrap-agreement-not-enforced-against-consumers-due-to-unconscionable-provisions-september-26-2002 [https://perma.cc/7H3P-PRY2].
[207] *See id.*
[208] Opposition to Motion to Compel Arbitration, *supra* note 2, at 29–30.

This proposed solution would protect against unconscionability by cabining the scope of the agreement according to the "clear and unmistakable" standard to ensure that the company cannot abuse its bargaining power, and so that the agreement is less likely to "shock the conscience."[209]

CONCLUSION

As the world grows ever more connected and companies continue to merge, the use of arbitration agreements will only grow in scope and complexity. Parties will continue to push the outer limits of what disputes they can compel into arbitration through their agreements. This expansion of scope and consolidation of companies will continue to create more levels of disagreement concerning the enforcement of arbitration agreements.

Parties can include affiliates and other non-signatories as parties to arbitration clauses, but they must meet a "clear and unmistakable" standard to ensure there is a meeting of the minds. A court should be the one to determine which parties are included in the arbitration agreement in the first step of the analysis to guarantee that the parties actually agreed to arbitrate. Finally, the FAA requires the dispute to "arise out of" the agreement because as arbitration agreements grow in scope, it is important that they remain subject to the textual requirements of the FAA. Enforcing these limitations will protect the reputation of arbitration as a force for good when it is consensual and will prevent malicious parties from compelling unintended arbitration.

[209] *See* Lucky, *supra* note 200, at 1.