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The Sources and Consequences of Disputes over Contractual Meaning

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ABSTRACT

With some frequency, parties agree to the particular words used in a contract they sign, only to later disagree as to the meaning of those words and their legal effect. That is, they each assent to something, but that "something" is something different for each of them. In this Article, I first categorize and trace the sources of recurring points of disagreement as a matter of language and linguistics. Then, I look at the consequences of a dispute that leads a fact finder to conclude that the parties genuinely did not agree to the same thing, which is to say that the meaning of the words they chose is indeterminant in the milieu of their "contract." Finally, I situate the discussion in the context of dispute resolution and the procedural

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consequences of a finding that, in words or effect, "there was no agreement."

INTRODUCTION

It's not uncommon for bargaining parties to reach an "agreement" only to learn later that their understandings of that agreement don't match in one or more substantive respects. When they subsequently take their dispute to a court or arbitration, the resulting decision can be based on a determination: (1) that one of the party's interpretations of the agreement is just dead wrong, (2) that the agreement—though ambiguous or vague at some level—can nonetheless be interpreted and enforced (perhaps through the introduction of extrinsic evidence), or (3) that the meaning of the agreement is so indeterminant that it cannot be said that there is any "contract" in the legal sense at all.

By way of preview, as all first-year law students learn in their contracts classes, contracting parties often find themselves at odds over the meaning of things like the name of a ship,[1] the definition of the word "chicken,"[2] or the content of the phrase "Swiss Coin Collection."[3] What we find is that—in a particular context—words that ordinarily pose no interpretive difficulties can become hotly contested. But the reasons for these disagreements vary with context—there's no one-size-fits-all explanation for why contracting parties sometimes find themselves aboard proverbial "ships passing in the night."

This Article seeks to explain three things: first, how disagreements over meaning arise; second, how disputes over meaning can be resolved; and third, what procedural implications arise from a finding by a judge, jury, or arbitrator that no enforceable contract exists between the parties and that, therefore, they may avoid the substantive rights and obligations of the putative agreement.

I. HOW DISAGREEMENTS OVER MEANING ARISE.

To explain faults in meaning in contractual language, it's useful to categorize how two parties come to disagree as a matter of phenomenology and then examine the basis of the disagreement as a matter of linguistics. With respect to the former task, a taxonomy derived from Allan Farnsworth's

1. Raffles v. Wichelhaus, 159 Eng. Rep. 375 (Ex. 1864).
2. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960).
3. Oswald v. Allen, 285 F. Supp. 488 (S.D.N.Y. 1968), *aff'd*, 417 F.2d 43 (2d. Cir. 1969).

Alleviating Mistakes: Reversal and Forgiveness for Flawed Perceptions will serve for our purposes.[4] Let's start there.

Farnsworth makes distinctions among accidents, mistakes, misunderstandings, mispredictions, and ignorance. A conceptual divide arises between an error caused by "flawed perception of reality" and one caused by other misfortune.[5] The former is a "mistake"; the latter probably an "accident."[6] As Keith Rowley neatly capsules the difference, "accidents *happen*; people *make* mistakes."[7] To illustrate, Rowley points to a bit of dialogue from NBC's *The West Wing*:

> *Sam*: About a week ago, I accidentally slept with a prostitute.
> *Toby*: I don't understand. Did you trip over something?[8]

Though humorously made, the point is a good one: in everyday speech we often treat words synonymously that mean very different things in a legal context.[9]

Farnsworth examines what he calls "'alleviating' mistakes"—i.e., mistakes that "entitle one to relief from [the] consequences" ordinarily flowing from, for example, "overpaying a debt, assuming an obligation on an unfavorable contract, incurring liability for a tort, or becoming answerable for a crime."[10]

A mistake of the "alleviating" variety tends to arise from a flawed perception that leads to a false perception of reality.[11] Payment of an un-

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4. E. ALLEN FARNSWORTH, ALLEVIATING MISTAKES: REVERSAL AND FORGIVENESS FOR FLAWED PERCEPTIONS (2004).

5. *Id.* at 16.

6. *Id*. at 20–24.

7. Keith A. Rowley, *To Err Is Human*, 104 MICH. L. REV. 1407, 1408 (2006); *see also* FARNSWORTH, *supra* note 4, at 21 ("In common parlance, accidents *happen* but mistakes are *made*." (emphasis added)).

8. Rowley, *supra* note 7, at 1408.

9. To play this out one step further, if Sam were trying to rationalize his misstep to his crush Mallory by claiming it was a "mistake," then he would be using the word to minimize his culpability—i.e., to make it seem less intentional.

10. FARNSWORTH, *supra* note 4, at 1.

11. *Id.* Relatedly, there are also mistakes as to "expression"—e.g., the parties to a contract thought that they had agreed to a price of $100 and the writing says $200. The relief in this uncommon situation is reformation. *Id.* at 14; *see also* Batto v. Westmoreland Realty Co., 246 N.Y.S. 498, 503 (N.Y. App. Div. 1930) (rescinding disputed "contract" and noting that the "apparent contract is declared nonexistent because the true intentions of the parties evolved no contract [or because] the law declares their acts to be ineffective to create a persisting contract"). "Upon this view, the doctrine of mutuality with respect to reformation in contracts has no application, and, therefore, only the rules governing rescission have controlling effect.

owed debt is paradigmatic here.[12] "Reality in this context means the world *dehors* the minds of the parties—a reality in the 'outside world.'"[13] At this point, Farnsworth distinguishes "mistake" from "misunderstanding," the latter often resulting from a flawed perception of the other party's understanding of contract language.[14] Usually, he says, misunderstanding the meaning of contractual language doesn't prevent contract formation: "A court will almost invariably apply an objective standard and find that the meaning of the language accords with the understanding of one or the other of the parties."[15] But he does make room for the "rare exception" of cases like *Raffles v. Wichelhaus*.[16] (discussed below along with other classic cases involving potentially irresolvable interpretive dilemmas), which turn on *mutual* misunderstandings.[17] For our purposes, I'll elide any lingering distinction between mistakes and mutual misunderstandings because we're examining mistakes and misunderstandings—no matter the nomenclature used—that give rise to contract avoidance.[18]

A flawed perception of reality is the *sine qua non* of Farnsworth's

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It is long settled law that rescission of a contract may be had for a unilateral mistake." *Id.* at 503–04.

12. FARNSWORTH, *supra* note 4, at 1.

13. *Id.* at 14.

14. *Id.*

15. FARNSWORTH, *supra* note 4, at 14–15. "American common law has adopted what is known as the 'objective' theory of assent." *Id.* RANDY E. BARNETT & NATHAN B. OMAN, CONTRACTS: CASES AND DOCTRINE 15 (6th ed. 2017). The objective theory of assent was described by Judge Learned Hand in the case of Hotchkiss v. National City Bank. 200 F. 287, 293 (S.D.N.Y. 1911). As Judge Hand elaborated: "If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes on them, *he would still be held*, unless there were some mutual mistake, or something else of the sort." *Id.* at 293 (emphasis added). But according to Farnsworth, that was not always a widely accepted legal truth. Dispute about whether to judge a party's assent by an objective or subjective standard "provoked one of the most significant doctrinal struggles in the development of contract law" but was ultimately resolved in favor of an objective standard. *See* E. ALLEN FARNSWORTH, CONTRACTS § 3.6 at 113–14 (1982).

16. *See infra* Part II.

17. FARNSWORTH, *supra* note 4, at 15.

18. Farnsworth also discusses situations in which ignorance and mispredictions should or should not be treated the same as mistakes. *Id.* at 31–57. *See also* Edwin W. Patterson, *Equitable Relief for Unilateral Mistake*, 28 COLUM. L. REV. 859, 891 (1928) ("The business man is not usually given equitable relief for vocational errors, that is, those which occur in the course of mental processes which are an ordinary incident to his vocation. He is not privileged to repudiate his promise because he was unaware of the prevailing market price of bonds which he was selling, or because he had forgotten about a prior contract with the same party which gave him an option for a lower price. Many such errors are within the realm of the bargain; they are the risks of the bargain.") (citations omitted).

conception of mistake.[19] "Without a flawed perception, there is no mistake."[20] And perceptions for him come in two flavors—active and passive.[21] The classic case of *Sherwood v. Walker*[22] is illustrative of the active branch.[23] There, a dispute over the sale of a cow arose because "both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder."[24] As it turned out, though, "she was with calf, and therefore of great value, and [the owner] undertook to rescind the sale by refusing to deliver her."[25] For the majority, "the mistake or misapprehension of the parties went to the whole substance of the agreement" with the consequence that "[t]he mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence."[26]

While both the *Sherwood* majority and dissent agreed that the seller believed the cow to have been barren, they disagreed as to whether the mutual mistake went to "the mere quality of the animal" or "went to the very nature of the thing."[27] For the majority, because a cow's barrenness "affect[s] the character of the animal for all time, and for [its] present and ultimate use," the cow for which the parties bargained "was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy."[28]

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19. Farnsworth uses the word "perception" in lieu of "a state of mind, a belief, a misapprehension, or an assumption," each of which can be found in legal materials attempting to define "mistake." FARNSWORTH, *supra* note 4, at 20. Farnsworth prefers "perception" to its aforementioned counterparts because he views the term "as more descriptive than its rivals and, in particular, as more suggestive of the gap between . . . the [distinct] process[es] of perception [and] decision." *Id*. "During this gap one acquires beliefs, draws inferences, formulates predictions and opinions, makes judgments, forms intentions, and ultimately arrives at a state of mind that is entirely distinct from initial perceptions." *Id*.

20. *Id*.

21. *Id*. at 26.

22. Sherwood v. Walker, 33 N.W. 919 (1887).

23. FARNSWORTH, *supra* note 4, at 26.

24. *Sherwood*, 33 N.W. at 923.

25. *Id*.

26. *Id*. at 923–24 ("Replevin for a cow."); *accord* JAMES KENT, COMMENTARIES ON AMERICAN LAW 468–69 (Oliver Wendell Holmes ed., 1873) ("But if the article intended to be sold has no existence, there can be no contract of sale."). More pointedly, "it is no contract if there be an error or mistake of a fact, or in circumstances going to the essence of it. This is a clear principle of universal justice. *Non videntur qui errant consentire* [Those who err are not deemed to consent]." *Id*. at 477 (citations omitted). For clarity, Kent's idea of an essential mistake is distinct from what we might call a prediction, business risk, or something of the sort. Patterson, *supra* note 18, at 890 n.109 (citations omitted).

27. *Sherwood*, 33 N.W. at 923.

28. *Id*.

For that reason—even though the parties both correctly understood the subject of proposed sale to be "Rose 2d of Aberlone, lot 56 of [defendants'] catalogue"—the court held as a matter of law that "there was no contract."[29] The dissent, on the other hand, noted that "both parties were equally ignorant, and as to this each party took his chances."[30] Furthermore, the dissent would have held that even though the fact in esse (i.e., the actual fact in existence rather than the fact assumed)—the cow's non-barren character—existed at the time of bargaining, cancellation was improper because the mistake was known to neither party.[31]

By contrast, passive perception arises "if one can say of a supposed fact, 'I did not have the supposed fact in mind at the time, but I could have called it to mind.'"[32] *Gould v. Board of Education of Sewandhaka Central High School District*[33] is illustrative of this branch. The case arose when Gould, a teacher, was told that she would be denied tenure but that "if she submitted her resignation . . . no information regarding the tenure denial would remain in her employment file."[34] She acted accordingly and submitted her resignation.[35] But "actions of [the teacher] in submitting her resignation and the Board in accepting it were all premised on a mutual mistake of fact as to a critical element: that petitioner was only a probationary employee," when in fact she had acquired tenure-by-estoppel by virtue of a previously tenured position and pertinent New York law.[36] The Court thus concluded that "[w]here, as here, such a misconception concerning a critical aspect of petitioner's employment pervades the entire transaction . . . the general principles of mutual mistake in the formation of contracts provide [a] basis for treating petitioner's resignation as a nullity."[37]

Of course, indeterminacy can creep in on aspects of "reality": "One can

29. *Id*. at 920, 923–24. The court—rightly or wrongly—distinguished between the case at hand and a situation in which both parties incorrectly believe a horse for sale to be "sound." Id. at 923. There, the mistake would go only to quality, and the agreement would be enforceable against the buyer attempting to rescind.

30. *Id*. at 926 (Sherwood, J., dissenting).

31. *Id*. In other words, the mistake was "impalpable." Patterson, *supra* note 18, at 869 n.28 ("The use of the term 'palpable' in this connection is supported by the opinion of the United States Supreme Court in Moffet Hodgkens & Clarke Co. v. City of Rochester, 178 U.S. 373, 20 Sup. Ct. 957 (1900).").

32. FARNSWORTH, *supra* note 4, at 26.

33. Gould v. Bd. of Educ., 616 N.E.2d 142 (1993).

34. *Id*. at 146.

35. *Id*. at 143.

36. *Id*. at 146.

37. *Id*. The court went on: "Nor does respondents' innocent unawareness of the facts alter the effect of the critical point: that the resignation was submitted and accepted under a fundamental misassumption as to the position petitioner was relinquishing." *Id*.

be mistaken as to a fact even though, at the time, the truth or falsity of the fact cannot be determined."[38] On this count, Farnsworth invokes the Ptolemaic conception of an Earth-centered universe, which—at the time—could not be proven or disproven.[39] To my mind, this conception is really a postulate (i.e., the assumption of fact rather than a fact in esse),[40] but the underlying indeterminacy point is one worth regarding. And then there's the adjacent (overlapping, even) notion that reality sometimes comes down to matters of "opinion," which Farnsworth treats as mispredictions rather than straight-up factual mistakes. Art offers a handy exemplum in that there's fact-of-the-matter as to who painted a picture (authenticity) but the artist's identity is a matter of (sometimes hotly contested) opinion (attribution). For example, when I was a student at the University of Kansas, I often visited the Spencer Museum of Art and enjoyed spending time in front of Claude Monet's "Winter on the Seine, Vetheuil." Decades later, I learned that the attribution had come into question and, from what I've been able to determine, remains uncertain.[41]

To illustrate, Farnsworth contrasts (1) the situation in which a French family put up for sale a painting under the designation "school of the Carracci" that was later (disputedly) attributed to Nicolas Poussin with (2) the situation in which a painting attributed to Albert Bierstadt was later attributed to a lesser-known artist.[42] In the French case, the sellers' perception "went to authenticity, so the pertinent reality went to authenticity."[43] So when the subsequent uncertainty as to the artist's identity arose, "the sellers' perception [at the time of sale] was flawed, and there was

38. FARNSWORTH, *supra* note 4, at 27. Other authors have discussed similar concepts in a like fashion. *E.g.*, Patterson, *supra* note 18, at 876 (noting that "a proposition is not regarded as a fact unless its correspondence to reality can be tested now by practicable methods").

39. FARNSWORTH, *supra* note 4, at 27–28; "The practical philosophy of mankind has been to expect the broad recurrences (rising of the sun, change of seasons) and to accept the details as emanating from the inscrutable womb of things, beyond the ken of rationality." Patterson, *supra* note 18, at 876 (quoting WHITEHEAD, SCIENCE AND THE MODERN WORLD (1925)).

40. *See also* Patterson, *supra* note 18, at 876 (While an expert building contractor's cement-price estimate is not quite so starry-eyed, even the expert builder "would surely not regard his prediction as a proposition of fact…. In common usage this proposition is not a fact but a prediction. Loosely speaking, a proposition is not regarded as a fact unless its correspondence to reality can be tested now by practicable methods.").

41. Chris Lazzarino, *Long 'Winter' of Intrigue*, KANSAS ALUMNI MAG. 64 (Jan. 2010), https://kansasalumnimagazine.org/wp-content/uploads/2022/05/kansasalumni_2010_01.pdf [https://perma.cc/FHF3-SXK4].

42. FARNSWORTH, *supra* note 4, at 28–30.

43. *Id*. at 28.

a mistake."[44] In the case of the not-Bierstadt, the sale was premised on attribution, so the pertinent reality was really the opinion of experts.[45] Thus, the buyer couldn't dodge the deal it had made because "both parties correctly believed at that time that the painting was generally believed to be a Bierstadt, and in fact, it was then generally regarded as a Bierstadt, [so] it seems unlikely that plaintiff could show that there was a mutual mistake of fact."[46]

Although ignorance and mistake often come to the same thing,[47] Farnsworth advocates keeping a degree of analytical distinction between them, even if the result in any given case may be the same. *Wilkin v. 1st Source Bank*[48] neatly illustrates a type of ignorance that is treated as a mistake. Olga Mestrovic was the owner of a large number of works of art created by her husband, Ivan Mestrovic, an internationally known sculptor and artist.[49] When she died, 1st Source Bank became the executor of her will and was charged with liquidating her assets and distributing the proceeds to members of her family.[50] The assets included real estate, which the Wilkins purchased.[51] After closing, the Wilkins complained that the property was a mess.[52] The bank agreed to either retain a cleaning service or the Wilkins could do the cleaning themselves and keep any personal property they wanted.[53] Unbeknown to either party, among the general clutter, several works of art by Ivan awaited discovery.[54]

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44. *Id*. at 30 ("Since the sellers' perception had been of a certain reality [that the painting was not Poussin's], proof of an uncertain reality sufficed to show that their perception was flawed and to justify relief.").

45. *Id*. at 28–29 (noting that "there was no mistake, since reality accorded with [the] perception [that experts believed the painting a Bierstadt]").

46. Firestone & Parson, Inc. v. Union League of Phila., 672 F. Supp. 819, 823 (E.D. Pa. 1987). Even though an argument might be made with respect to Farnsworth's example that the non-Bierstadt's true artist was no less ascertainable at the time of exchange as a matter of fact in esse than was the French painting's artist, an important practical distinction exists. I believe Farnsworth addresses this, albeit indirectly, by noting that "Ptolemy's perception that the earth was at the center of the universe was no less a mistake if we assume that the state of scientific knowledge at the time did not permit him to know the truth." FARNSWORTH, *supra* note 4, at 27–28.

47. Farnsworth also distinguishes "mispredictions" and "opinions" from mistakes, but we can set those aside because—although there may sometimes be relief available for them—they do not implicate contract formation. FARNSWORTH, *supra* note 4, at 47–60.

48. Wilkin v. 1st Source Bank, 548 N.E.2d 170 (Ind. Ct. App. 1990).

49. *Id*. at 171.

50. *Id*.

51. *Id*.

52. *Id*.

53. *Id*.

54. *Id*.

The court thought that this case might be analogized to *Sherwood v. Walker*, so its task was to evaluate signs of "mutual assent" and "meeting of the minds."[55] It found that the "Bank and the Wilkins considered the real estate which the Wilkins had purchased to be cluttered with items of personal property variously characterized as 'junk,' 'stuff' or 'trash.' Neither party suspected that works of art created by Ivan Mestrovic remained on the premises."[56] So "[b]ecause the Bank and the Wilkins did not know that the eight drawings and the plaster sculpture were included in the items of personalty that cluttered the real property, the discovery of those works of art by the Wilkins was unexpected."[57] As a consequence, "[t]he resultant gain to the Wilkins and loss to the Bank were not contemplated by the parties when the Bank agreed that the Wilkins could clean the premises and keep such personal property as they wished."[58] Thus, there was no meeting of the minds, and the estate retained ownership of the artworks.[59] This is an example of what we'll discuss later as a category disagreement—in essence, one party believed that the "personal property" it could retain included everything found in the house, the other only "junk," "stuff," or "trash."[60]

II. LESSONS FROM THE CLASSIC CASES.

The classic cases teach us that disputes over meaning can result in a determination that the parties didn't really reach an agreement and point us towards questions of how it is that the parties agreed to words, the meaning of which they later dispute. For the most part, we'll set aside the all-too-common issue that one or both parties are acting in bad faith and instead focus on situations in which both parties advance interpretations that are plausible from the perspective of a disinterested third party (e.g., a judge or arbitrator). Lawrence Solan calls this latter situation "pernicious

55. *Id*. at 172.
56. *Id*.
57. *Id*.
58. *Id*.
59. *Id*.
60. *See id*. Contrast this scenario with one in which the complaining party acted out of "conscious ignorance." In *Nelson v. Rice*, estate administrators sold two paintings for $60 that were later sold at auction for over $1 million. 12 P.3d 238, 240 (Ariz. App. 2000). The court found that the administrators went forward with the sale, even though the estate's appraiser specifically said "that she did not appraise fine art." *Id*. at 241. Thus, "[b]y relying on the opinion of someone who was admittedly unqualified to appraise fine art to determine its existence, the personal representatives consciously ignored the possibility that the Estate's assets might include fine art, thus assuming that risk." *Id*. at 242. In the court's view, then, there was no "mistake"—mutual or otherwise—but rather "conscious ignorance" for which the estate bore the risk of loss. *Id*.

ambiguity"—i.e., "when the various actors involved in a dispute all believe a text to be clear, but assign different meanings to it."[61] To probe the contours of this recurring situation, we'll look at three classic cases: *Raffles v. Wichelhaus*,[62] *Oswald v. Allen*,[63] and *Frigaliment Importing Co. v. B.N.S. International Sales Corp*.[64]

Raffles arose out of a contract to buy and sell cotton to arrive in Liverpool "ex Peerless from Bombay."[65] But the parties later learned that two ships fit that description.[66] The defendants (the buyers) pled:

> [t]hat the said ship mentioned in the said agreement was meant and intended by the defendant to be the ship called the "Peerless," which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the "Peerless," and which sailed from Bombay, to wit, in December.[67]

The defendants thus argued that there was a latent ambiguity that relieved them from taking delivery, in essence because there was no contract.[68] The court agreed.[69] But it's worth noting that the court agreed within a particular procedural context. As A. W. Brian Simpson suggests, the plaintiff's opening gambit was to demur to the defendants' just-quoted plea, which meant that the plaintiff "admitted the truth of [defendants'] factual claim; he conceded that they had indeed meant to refer to the October

61. Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 859 (2004). The presence of dueling interpretations—even those made in good faith—does not invariably mean that a decision maker will declare that the disputed language is "ambiguous." *Id*. at 867. Some courts conclude that a dispute means one of the parties is "wrong." *Id*. But for some courts, two "plausible" interpretations suffice to demonstrate ambiguity. *Id*. at 867–68.

62. Raffles v. Wichelhaus, 159 Eng. Rep. 375 (Ex. 1864).

63. Oswald v. Allen, 285 F. Supp. 488 (S.D.N.Y. 1968), *aff'd*, 417 F.2d 43 (2d. Cir. 1969).

64. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960).

65. *Raffles*, 159 Eng. Rep. at 375.

66. *Id*.

67. *Id*.

68. *Id*.

69. *Id*.

ship."[70] This proved something of a blunder: "It was enough that the plea, if true, could in law furnish an answer to the action; if so, the plaintiff's legal objection to it failed."[71] So, as the report laconically puts it: "There must be judgment for the defendants."[72] What we therefore don't know is how the matter would have been sorted out at trial and on a full record. What we do know is that the subjective perceptions of the parties can lead to an after-the-fact determination that no contract was formed. For instance, in *Kyle v. Kavanagh*[73] the parties contracted for the purchase and sale of property on "Prospect Street" in Waltham, Massachusetts.[74] But there were two Prospect Streets.[75] The court determined that:

> [I]f the defendant was negotiating for one thing and the plaintiff was selling another thing, and if their minds did not agree as to the subject matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff.[76]

While *Oswald v. Allen* turned on the no-meeting-of the minds "rule" that one can extract from *Raffles*, the mutual misunderstanding arose from a conceptually distinct ambiguity.[77] There, Dr. Oswald, a coin collector from Switzerland, arranged to see Mrs. Allen's Swiss coins while he was in the United States.[78] The parties visited the bank where two of her collections (the Swiss Coin Collection and the Rarity Coin Collection) were located in separate vault boxes.[79] Dr. Oswald examined the Swiss Coin Collection and several Swiss coins from the Rarity Coin Collection.[80] The evidence was sufficient to show that each collection had a different safety deposit box number and were maintained in separately labeled cigar boxes.[81]

The parties (Dr. Oswald, who spoke little English, through his brother) negotiated a sales price of $50,000 that was agreed upon.[82] But "[a]pparently

70. A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287, 289 (1989).
71. *Id*. at 292.
72. *Id*. (quoting *Raffles*, 159 Eng. Rep. at 376).
73. Kyle v. Kavanagh, 103 Mass. 356 (1869).
74. *Id*.
75. *Id*. at 357.
76. *Id*. at 359.
77. Oswald v. Allen, 285 F. Supp. 488, 490–2 (S.D.N.Y. 1968), *aff'd*, 417 F.2d 43 (2d. Cir. 1969).
78. *Id*. at 489.
79. *Id*. at 489–90.
80. *Id*. at 490.
81. *Id*. at 489.
82. *Id*. at 490–92.

the parties never realized that the references to 'Swiss coins' and the 'Swiss Coin Collection' were ambiguous."[83] The trial judge thus "found that Dr. Oswald thought the offer he had authorized his brother to make was for all of the Swiss coins, while Mrs. Allen thought she was selling only the Swiss Coin Collection and not the Swiss coins in the Rarity Coin Collection."[84] Specifically, the trial court held that:

> [P]laintiff believed that he had offered to buy all Swiss coins owned by the defendant while defendant reasonably understood the offer which she accepted to relate to those of her Swiss coins as had been segregated in the particular collection denominated by her as the "Swiss Coin Collection.[85]

On appeal, the court held that—under the Restatement view, which adopted *Raffles*: "In such a factual situation the law is settled that no contract exists."[86] This is so because "when any of the terms used to express an agreement is ambivalent, and the parties understand it in different ways, there cannot be a contract unless one of them should have been aware of the other's understanding."[87] Here, "the facts found by the trial judge clearly place this case within the small group of exceptional cases in which there is 'no sensible basis for choosing between conflicting understandings.'"[88]

But is this case *really* like *Raffles*? We'll return to the matter in greater detail later, but for now it's enough to note that *Raffles* presents a case in which a single sign (the proper noun "Peerless") turned out not to refer to a single entity, whereas the definitional sign "Swiss Coin Collection" turned out to be unclear as to the members of the set it was intended to denote.[89]

The third case in the traditional interpretive trifecta, *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*,[90] turned on the meaning of "chicken" in two sales contracts.[91] The buyer and seller had agreed in

83. Oswald v. Allen, 417 F.2d 43, 44 (2d Cir. 1969).

84. *Id*. Although the Court seems not to have put much weight on the fact, there was some evidence of seller's remorse: "Mrs. Allen's husband told [told a representative of Oswald's agent-bank] that his wife did not wish to proceed with the sale because her children did not wish her to do so." *Id*.

85. *Oswald*, 285 F. Supp. at 492.

86. *Oswald*, 417 F.2d at 45.

87. *Id*. (quoting William F. Young, Jr., *Equivocation in Agreements*, 64 COLUM. L. REV. 619, 621 (1964)).

88. *Id*.

89. There remains an ongoing dispute about what it means to say that language "refers" to actual things, concepts of things, or both. See Solan, *supra* note 61, at 881 n.81.

90. *Frigaliment*, 190 F. Supp. 116 (S.D.N.Y. 1960).

91. *Id*. at 117.

writing to purchase and sell a large quantity of frozen chicken, but the buyer claimed that the word "chicken" meant younger, smaller chickens suitable for "broiling and frying," whereas the seller contended that the word meant nothing more than a type of bird, so older, larger "stewing" chickens fit within the term.[92] Judge Friendly approached the problem from Holmes' familiar aphorism "that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties' having meant the same thing but on their having said the same thing."[93] After consulting dictionaries, he had no trouble finding the word chicken "ambiguous" and thus resorted to a range of interpretive handrails to guide the analysis: the contracts themselves, pre-execution communications and negotiations, trade usage, government regulations, and prevailing market prices at the time of contracting.[94] From this Judge Friendly concluded that:

> When all the evidence is reviewed, it is clear that defendant believed it could comply with the contracts by delivering stewing chicken in the 2½-3 lbs. size. Defendant's subjective intent would not be significant if this did not coincide with an objective meaning of "chicken." Here it did coincide with one of the dictionary meanings, with the definition in the Department of Agriculture Regulations to which the contract made at least oblique reference, with at least some usage in the trade, with the realities of the market, and with what plaintiff's spokesman had said.[95]

As a consequence, the judge—while acknowledging a genuine fault in meaning—elided the interpretive dilemma by holding for the seller on procedural grounds: "plaintiff has the burden of showing that 'chicken' was used in the narrower rather than in the broader sense, and this it has not sustained."[96] We're thus left to explore how a common word like "chicken" can turn multifarious in a legal context.

III. SIGNS, REFERENTS, AND FAULTS IN MEANING—HOW IS IT THAT PARTIES COME TO AGREE ON WORDS YET LATER DISAGREE ON WHAT THOSE WORDS MEAN?

It's a matter of common, though often unexamined, experience—that

92. *Id*.
93. *Id*. (citations omitted).
94. *Id*. at 118–21.
95. *Id*. at 121.
96. *Id*.

the meaning of a word and what it designates are different things. A stock example from linguistics and the philosophy of language centers on two phrases: "the morning star" and "the evening star," both of which mean different things yet both designate Venus.[97] And it's within the gap between meaning and designation that contractual disputes can arise. Before returning to our set of examples, a bit of theoretical context will prove useful.

The meaning/designation divide flies under various flags in the lingo-philosophical literature. John Stuart Mill called it connotation and denotation;[98] Gottlob Frege, sense and reference;[99] Rudolp Carnap, intension and extension.[100] One aspect of this vast theoretical discourse is sufficient for our purposes—namely, the problems associated with Carnap's intensional and extensional definitions, especially when the definitions underdetermine their intended contents.

An intensional definition sets forth the necessary and sufficient conditions for the use of a term.[101] Let's use *Raffles* as a running example. In the contract at issue in that case, the seller agreed to sell and the buyer agreed to buy "125 bales of Surat cotton, guaranteed middling fair merchant's dhollorah."[102] Thus, to conform to the requirements of the contract to provide "Surat cotton," the seller needed to deliver a substance of the genus *Gossypium*, species *arboreum* native to India. This definition not only mandates the necessary and sufficient conditions to conform to the contract, but also excludes a variety of other raw textile materials like flax, wool, and, indeed, other types of cotton (like Upland or Levant cotton). Here, an intensional definition fits the bill because "Surat cotton" has an easily defined set of properties.

Sometimes, though, a word or phrase is not describable in terms of

97. Robert A. Schultz, *Sense and Reference in the Languages of Art*, 28 PHILOSOPHICAL STUDIES: AN INT'L J. FOR PHIL. IN THE ANALYTIC TRADITION 77 (1975). See also KATE KEARNS, SEMANTICS 1 (2d ed. 2011) (differentiating between semantic meaning and pragmatic meaning and noting that "Semantics deals with the literal meaning of words" and "Pragmatics deals with all the ways in which literal meaning must be refined, enriched or extended to arrive at an understanding of what a speaker meant in uttering a particular expression"). "This division can roughly be illustrated with [the following phrase]: 'I forgot the paper.'" *Id*. (noting the multiple possible pragmatic meanings for one statement). In other words, two distinct semantic statements can 'read' identically in a pragmatic sense. Or one statement could bear differing pragmatic implications—the statement used, viewed through an objective lens, controls.

98. RUDOLPH CARNAP, MEANING AND NECESSITY: A STUDY IN SEMANTICS AND MODAL LOGIC (1947).

99. *Id*.

100. *Id*.

101. *Id*.

102. Raffles v. Wichelhaus, 159 Eng. Rep. 375, 375 (Ex. 1864).

characteristics but is definable via a list of referents—an extensional definition.[103] As we've seen, in *Raffles* the trouble arose from the definition of "the ship called the Peerless."[104] "Ship" of course poses no problem—an intensional definition tells us all we need to know (e.g., a floating vessel for transporting people or goods over water). But its extension, "the Peerless," is not susceptible to definition in an intensionalist mode. Rather, it requires a listing of the members of the set—here, a set-of-one, driven by the word "the." But the parties had a false sense of reality—"Peerless" in fact had several referents that would need to be included in a proper extensional definition. The root problem was that the contract term "Peerless" was too broad: each contracting party thought the set contained only one member, but each believed the referent was to a different, particular ship.[105]

Similarly, the dilemma in *Oswald* was not that the words "Swiss Coins" are inherently problematic, but they became contextually problematic because the words were too general to fit the referential needs of the contract.[106] The fix here would have been simple: either enumerate coins (probably the better tack) or refer to the labels on the boxes that held the coins.

Frigaliment, by contrast, doesn't suffer from a referential flaw of the sort we saw in *Raffles* and *Oswald*. There, the uncertainty arises at the level of concept.[107] In a distinction usually traced to Ferdinand de Saussure, the sign-referent model is incomplete because the sign is itself bifurcated into a "signifier" and a "signified."[108] The signifier is the black marks on the page (e.g., d-o-g); the signified is the concept of a dog (that makes it different from other animals like cats or even from other things like chairs); and the referent could be the particular four-legged, furry creature curled up by my feet as I'm writing this (i.e., my collie, Bonny).[109] The relationship between signifier and signified is arbitrary (e.g., contrast c-h-i-e-n in French). To my mind, the disjunction in *Frigaliment* arises at the level of concept: the signifier c-h-i-c-k-e-n, because of trade usage, has a potential signified narrower than what we find in ordinary English. Trade usage is in this way like another language that attaches different concepts to the same signifiers (e.g., c-o-i-n means street corner in French, a metallic unit of money in English).

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103. CARNAP, *supra* note 98.
104. *Raffles*, 159 Eng. Rep. at 375.
105. *Id*.
106. Oswald v. Allen, 285 F. Supp. 488, 492 (S.D.N.Y. 1968), *aff'd*, 417 F.2d 43 (2d. Cir. 1969).
107. *Frigaliment*, 190 F. Supp. at 117–21.
108. TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 96–97 (1987).
109. *See id*.

How do these definitional concepts come home to roost in legal disputes? As we've seen in our three principal cases, courts have said that "ambiguity" lurks within the contract language that the parties selected to memorialize their agreement. In a push towards greater precision, some courts characterize ambiguity as either "patent" (which is to say facially obvious) or "latent" (which is to say apparent only in context).[110] Helpful as this distinction may be with respect to interpretive procedures (e.g., whether to allow the introduction of parol evidence),[111] it doesn't tell us much about *why* particular language is ambiguous. And as we will soon see, "ambiguity" is often a shorthand term for language that is unclear: in some cases, the language at issue is actually "vague" or "undetermined" or "general" or "indefinite." Michael Herz, for example, puts a finer point on the ambiguity-versus-vagueness distinction in proposing that "[a] term is ambiguous when it can have two or more meanings; each alone is clear and understandable, but the reader is uncertain as to which is in play,"[112] while "[a] term is vague

110. *See, e.g.*, Colfax Envelope Corp. v. Loc. No. 458-3M, Chicago Graphic Commc'ns Int'l Union, AFL-CIO, 20 F.3d 750 (7th Cir. 1994).

111. Depending on the jurisdiction, a court may permit the introduction of extrinsic evidence (1) to clear up a patent ambiguity or (2) demonstrate a latent ambiguity. Edwin T. Pullen, *Wills — Admission of Extrinsic Evidence to Explain Ambiguities in Wills*, 35 N.C. L. REV. 167, 168 (1956).

112. Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1989 (2015) (primarily discussing statutory, rather than contractual, language but nonetheless presenting an analysis of more general application). "An agreement that is so vague, indefinite and uncertain that the intent of the parties cannot be ascertained is unenforceable, and courts are left with no choice but to leave the parties as they found them." Griffith v. Clear Lakes Trout Co., 152 P.3d 604, 607 (Idaho 2007). "Where a contract is too vague, indefinite, and uncertain as to its essential terms, and not merely ambiguous, there has been no 'meeting of the minds' which is necessary for contract formation and courts will leave the parties as they found them." Alexander v. Stibal, 385 P.3d 431, 438 (Idaho 2016) (quoting Silicon Int'l Ore, LLC v. Monsanto Co., 314 P.3d 593, 606 (Idaho 2013)). "Thus, 'a court cannot enforce a contract unless it can determine what it is.'" *Id*. (quoting 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 4.1 (rev. ed. 1993)). "However, 'mere disagreement between the parties as to the meaning of a term is not enough to invalidate a contract entirely; the applicable standard is reasonable certainty as to the material terms of a contract, not absolute certainty relative to every detail." *Id*. (quoting *Griffith*, 152 P.3d at 608) ("The law does not favor the destruction of contracts because of uncertainty."). *See also* Aon Risk Servs., Inc. v. Meadors, 267 S.W.3d 603, 281–82 (Ark. Ct. App. 2007) (describing "vague" writings as "indefinite" and noting that vagueness "is an impediment to the formation of a contract) (first citing Barnes v. Barnes, 627 S.W.2d 552 (Ark. 1982); and then citing Mgmt. Comp. Servs., Inc. v. Hawkins, Ash, Baptie, & Co., 557 N.W.2d 67 (Wis. 1996)).

But in contrast to vagueness, "ambiguity does not prevent the formation of a contract; rather, it calls for interpretation of a contract." *Id*. at 282 (citing *Mgmt. Comput. Servs.*, 557 N.W.2d at 75). "Courts often describe the definiteness requirement as mutual assent, or

when its scope is unclear."[113] To his mind, if someone or something is "cool," that could indicate that the person or thing is "hip" or "of low temperature" or "of even temperament" and is thus ambiguous.[114] By contrast, words like "tall" are vague because "no bright line [exists] between those individuals who are tall and those who are not."[115] And some words can be both ambiguous and vague: "cool," as already noted, is ambiguous, but "in the temperature sense, it is also vague."[116]

As a further complication, "[t]he distinction [between ambiguity and vagueness] maps on to the interpretation/construction distinction."[117] This latter distinction does so because legal texts "mean" in two different ways. First, they have semantic content, which is to say that they have linguistic meaning—they say something about facts in the world.[118] But they also have legal content, which is to say that they have legal effect.[119] This suggests that plumbing textual meaning entails two sequential operations: "interpretation"

'meeting of the minds.'" *Mgmt. Comput. Servs.*, 557 N.W.2d at 75 (citing 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 4.13 (rev. ed. 1993)). "An ambiguous contract is not necessarily indefinite. Vagueness or indefiniteness as to an essential term of the agreement prevents the creation of an enforceable contract, because a contract must be definite as to the parties' basic commitments and obligations." *Mgmt. Comput. Servs.*, 557 N.W.2d at 75. An ambiguous writing may be understood and enforced by applying the rules of contract construction. *Id*. (first citing Smith v. Farm Bureau Mut. Ins. Co., 194 S.W.3d 212 (Ark. Ct. App. 2004); and then citing Shibley v. White, 104 S.W.2d 461 (Ark. 1937) (recognizing that, while a contract was ambiguous, it was not uncertain)). "[I]f the jury can determine the parties' intentions" from "the parties' subsequent conduct" coupled with the jury's "own practical interpretation," then "indefiniteness disappears as a reason for refusing enforcement." *Id*. at 76 (noting that "a literal meeting of the minds is not required for an enforceable contract, which is fortunate, since courts are not renowned as mind readers") (first quoting Nelsen v. Farmers Mut. Auto. Ins. Co., 90 N.W.2d 123 (1958); and then quoting 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 4.1 (rev. ed. 1993)). "As Judge (later Justice) Cardozo has stated, '[i]ndefiniteness [otherwise known as 'vagueness'] must reach the point where construction becomes futile.'" (quoting Heyman Cohen & Sons, Inc. v. M. Lurie Woolen Co., 133 N.E. 370, 371 (1921)).

113. Herz, *supra* note 112, at 1898 (contrasting words like "cool" with words like "tall"); see also Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97–98 (2010) ("In the technical sense, ambiguity refers to the multiplicity of sense: a term is ambiguous if it has more than one sense . . . The technical sense of vagueness refers to the existence of borderline cases: a term is vague if there are cases where the term might or might not apply.").

114. Herz, *supra* note 112, at 1898.

115. *Id.*

116. Solum, *supra* note 113, at 98; *see also* Herz, *supra* note 107, at 1898 ("The same word can be both ambiguous and vague in one of its senses: cool is ambiguous and each sense of cool is vague.").

117. Herz, *supra* note 112, at 1899.

118. Solum, *supra* note 113, at 98.

119. *Id*. at 100.

and "construction," where "interpretation yields semantic content, whereas construction determines legal content[.]"[120] In a contracts case, then, "[i]nterpretation involves ascertaining the meaning of contractual words, whereas 'construction' refers to deciding their legal effect."[121] Why is this?

As a general matter, "[c]ontract interpretation yields the linguistic meaning of the contract."[122] In many cases, technical ambiguity—i.e., ambiguity inherent in the use of a word that has multiple dictionary definitions—can be resolved interpretively by considering context. Reverting to our running example of "cool," we quickly—unconsciously, even—disambiguate the sentence, "It was cool that November afternoon, so I put on a sweater before we went outside."[123]

But that doesn't work with vagueness, as we've defined it, because no amount of interpretive effort can supply the semantic content of a vague term. As Solum suggests, "[i]n cases where the text is vague and the resolution of the particular dispute requires the court to draw a line, the dispute-resolving work is being done by construction."[124] But this does not mean that all ambiguous or vague terms can—in any principled or non-arbitrary way—be resolved by construction.[125]

At this point a more pointed discussion of terminology will be helpful. In his famous study of literary tropes, *Seven Types of Ambiguity*, William Empson posited that:

> An ambiguity, in ordinary speech, means something very pronounced, and as a rule witty or deceitful. I propose to use the word in an extended sense, and shall think relevant to my subject any verbal nuance, however slight, which gives room for alternative reactions to the same piece of language.[126]

But no sooner made, Empson creeps back from his attempt to define the

120. *Id*.

121. Fashion Fabrics of Iowa v. Retail Inv. Corp., 266 N.W.2d 22, 25 (Iowa 1978); *see also* Herz, *supra* note 112, at 1898 ("In general, interpretation is the process for resolving ambiguity; construction is the process for resolving vagueness.").

122. Solum, *supra* note 113, at 100.

123. *Id*. at 102.

124. *Id*. at 107.

125. *See* Herz, *supra* note 112, at 1899 ("When a statute is ambiguous—that is, we are unsure as to which of two (or more) meanings apply—Congress generally has made a decision and the challenge is figuring out what that decision was . . . sometimes, when a term can have either of two meanings, there really is no way of saying which is 'right.' But, in general, the challenges of ambiguity are ones of semantic meaning and are resolved by courts. The classic Chevron case involves statutory vagueness.").

126. WILLIAM EMPSON, SEVEN TYPES OF AMBIGUITY 1 (1966).

concept: "naturally, the question of what would be the best definition of 'ambiguity' (whether the example in hand should be called ambiguous) crops up all through the book."[127] To keep the subject manageable, some subcategorization will prove helpful.

First, there's "lexical" ambiguity—one word means several things.[128] "Bat" is a common exemplar: it can mean a small flying mammal, a type of stick used in games like baseball and cricket, or—used as a verb—the act of swatting something away.

Second, there's syntactic ambiguity—a sentence is unclear for a variety of reasons (e.g., a pronoun referent is uncertain, a modifier could be attached to more than one noun, or multiple connectives cause confusion).[129] The definition of an "enterprise" in the RICO statute is, sadly, an excellent example: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[130] There are several problems in this definition, but let's focus on just one. Is any union of individuals associated in fact and any group of individuals associated in fact that constitutes an enterprise? Or is it any *labor* union or any group of individuals associated in fact that constitutes an enterprise? The distinction can make an important difference in RICO litigation.[131]

Third, there are a variety of other situations, some derived from speech-act theory, that turn on context, presuppositions, deleted information, and more. Though interesting, we'll set these other scenarios aside, since they don't significantly inform the commonplace instances we're examining.

Vagueness, by contrast, arises when a term has borderline cases. What's "tall"? Or a "mountain"?[132] In a contribution to JM Baldwin's *Dictionary of*

127. *Id*. at 1 n.1. Empson is not alone in the struggle to fashion an unambiguous definition of "ambiguous." Ambiguous, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/ambiguous (last visited Nov. 11, 2022) (defining "ambiguous" as "doubtful or uncertain especially from obscurity or indistinctness" or "capable of being understood in two or more possible senses or ways") [https://perma.cc/WJN3-MS6E].

128. Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 THOMAS JEFFERSON L. REV. 167, 171 (2002).

129. *Id*. at 171–72.

130. 18 U.S.C. § 1961(4).

131. Randy D. Gordon, *Of Gangs and Gaggles: Can a Corporation Be Part of an Association-in-Fact RICO Enterprise? Linguistic, Historical, and Rhetorical Perspectives*, 16 U. PA. J. BUS. L. 973 (2014).

132. An amusing example lies at the center of the 1995 film The Englishman Who Went Up a Hill but Came Down a Mountain. There, Welsh villagers are outraged when English cartographers attempt to reclassify a local "mountain" as a "hill" because it did not quite reach an arbitrarily stated height of 1000 feet. Much of the comedy in the film comes from the villagers' various attempts to build the hill up by 16 feet.

Philosophy and Psychology, CS Peirce suggested that:

> A proposition is vague when there are possible states of things concerning which it is intrinsically uncertain whether, had they been contemplated by the speaker, he would have regarded them as excluded or allowed by the proposition. By intrinsically uncertain we mean not uncertain in consequence of any ignorance of the interpreter, but because the speaker's habits of language were indeterminate; so that one day he would regard the proposition as excluding, another as admitting, those states of things. Yet this must be understood to have reference to what might be deduced from a perfect knowledge of his state of mind; for it is precisely because these questions never did, or did not frequently, present themselves that his habit remained indeterminate.[133]

Peirce's point is that vague terms resist inquiry—there's no way to settle whether a statement about a borderline case is true or false. Is a man who is 5'10" "tall"? No amount of conceptual analysis or empirical investigation can settle the matter.[134] Resolution can be had only by arbitrarily stipulating standards external to a term itself—e.g., a "mountain" must be at least 1000 feet tall.

IV. A CASE STUDY—HERITAGE AUCTIONS.

The metaphysical consequences of an irresolvable fault in contractual meaning are often clearly stated—but somewhat ironically—uncertain in practical import. That is, it's easy enough to say that, because there's a present interpretive impasse, there was "no meeting of the minds" or "no contract formed." But what does that mean in the context of dispute resolution? The problem is particularly acute when the parties have already performed to some extent or have submitted their dispute according to contractually specified protocols (e.g., to arbitration, to a particular court or venue, or according to a specified body of law.) As a case study, *OMG, L.P. v. Heritage Auctions, Inc.*[135] will prove instructive. The facts recited below

133. C.S. PEIRCE, DICTIONARY OF PHILOSOPHY AND PSYCHOLOGY 748 (McMillan 1902).

134. Vagueness in Stanford Encyclopedia of Philosophy. There is a linguistic distinction to be made between "generality" and "vagueness." *Id*. This distinction doesn't seem to have much purchase in case law.

135. OMG, LP v. Heritage Auctions, Inc., 11 F. Supp. 3d 740 (N.D. Tex. 2014); OMG, L.P. v. Heritage Auctions, Inc., 612 F. App'x 207 (5th Cir. 2015). By way of full disclosure, I joined the Heritage team on appeal to the Fifth Circuit and was the principal author of the briefs on that appeal.

are gleaned from two opinions, one from the magistrate judge's Report and Recommendation, which the district judge adopted,[136] and one from the Fifth Circuit.[137]

Heritage Auctions was "a large and prominent auction house, boasting over $800 million in merchandise sales."[138] OMG was "the successor of various entities that have auctioned high-end firearms through the collaboration of Bernard Osher, Greg Martin, and John Gallo" (collectively, OMG).[139] OMG was "in the business of selling firearms and firearm related merchandise on consignment through auction."[140] OMG and Heritage entered into two agreements: the Asset Purchase Agreement ("APA") and the Consulting Agreement ("CA").[141] "In exchange for $150,000, the APA transferred to Heritage all of the 'business' assets owned by OMG, including all consignment contracts, tangible personal property, mailing lists, and consumer information, as well as all 'goodwill associated' with those assets."[142] Importantly, under the CA, OMG was to provide consulting services to Heritage in exchange for commissions on certain merchandise.[143]

A dispute subsequently arose "over the calculation of commissions and the meaning of 'Merchandise' under the CA."[144] And although the CA main document did not define "merchandise," an exhibit to it made OMG "responsible for procuring . . . firearms and firearm related merchandise on consignment for auction (the 'Merchandise'), using their reasonable best efforts."[145] As the Fifth Circuit framed the dispute:

> OMG believed the CA entitled it to commissions for any firearms or related merchandise sold by Heritage—broadly defined to include western art, correspondence, and antique items—regardless of who procured the merchandise. By contrast, Heritage believed the CA entitled OMG only to commissions for items OMG procured—including firearms and narrowly-related merchandise like bullets, bayonets, holsters, and like items.[146]

To resolve the dispute, Heritage filed a demand for arbitration under the

136. *Heritage*, 11 F. Supp. 3d 740 (N.D. Tex. 2014).
137. *Heritage*, 612 F. App'x 207 (5th Cir. 2015).
138. *Id*. at 208.
139. *Id*.
140. *Heritage*, 11 F. Supp. 3d at 747 n.2.
141. *Id*. at 741.
142. *Id*. at 741–42.
143. *Id*. at 742.
144. *Heritage*, 612 F. App'x at 208.
145. *Id*.
146. *Id*.

following dispute resolution clauses of the APA and the CA:

> Any dispute or difference between the Parties hereto arising out of or in any way related to this Agreement or the transactions contemplated hereby that the Parties are unable to resolve themselves shall be submitted to and resolved by arbitration administered by the American Arbitration Association (the "AAA") . . . The Parties further agree that disputes as to whether a valid agreement to arbitrate has been made in the first instance and whether certain disputes are subject to arbitration shall be submitted to the arbitrators.[147]

The parties asserted claims and counterclaims for fraud and breach of contract, but Heritage also argued, alternatively, that the terms "firearms" and "firearm-related merchandise" were ambiguous and that "there was never a 'meeting of the minds' between the parties regarding the meaning of those terms. . . ."[148] Ultimately, the arbitrator denied the parties' fraud and breach-of-contract claims but found "that the terms 'procurement,' 'firearms,' and 'fire-arm related merchandise' were 'ambiguous.'"[149] Upon the finding of ambiguity, "the arbitrator considered the parties' proffered extrinsic evidence to determine their intended meaning."[150] But the extrinsic evidence led into aporia, and so the arbitrator concluded that "there was 'no meeting of the minds,'" and as such, "the APA and CA therefore 'never came into existence as enforceable obligations on either side.'"[151] As a remedy in his reasoned award, he "cancelled" both agreements, "leaving the parties 'in the positions they [then] occup[ied].'"[152]

Before moving on to the subsequent judicial proceedings, a closer look at the contract language—and the arbitrator's reaction to it—is illuminating. As a threshold matter, it's reasonably clear that the arbitrator found the ambiguities to be "latent"—otherwise he wouldn't have declared ambiguity and then considered extrinsic evidence. But there are two different interpretive strains in place here.

First, there's OMG's argument that it was due commissions on items

147. *Heritage*, 11 F. Supp. 3d at 742.
148. *Id*.
149. *Id*. at 743.
150. *Id*.
151. *Id*.
152. *Id*. According to the Fifth Circuit, "[c]ancellation and rescission are often 'synonymous' under Texas law . . . [They] can operate in different ways, in that cancelling a contract may abrogate so much of it as remains unperformed and differ from rescission, which means to restore the parties to their former position." OMG, L.P. v. Heritage Auctions, Inc., 612 F. App'x 207, 213 (5th Cir. 2015) (citations and internal quotation marks omitted).

that it did not "procure." It's not that the word "procure" is unclear in some way—it's that other aspects of the agreements and their context cast doubt that "procurement" was the sole basis upon which a right to a commission would be triggered.

Second, the problem with "fire-arm related merchandise" is not that the phrase is ambiguous in the technical sense of having more than one meaning—rather, it's vague because there's no clear boundary between merchandise that's "related" to firearms and merchandise that's not so related. No matter the nomenclature, however, the overarching point is that the arbitrator found that "ambiguity" prevented the *formation* of a contract. Now, we'll take up the consequences of that finding.

OMG moved to vacate the award, "contending that the arbitrator exceeded his authority by canceling the APA and CA on grounds that they never came into existence because there was no 'meeting of the minds' between the parties."[153] The Magistrate Judge noted OMG's assertion that "determining a contract's *validity* is within the bounds of an arbitrator's powers" but that "determining a contract's *existence* is a threshold issue to arbitration that only a court can decide."[154] In the end, the magistrate judge recommended that contractual existence *could be* ceded to an arbitrator. The magistrate judge held "the delegation provision found within the arbitration clause expressly delegates to the arbitrator the authority to decide arbitrability (i.e., the parties' agreement to arbitrate in the first instance)." However, "neither this provision nor the arbitration clause as a whole 'specifically' or 'clearly and unmistakably' delegate to the arbitrator the power to determine questions of contract formation."[155] Thus, according to the magistrate judge:

> the arbitrator's findings that the CA and the APA never came into existence because there was no meeting of the minds between Heritage and OMG, and that there were never any obligations to perform, necessarily implied that the arbitration clauses contained in those agreements never existed either and were not binding obligations.[156]

As a consequence, "a court was the proper decision-maker as to contract formation issues in this case, not the arbitrator. By finding that the APA and the CA 'never came into existence,' the arbitrator intruded on an issue that was reserved for an alternative decision-maker and thereby exceeded his

153. *Heritage*, 11 F. Supp. 3d at 743.
154. *Id*.
155. *Id*. at 746.
156. *Id*.

authority," thus warranting vacation of his award.[157] There's good reason to think that this conclusion is wrong both legally and factually. We turn next to the question of why this is so.

After considering Heritage's objections to the Magistrate Judge's recommendation, the district court adopted it and rendered judgment accordingly;[158] Heritage appealed.[159] On appeal to the Fifth Circuit, Heritage generally argued that the law provides that an arbitral award is not to be lightly assailed and that a district court errs when it vacates an award without showing sufficient deference to the arbitral process or acts beyond the narrow scope of its reviewing power.[160] This is so much more the case when vacatur is premised on the arbitrator's choice of remedy.[161]

More particularly, and of crucial significance to our present discussion, Heritage urged that the District Court erred by conflating two distinct contract "formation" issues.[162] But the Fifth Circuit declined to decide whether "meeting of the minds is an issue that only courts can decide," opining that "[w]e need not and do not decide whether a court would need to decide meeting of the minds, rather than allowing an arbitrator to do so, when faced with a contested motion to compel arbitration based on a potentially nonexistent contract."[163]

The Court did not undertake this task because it found a "simpler question," the answer to which could (and ultimately did) dispose of the case: *viz*., "whether OMG and Heritage, by their conduct, consented to the arbitrator determining the meeting of the minds issue by submitting it to the arbitrator and failing to object that he lacked authority to decide this

157. *Id*.

158. *Id.* at 740; OMG, L.P. v. Heritage Auctions, Inc., 612 F. App'x 207, 208 (5th Cir. 2015)

159. *Heritage*, 612 Fed. App'x at 207–08.

160. Haag v. Infrasource Servs., Inc., No. 12-60259, 2013 WL 632245, at *1 (5th Cir. Feb. 20, 2013) (judicial review of an arbitration award is "exceedingly deferential"); Antwine v. Prudential Bache Secs., Inc., 899 F.2d 410, 413 (5th Cir. 1990) ("Judicial review of an arbitration award is extraordinarily narrow and this Court should defer to the arbitrator's decision when possible.").

161. *See* Timegate Studios, Inc. v. Southpeak Interactive, LLC, 713 F.3d 797, 803 (5th Cir. 2013) (an "arbitrator's selection of a particular remedy is given even more deference than his reading of the underlying contract[.]"); Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1325 (5th Cir. 1994) ("[T]he remedy lies beyond the arbitrator's jurisdiction only if 'there is no rational way to explain the remedy handed down by the arbitrator as a logical means of furthering the aims of the contract.'"); Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 471 (5th Cir. 2002) ("'If the dispute is within the scope of the arbitration clause, the court may not delve further into the merits of the dispute.'" (quoting Snap-On Tools Corp. v. Mason, 18 F.3d 1261, 1267 (5th Cir. 1994)).

162. *Heritage*, 612 F. App'x at 211–14.

163. *Id*. at 214 n.3.

issue."[164] And here:

> An abundance of evidence makes clear that OMG consented to the submission of the issues of contract formation and whether there was a meeting of the minds to the arbitrator. If OMG did not believe that the arbitrator had the authority to decide those issues, it should have refused to arbitrate, leaving a court to decide whether the arbitrator could decide the contract formation issue.[165]

But what if OMG had consistently objected to arbitrating formation issues? What should the reviewing courts have done in that situation? Let's work through the counterfactual.

V. THE PROCEDURAL IMPLICATIONS OF "NO MEETING OF THE MINDS."

With some frequency, district courts are faced with a before-the-fact challenge to arbitration rooted in a claim that contract "formation" is a non-arbitral issue. And although courts often use similar vocabulary to describe "formation" challenges, there are two distinct categories in play. First, there are challenges based on an assertion that the parties didn't agree to anything, including arbitration. In this type of case, the party opposing arbitration points to evidence that contract documents weren't executed, a signature was forged, or some other required sign of assent is lacking.[166] That's the scenario that the Supreme Court faced in *Granite Rock* when it stated that "where the dispute at issue concerns contract formation, the dispute is generally for courts to decide."[167] In *Heritage*, all the contractual documents were in order, so the no-sufficient-document line of cases should have been set aside by the district court as a false trail.[168] Instead, as we've already noted, the case was reduced to a claim that the parties did not commit contract formation issues to the Arbitrator, a false premise that led the district court into error.

The lower court's notion that the arbitrator—in Ouroboros-like

164. *Id*. at n.32.

165. *Id*. at 212.

166. *See* Chastain v. The Robinson-Humphrey Co., 957 F.2d 851 (11th Cir. 1992) (considering whether alleged obligor signed the contract); Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587 (7th Cir. 2001) (considering whether signor had authority to commit alleged principal); Spahr v. Secco, 330 F.3d 1266 (10th Cir. 2003) (considering whether signor had mental capacity to assent).

167. Granite Rock Co. v. Int'l Bd. of Teamsters, 561 U.S. 287, 296 (2010).

168. *Sphere Drake*, 256 F.3d at 592 (so long as "rudiments of agreement" are not missing, whether "neither party is bound" by ambiguous agreement is question for arbitrator).

fashion[169]—swallowed his own jurisdiction was wrong. The text of the award and the context that generated it demonstrate the lower court's error. As we've already seen, the heart of the dispute—and the arbitrator's quandary—centered around the parties' different interpretations of the "procurement" and "firearm related merchandise" provisions of the CA. After finding the provisions ambiguous, and then reviewing extrinsic evidence as to "intended meaning," the situation at the time of contracting proved inconclusive to him, and so he held that there was no "meeting of the minds" as to how and for what OMG would be compensated.[170] In short, there was no agreement as to a material term. But this does not mean that the agreement vanished, as the lower court found.[171] The agreement is a physical fact, marked with signs of assent. So, there's no doubt it "exists."[172] The question then becomes, how should we view a contract containing an arbitration clause once we determine that a mutual misunderstanding or latent ambiguity relieves the parties of further performance obligations?[173]

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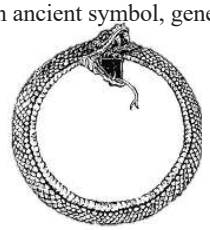
169. The Ouroboros is an ancient symbol, generally associated with the cycle of life:



170. *Heritage*, 11 F. Supp. 3d at 743.

171. Any attendant confusion arises because courts often use the same words and phrases (existence, meeting of the minds, etc.) when discussing genuine gateway formation issues and after-the-fact interpretation issues. Thus, where a court declares there is no meeting of the minds, it is not *really* saying that there is no contractual relation between the parties but simply declaring that it cannot discern a nonarbitrary way to decide whose interpretation is best. It therefore will not enforce either version but will instead allow remedies of rescission and restitution and send the parties their separate ways. *Colfax*, 20 F.3d at 756. "Existence" is another word prone to sloppy usage: sometime courts mean that literally (e.g., the offer and acceptance didn't match or the "acceptance" wasn't signed by all necessary parties), but sometimes the word is used metaphorically.

172. Disagreement abounds among courts and commentators (sometimes within the same treatise) about what to call an agreement that is later found to fail because there was a mutual misunderstanding/no meeting of the minds as to the meaning of material terms. Some say no contract "exists," *see* 3 CORBIN ON CONTRACTS § 599 (1960); some say there's a contract, but it's "voidable," *see* Restatement (Second) of Contracts § 152 (1981); and some say it's "subject to cancellation," *see* 1 CORBIN ON CONTRACTS § 104 (1960). But no matter the nomenclature, these cases should come out the same way, "since laypersons are clearly in no position to make the distinction." 1 WILLISTON ON CONTRACTS § 3:4 (4th ed. 2007).

173. The Fifth Circuit noted—without deciding—Heritage's contention "that the lack of

In the leading case on this question, *Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications International Union*, the Seventh Circuit was faced with this very scenario.[174] There, the parties signed an agreement containing an arbitration clause and specifying how many workers must be assigned to operate four-color printing presses of various sizes.[175] A dispute arose as to whether one shorthand term of the contract (namely, 4C 60 inches Press - 3 Men) meant that only three workers were required to operate a press that printed sheets *over* 60 inches or *under* 60 inches (if the latter, then four operators would be needed for the larger press).[176]

Judge Posner initially analogized the situation to *Raffles*, where to recall our earlier discussion, the court held that there was no contract for want of a "meeting of the minds."[177] But to Judge Posner's mind, the analogy didn't quite hold because the drafting defect resulted in a patent ambiguity (Colfax had reason to know that the "4C 60 [inches] Press - 3 Men" descriptor was unclear on its face and was thus gambling that its interpretation would prevail if a dispute arose) rather than a latent ambiguity (no meeting of the minds).[178] This sub-issue made no difference to the question of arbitrability, though.[179] If the ambiguity were patent, then the parties plainly agreed to have the matter of interpretation decided by an arbitrator.[180] And if it were latent—thereby calling the agreement itself into question because there was no meeting of the minds as to a material term—there still was "a meeting of the minds on the mode of arbitrating disputes between the parties."[181] At the end of the day, "[a]ll that is important is that the parties have agreed that arbitration rather than adjudication would be the mode of resolving their

meeting of the minds constituted a 'mutual mistake'" warranting recission of the contract. OMG, L.P. v. Heritage Auctions, Inc., 612 F. App'x 207, 214 n.2 (5th Cir. 2015)*; see also* 1 CORBIN ON CONTRACTS § 104 (1960) ("[I]f the parties had materially different meanings, and neither one knew or had reason to know the meaning of the other, there is no contract.").

174. Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications International Union, 20 F. 3d 750 (7th Cir. 1994).

175. *Id.* at 751.

176. *Id.* at 751–52.

177. *Raffles*, 159 Eng. Rep. at 375.

178. *Colfax*, 20 F.3d at 754; *see also* Solum, *supra* note 113, at 107 ("it might be the case that a text was deliberately written in ambiguous language, perhaps because the drafters could not agree on some point and decided to paper over their disagreement with ambiguous language that would kick the can down the road for resolution by subsequent construction.").

179. *Colfax*, 20 F.3d at 754.

180. *Id.*

181. *Id.* at 755.

disputes."[182] A different view would "deprive the arbitrator of an important contract remedy—rescission."[183] To avoid this untenable result, "the only essential point" is "whether or not there was . . . such a meeting of the minds, there was sufficient mutual understanding to create an enforceable contract to submit the issue to arbitration."[184]

As Solan indicates, "courts frequently repeat that '[a] contract is not rendered ambiguous simply because the parties do not agree on the meaning of its terms."[185] And because "courts are loathe to find no agreement at all, [they] bend over backwards to attribute some mutual intent to the parties."[186] Nonetheless, the notion that a decision maker faces a "binary choice" in interpreting troublesome language in an agreement calls to mind one of Yogi Berra's deathless aphorisms: "when you come to a fork in the road, take it."[187] That is, a judge or arbitrator *must* choose one proffered interpretation or the other. But such a "rule" is nothing more than an instantiation of the classic either-or fallacy. So, OMG in *Heritage* complained that the arbitrator "threw up his hands" (which is just a more loaded way of saying he reached an interpretive impasse that could not be resolved in a non-arbitrary way), they ran against the grain of all the "meeting of the minds" cases from *Raffles* to *Colfax*, which uniformly hold that "throwing up one's hands" is exactly what a judge or arbitrator is supposed to do when faced with a fault in meaning.[188]

The point here is that there are situations in which decision- makers can't reckon the meaning of a contractual provision without arbitrarily choosing one presented by the opponents or imposing one of their own. And so, they don't.[189] Judge Posner rejected *Raffles* as suitably analogous, but

182. *Id.; see also Sphere Drake* Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 591–92 (7th Cir. 2001) at 591–92 ("when both parties sign a contract that appears to be definitive, and contains an unmistakable arbitration clause, a dispute about whether the substantive promises are too uncertain to be enforceable is for the arbitrator; if they have agreed on nothing else, . . . they have agreed to arbitrate").

183. *Colfax,* 20 F.3d at 755.

184. *Id*.

185. Solan, *supra* note 61, at 870.

186. *Id.* at 870.

187. YOGI BERRA, "WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT!" (2002).

188. *See* 3 CORBIN ON CONTRACTS § 536 (1960) ("[I]nasmuch as two parties may have had different meanings and intentions, the court must determine to which one of them, *if to either*, is legal effect to be given." (emphasis added)); Restatement (Second) of Contracts § 201 (1981) ("[N]either party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.").

189. Richard A. Lord, 1 WILLISTON ON CONTRACTS § 3:4 (4th ed. 2007) ("[T]here are occasionally instances where there appears to be a manifestation of assent initially, but,

another classic case that we've already examined, may be a better fit. The interpretive problem in *Oswald* was that the phrase "the Swiss coins" was inherently ambiguous because—to avoid referential indeterminacy—the phrase probably required an extensional definition (i.e., one enumerating the members of the set referred to). There was thus no meeting of the minds, and the parties were relieved of performance.[190] The *Heritage* arbitrator made the same decision—i.e., he concluded there was no non-arbitrary way for him to find (1) that the phrase "firearm related merchandise" included only guns and related accessories (like bullets and holsters) or something much broader like swords and Western paintings or (2) that the word "procure" included more than items actually consigned by OMG itself.[191]

It's worth emphasizing that there's a sharp distinction between cases in which assent to a contract is at issue and cases in which "there is no sound basis for choosing between competing understandings" and therefore "neither party is bound."[192] For as Judge Easterbrook observed in *Sphere Drake*, "[w]hether an extrinsic ambiguity so vital as to preclude enforcement is exactly the sort of question that an arbitrator is supposed to handle; putting such matters in the hands of specialists rather than judges or jurors is one attraction of arbitration."[193] Properly framed, then, the district court would have seen that the case fell neatly in step with the line of arbitrable cases in which there was a latent ambiguity as to a material term of a contract containing an arbitration clause.[194]

The holdings of these cases are not surprising, given the concept of

following appropriate interpretation or construction, it becomes clear that the parties' apparent assent did not in fact indicate assent at all. In such a case, there is no contract.").

190. Oswald v. Allen, 417 F.2d 43, 45 (2d Cir. 1969).

191. To the extent OMG suggested Texas courts would hold otherwise, that too was wrong. *See* Graham-Rutledge & Co., Inc. v. Nadia Corp., 281 S.W.3d 683, 690 (Tex. App. 2009) ("[T]he arbitrator did not exceed her powers in finding the provision unenforceably vague."); Fiduciary Fin. Servs. Of Sw., Inc. v. Corilant Fin., L.P., 376 S.W.3d 253, 256–58 (Tex. App. 2012) (holding that a contract was unenforceable for indefiniteness because "there [was] no evidence of a mutual understanding" as to an essential term); Martin v. Martin, 326 S.W.3d 741, 747–54 (Tex. App. 2010) (holding that a contract was unenforceable for indefiniteness because it left material terms open to further negotiation).

192. Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 592 (7th Cir. 2001).

193. *Id.*

194. *See* Unionmutual Stock Life Ins., Co. of Am., v. Beneficial Life Ins. Co., 774 F.2d 524, 528–29 (1st Cir. 1985) (finding that "the arbitration clause is separable from the contract and is not rescinded by Beneficial's attempt to rescind the entire contract based on mutual mistake and frustration of purpose"); Choice Hotels Int'l, Inc. v. Felizardo, 278 F. Supp. 2d 590, 595 (D. Md. 2003) (holding that "arbitrator did not exceed his authority by finding no contract existed"). *C.f.* Martinez v. Carnival Corp., 744 F.3d 1240, 1245–47 (11th Cir. 2014) (whether contract terminated before arbitration demand was reserved for arbitration, not litigation).

"severability,"[195] which funnels to the arbitrator all challenges to a contract's existence or validity, unless the challenge is to the physical existence of the contract ("I didn't sign that document!") or to the arbitration clause itself ("They lied to me about arbitration!").[196] This doctrine derives from *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[197] in which the Supreme Court considered "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators."[198] The Court ruled that "arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded," and so a general challenge to a contract is a matter for arbitration, not litigation.[199] Courts thus often invoke the severability doctrine in finding that an arbitrator—not a judge—is the proper figure to determine whether an ambiguity is such that it vitiates the substantive performance obligations of the parties.[200]

Thus, where "the parties have clearly and unmistakably agreed to arbitrate arbitrability, certain threshold questions—such as whether a particular claim is subject to arbitration—are for the arbitrator, and not a court, to decide."[201] In *Heritage*, the parties pretty plainly removed from judicial purview all questions of what claims and remedies the arbitrator

195. The concept of severability also arises in the context of severability clauses that are drafted into most commercial contracts. *See* Uri Benoliel, *Contract Interpretation Revisited: The Case of Severability Clauses*, 3 BUS. & FIN L. REV. 90 (2019). These clauses are beyond the scope of the present discussion.

196. It's true that issues of contract formation must sometimes be determined by courts. But this is almost always in the limited context in which a party *initially* challenges arbitration by calling into question the formation of the contract containing the arbitration clause. *E.g.*, Gen. Guar. Ins. Co. v. New Orleans Gen. Agency, Inc., 427 F.2d 924, 928 (5th Cir. 1970) ("The propriety and desirability of having an *initial* judicial determination of whether an arbitration contract exists is well recognized.") (emphasis added). This makes good sense, for if the parties don't have *any* agreement about *anything*, then how can one of them be forced to arbitrate?

197. Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967).

198. *Id.* at 402. The separability doctrine is a legal fiction now thoroughly institutionalized in arbitration jurisprudence. In *Heritage*, nothing in the award suggested that there was no meeting of the minds or ambiguity about the *agreement to arbitrate*, and OMG made no argument that it did not agree to arbitrate *ab initio* [from the beginning]. OMG, L.P. v. Heritage Auctions, Inc., 612 F. App'x 207, 212 (5th Cir. 2015) ("OMG never objected to the arbitrator's authority or contended that it had not agreed to arbitrate.").

199. *Prima Paint Corp.,* 388 U.S. at 402.

200. *See, e.g.*, *Colfax*, 20 F.3d at 754 (to deprive an arbitrator of authority, a party "must show that the arbitration clause itself, which is to say the parties' agreement to arbitrate any disputes over the contract that might arise, is vitiated by fraud, or lack of consideration or assent").

201. Crawford Professional Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249, 262 (5th Cir. 2014).

could entertain, and—in two distinct ways—specifically delegated them to him.[202] First, both the APA and the Consulting Agreement contained identical broad arbitration provisions that conveyed unfettered authority to the arbitrator:

- "Any dispute or difference between the Parties hereto arising out of or in any way related to this Agreement or the transactions contemplated hereby that the Parties are unable to resolve themselves shall be submitted to and resolved by arbitration";[203]
- "The arbitrator shall have the authority to grant any equitable and legal remedies that would be available in any judicial proceeding to resolve any claim hereunder";[204]
- "This arbitration clause is to be interpreted to the broadest extent allowable by Law";[205] and
- "The Parties further agree that disputes as to whether a valid agreement to arbitrate has been made in the first instance and whether certain disputes are subject to arbitration under this [Section] and shall be submitted to the arbitrators in accordance herewith."[206]

By the terms of the contracts, then, the *Heritage* arbitrator had the unrestricted power to decide "any dispute" in "any way related" to the parties' agreements.[207] The agreement doesn't stop there: it authorized the arbitrator to resolve disputes "in anyway related to . . . the transactions contemplated hereby . . . or any document or instrument delivered," which broadened his authority beyond the four corners of an "agreement," and it empowered him to grant "any equitable or legal remedies" that a court possesses.[208] To underscore the depth of the arbitrator's power, all this was to be construed "to the broadest extent allowable by Law."[209]

Second, the parties also consented to arbitrate their dispute under the auspices of the American Arbitration Association (AAA) and in accordance

202. *Heritage*, 612 F. App'x at 211–14.

203. OMG, LP v. Heritage Auctions, Inc., 11 F. Supp. 3d 740, 742 (N.D. Tex. 2014)

204. Brief of Appellant, OMG, LP v. Heritage, Auctions, Inc., 612 F App'x 207 (5th Cir. 2015) (No. 14-10403) at 5 [*hereinafter* Brief of Appellant].

205. *Id.*

206. *Id.*

207. *Heritage*, 612 Fed. App'x at 208–09; *see* Timegate Studios, Inc. v. Southpeak Interactive, LLC, 713 F.3d 797, 803 (5th Cir. 2013) (rejecting argument that arbitrator exceeded his powers, because "the arbitration clause is quite broad and contains no limits relevant to the instant dispute").

208. Brief of Appellant at 24.

209. *Id.*

with its rules.[210] At the time, the Fifth Circuit had recently joined several other circuits in holding that adoption of AAA rules in an arbitration clause "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."[211] And here the parties agreed to "arbitration . . . in accordance with the Commercial Arbitration Rules of the AAA."[212] These rules provide that (1) they are deemed part of the arbitration agreement itself, (2) an arbitrator has the power to rule on his own jurisdiction, including the scope of the arbitration agreement and the arbitrability of any claim, (3) an arbitrator may grant any remedy or relief that he deems just and equitable, and, most important (4) an arbitrator has "the power to determine the existence or validity of a contract of which an arbitration agreement forms a part."[213] This would seem to close the question of whether the parties agreed in advance to permit the Arbitrator to pass on the existence of the agreement and to "null[ify]" the agreement without "render[ing] invalid the arbitration clause."[214]

In *Heritage*, the Fifth Circuit agreed with this reasoning but resolved the case without engaging with the substance of the "meeting of the minds" issue.[215] Instead, it said, in essence, that the Plaintiffs were the authors of their own misfortune:

> An abundance of evidence, in this case, makes clear that OMG consented to the submission of the issues of contract formation and whether there was a meeting of the minds to the arbitrator. If OMG did not believe the arbitrator had the authority to decide those issues, it should have refused to arbitrate, leaving a court to decide whether the arbitrator could decide the contract formation issue.[216]

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210. *Id.*

211. Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012). By incorporating AAA rules, it's as if the parties had actually written the power-to-examine-formation language into the agreement. Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 279 (5th Cir. 2019). The Supreme Court has specifically held that the parties can agree to delegate matters to an arbitrator that might otherwise be for a court. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 66 (2010) (arbitration clause ceded exclusive authority to arbitrator to decide, among other things, "formation of this Agreement"). *See also* Battaglia v. McKendry, 233 F.3d 720, 727 (3d Cir. 2000) ("[T]he Arbitration Clause is broad enough to encompass disputes relating to the formation of the . . . Agreement.").

212. Brief of Appellant at 24.

213. Commercial Arbitration Rules and Mediation Procedures, American Arbitration Association, https://adr.org/sites/default/files/Commercial_Rules-Web.pdf [https://perma.cc/6XTP-S9WA].

214. *Id.*

215. OMG, L.P. v. Heritage Auctions, Inc., 612 F. App'x 207, 211–12(5th Cir. 2015).

216. *Id.*

But what should have happened if OMG had properly objected along the way? In other words, what are the procedural consequences of a finding that bargaining parties failed to reach an agreement—that they were "ships passing in the night."[217] And what of other standard contract terms in this situation—e.g., venue and choice-of-law clauses, jury waivers, and damages limitations?

The answer lies in a concept that we've already lightly discussed: "severability" (often called "separability" in the academic literature). The separability doctrine is a legal fiction now thoroughly institutionalized in arbitration jurisprudence. The fiction is that the parties entered into an arbitration agreement separate and apart from the underlying agreement, even though the parties signed a single document.[218] Thus, even if the substantive agreement is later found to fail, the promise to arbitrate survives.[219] This concept ensures that if a tribunal determines that a contract is invalid, then in so finding "does not saw the legs of the chair on which it is sitting."[220]

The underlying issue can usefully be framed as a question of assent. Did the parties agree to *something*? As Christopher Drahozal puts it, "arbitration is a matter of contract; a party cannot be required to arbitrate a dispute if it has not agreed to do so."[221] So "surely a forger cannot bind a party to arbitrate by forging that party's signature to a contract that includes an arbitration clause. The party whose signature was forged has not agreed to anything, not even a separable arbitration clause."[222] This issue arises with some regularity in "gateway" proceedings like motions to compel or enjoin arbitrations and can take the form of challenges to contract formation based on, for example:

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217. *Raffles*, 159 Eng. Rep. at 375.

218. *See* Stephen L. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 312 WAKE FOREST L. REV. 1001, 1010 (1996).

219. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1 (2006) (holding dispute arbitrable and distinguishing cases holding "that it is for courts to decide whether the alleged obligor ever signed the contract"); *see also* Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 471 (5th Cir. 2002) ("A federal court may consider only issues relating to the making and performance of the agreement to arbitrate. Accordingly, unless a defense relates specifically to the arbitration agreement, it must be submitted to the arbitrator as part of the underlying dispute.").

220. Christopher R. Drahozal, *Buckeye Check Cashing and the Separability Doctrine*, 1 Y.B. ON ARB. & MEDIATION 55, 55 (2009) (quoting PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION 96 (2d ed. 2004)).

221. *Id.* at 68.

222. *Id.*

- Lack of assent.[223]
- No offer and acceptance.[224]
- Revocation.[225]
- Lack of consideration.[226]
- Lack of authority.[227]
- Forgery.[228]

There are of course close calls at the factual level. For example, in *Granite Rock Co. v. International Brotherhood of Teamsters*,[229] the issue was whether an agreement had been ratified in time for its arbitration clause to kick in with respect to a particular dispute.[230] Even more complicated, in *Will-Drill Resources, Inc. v. Samson Resources Co.*,[231] a purchaser offered to buy mineral leases belonging to over 40 parties and provided the sellers' agent with an agreement containing a broad arbitration clause and signature blocks for each selling party.[232] But eight of the 40-odd sellers changed their mind and did not sign the agreement.[233] Later, the sellers' agent and some of the sellers sought specific performance of the agreement and invoked the arbitration clause.[234] The Fifth Circuit held that because the offer and acceptance did not match, contract formation was at issue and the situation should be treated like a non-signatory or forgery case—i.e., a district court should first sort out the merits of the gateway question of whether there is or is not a contract containing an arbitration clause.[235]

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223. *See, e.g.*, U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 145 (2d Cir. 2001).

224. *See, e.g.*, Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1373 (11th Cir. 2005).

225. *See, e.g.*, Byrd v. Simmons, 5 So. 3d 384, 388 (Miss. 2009).

226. *See, e.g.*, *Caley*, 428 F.3d at 1373.

227. *See, e.g.*, Sphere Drake Ins., Ltd. v. Clarendon Nat'l Ins. Co., 263 F.3d 26, 33 (2d Cir. 2001).

228. *See, e.g.*, Jolley v. Welch, 904 F.2d 988, 993–94 (5th Cir. 1990).

229. Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287 (2010).

230. *Id.* at 304 ("[T]he date on which an agreement was ratified determines the date the agreement was formed, and thus determines whether the agreement's provisions were enforceable during the period relevant to the parties' dispute.").

231. Will-Drill Resources, Inc. v. Samson Resources Co., 352 F.3d 211 (5th Cir. 2003).

232. *Id.* at 213.

233. *Id.*

234. *Id.*

235. *Id.* at 219–20. This does not mean that arbitrators cannot decide questions of assent. "Arbitrators have the competence to resolve the assent issue in the first instance; that is challenging assent before the arbitrators does not require the arbitration proceeding to stop. But if the party challenging assent properly preserves its challenge, a court reviewing the arbitrator's award on the issue of assent does so de novo." Drahozal, *supra* note 220, at 69 n.69.

But our primary object of study is not the non-contract; rather, it's the contract that fails because the document that the parties assented to fails in some critical respect. After *Buckeye Check Cashing, Inc. v. Cardegna*,[236] it's reasonably clear that separability is close to a conclusive presumption in the context of arbitration provisions.[237] The question remains whether—or to what extent—the separability presumption obtains in the context of other "procedural" contractual clauses.[238] Drahozal observes that —when considering clauses of this ilk—"courts have adopted separability-like principles: they will consider claims of fraudulent inducement directed at the clause itself, but not claims of fraudulent inducement of the main contract."[239] Accordingly, we find courts routinely—though not universally—enforcing forum-selection clauses,[240] choice-of-law provisions,[241] and jury waivers.[242] As authority, courts often invoke *Prima Paint*, but many also nod to *Scherk v. Alberto-Culver Co.*, in which the Supreme Court appeared to treat arbitration and forum-selection clauses *pari passu*.[243]

Helpful as these authorities may be, the Restatement (Second) of Conflicts of Laws may be more germane to our examination of the consequences of contract failure. There, Comment C to Section 201 states:

> The fact that a contract was entered into by reason of misrepresentation, undue influence or *mistake* does not necessarily mean that a choice-of-law provision contained therein will be denied effect. This will only be done if the misrepresentation, undue influence or *mistake* was

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

237. *See id.*

238. Hossein Fazilatfar, *In Defense of Separability: Prima Paint, Buckeye, and Rent-A-Center*, 54 TEXAS TECH L. REV. 183, 227–29 (2022) (drawing distinction between procedural and substantive contract clauses, using arbitration clauses as the example of a procedural clause).

239. Drahozal, *supra* note 220, at 85.

240. *Id.* at 84; *see* Lily Jeung v. Yelp, Inc., 2015 WL 12990204 (C.D. Cal. May 13, 2015). *But see* Int'l Sport Divers Ass'n, Inc. v. Marine Midland Bank, N.A., 25 F. Supp. 2d 101 (W.D.N.Y. 1998). If a court refuses to enforce a forum-selection/venue clause, on appeal the error might well be found harmless.

241. Drahozal, *supra* note 220, at 85.

242. *Id.*; dOTERRA Int'l, LLC v. Kruger, 491 P.3d 939 (UT 2021) (waiver of punitive damages was ineffective); 9th St. Apt. L.L.C. v. DRA Anderson Constructors Co., No. A-08-1276, 2009 WL 3260661 (Neb. Ct. App. Oct. 6, 2009) (a waiver of consequential damage clause in a contract barred the owner from recovery in a breach of contract suit against the contractor).

243. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 (1974) ("an arbitration or forum-selection clause in a contract is not enforceable *if the inclusion of that clause in the contract* was the product of fraud or coercion.") (emphasis original).

> responsible for the complainant's adherence to the provision . . . [244]

The point here is that although what Farnsworth calls "alleviating mistakes" may relieve parties of substantive performance obligations, that does not mean that they're relieved of their separable procedural obligations.[245] Indeed, at this point, it is perhaps not reaching too far to suggest that the separability of all procedural contractual clauses is a "presumption."[246]

CONCLUSION

Disputes over contractual meaning arise with some regularity. If we're talking about disputes made in good faith, then it's useful to undertake a fairly fine-grained analysis of why there is a dispute at all. A necessary starting point is with the contractual language at issue. What is it about this language that makes it susceptible to uncertainty?

As we've seen, linguistic tools can help us make this determination, which in turn can lead us to conclude whether the uncertainty can be resolved in some non-arbitrary way. If it cannot, then a series of legal questions come into play. Who bears the risk of uncertainty? What happens when the uncertainty is so great with respect to a material term that it can be said that the parties reached no agreement at all? And if that's the case, what are the procedural implications of such a finding?

This Article demonstrates that there are cases in which the contracting parties were indeed "ships passing in the night" and thus reached no substantive agreement. But the Article goes on to posit that—even so—the parties should still be bound by the procedural choices that they made as to things like forum selection, jury waivers, and damages limitations. So, at the end of the day, judges or arbitrators should be allowed to implement jurisdictional and other procedural devices without fear that their efforts will be swallowed by a finding that the parties had "no meeting of the minds" on matters of substance.

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244. Restatement (Second) of Conflict of Laws § 201 cmt c (1971). *See also* Drahozal, *supra* note 220, at 86.

245. Odes v. Harris, 2013 WL 11942399 (S.D. Fla. Sept. 13, 2013); Stupka v. PSS World Med., Inc., 2009 WL 10670708 (N.D. Ga. Nov. 9, 2009).

246. Drahozal, *supra* note 220, at 87 (quoting GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 312 (3d ed. 2009)).