FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANTIAGO LIM, *Plaintiff-Appellee*, v. TFORCE LOGISTICS, LLC; TFORCE FINAL MILE WEST, LLC, *Defendants-Appellants*, and TRANSFORCE, INC.; DOES, 1–10, *Defendants.*	No. 20-55564 D.C. No. 2:19-cv-04390-JAK-AGR OPINION

Appeal from the United States District Court
for the Central District of California
John A. Kronstadt, District Judge, Presiding

Argued and Submitted July 26, 2021
Pasadena, California

Filed August 12, 2021

Before: MILAN D. SMITH, JR. and JOHN B. OWENS, Circuit Judges, and EDUARDO C. ROBRENO,[*] District Judge.

Opinion by Judge Milan D. Smith, Jr.

SUMMARY[**]

Arbitration

The panel affirmed the district court's denial of defendants' motion to compel arbitration of employment-related claims on the grounds that the delegation clause and arbitration provision in the plaintiff's contract were unenforceable as unconscionable under California law.

Plaintiff Santiago Lim alleged that he and other delivery drivers signed agreements purporting to classify them as independent contractors, but defendants treated and managed them as employees in violation of California labor laws. Lim's Independent Contractor Operating Agreement included an arbitration provision.

The panel held that a delegation clause, requiring the arbitrator to determine the gateway issue of arbitrability, was unenforceable as to Lim because it was procedurally and substantively unconscionable. The panel held that the

[*] The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

district court properly exercised its discretion by not severing the unconscionable provisions and enforcing what remained of the delegation clause.

The panel held that because the delegation clause was unenforceable, the district court properly proceeded to determine the gateway issue of arbitrability. The panel held that the same bases for concluding that the delegation clause was procedurally and substantively unconscionable—the take-it-or-leave-it circumstances and cost-splitting, fee-shifting, and Texas venue provisions—also rendered the arbitration provision unconscionable. The district court did not err by not severing those same terms and declining to enforce the arbitration provision.

COUNSEL

Steven C. Rice (argued) and Paul Marron, Marron Lawyers APC, Long Beach, California, for Defendants-Appellants.

Joshua Konecky (argued) and Nathan B. Piller, Schneider Wallace Cottrell Konecky LLP, Emeryville, California, for Plaintiff-Appellee.

OPINION

M. SMITH, Circuit Judge:

Defendants-Appellants Transforce, TForce Logistics, and TForce Final Mile (TForce) appeal the district court's denial of a motion to compel arbitration of employment-related claims brought by Plaintiff-Appellee Santiago Lim (Lim). Because the district court correctly determined that the delegation clause and arbitration provision in Lim's contract were unenforceable as unconscionable, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Lim worked as a delivery driver for TForce in California. Lim alleges that TForce employs delivery drivers as part of its business and misclassifies them as independent contractors rather than employees. While he and other drivers signed agreements purporting to classify them as independent contractors, Lim alleges that TForce treated and managed them as employees. That employment, Lim contends, violated California labor laws.

A.

The Independent Contractor Operating Agreement between Dynamex Operations West, Inc.[1] and Lim (contract) provides that "[t]his agreement shall be governed by the Laws of the State of Texas, as the principal place of business of [TForce]." The contract also provides that "[t]he parties agree that any legal proceedings between the parties

[1] When Lim's employment began, TForce was called "Dynamex Operations West, Inc."

arising under, arising out of, or relating to the relationship created by this Agreement, including arbitration proceedings discussed below, shall be filed and/or maintained in Dallas, Texas or the nearest location in Texas where such proceedings can be maintained."

As to "dispute resolution," the contract provides:

> All disputes and claims arising under, out of, or relating to this Agreement, including an allegation of breach thereof, and any disputes arising out of or relating to the relationship created by this Agreement or prior agreements between us, including any claims or disputes arising under any state or federal laws, statutes or regulations, and any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties, shall be fully resolved by arbitration in accordance with Texas's Arbitration Act and/or the Federal Arbitration Act.

The contract also states that "[a]ny arbitration between the parties will be governed by the Commercial Arbitration Rules of the American Arbitration Association," and that "[t]he parties specifically agree that no dispute may be joined with the dispute of another and agree that class actions under this arbitration provision are prohibited." With respect to arbitration costs, the contract states that "[t]he parties agree that the arbitration fees shall be split between the parties, unless [Lim] shows that the arbitration fees will impose a substantial financial hardship on [Lim] as determined by the Arbitrator, in which event [TForce] will pay the arbitration fees." With respect to attorney's fees, the

contract provides that "[i]f any action is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to recover its attorney's fees, costs and disbursements in pursuing such action."

B.

The parties submitted several competing declarations in the district court concerning contract formation and execution in the motion to compel arbitration proceedings. We discuss the relevant facts below.

1. Lim Declaration Opposing Motion to Compel

Lim began working for TForce in 2011. During his employment, Lim delivered "blood and blood products" to hospitals and facilities in Southern California for TForce's client, the Red Cross. Lim worked from the Red Cross hub in Pomona, California. Before working for TForce, Lim delivered blood for the Red Cross from Pomona through a different company.

In May 2011, TForce held a meeting of drivers making deliveries for the Red Cross. At that meeting, TForce presented Lim with the contract that had his name and other information "preprinted on it." Lim states that he and other employees were told to sign the contract "if [they] wanted to continue making deliveries for the Red Cross." Lim states that he was "not given an opportunity to negotiate the terms of the contract" and that the contract was "largely preprinted." Lim declares that the 54 percent figure for compensation was "already pre-printed on" his contract and it was his "understanding that this was the standard amount that [TForce] pays for Red Cross deliveries and that [he] could either take it or go work somewhere else."

Lim explains that the entire orientation and contract process took place during a single meeting. Lim states he was not taken into a separate room to review the contract, was not given an opportunity to read through the contract, that no one explained any terms or their meanings, that no one informed him that he could take the contract with him, and that no one explained that he was giving up rights or that he could seek the advice of an attorney in reviewing the contract. Lim declares that there was "no option to sign another document or to negotiate different terms." Lim states that at that time he "did not even know what arbitration was," no one told him about the arbitration provision or delegation clause, and that he did not know "what a delegation clause look[ed] like, or what 'arbitrability' mean[t]."

2. David Brooks Declaration Supporting Motion to Compel

David Brooks' declaration generally describes the typical "contracting process" for TForce in 2011. Brooks states that prospective drivers were invited to an "initial meeting" at TForce's Fullerton office after a phone screening. These prospective drivers then "would be provided information enabling them to arrange to undergo a background check and drug screening." A "follow-up meeting" would then be held after these "preliminary onboarding steps" were completed. At the follow-up meeting, the prospective drivers would review the contract. Brooks states that "preliminary onboarding steps" would take "from one to two weeks" before the review of the contract. Either Brooks or one of his subordinates would conduct the "follow-up meeting." At that meeting, each prospective driver "would be provided with a hard copy of the Contract to review." "Pre-negotiated commission rates" for drivers would "typically be negotiated at this meeting."

A prospective driver "would be asked to go to a separate room so that they could review the contract prior to signing." "If the terms of the Contract were acceptable" to the prospective driver, then that prospective driver would sign and execute the contract.

3. Elijah Naylor Declaration Supporting Motion to Compel

Elijah Naylor began as an assistant in the compliance department and has served as the compliance manager for TForce since 2017. Naylor declares that, "[b]ased on [his] review" of Lim's contract, Lim "negotiated a commission rate of 54%." Naylor states that the onboarding process at TForce includes a meeting between "a TForce representative" and a prospective driver to "review the Contract." During this meeting, according to Naylor, the prospective driver "is provided time to review the Contract and ask any questions he or she may have prior to signing."

4. Jesus Ramos Reply Declaration Supporting Motion to Compel

Jesus Ramos was an operations manager with TForce from 2010 through 2016 and worked out of the Pomona hub. Ramos' declaration generally describes the 2011 onboarding process at the Pomona hub that Lim delivered from. Ramos declares that, in early 2011, TForce contacted drivers who were making Red Cross deliveries through a different delivery broker. Those drivers were invited to the Fullerton office "if they wished to begin the process of contracting with TForce." Ramos states that some of these drivers contacted TForce's Fullerton office, "completed the onboarding process, and signed a contract with TForce." Ramos describes a 2011 "informational meeting" at TForce's Fullerton office, and states that no contracts were

signed during or after that meeting, because all drivers had "already completed the onboarding process" and signed contracts. Ramos states that all drivers at this "informational meeting" already "negotiated and signed contracts with TForce."

II.

A different class-action proceeding alleges similar claims against the same defendants and reached the California Supreme Court on the issue of class certification. *See Dynamex Operations W., Inc. v. Superior Ct.*, 4 Cal. 5th 903 (2018). In that case, the California Supreme Court adopted the test for determining when independent contractors qualify as employees. *See id.* at 964. The *Dynamex* class includes only individuals who returned timely and complete questionnaires as part of the discovery process. *See id*. at 919. Lim is not a member of that class, and this action excludes any individuals who are class members in that case.

In this case, TForce filed a motion to compel arbitration of Lim's employment-related claims based on the arbitration provision in Lim's contract. The district court denied the motion, holding that the delegation clause and arbitration provision were procedurally and substantively unconscionable, and therefore unenforceable as to Lim.[2]

[2] In 2015, another district court denied a motion to compel arbitration by TForce against another plaintiff based on the same agreement at issue here. *See Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 416 (N.D. Cal. 2015). The district court held that the delegation and arbitration clauses were procedurally and substantively unconscionable. *Id*. at 422. In light of multiple unconscionable terms that would have

TForce appealed and the district court stayed class proceedings pending resolution of this appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 9 U.S.C. § 16. We review denial of a motion to compel arbitration *de novo*, *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1009 (9th Cir. 2005), and review findings of fact underlying the district court's decision for clear error. *Bradley v. Harris Rsch., Inc.*, 275 F.3d 884, 888 (9th Cir. 2001), *abrogated in part on other grounds by Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015). We review a district court's decision not to sever unconscionable portions of an arbitration agreement for abuse of discretion. *Bridge Fund Cap. Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1000 (9th Cir. 2010).

ANALYSIS

I.

Lim's contract contains a delegation clause that requires the arbitrator to determine the gateway issue of arbitrability. The district court held that the delegation clause was

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required redrafting to cure, the district court held that the delegation and arbitration clauses were unenforceable as to Saravia. *Id.* at 421–22.

In addition, two years before *Saravia*, a Massachusetts state court declined to enforce the same arbitration provision, in part on waiver grounds, but described TForce's Texas venue clause as "repugnant" for "forcing [a worker] to travel over 2,000 miles and cross the nation to get paid an arguably honest wage." *Okeke v. Dynamex Operations E., Inc.*, No. MICV201002017F, 2013 WL 2182863, at *3 (Mass. Super. Ct. May 12, 2013).

unenforceable as to Lim because it was procedurally and substantively unconscionable. We agree.

A.

Section 2 of the Federal Arbitration Act (FAA) provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "The final clause of § 2, generally referred to as the savings clause, permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1259 (9th Cir. 2017) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks omitted)). "[T]he party opposing arbitration bears the burden of proving any defense, such as unconscionability." *Id.* at 1260 (quoting *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 236 (2012)).

In deciding whether to compel arbitration under the FAA, a court's inquiry is limited to two "gateway" issues: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (citations omitted). If both conditions are met, "the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms." *Id.*

"However, these gateway issues can be expressly delegated to the arbitrator where 'the parties *clearly and unmistakably* provide [for it].'" *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (quoting *AT&T Techs.,*

Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)). "Such 'clear and unmistakable evidence of [an] agreement to arbitrate arbitrability might include a course of conduct demonstrating assent or an express agreement to do so'"—*i.e.*, a delegation clause. *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) (citation and alterations omitted).

Importantly, "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Ctr., W., Inc., v. Jackson*, 561 U.S. 63, 70 (2010). But "[b]ecause a court must enforce an agreement that, as here, clearly and unmistakably delegates arbitrability questions to the arbitrator," the court's initial inquiry focuses on whether the agreement to delegate arbitrability—the delegation clause—is itself unconscionable. *See Brennan*, 796 F.3d at 1132 (citing *Rent-A-Ctr.*, 561 U.S. at 74).

Under California law, a court may refuse to enforce a provision of a contract if it determines that the provision was "unconscionable at the time it was made." Cal. Civ. Code § 1670.5(a).[3] To establish this defense, the party opposing arbitration must demonstrate procedural and substantive unconscionability, but both "need not be present in the same degree." *Poublon*, 846 F.3d at 1260 (quoting *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910 (2015)). Instead, a sliding scale exists such that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that

[3] Even though the contract is governed by Texas law, the parties agree that California law governs the unconscionability inquiry.

the term is unenforceable, and vice versa." *Id.* (quoting *Sanchez*, 61 Cal. 4th at 910).

B.

"The procedural element of unconscionability focuses on 'oppression or surprise due to unequal bargaining power.'" *Id*. (quoting *Pinnacle*, 55 Cal. 4th at 246). "The oppression that creates procedural unconscionability arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." *Id.* (quoting *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347–48, *as modified on denial of reh'g* (Feb. 9, 2015)). Oppression can be established "by showing the contract was one of adhesion or by showing from the 'totality of the circumstances surrounding the negotiation and formation of the contract' that it was oppressive." *Id.* (quoting *Grand Prospect Partners*, 232 Cal. App. 4th at 1348).

A contract of adhesion is one "imposed and drafted by the party of superior bargaining strength[that] relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Id.* at 1261 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 113 (2000)). While these circumstances can establish "some degree of procedural unconscionability," a contract of adhesion is not "per se unconscionable." *Id.* (quoting *Sanchez*, 61 Cal. 4th at 914–15). The party who drafts an agreement is "under no obligation to highlight the arbitration clause of its contract, nor [i]s it required to specifically call that clause to [a counter-party]'s attention. Any state law imposing such an obligation would be preempted by the FAA." *Sanchez*, 61 Cal. 4th at 914 (citations omitted). However, where California procedural unconscionability rules "focus on the parties and the circumstances of the

agreement and apply equally to the formation of all contracts," they are permissible and "do not disproportionately affect arbitration agreements." *Chavarria v. Ralphs Grocery Co*., 733 F.3d 916, 926 (9th Cir. 2013).

Viewing the evidence as a whole, the district court found that Lim was presented with a contract of adhesion, *i.e.*, a take-it-or-leave-it offer. As the district court found, Lim received the contract on the day it was to be executed, material terms—including the delegation clause—were pre-printed, and there were no negotiations as to any of the contract terms. Importantly, the district court found that Lim believed that, if he wanted to continue delivering for the Red Cross, he needed to sign the contract. Despite the general descriptions of the onboarding process provided in the TForce declarations, Lim's declaration establishes that the only choice TForce provided to him was to agree to the delegation clause and the rest of the contract or stop delivering for the Red Cross. These circumstances, especially in the employment context, indicate some degree of procedural unconscionability. *See, e.g.*, *Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 420 (N.D. Cal. 2015); *Pinela v. Neiman Marcus Grp., Inc.*, 238 Cal. App. 4th 227, 243 (2015); *Tiri v. Lucky Chances, Inc*., 226 Cal. App. 4th 231, 245 (2014).

With respect to unfair surprise, TForce presented the delegation clause in the middle of 31 numbered paragraphs, within more than nine pages of single-spaced, 10-point font. Nothing in the text of the agreement called Lim's attention to the delegation clause, and Lim was not required to sign or initial that specific provision. This further supports some degree of procedural unconscionability. *See, e.g.*, *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 128 (2019) (affirming finding of unfair surprise where the arbitration agreement consisted

of 8.5-point font that was "visually impenetrable" and "challenge[d] the limits of legibility").

As noted, another district court denied a motion to compel arbitration by TForce against another plaintiff based on similar unconscionability findings regarding the same contract at issue here. *See Saravia*, 310 F.R.D. at 416. While the district court in this case correctly noted the procedural unconscionability was not as severe as that found in *Saravia*, where a language barrier existed, the facts presented here show a situation where TForce "had overwhelming bargaining power . . . and presented [the delegation clause] to [Lim] on a take-it-or-leave-it basis." *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1284 (9th Cir. 2006). Accordingly, the district court correctly determined procedural unconscionability existed with respect to the delegation clause because "the circumstances show a degree of unfair surprise and oppression that left [Lim] without an ability to negotiate and to make only a take-it-or-leave-it decision." *See Saravia*, 310 F.R.D. at 420.

C.

"Substantive unconscionability examines the fairness of a contract's terms." *OTO*, 8 Cal. 5th at 129. The substantive unconscionability doctrine is concerned with terms that are "unreasonably favorable to the more powerful party," not just "a simple old-fashioned bad bargain." *Id.* at 130. California law seeks to ensure that contracts, particularly contracts of adhesion, do not impose terms that are overly harsh, unduly oppressive, or unfairly one-sided. *Id.* at 129–30 (citations omitted).

The California Supreme Court held that "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process

cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Armendariz*, 24 Cal. 4th at 110–11. Applying this principle, district courts have found cost-sharing provisions in employment arbitration agreements substantively unconscionable because the employer generally has far greater resources and the employee should not be required to pay for the opportunity to present claims—especially where employees would not bear those costs in federal court. *See, e.g.*, *Ortolani v. Freedom Mortg. Corp.*, No. EDCV 17-1462(KKx), 2017 WL 10518040, at *6 (C.D. Cal. Nov. 16, 2017); *Antonelli v. Finish Line, Inc.*, No. 5:11-cv-03874, 2012 WL 525538, at *5 (N.D. Cal. Feb. 16, 2012); *Chavarria v. Ralphs Grocer[y] Co*., 812 F. Supp. 2d 1079, 1088 (C.D. Cal. 2011), *aff'd Chavarria v. Ralphs Grocery Co*., 733 F.3d 916 (9th Cir. 2013).

We have similarly held, applying California law, that substantive unconscionability exists when a fee-shifting clause creates for employees a "greater financial risk in arbitrating claims than they would face if they were to litigate those same claims in federal court." *See Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1004 (9th Cir. 2010), *disapproved of on other grounds by Poublon*, 846 F.3d at 1265–66. In *Pokorny*, the arbitration clause allowed the arbitrator to award arbitration fees, costs, expenses, reasonable attorney's fees, and compensation in favor of the prevailing party. *Id.* We compared this impermissible "loser pays" situation with the rules that would apply if the dispute were litigated in court, where a plaintiff could recover attorney's fees from an employer if the plaintiff prevailed, but was not at risk of paying the employer's fees if the employer prevailed. *Id.*; *see also Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1026 (9th Cir. 2016) (distinguishing loser-

pays scenario in employment context from consumer context under California law).

With respect to forum selection, as a general rule, "inconvenience and expense" of a forum alone is not enough to treat a forum-selection clause as unenforceable. *Poublon*, 846 F.3d at 1264–65 (citations omitted). Instead, the clause must be "unreasonable" in that "the forum selected would be unavailable or unable to accomplish substantial justice." *Id.* at 1265 (quoting *Tompkins*, 840 F.3d at 1027). "To assess the reasonableness of the 'place and manner' provisions in [an] arbitration clause, [the court] must take into account the 'respective circumstances of the parties.'" *Nagrampa*, 469 F.3d at 1288 (quoting *Bolter v. Superior Ct.*, 87 Cal. App. 4th 900, 909 (2001)).

Viewed collectively, the district court concluded that the cost-splitting, fee-shifting, and Texas venue provisions rendered the delegation clause substantively unconscionable as to Lim. The district court evaluated Lim's financial circumstances and found that the delegation clause was so "prohibitively costly" that it deprived Lim of any proceeding to vindicate his rights. *See Saravia*, 310 F.R.D. at 421 (quoting *Nagrampa*, 469 F.3d at 1289). These findings are supported by the record and demonstrate substantive unconscionability.

The contract requires that Lim arbitrate his claims in Dallas, Texas, and that the arbitration fees be "split between the parties," unless Lim "shows that the arbitration fees will impose a substantial financial hardship" on him "as determined by the Arbitrator." As the district court found, Lim resides in Southern California, "take[s] home about $600 a week," and has joint custody of his minor daughter who spends half of her time with him. Lim argued that he would not be able to arbitrate his claims in Dallas because

he "cannot afford to travel to Dallas, Texas" and leave his daughter and work for a significant period of time. Lim explained that in the delivery driver field, drivers commonly lose opportunities for work if they are not available for several consecutive days. As the district court correctly concluded, these financial circumstances were more than mere inconvenience, and when viewed collectively with the Texas venue provision, rendered the delegation clause so "prohibitively costly" so as to deprive Lim of any proceeding to vindicate his rights or accomplish substantial justice. *See Poublon*, 846 F.3d at 1264–65.

In addition, the requirement that Lim pay half of the arbitration fees, including with respect to the gateway issue of arbitrability, impermissibly imposes a "*type* of expense that [Lim] would not be required to bear if he [] were free to bring the action in court." *Armendariz*, 24 Cal. 4th at 110–11. Lim submitted the applicable AAA Commercial Arbitration Fee Schedule and the applicable AAA Commercial Rules, which demonstrate that he would be required to pay fees and costs unique to arbitration. While the district court recognized the arbitrator could excuse Lim from paying arbitration fees if he demonstrated the "arbitration fees will impose a substantial financial hardship," it reasonably found that "[t]here is no assurance that such relief would be granted." Therefore, the district court correctly concluded that the cost-splitting provision, as applied to the delegation clause, was unconscionable under California law.

The district court also correctly concluded that the provision permitting an award of attorney's fees to the prevailing party was substantively unconscionable under California law. While the district court recognized that neither party would likely become the prevailing party based

on an initial decision of arbitrability, the prevailing-party provision does not preclude eventual recovery for attorney's fees arising from the arbitrator's initial decision on arbitrability.

As the district court recognized, if TForce prevailed on arbitrability and later prevailed on the merits in the arbitration, the contract would allow TForce to seek to recover all of its reasonable attorney's fees, including those incurred in connection with determining arbitrability. This creates a chilling effect on Lim enforcing his rights because it exposes him to the possibility of paying attorney's fees to TForce if he lost at arbitration, including fees associated with the threshold issue of arbitrability. Importantly, Lim would not face that risk in federal court because California public policy "unequivocally prohibits an employer from recovering attorney fees for defending a wage and hour claim." *Ling v. P.F. Chang's China Bistro, Inc.*, 245 Cal. App. 4th 1242, 1256 (2016). As we held in *Pokorny*, "the fee-shifting clause puts [plaintiffs] who demand arbitration at risk of incurring greater costs than they would bear if they were to litigate their claims in federal court, [so] the district court properly held that the clause is substantively unconscionable." 601 F.3d at 1004 (citations omitted).

TForce argues that the prevailing party fee award does not render the delegation clause unconscionable because Lim would likely not be required to pay attorney's fees unless and until TForce prevails on the merits of Lim's claims. But the timing of the payment does not eliminate the unconscionable chilling effect of the fee-shifting provision because it still exposes Lim to liability for his employer's attorney's fees if his claims are unsuccessful—which California law prohibits. *See Ling*, 245 Cal. App. 4th at 1256; *see also Pokorny*, 601 F.3d at 1004; *D.C. v. Harvard-*

Westlake Sch., 176 Cal. App. 4th 836, 861 (2009) (recognizing that "certain rights—unwaivable statutory rights or fundamental rights delineated in constitutional or statutory provisions—are so important in our society that their enforcement should not be chilled by the threat of expenses unique to arbitration").

TForce also argues, for the first time on appeal, that the district court erred by not requiring Lim to demonstrate his financial condition at the time he signed the contract in 2011, rather than when TForce filed its motion to compel arbitration in 2019. TForce waived this argument by not raising it in connection with its motion to compel arbitration in the district court. *See Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1153 (9th Cir. 2020).

And even if TForce had raised this issue in the district court, imposing arbitration expenses on an employee that he would not otherwise bear in federal court is unconscionable regardless of his ability to pay. *See Armendariz*, 24 Cal. 4th at 110–11. Nor does Lim's ability to pay eliminate the unconscionable chilling effect of the attorney's fee-shifting provision.[4] *See Pokorny*, 601 F.3d at 1004.

[4] To the extent Lim's ability to pay is relevant to the Texas venue provision, nothing suggests Lim experienced any change in income since the time the contract was signed, and TForce offered no evidence or argument to support a finding that Lim's ability to afford arbitration in Texas was materially different in 2011. Instead, Lim signed the contract with TForce in 2011 to *continue* making deliveries from the Red Cross facility. In this regard, the California Supreme Court has explained that:

> Absent unforeseeable (and thus not reasonably expected) circumstances, there is no reason to think that what an employee can afford when a wage dispute arises will materially differ from the parties'

TForce also argues, as it did in the district court, that it will waive the provisions at issue by paying all of the administrative costs of arbitration, not enforcing the venue clause, and arbitrating the claims in Southern California. TForce states that it has already filed the arbitration demand in Los Angeles and agreed to pay all arbitration fees. But, as the district court correctly recognized, waiving unconscionable elements of the delegation clause does not change the analysis of whether the delegation clause, as drafted, is unconscionable. TForce's later willingness to alter the arbitration provision "does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy." *Armendariz*, 24 Cal. 4th at 125; *see also Parada*, 176 Cal. App. 4th at 1584 ("[C]ourts should not consider after-the-fact offers by employers to pay the plaintiff's share of the arbitration costs where the agreement itself provides that the plaintiff is liable . . . . [T]he [drafter] is saddled with the consequences of the provision *as drafted*. If the provision, as drafted, would deter potential litigants, then it is unenforceable, regardless of whether, in a particular case, the employer agrees to pay a particular litigant's share of the fees and costs to avoid such a holding." (citations omitted)). To conclude otherwise would incentivize drafters to overreach based on the assumption they could simply waive unconscionable terms when faced with litigation.

> understanding of what the employee could afford at the time of entering the agreement.

Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109, 1164 (2013). In light of this principle, several California cases have considered evidence of a present inability to afford arbitration in assessing unconscionability at the time the contract was made. *See id.* (collecting cases); *Parada v. Superior Ct.*, 176 Cal. App. 4th 1554, 1583–84 (2009); *Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4th 77, 90–91 (2003).

Therefore, based on the cost-splitting, fee-shifting, and Texas venue provisions, the district court correctly concluded the delegation clause was substantively unconscionable as to Lim.

D.

TForce contends that the district court abused its discretion by not severing the unconscionable provisions and enforcing what remained of the delegation clause. We disagree.

California Civil Code § 1670.5(a) provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

In discussing § 1670.5 in *Armendariz*, the California Supreme Court explained:

> Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.

24 Cal. 4th at 124.

With respect to arbitration, the California Supreme Court recognized that "multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Id.* Accordingly, the California Supreme Court instructed that "an arbitration agreement permeated by unconscionability, or one that contains unconscionable aspects that cannot be cured by severance, restriction, or duly authorized reformation, should not be enforced." *Id.* at 126.

Severance is not permitted if the court would be required to augment the contract with additional terms because § 1670.5 does not authorize reformation by augmentation. *Id.* at 125. The same is true for California's arbitration statute, Cal. Civ. Proc. Code § 1281.2, which "authorizes the court to refuse arbitration if grounds for revocation exist, not to reform the agreement to make it lawful." *Armendariz*, 24 Cal. 4th at 125; *see Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 803 (2012) (recognizing that "the entire provision is unenforceable if the only way to cure the unconscionability is in effect to rewrite the agreement, [because] courts cannot cure contracts by reformation or augmentation" (citations and quotation marks omitted)).

As the district court correctly recognized, an unconscionable arbitration term should also not be severed if drafted in bad faith because severing such a term and enforcing the arbitration provision would encourage drafters to overreach. *See Parada*, 176 Cal. App. 4th at 1586 (citing *Armendariz*, 24 Cal. 4th at 124–25). *Armendariz* explained that "[a]n employer [would] not be deterred from routinely inserting . . . a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the

worst penalty for such illegality is the severance of the clause after the employee has litigated the matter." 24 Cal. 4th at 124 n.13. *Saravia*, which analyzed the same provision at issue here, applied this principle and recognized that "[s]evering the unenforceable provisions of an arbitration clause (or as here, a delegation clause) would allow an employer to draft one-sided agreements and then whittle down to the least-offensive agreement if faced with litigation, rather than drafting fair agreements in the first instance." 310 F.R.D. at 421.

Therefore, given the pervasive unconscionability of the delegation clause based on multiple unconscionable provisions—the cost-splitting, fee-shifting, and Texas venue provisions—the district court did not abuse its discretion by not severing those unconscionable terms. *See Armendariz*, 24 Cal. 4th at 124–25.

II.

Because the district court correctly held that the delegation clause was unenforceable as procedurally and substantively unconscionable, the district court properly proceeded to determine the gateway issue of arbitrability. In doing so, the district court correctly concluded that the same bases for concluding that the delegation clause was procedurally and substantively unconscionable—the take-it-or-leave-it circumstances and the cost-splitting, fee-shifting, and Texas venue provisions—also rendered the arbitration provision unconscionable. And for the same reasons it did not err by declining to sever the unconscionable terms with respect to the delegation clause, the district court did not err by not severing those same terms and declining to enforce the arbitration provision.

CONCLUSION

The district court correctly determined that the delegation clause was unenforceable because it was procedurally and substantively unconscionable. Because the delegation clause was unenforceable, the district court properly proceeded to determine the gateway issue of arbitrability, and correctly concluded that the same bases for concluding that the delegation clause was procedurally and substantively unconscionable—the take-it-or-leave-it circumstances and the cost-splitting, fee-shifting, and Texas venue provisions—also applied to render the broader arbitration clause unconscionable. In light of the multiple unconscionable provisions and resulting pervasive unconscionability, the district court did not abuse its discretion by declining to sever the unconscionable provisions from the delegation clause and arbitration provision.

AFFIRMED.