In Memory of Professor Hans Smit

Volume 4 of the *Yearbook on Arbitration and Mediation* is dedicated to the memory of Professor Hans Smit, long-time Columbia Law School professor and pillar of the international litigation and arbitration community. Professor Smit, was the father of "fast-track" arbitration and, more recently, of consultative relationships between parties and the arbitrators. He founded the ***American Review of International Arbitration*** and, with Vrat Pechota, constructed the 8-volume work entitled, ***The Smit Guides to International Arbitration***. He was an exceptional man who made a remarkable and singular contribution to law teaching and the development of arbitration.

YEARBOOK ON ARBITRATION AND MEDIATION

Volume 4 - 2012

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FOREWORD

The *Yearbook on Arbitration and Mediation* is an annual publication chronicling major developments in the fields of domestic and international arbitration and alternative dispute resolution. The *Yearbook* publishes professional articles from outstanding academics and distinguished practitioners. The professionally authored articles are complemented by contributed works from students at Penn State University's Dickinson School of Law.

Volume 4 features submissions from the *Yearbook*'s 2012 symposium titled, "U.S. Arbitration Law in the Wake of *AT&T Mobility v. Concepcion*." As the *Yearbook*'s marquee event, the 2012 symposium contributors are among the leading scholars in the field of international and commercial arbitration.

This latest installment of the *Yearbook* features an extraordinary array of commentary on the preceding year's developments in the field. On behalf of the faculty advisors and the editorial staff, I trust you will enjoy Volume 4 of the *Yearbook on Arbitration and Mediation*.

Nicholas V. Fox[*]
Editor-in-Chief
Yearbook on Arbitration and Mediation

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INTRODUCTION

Thomas E. Carbonneau*

Penn State Law was privileged to receive as invited guests the scholars and lawyers who contributed so effectively to the symposium on *AT&T Mobility*.[1] The presentations and accompanying discussions provided greater lucidity and understanding of another significant yet controversial U.S. Supreme Court ruling on the topic of arbitration. From Feerick to Moritz, we benefited from thorough and rigorous assessments, broadcast simultaneously from Penn State Law's two campuses through the marvels of modern AV technology. The student editors did an outstanding job organizing the proceedings and crafting the *Yearbook* volume that memorializes them. The volume also includes additional professional pieces on arbitration.

The evaluation of *AT&T Mobility v. Concepcion* was a judicious choice of symposium topic. When *Stolt-Nielsen v. AnimalFeeds Int'l*[2] was rendered, it seemed that the reign of arbitral autonomy had come to a sudden and brutal end through the implementation of a judicial merits review standard for awards—an approach that undermined the arbitrators' autonomous interpretation of the arbitral agreement. *AT&T Mobility* confirmed the continuing vitality of judicial support for arbitration by proclaiming that legal restrictions reflecting valid state public policy objectives could not be applied disproportionately to arbitration agreements. When the content of state contract laws disabled arbitration agreements in particular, they conflicted with the enforcement directive of FAA § 2 and were preempted by federal law. As a result, class action waivers became a lawful part of the bargain for arbitration. Moreover, adhesive contracts for arbitration were not presumed to be defective instruments by which to agree to arbitration. An opposite perspective, in fact, appeared to govern. The majority opinion indicated that such arrangements had been, and continued to be, the standard means by which to transact business in the consumer sector. Disparity of position and unilaterality, therefore, were not—*per se*—suspect means for establishing a binding contract. Despite the errant doctrinal statement in *Stolt-Nielsen*, the Court's compass had returned to pointing due north; the only true course by which to proceed in U.S. arbitration law was to continue building a sanctuary for efficient and effective private civil adjudication.

The would-be public policy debate aspect of the case made for a close ruling (4-1-4), but the plurality opinion spoke forcefully to the well-established content of U.S. arbitration law and the strength of the federal policy in favor of arbitration. Justice Scalia appears to have become the Court's "point-man" on divisive arbitration opinions, attesting to his evolution on the topic of arbitration. Justice Scalia, in fact, spoke for a firmer majority in the Court's latest pronouncement on arbitration. In *CompuCredit Corp. v. Greenwood*,[3] the Court again concluded that the enforcement imperative in regard to arbitration withstood the restrictive language of a consumer protection statute, but this time the majority was six in number, the two concurring opinions reflected substantial genuine agreement with the majority, and there was only a single dissent. In

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[1] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[2] Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

[3] 132 S. Ct. 665 (2012).

two *per curiam* opinions—*KMPG LLP v. Cocchi*[4] and *Marmet Health Care Center, Inc. v. Brown*[5]—the Court emphasized the rule that arbitration agreements must be enforced regardless of state law provisions to the contrary.

The spectrum of opinion on the assessment of these developments is vast among commentators. While it appears reasonably clear that any litigious challenge to arbitration is likely to fail, it is difficult to apprehend how judges (especially the Justices) are defining and responding to the issues of arbitration law raised by litigation. Outcomes are often difficult to predict and the reasoning that brings about the result is opaque. Consensus-building to create a majority contributes to the fog that envelops majority propositions on arbitration, but what exactly the Court decided and why are, at times, difficult to ascertain. It often seems that the law of arbitration is more a product of policy than the result of analytical reasoning or the confrontation of jural dilemmas. To commentators who seek to systematize the decisional rulings into a coherent body of legal rules for purposes of effective and transparent social governance, the Court's approach to, and definition of, legal propositions in arbitration is perplexing and sometimes resists comprehension. The rulings in *Commonwealth Coatings Corp.*,[6] *Volt Information Sciences, Inc.*,[7] and (especially) *Stolt-Nielsen* effectively illustrate the point. Without a common point of reference, like legal analysis, the rhetoric of opinion-writing and the public portrayal of conclusions make an accurate assessment unattainable. The reasoning in precedents not only engenders analytical confusion, but uncertainty as well in representational circumstances.

For example: *Marmet* seems to leave the door open to possible contract validation in other circumstances despite the untenable conclusions reached by one of the West Virginia courts. Does that mean that arbitration contracts are indeed subject to the strictures of contract formation under state law? If so, when and to what extent? Does the federal policy on arbitration remain a trump card in this configuration? Relatedly, what is the contemporary status of the holding in *Volt Information Sciences*? While courts must (sometimes) enforce arbitral clauses as written, can state law supplant the dictates of federal law as a means of regulating arbitration? What standard applies to the impartiality and neutrality of arbitrators in light of the dated ruling in *Commonwealth Coatings*? Did *Hall Street Associates*[8] irretrievably compromise the principle of contract freedom in arbitration? Are there indeed two separability doctrines in U.S. arbitration law after *Rent-A-Center v. Jackson*?[9] Are there two regimes for *kompetenz-kompetenz*—one by contract and the other through the application of common law? How do the cases—*Kaplan*,[10] *Howsam*,[11] *Bazzle*,[12] and *Stolt-Nielsen*—sort themselves out? Is there now an over-arching judicial surveillance of arbitrator determinations on jurisdiction? How will the Court pursue its concern about manifest disregard and excessive litigation about arbitration in the future? Is adhesion now a dead letter under the "savings clause" of FAA § 2?

An enormous gulf separates the bench, bar, and commentators on the specifics of the U.S. law of arbitration. The interested parties appear to assess arbitration and the adjustments of

[4] 132 S. Ct. 23 (2011).
[5] 132 S. Ct. 1201 (2012).
[6] Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968).
[7] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989).
[8] Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).
[9] Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772 (2010).
[10] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995).
[11] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).
[12] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

arbitral adjudication in remarkably different and contradistinctive ways. The Court is the oracle and it alone determines what matters are important enough to consider. It needs to reach a majority among its members and present or sell its determinations to the bar, the lower courts, other government branches, commentators, and the American public. There is an insufficient number of courts and scarce resources for funding adversarial adjudication. The Court's agenda differs from the objectives that might motivate the other implicated parties. What does the modern manifestation of arbitration mean to these parties and their construction of the governing law? An updated legislative protocol would be useful in elucidating the content of the applicable law. Some type of public discussion between the affected constituencies might also prove useful to defining the differences in perspective. Penn State Law and the *Yearbook* intend to continue to provide an effective platform for discussion of the issues of arbitration law.

SYMPOSIUM: U.S. ARBITRATION LAW IN THE WAKE OF *AT&T MOBILITY V. CONCEPCION*

INTRODUCTION

Dean Philip McConnaughay[*]

Welcome everyone. I would like to commend the editors of the *Yearbook on Arbitration and Mediation* on their choice of topic for today's symposium: "*U.S. Arbitration Law in the Wake of AT&T Mobility v. Concepcion*." Jean Sternlight has written that the *Concepcion* case represents a "tsunami" with policy implications that, if not curtailed, will substantially harm consumers, employees, and perhaps others by permitting companies to use arbitration clauses to exempt themselves from class actions – thereby giving them free rein to engage in fraud, torts, discrimination, and other harmful acts.[1] *The Columbia Business Law Review* published an article with a slightly different take on the case. It was entitled "Much Ado About Nothing."[2] It noted that most attempts to remedy serious corporate injury, e.g., tobacco, asbestos, defective pharmaceuticals and the like, don't depend on a contractual relationship with the corporation in question, and hence won't be affected by class action waiver clauses. Most of the headlines since *Concepcion* seem to side with Professor Sternlight. One read, "The Corporate Court Does It Again."[3] Another asked, "Has Consumer Protection Law Been Completely Preempted?"[4] Many more proclaim the end of class actions as we know them. Nonetheless, in one of the first post-*Concepcion* decisions by an official body, the NLRB surprised many observers by declaring, despite *Concepcion*, that a class action waiver in the context of a collective bargaining agreement is an unfair labor practice and not enforceable. Many wonder whether the new Federal Consumer Financial Protection Bureau will join the NLRB in issue regulations limiting the predicted effects of *Concepcion* with respect to consumers.

It is fitting that the organizers of today's symposium have dedicated this symposium to the memory of Columbia Law School Professor Hans Smit, who passed away last month after a distinguished career as one of the world's leading scholars of International Commercial Arbitration and who would have reveled in the task of predicting the effects of *Concepcion*. Professor Smit's contributions to the law of procedure, the law of the European Union, and the law and practice of arbitration, are legendary. We are very proud at Penn State that the name of one of our leading arbitration scholars, Tom Carbonneau, appears with Professor Smit on the bindings of the exceptional treatises and compilations on which they collaborated.

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[1] Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV 703, 704 (2012).

[2] Alessandro Presti, *AT&T Mobility v. Concepcion: End of Class Litigation as We Know It? Or Much Ado About Nothing?*, COLUM. BUS. L. REV. ONLINE (May 9, 2011, 3:57 p.m.), http://cblr.columbia.edu/archives/11739.

[3] Nan Aron, *AT&T Mobility: The Corporate Court Does it Again*, HUFFINGTON POST (Apr. 29, 2011, 11:46 a.m.), http://www.huffingtonpost.com/nan-aron/att-mobility-v-concepcion_b_855161.html.

[4] Mike Appleton, *AT&T Mobility v. Concepcion: Has Consumer Protection Law Been Preempted?*, JONATHAN TURLEY: RES IPSA LOQUITUR ("THE THING ITSELF SPEAKS") (Jul. 3, 2011, 11:20 p.m.), http://jonathanturley.org/2011/07/03/att-mobility-v-concepcion-has-consumer-protection-law-been-preempted/.

Today's speakers and panelists also are among the world's leading scholars and practitioners of arbitration. I have the privilege of introducing the Symposium's keynote speaker. John Feerick is the Norris Professor of Law and Dean Emeritus of the Fordham University School of Law. He is renowned as an arbitrator and mediator, and has served as both for the NFL, the NBA, and the Jacob Javits Convention Center. He is a former President of the New York City Bar, a former Chairman of the Board of the American Arbitration Association, a former Chair of the New York State Commission on Government Integrity, a former Chair of the New York Commission on Judicial Elections, and a former Partner of Skadden, Arps, Slate, Meagher & Flom. His book on the 25th Amendment to the United States Constitution,[5] an amendment that he helped to draft, was nominated for a Pulitzer Prize. He is a recipient of the American Bar Association's D'Alemberte/Raven Award for outstanding service in Dispute Resolution. And he is a recipient of the ABA's Robert J. Kutak Award for his exceptionally distinguished contributions to promoting cooperation between legal education, the practicing bar, and the judiciary. Please join me in welcoming Professor John Feerick.

[5] JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS (Fordham Univ. Press 1992).

SYMPOSIUM: U.S. ARBITRATION LAW IN THE WAKE OF *AT&T MOBILITY V. CONCEPCION*

KEYNOTE ADDRESS

Professor John Feerick*

First I want to thank Dean McConnaughay for his very generous and charitable introduction, which I appreciate very much. I also want to thank the editors of the *Yearbook*; I'm honored to have been asked to be part of this program. I'm aware of this law school and its history, and I really thank you for thinking that I was worthy to be part of this program in the role that I was asked to play.

I am also honored to dedicate my remarks, such as they are, in memory of the late Professor Hans Smit. I remember not too long ago, he did a program at Fordham Law School, and I recall how soothing and calming he was in dealing with a lot of difficult issues. I couldn't help but think, as I thought about him the last few days, how important he would be right now in making sense of all these issues that we're dealing with in terms of this case of April of 2011.

I also would like to dedicate my remarks to my two mentors who pushed me into the field of arbitration—the late Leslie Arps, who was the founding partner of Skadden Arps, and William Meagher. And, I want to acknowledge the important role that the American Arbitration Association has played in my life, in introducing me to the field of arbitration in so many different ways. I also wish to acknowledge Tom Carbonneau, who I met many years ago, too many I suppose, when he was a Visiting Professor at Fordham Law School. It was really a delight for me to come to know Tom at that time.

In thinking about this case, I've done nothing else actually, in the last few weeks, than think about it and read it and read it again, to see if I understood it. I had the good pleasure of a colleague I teach with at Fordham, Joel Davidson, who picked me up yesterday, and we drove down from Westchester County, and it won't surprise you that we spent almost five hours in the car talking about the case. I suspect when today's program is over, and when we go back—we're going to be talking about it. I almost feel like, as I look at the distinguished faculty that you have assembled, the boy who survived the Johnstown Flood. He just kept talking about surviving the flood, and he arrives at heaven and St. Peter says, "You are entitled to one wish." The boy said, "Well, I want to talk about the Johnstown Flood," and Peter says, "Ok, your wish is granted, talk about it, but keep in mind, Noah is in the audience." There are a lot of Noahs here when it comes to this case and understanding the case.

I'm going to assume that most of you have read the case and are familiar with the case. In *AT&T Mobility*, the contract provided for arbitration but prohibited class action arbitration.[1] A California case, *Discover Bank*,[2] prohibited class action waivers in court or in arbitration and the Supreme Court, by a five to four vote, which won't surprise you, held that the California *Discover Bank* rule was preempted by the federal arbitration statute and, therefore, the waiver

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[1] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

[2] Discover Bank v. Superior Court of Los Angeles, 113 P.3d 1100 (Cal. 2005).

was enforceable in a contract of adhesion as written. The dissent believed that the *Discover Bank* rule was valid and should have been enforced.[3] In short, the case limited the role of the state, federalism, in protecting consumers and decided that class action arbitrations were suspect, as I see it.

How to view *AT&T Mobility*—its meaning and significance? To some extent, it depends on a number of questions. But before going to the questions that for me are suggested by the case, I think it's important to take account of the fact that arbitration has been with us for a long time.

One can find evidence of arbitration systems in ancient times, and there's a lot of reference to arbitration in the scripture, in the writings and moralizing of Aristotle and Cicero, and of many other people. Arbitration has been used historically for all kinds of private and public disputes. Indeed, you find it in the United Nations Charter as a means for resolving disputes among nations. As we know, fifty years ago, fifty-one years ago, a year before I graduated from law school, the United States Supreme Court decided three cases known as the Steel Workers Trilogy,[4] under the Labor Management Relations Act[5]—the labor statute. And those cases still today are prevalent and celebrated in a sense because of, and there have been tributes in the past year or two that ties to its fiftieth anniversary, the important role they have played certainly in the field of labor law, but far beyond the field of labor law in the field of arbitration generally. They gave a broad sweep to arbitration and subjects to be covered in arbitration; suggested that doubts about whether something was covered by an arbitration clause or not should be referred to the arbitrator to decide and gave support as well to decisions by arbitrators in the form of arbitration awards.

And of course we have the FAA,[6] it came along in 1925 and in the period that the Trilogy played itself out; the FAA became a much more serious foundational basis for arbitration as a result of decisions by the United States Supreme Court. Without those cases, I'm not so sure that we'd be talking about the FAA in the terms we are at the present time. But it was the Supreme Court that sort of took the generality of that statute and made it so important in supporting the field of arbitration. So you've got those two statutes, and in response to those statutes, law schools have added courses and programs, bar associations, also. ADR provider organizations have come along to educate, to train, and to prepare people for roles as arbitrators. We all know arbitrators today handle the most difficult of controversies in terms of dollars, in terms of the significance of cases, and in terms of industry. And so a view of arbitration that suggest that it is not a very important part of our system of justice, largely a private justice system, but not exclusively, would be unfaithful to the history of what's happened with respect to the subject of arbitration. I can't believe it has expanded the way it has, and I've seen it for fifty years both as a practicing attorney and as a legal educator.

Now, how to view the case? To some extent, its meaning and significance depends on how one asks questions concerning its import. If the decision simply means a court should enforce arbitration agreements according to their terms, then the case adds little to the realm of arbitration. You've got an agreement and *the* agreement—the arbitration agreement is enforced

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[3] *Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting).

[4] United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960), United Steelworkers of Am. v. Warrior & Navigation Co., 363 U.S. 574 (1960), United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[5] Labor Management Relations Act, 29 U.S.C. §§ 141-181 (2011) (the Taft-Hartley Act).

[6] Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2011).

according to its terms. That's the question. If the decision means that consumers can have at least some significant substantive and procedural rights impaired by contracts of adhesion—that sparks a different discussion. If the case means that the courts are hostile to class action arbitration, to class actions in general, yet another debate can result. If it means that the states have no legitimate right or ability to promote fairness in arbitration—that poses issues involving the Commerce Clause of the Constitution and federalism. If the case has created a situation where consumers can be deprived of their right to sue in court and be deprived of any meaningful right to vindicate statutory rights in arbitration, we could become embroiled in a high stakes political debate. If the case is viewed as a narrow holding, that it does not prevent a court from intervening to facilitate or preserve the prosecution of claims based on statutory rights, then the case may not mean much at all. If *AT&T Mobility* gives courts the ability to protect the vindication of some statutory claims, say federal statutory claims, but perhaps not state statutory claims, one can readily argue that such is not a well-reasoned result.

If the case is read as courts interpreting Section 2 of the Federal Arbitration Act, including defenses of arbitration based on unconscionability, there are arguments that the case is departing from major prior law. It is also possible that the case means that if the parties provide for construction of the arbitration clause under the Federal Arbitration Act, as opposed to state law, different decisions can result from factually similar issues.

If *AT&T Mobility* applies only to the consumer contract arbitration clause and not to employment law cases or contracts which are actually negotiated by the parties, it seems to me that one finds unwarranted differentiation between different types of cases. If *AT&T Mobility* reflects only a judicial hostility toward class actions—is that judicial hostility likely to impact future decisions involving other aspects of the construction of the Federal Arbitration Act?

I'm just saying that these questions would make a very good exam question, and frankly I don't think I'd have any other questions if I was putting together an exam for law students. Now, I tend to approach judicial decision making cautiously, and I'm supported in that view by Justice Cardozo's *The Nature of the Judicial Process*.[7] You may have a statement of law, a rule of law, but key to it all is going to be the application of that rule to facts.

There was a television show when I was growing up that said, "You know, what are the facts? Give me the facts." Judge-made law takes rules and applies them to facts, and if we know anything about the history of American law, in my opinion, is that it's a law that evolves. It's a law that adapts to changes in the social order, to changes in the economy, to changes in one's way of life. So, I hesitate rushing to condemn the Court for this decision. I tend not to be a protestor anyway. I do my protesting in expressing my views on different subjects. When I read the case, as I've done too many times, it can be viewed much more narrowly than read by some of the very esteemed persons to which reference has already been made. You know their view. And who knows who's right? You just have got to give it time. Yogi Berra tells us, predicting—it's sort of risky business. But, you've got to stake out a view, or otherwise you're not living.

So when I read the case, what is it I see? I'm not going into the whole factual record and whether there's a factual basis for what the majority said. What the majority said, as I read it in a number of places, was the California *Discover Bank* rule was a rule that was hostile to arbitration clauses and to arbitration agreements. The Court cites two cases in recent years. One case,

[7] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (Yale Univ. Press 1964) (1921) (containing a series of lectures delivered by Justice Cardozo in 1921 as part of the William L. Storrs Lecture Series at Yale Law School).

involving a Montana rule, a Supreme Court case—*Doctor's Associates*,[8] said that when it comes to the arbitration provision in a contract, it has to be highlighted. If it is not highlighted, that arbitration clause is gone. The Supreme Court came along, and determined that this Montana rule is preempted.

And then there's the other case, the *Perry* case.[9] The California courts' approach to arbitration has had a history that one could study. That history may be relevant in some nuanced way to the outcome in this case, I don't know. The *Perry* case, as I read it, says that a state statutory claim that requires you first to have an administrative adjudication before you can have arbitration for that claim, even though the arbitration clause applied to the claim, is stricken—preempted.[10]

Now yesterday, another opinion dealing with federalism in this context was handed down.[11] A West Virginia state rule that barred arbitration agreements in the nursing home area was preempted. I haven't read the case yet, but my colleague, Joel Davidson, read the case overnight and he shared with me that the case goes back to state court because it says, "Even though we've stricken the state rule that said you can't have arbitration in the nursing home industry, because that's preempted, it doesn't mean that that clause might not be subject to another analysis that would lead to its invalidity based on law that's not geared to arbitration as such." Very significant case.

The Justices, they knew this program was taking place today, and so the Court wanted to introduce that case into the program. So I see, as a possible reading, that what the Court did here was follow what it was doing in other cases, such as the ones I just discussed. So, you can't get too excited about the *AT&T Mobility* decision; we just don't know enough about it and its significance.

I see in the Court's opinion, that they did view the *Discover Bank* rule as going after arbitration clauses and invalidating them. Class action waiver clauses, they said, "Can't do that." And then they had a lot of discussions about the difference between bilateral arbitration and class action arbitration. Now whether or not the court should have gotten into interpreting the clause to begin with, rather than the arbitrators, is another issue. I think you can find in *Prima Paint*[12] and *Southland*[13] and other cases, support for the view that the court should have let this question go to the arbitrator. Who knows?

So the second thing is that the result here should not surprise us. In April of 2010, the Supreme Court in the *Stolt-Nielsen* case said that a class action which resulted in that matter, should have had a clause in the contract, an express clause, in the context of that case.[14] The Court basically said, "There's no clause in the contract that's supportive of a class action, and that arbitration is a matter of agreement." And the parties themselves said, "We had not agreed that there could be a class action, or that the contract covered class actions." So the Court took that as a statement that the contract had nothing in it to support an interpretation that there was an agreement by the parties to have a class action as a possibility. And the Court said, "Well there may be certain circumstances where a contract does not have an express clause but that we still

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[8] Doctor's Assoc.'s, Inc. v. Casarotto, 517 U.S. 681 (1996).
[9] Perry v. Thomas, 482 U.S. 483 (1987).
[10] *Id*. at 489-90.
[11] Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012).
[12] Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 403-04 (1967).
[13] Southland Corp. v. Keating, 465 U.S. 1, 11-12 (1984).
[14] Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010).

could find in that contract through implication, maybe through custom and practice in the industry, a basis for class action." Of course we're not dealing with such a contract here, we're dealing with a class action waiver, but there's not enough to say to anybody that has been following this area, "What will be the next step." Something like a class action is possible through context.

Another way to look at the case is to take a look at the underlying contract provision. Yes, it is quite a long provision, but it's not a bad clause on its face. Now, I recognize that for somebody with a $30 claim, one might say, "Unless I have a class action, no system is going to work for me." But when you look at the contract in terms of the employer picking up the cost, and in terms of venue, venue is where the consumer is, the consumer has an option to go to small claims court. The consumer is not stuck with the arbitration provision. We know there is no jury trial in small claims court, but the Court says that there are a lot of incentives to use this process. This is not a tainted process; it depends on how you look at it.

The way I looked at it, having seen many terrible contract clauses and arbitration systems in my judgment, is that this one is pretty good. One problem, however, is that if you have a $30 claim, you are probably not going to spend time on this system. So, that becomes part of the difficulty of the case and its outcome.

My view is that you have got to give it some time to see how this case is going to play out. After learning of yesterday's *Marmet* case, my remarks haven't changed. You've got federal statutory claims, people have signed contracts, and they can't pursue those claims in the processes of those statutes because they've agreed to arbitration. So, arbitration becomes the forum, and it has certainly been my view of the law, of the practice, that when people give up federal statutory claims because there's an arbitration provision, the process has to be adequate for an effective vindication of those claims. The Second Circuit has several cases, and one in early February, where they have not been accepting the wisdom of the *AT&T Mobility* case, which says these class action waiver provisions are enforceable. Therefore, you have to go through an individual arbitration. The Second Circuit, dealing with statutory claims, has said if you can't get an effective vindication via arbitration, then that class action waiver clause goes.

So, we've got some testing going on. We've got some developments going on to watch. The Labor Management Relations Act has a section that gives employees the ability to have concerted action,[15] and there's been a view that you can't take that away from them simply because there's an arbitration provision. I think we've got a lot more to see before we can draw conclusions on this case.

Now I am worried about federalism. In a court that appeared to have some history in federalism, in terms of the majority—where is federalism after *AT&T Mobility*? Well, I think with federalism, we've got some evidence. While there's no opinion in the West Virginia *per curiam* opinion,[16] it says, "Go back to figure out what's there in the state." It is still alive! So, those are my reflections.

I would like to end my remarks, and I look forward to learning more about this subject from the great, great faculty that you have assembled. In my final analysis, I am reminded of the nature of the judicial process, the evolution of law, and its application to the facts of cases. Justice Cardozo in his classic work, he was our Chief Judge in New York, as you're well aware,

[15] Labor Management Relations Act, 29 U.S.C. §§ 141-181 (2011) (the Taft-Hartley Act).
[16] *Marmet*, 132 S. Ct. 1201.

and served on the United States Supreme Court, gave a series of lectures at Yale Law School[17] that still remain, in my judgment, among the most important literature out there having to do with the nature of the judicial process. He said that the application of the rule of law makes up the bulk of the business of the courts. The facts are important to the litigants involved in them. They call for intelligence and patience and reasonable discernment on the part of the judges who decide these cases where you're applying a rule to facts. But, they leave the jurisprudence where it stood before when applying rules to facts. That's what he said. It is a process, he said, of search and comparison, requiring the balancing of judgment and the testing and sorting of considerations of analogy, and logic, and integrity, and utility, and fairness. I end with a note that a private justice system such as arbitration, not acting on principles of fairness, is a system not worthy of the title, "Justice."

Thank you very much.

[17] William L. Storrs Lecture Series; *see* CARDOZO, *supra* note 6.

CONCEPCION AND PREEMPTION UNDER THE FEDERAL ARBITRATION ACT

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Abstract

The Supreme Court held in *AT&T Mobility LLC v. Concepcion* that a California law declaring class arbitration waivers unconscionable was preempted because it stood as an "obstacle to the accomplishment and execution of the full purposes and objectives" of the Federal Arbitration Act. The Court's *Concepcion* decision was necessarily based on implied preemption, because the FAA contains no express preemption clause and because there was no textual conflict between the FAA and the California law. *Concepcion* illustrates two fundamental problems with implied preemption: it violates federalism principles by permitting significant federal encroachment on state laws, and it violates separation-of-powers principles by permitting the Court to re-write federal statutes in accordance with the Court's inferred (and arguable) interpretation of statutory purpose. This article argues that the Court's preemption analysis of the FAA is wrong and that the FAA should preempt only textually inconsistent state laws.

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The Supreme Court's recent 5-4 decision in *AT&T Mobility LLC v. Concepcion*[1] controversially held a California law that declared class arbitration waivers *unconscionable* was preempted because it stood as an "obstacle to the accomplishment and execution of the full purposes and objectives"[2] of § 2 of the Federal Arbitration Act (FAA).[3] In doing so, the majority engaged in a contentious debate with the dissenters over whether California's *Discover Bank*[4] rule was consistent with the FAA's primary objective and to what extent the FAA's savings clause in § 2 precluded California's general policy against exculpatory contracts. Crucially, however, the two sides disagreed over the FAA's primary purpose and whether the nature of class arbitration proceedings was fundamentally at odds with the appropriate definition of arbitration.

This disagreement and others like it involving doctrines of implied preemption can be avoided by applying Professor Stephen Gardbaum's new perspective on federal preemption.[5] Gardbaum argues that a fundamental misconception of preemption, that Congress's power to preempt flows from the Supremacy Clause, confuses the issue of whether concurrent state authority has actually been displaced.[6] A proper understanding of the FAA's effect on state contract disputes therefore begins with framing Congress's power to preempt.[7] This article asserts that the modern dialectic over the FAA's preemption power overly focuses on the purposes and objectives of Congress in passing the Act, rather than the true issue of whether there is actual conflict between state law and the FAA's text. Adoption and incorporation of Gardbaum's preemption analysis provides a necessary guide to navigating the tricky waters left in the wake of *Concepcion*.

A conversation regarding the nature of preemption and whether the FAA has preemptive power is essential, as *Concepcion* demonstrates, because the Court has shown itself willing to supersede state laws reflecting state public policy when those laws conflict with an inferred purpose of the FAA , rather than with the actual text of the Act.[8] Part I of this article provides an accounting of the *Concepcion* case itself. It methodically considers the three opinions in the case and the main arguments advanced by each. In Part II, the current doctrine of implied preemption is analyzed and compared with the preemption theories of two legal commentators on the issue. This section particularly focuses on the problems associated with the "categorical" approach to preemption and the idea that the Court may infer the purpose of Congress to displace state authority. Part III briefly examines several of the recent criticisms of *Concepcion* and the suggested unavoidable consequences of the majority's holding. Throughout the article we will demonstrate that the entrenched thinking on FAA preemption of state law exists largely because of misinterpretations of Congress's preemption power and has resulted in harsh results for state governments as well as for unsophisticated parties to arbitration agreements.

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[1] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[2] *Id.* at 1753 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[3] 9 U.S.C. § 2 (2006). This section is commonly referred to as the FAA's "savings clause," which provides the criteria for which arbitration agreements are not enforceable under the FAA.

[4] Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

[5] *See* Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39 (2006); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994).

[6] Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39, 41 (2006) ("Thus, although both supremacy and preemption displace (or supersede) state law, they operate to displace *different* types of state law and do so by the *different* mechanisms of automatic consequence and discretionary power respectively.").

[7] *See id.* at 40.

[8] *Concepcion*, 131 S. Ct. at 1753.

I. CONCEPCION

A. Background & Facts

Vincent and Liza Concepcion's case started with an increasingly typical consumer transaction. Responding to Cingular Wireless'[9] advertisement offering a free cellular phone with every new wireless contract, the Concepcions signed a two-year Wireless Service Agreement (WSA) in February 2002.[10] The WSA contained both a clause requiring that all disputes arising out of the agreement be submitted to arbitration, and a class action waiver that barred the aggregation of similar claims.[11] After signing the contracts and receiving two new phones, the Concepcions also received a bill for $30.22, a charge for sales tax on the phones.[12] Instead of following the WSA's procedure for claim dispute resolution, involving arbitration, the Concepcions sued AT&T Mobility in the United States District Court for the Southern District of California in March 2006.[13] The Concepcions alleged that AT&T had defrauded them as consumers and had falsely advertised the phones as "free."[14] The district court consolidated the Concepcions' claim in September 2006 with the *Laster v. AT&T Mobility LLC* class action involving the same types of advertisements and charges.[15]

In December 2006, AT&T modified the arbitration clause of the WSA to include a "premium payment clause," which required AT&T to pay $7,500 to a claimant if an arbitrator awarded the consumer an amount greater than AT&T's largest settlement offer at the time of arbitrator selection.[16] After the addition of this clause, AT&T filed its motion to compel arbitration under the WSA's revised terms.[17] The district court denied AT&T's motion and, applying the California Supreme Court's holding in *Discover Bank v. Superior Court*,[18] held that "California's stated policy of favoring class litigation and arbitration to deter alleged fraudulent conduct in cases involving large numbers of consumers with small amounts of damages, compels the Court to invalidate [AT&T]'s class waiver provision."[19]

California's *Discover Bank* test requires satisfying three prongs to determine the unconscionability of a class action waiver in a consumer contract:

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[9] Although the Concepcions bought the contract from Cingular in 2002, the company was bought by AT&T in 2005 and renamed AT&T Mobility in 2007. Laster v. AT&T Mobility LLC, 584 F.3d 849, 852 n.1 (2009).

[10] *Concepcion*, 131 S. Ct. at 1744.

[11] *Laster*, 584 F.3d at 852.

[12] *Id.*

[13] *Concepcion*, 131 S. Ct. at 1744.

[14] *Id.*

[15] *Laster*, 584 F.3d at 853.

[16] *Id.*

[17] *Id.*

[18] *Discover Bank*, 113 P.3d at 1100.

[19] Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008).

> (1) is the agreement a contract of adhesion; (2) are disputes between the contracting parties likely to involve small amounts of damages; and (3) is it alleged that the party with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money.[20]

The Ninth Circuit upheld the district court's application of California law and also found that the FAA did not expressly or impliedly preempt the *Discover Bank* rule.[21] According to the Ninth Circuit, the FAA did not expressly preempt California law because the *Discover Bank* rule applied equally to any contract clause that barred class aggregation of claims.[22] Therefore it did not conflict with the FAA's § 2 which states that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[23] Additionally, the FAA did not impliedly preempt *Discover Bank* under a theory of obstacle preemption because California's law "placed arbitration agreements on the *exact same footing* as contracts that bar class litigation outside the context of arbitration."[24]

B. The Scalia Majority Opinion

Justice Scalia wrote for the Court. He began his analysis by discussing the purposes and general policy of the FAA, foreshadowing a finding of implied preemption,[25] specifically the variety referred to as obstacle preemption.[26] The majority determined that California's policy of protecting consumers by barring class waivers from arbitration agreements obstructed Congress's purpose in enacting the FAA and was therefore preempted.[27] Scalia's argument for FAA preemption rested on two main points: (1) that California's "policy against exculpation" was not a ground under the FAA's § 2, that "exist[s] at law or in equity for the revocation of any contract,"[28] and (2) that *Discover Bank* was inconsistent with the FAA's "'principal purpose' to ensure that private agreements are enforced according to their terms."[29]

In holding that the *Discover Bank* rule was not "a ground that 'exist[s] at law or in equity for the revocation of any contract' under FAA § 2,"[30] Scalia engaged in a categorical evaluation of whether a state policy against class waivers satisfied the textual requirements of the FAA's savings clause.[31] In the majority's view, California's policy of protecting consumers from class waivers in adhesion contracts had a "disproportionate impact on arbitration agreements,"[32] and

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[20] *Laster*, 584 F.3d at 854.
[21] *Id.* at 857-59.
[22] *Id.* at 857.
[23] *Id.* (citing 9 U.S.C. § 2 (2006)).
[24] *Id.* (emphasis in original).
[25] *Concepcion*, 131 S. Ct. at 1745.
[26] Gardbaum, *supra* note 5, at 62.
[27] *Concepcion*, 131 S. Ct. at 1753.
[28] *Id.* at 1746.
[29] *Id.* at 1748 (citing Volt Info. Scis. Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 489 (1989)).
[30] *Id.* at 1746.
[31] *Id.* at 1747.
[32] *Id.*

was therefore inconsistent with the Court's previous holding in *Perry v. Thomas*.[33] In *Perry*, the Court had held that states cannot "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot."[34] In other words, because the state policy in *Discover Bank* applied only to consumer adhesion contracts, it did not apply "generally" to contracts and in fact would disproportionately affect agreements where the parties had agreed to settle their disputes through arbitration.[35] Scalia also cited two law review articles in stating that "California courts have been more likely to hold contracts to arbitrate unconscionable than other contracts."[36]

The majority's second conclusion, that *Discover Bank* is hostile to the "primary purpose" of the FAA, exhibited a more functional analysis of what arbitration under the FAA was supposed to look like.[37] In painting a picture of the kind of arbitration favored by the FAA, the majority described arbitration as: "efficient, streamlined procedures tailored to the type of dispute," relatively informal, generally successful at "reducing the cost and increasing the speed of dispute resolution," and beneficial because "the costliness and delays of litigation . . . can be largely eliminated . . .."[38] This was crucially important because the *Concepcion* plaintiffs argued that aggregation of arbitration claims, though inconsistent with the class waiver provision in the arbitration agreement, were not inconsistent with the purpose of promoting arbitration. Given this position, the majority opinion held that class arbitration proceedings were too dissimilar to the kind of arbitration contemplated by the FAA to be consistent with its "primary purpose."[39] The majority determined that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."[40] This rationale takes issue with the form of arbitration sought by the plaintiffs and its fundamental inconsistency with traditional bilateral arbitration.

In our view, the second conclusion is more critical to the majority's opinion than the first because it strikes at the heart of obstacle preemption: frustration of purpose. The majority

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[33] Perry v. Thomas, 482 U.S. 483 (1987).

[34] *Id.* at 493 n.9.

[35] This inference supposes that the majority of consumer contracts include a mandatory arbitration clause for handling all disputes under the contract. Because nearly all consumer contracts are now contracts of adhesion, the effect of the rule then applies primarily to consumer contracts. The majority particularly found troubling the fact that the *Discover Bank* test's requirements that damages be predictably small and a scheme to cheat consumers be alleged. In its view, the majority considered these factors "toothless and malleable" and contrary to the FAA's purpose in favoring arbitration by only requiring mere allegation to invalidate an arbitration agreement. *See Concepcion*, 131 S. Ct. at 1750.

[36] *Concepcion*, 131 S. Ct. at 1747 (citing Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 54, 66 (2006); and Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of the Unconscionability Doctrine*, 52 BUFF. L. REV. 185, 186-87 (2004)).

[37] *See Concepcion*, 131 S. Ct. at 1748-53.

[38] *Id.* at 1749 (citing 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); and Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

[39] *Id.* at 1750.

[40] *Id.* at 1751; *see also id.* at 1750 ("[T]he 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.'") (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1776 (2010)); and *Concepcion*, 131 S. Ct. at 1750 ("Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And . . . arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.").

concludes that class arbitration procedures cannot be as efficient as the bilateral procedures contemplated by the FAA.[41] In his view, Justice Scalia considered class arbitration incapable of producing "efficient, streamlined" results for parties agreeing to arbitrate their disputes.[42] The majority states, contrary to the dissent's view, that the primary purpose of the FAA *is* the "expeditious resolution of claims" through an informal, low-cost proceeding.[43] Additionally, arbitrators by and large are simply incapable of understanding the "often-dominant" procedural demands of class certification.[44] As will be discussed later, these arguments *for* arbitration in *Concepcion* are eerily similar to the types of arguments initially launched *against* arbitration when the FAA was enacted. Yet, the majority finds that the essence of arbitration in the FAA is incompatible with the modern procedural form of class actions, which is "slower, more costly, and more likely to generate procedural morass than final judgment."[45]

The Court's holding in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*[46] is vital in this respect because it determined that the class form of arbitration is so incompatible with the fundamental purpose of arbitration that where arbitration agreements are silent as to the availability of class procedure for dispute resolution, it cannot be found impliedly available.[47] *Stolt-Nielsen* makes the logic of the *Concepcion* majority clear: if class arbitration is not impliedly available absent a class waiver, then finding an arbitration agreement's class waiver unconscionable and void under state law cannot make claim aggregation any more available than where the waiver was absent. The *Concepcion* plaintiffs, however, raised the obvious argument that because parties to an arbitration agreement could *provide* for the possibility of aggregated claims in their agreement, class arbitration cannot be incompatible with the purpose of FAA arbitration.[48] Yet Scalia, in stating that "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations,"[49] dismisses this argument because presumably parties cannot reasonably expect the availability of class arbitration where the contract does not so provide.[50]

The majority opinion closes by addressing the functional effect issues raised by the *Concepcion* plaintiffs, specifically that companies that include class waiver provisions in their arbitration agreements will effectively immunize themselves from fraud claims.[51] Citing the Ninth Circuit's findings, the majority stated that the "Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action" because of the premium payment clause in the revised contract.[52] Therefore, because submitting disputes to arbitration under the agreement would result in the vastly improved position of the consumer, it was immaterial whether most aggrieved consumers would consider the claim too

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[41] *Id.* at 1750-51.

[42] *Id.* at 1749-51.

[43] *Concepcion*, 131 S. Ct. at 1749.

[44] *Id.* at 1750.

[45] *Id.* at 1751. "Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in *Discover Bank*, class arbitration is a 'relatively recent development.'" *Id.* (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005)).

[46] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

[47] *Id.* at 1775.

[48] *Concepcion*, 131 S. Ct. at 1752.

[49] *Id.* (citing Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2777 (2010)).

[50] *See id.*

[51] *Id.* at 1753.

[52] *Id.* (quoting *Laster*, 2008 WL 5216255, at *12).

insignificant to contest or too burdensome. In other words, despite the Ninth Circuit's consideration that California had a valid (and non-preempted) interest in *deterring* consumer fraud through the class waiver ban, the majority found the interest insufficient to meet the FAA § 2 standard of "a ground that 'exist[s] at law or in equity for the revocation of any contract.'"[53]

C. The Thomas Concurrence

Justice Thomas reiterated his traditional opposition to the Court's use of the implied preemption doctrine, but concurred with the majority because he believed *Discover Bank* did not provide a "ground for the *revocation* of any contract" as textually required by FAA § 2.[54] His concurrence analyzed the textual requirements of the FAA and the ability of the *Discover Bank* rule to provide a reason compatible with the FAA for the class waiver ban. Because the text of § 2 refers to "grounds . . . for revocation," it necessarily meant that only those grounds related to the *making* of the contract were sufficient to activate the savings provision of the FAA.[55]

The *Discover Bank* rule provides for the *nonenforcement* of an arbitration clause, rather than the *revocation* of the contract as required by FAA § 2.[56] In Thomas' view, the California rule, therefore, did not satisfy the savings clause provision of the FAA and was invalid.[57] To Thomas, the Ninth Circuit's characterization of AT&T's arbitration clause as "exculpatory" was fatal because "[e]xculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy . . . Refusal to enforce a contract for public policy reasons does not concern whether the contract was properly made."[58] Therefore, because the nonenforcement of the class waiver did not need to consider whether the contract was properly formed, it was not a ground sufficient for the savings clause and was preempted.[59]

D. The Breyer Dissent

The *Concepcion* dissent was written by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan.[60] Breyer followed the organization of the majority opinion and argued that: (1) the *Discover Bank* rule satisfies the requirements of the FAA's savings clause in § 2,

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[53] *Concepcion*, 131 S. Ct. at 1746 (quoting 9 U.S.C. § 2 (2006)).

[54] *Id.* at 1753 (Thomas, J., concurring) (emphasis added) (quoting 9 U.S.C. § 2 (2006)); Justice Thomas has repeatedly stated his opposition to implied preemption, objecting to where "the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law," Wyeth v. Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring); *see also* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 459 (2005) (Thomas, J., concurring) ("[I am] increasing[ly] reluctan[t] to expand federal statutes beyond their terms through doctrines of implied pre-emption.").

[55] *Concepcion*, 131 S. Ct. at 1754-55 (Thomas, J., concurring).

[56] *Id.* at 1756.

[57] *Id.*

[58] *Id.*

[59] *Concepcion*, 131 S. Ct. at 1756 (Breyer, J., dissenting).

[60] *Id.*

merely placing arbitration clauses on the same or equal footing as other contract clauses;[61] and (2) the *Discover Bank* rule is consistent with the purpose behind the FAA because class arbitration is not opposed to the fundamental attributes of arbitration.[62] Accordingly, the dissent argued that the ban on class waivers applied broadly enough to all contracts that it satisfied the savings clause and that class arbitration's form was not fundamentally adverse to the purpose of the FAA.[63]

The dissent premised its argument for qualification under the savings clause on the notion that the *Discover Bank* rule was nothing more than an "authoritative state-court interpretation" of that state's general unconscionability law.[64] California Civil Code already declared exculpatory contracts or clauses illegal, and authorized expansion of the unconscionability doctrine to such terms.[65] Therefore, consumer adhesion contracts that effectively exculpated companies like AT&T through class waivers violated the pre-existing California unconscionability doctrine. To the dissent, the *Discover Bank* rule did little more than determine that certain contracts that met the three-prong requirement were as exculpatory as other contracts that limited liability under California law.[66] Indeed, not all class action waivers were unconscionable under California law, only ones which satisfied the qualities of an exculpatory contract or term.[67] Breyer reasoned the that application of California's unconscionability doctrine under these circumstances, whether in an arbitration agreement or an agreement subject to litigation, placed class waivers "upon the same footing as other contracts."[68]

In response to Scalia's condemnation of class arbitration as a process fundamentally different from bilateral arbitration because of its form, the dissent urged that the FAA was not enacted to secure substantive rights to any particular procedural advantages.[69] Rather, the FAA was passed so that arbitration, when freely chosen by the contracting parties as a venue for remedy, would be honored by the courts.[70] To the dissent, class arbitration itself would not be adverse to the primary purpose or primary objective of the FAA unless it discouraged the enforcement of arbitration agreements.[71] Therefore the primary objective of the FAA was enforcement of arbitration clauses and not, as the majority indicated, protecting a particular form of arbitration that guaranteed low costs to parties or expedient claim resolution.[72]

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[61] *Id.* at 1760 (Breyer, J., dissenting); *see also id.* (Breyer, J., dissenting) ("Because California applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision."); and *id.* at 1758 ("[U]nlike the majority's examples, the *Discover Bank* rule imposes equivalent limitations on litigation . . . .").

[62] *Id.* at 1759 (Breyer, J., dissenting) (citing *Concepcion*, 131 S. Ct. at 1743 n.9) ("Where does the majority get its contrary idea--that individual, rather than class, arbitration is a 'fundamental attribut[e]' of arbitration? The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.").

[63] *Id*.

[64] *Id*. at 1756.

[65] *Id.* (citing CAL. CIV. CODE §§1668, 1670.5(a) (West 1985)).

[66] *See Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting).

[67] *Id*. ("Courts applying California law have *enforced* class action waivers where they satisfy general unconscionability standards.") (emphasis added).

[68] *Id.* (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).

[69] *Id.* at 1758.

[70] *Id.*

[71] *See Concepcion*, 131 S. Ct. at 1758 (Breyer, J., dissenting) ("But we have also cautioned against thinking that Congress' primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the 'enforcement' of agreements to arbitrate.") (citing *Dean Witter Reynolds Inc.*, 470 U.S. at 221).

[72] *Id.*

To counter the litany of difficulties associated with class procedure as outlined by the majority, Breyer referenced several sources approving of class arbitration and declared the procedure "consistent with the use of arbitration."[73] Prominently, the dissent cited the American Arbitration Association's (AAA) *amicus* brief from *Stolt-Nielsen*, which described class arbitration as "a fair, balanced, and efficient means of resolving class disputes."[74] The AAA also favorably described the benefits of class arbitration, stating that class arbitration reduced the average time for dispute resolution over court-based class actions.[75] Therefore, *even if* the FAA was enacted for the specific purpose of expediting claims in a low-cost, efficient, and fair resolution process, class arbitration was not inconsistent with any of those attributes.[76]

The dissent concluded by stating that the Court has previously considered the dynamic nature of arbitration proceedings and the varied forms they might take, demonstrating the illogic of the majority's restriction of arbitration to a particular form.[77] Absent a state law that "disfavors arbitration," the dissent stated that California's law was not preempted and that states should be able to apply their own doctrines of unconscionability consistent with that restriction.[78]

II. FAA PREEMPTION & ANALYSIS

As the holding in *Concepcion* rests on the majority's finding that the FAA preempts California law, it is vital to consider the source of the FAA's preemption and the context in which state law is supplanted by the operation of the federal statute. Since the Supreme Court's decision in *Southland Corp. v. Keating*,[79] the Court has interpreted § 2 of the FAA as preempting state laws that single out arbitration for disfavored treatment.[80] As the Court has stated in the past, however, the FAA contains no express preemption provision.[81] Therefore, a preemption finding is dependent upon an implication of Congress's intent to displace state authority. In *Concepcion*, the majority held that the *Discover Bank* rule was preempted "because it 'stands as

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[73] *Id.*

[74] *Id.* (quoting Brief for American Arbitration Association as Amicus Curiae at 25, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198)).

[75] *Id.* at 1759 (quoting Brief for American Arbitration Association as Amicus Curiae Supporting Neither Party at 24, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 2896309); *see also id.* at 1759-60 ("Data from California courts confirm that class arbitrations can take considerably less time than in-court proceedings in which class certification is sought . . . And a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution were all that mattered, the *Discover Bank* rule would reinforce, not obstruct that objective of the Act.").

[76] *See Concepcion*, 131 S. Ct. at 1758 (Breyer, J., dissenting). The dissent specifically rejected the idea that the FAA's "primary purpose" was to provide a simplified and expedient claim resolution process, citing *Dean Witter*: "we 'reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.'" *Dean Witter*, 470 U.S. at 219.

[77] *Id.* at 1761 (Breyer, J., dissenting) ("We have reached results that authorize complex arbitration procedures . . . We have upheld nondiscriminatory state laws that slow down arbitration proceedings . . . But we have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings.").

[78] *Id.* at 1760.

[79] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[80] Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 422 (2006).

[81] Volt Info. Scis., Inc., v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a general congressional intent to occupy the entire field of arbitration.").

an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[82] This section examines (1) the source of Congress's preemption power, and (2) the doctrine of implied "obstacle" preemption and the problems associated with implied FAA preemption.

A. The Source of Congress's Power to Preempt

It is widely agreed that the "pre-emption doctrine is derived" from the Supremacy Clause,[83] and "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."[84] Further, to determine "whether the Congress ha[s] precluded state enforcement of select state laws adopted pursuant to its authority . . . [t]he purpose of Congress is the ultimate touchstone." [85] These two often quoted pillars of federal preemption doctrine continue to guide the Court's reasoning in FAA cases dating back to *Southland*.[86]

However, acceptance of these maxims is not universal and some legal theorists, including Professor Stephen Gardbaum and Professor Caleb Nelson, compellingly contend that federal preemption doctrine incorrectly locates the source of Congress's preemption power in the Supremacy Clause.[87] Their alternative view posits that the Supremacy Clause operates automatically to determine whether state law or federal law should govern where the two sources of power are contradictory.[88] Preemption, on the other hand, occurs when Congress affirmatively deprives states of their authority to act, even where state law does not contradict the federal law at all.[89] This view challenges the accepted doctrine of implied preemption that state law is displaced when it merely obstructs the purposes of Congress.[90] As the Court in *Concepcion* expanded the interpretation of the FAA to preclude a particular *form* of arbitration, revisiting FAA preemption is warranted to comprehend to what extent state law is valid before it conflicts with the FAA's "principal purpose."

Under Gardbaum and Nelson's alternative approach, state law is naturally displaced, or "trumped," under the Supremacy Clause by a federal statute "[w]hen a court must choose between applying a valid rule of federal law and applying some aspect of state law."[91] This distinction is important to the application of the doctrine of implied preemption because it categorizes "supremacy" as the effect which occurs when compliance with both laws *as written* is

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[82] *See Concepcion*, 131 S. Ct. at 1753 (quoting *Hines*, 312 U.S. at 67).

[83] U.S. Const., art. VI, cl. 2.

[84] Gade v. Nat'l Solid Waste Mgmt., 505 U.S. 88, 108 (1992) (citing Felder v. Casey, 487 U.S. 131, 138 (1988)).

[85] Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963) ("Congress under the Commerce Clause may displace state power.").

[86] *Southland Corp*., 465 U.S. at 1-2.

[87] *See* Gardbaum, *supra* note 5, at 39; Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

[88] Nelson, *supra* note 87, at 231.

[89] *See* Gardbaum, *supra* note 5, at 771.

[90] As stated, FAA preemption of state law can be traced to *Southland*, where the Court first held that the FAA preempts state laws that target arbitration agreements. *See* Bales, *supra* note 80, at 422.

[91] Nelson, *supra* note 87, at 231.

impossible.[92] If the Supremacy Clause does not provide Congress with an affirmative power, but instead acts as a "tiebreaker" for courts in determining which law should govern a particular matter, then the Supremacy Clause cannot be the source of power for implied preemption.[93] Because obstacle preemption is a particular variety of the implied preemption doctrine, determining whether supremacy or preemption is involved has specific importance to *Concepcion*.

This does not mean, however, that preemption is unauthorized by the Constitution. To the contrary, Professor Gardbaum describes preemption as a valid exercise of Congress's power under the Necessary and Proper Clause[94] to displace state authority.[95] According to Gardbaum "the most compelling argument in favor of a congressional power of preemption is a practical one – the need for uniform national regulation, for one set of rules in particular areas."[96] The Necessary and Proper Clause enables Congress to effectuate its enumerated powers under the Constitution, and most frequently under the Commerce Clause.[97] This is consistent with the Court's statement of federal preemption in *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*,[98] although missing the step of the Necessary and Proper Clause's operation, stating that "Congress under the Commerce Clause may displace state power."[99]

Yet, Gardbaum contends that Congress *is* limited to an extent in using its power to preempt.[100] Because preemption involves the operation of one of Congress's enumerated powers, incorporating the power under the Necessary and Proper Clause, it is a discretionary power which may only be invoked expressly.[101] Thus, it is predictable that Gardbaum concludes: "[a]s a matter of constitutional law, there should be no such thing as implied preemption."[102]

B. Implied Preemption

The doctrine of implied preemption features most prominently in *Concepcion* in the majority's consideration of the "principal purpose" of the FAA.[103] Arriving at the conclusion that the FAA's purpose is to "ensur[e] that private arbitration agreements are enforced according to

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[92] *See* Gardbaum, *supra* note 5, at 41. Though Professor Nelson does not draw the same taxonomical distinction between preemption and supremacy as Gardbaum, he nonetheless outlines his "logical-contradiction" test (which *is* compatible with Gardbaum's views) for determining whether a state law is trumped by the Supremacy Clause: "Courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law." Nelson, *supra* note 87, at 260.

[93] Implied preemption will be discussed *infra*, but is generally described as occurring when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67.

[94] U.S. Const. art. I, § 8, cl. 8.

[95] *See* Gardbaum, *supra* note 5, at 781.

[96] *Id.*

[97] *Id.* at 782.

[98] Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn, 375 U.S. 96 (1963).

[99] *Id.* at 103.

[100] Gardbaum, *supra* note 5, at 51-59.

[101] *Id.* at 51 ("Preemption is one of Congress's enumerated powers albeit, as I have argued, a part of its enumerated implied powers under the Necessary and Proper Clause. As an inherent feature of federal law, supremacy operates whether Congress says so or not. By contrast, as a discretionary power of Congress, preemption operates only if Congress says so.")

[102] *Id.* at 52.

[103] *Concepcion*, 131 S. Ct. at 1748-53.

their terms,"[104] Scalia next states that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."[105] The majority opinion then adopts the view that arbitration, as Congress intended when it enacted the FAA, required certain procedural and functional qualities with which class arbitration would be inconsistent.[106] This purpose was inferred by the Court, and consistent with its prior holding in *Stolt-Nielsen*.[107] Because Congress had not stated its intent to preempt state law, both the primary purpose of the FAA and Congress's intent to preempt state authority were implied. By restricting the form that arbitration may take outside of the specific intent of the contracting parties, the Court expanded the preemptive power to exclude more state law than previously considered.

Many critics of FAA preemption point to the Court's decision in *Southland* as the crucial moment where the FAA's § 2 was first considered preemptive "substantive law," rather than procedural law that did not bind state courts.[108] In *Southland*, the majority concluded that '[i]n enacting [Section] 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties had agreed to resolve by arbitration."[109] Justice O'Connor notably dissented in that case and argued that the FAA declared federal procedural law, which applied only in federal courts, not state courts.[110] This view has been echoed most recently by Justice Thomas who continues to argue that the FAA applies only in federal courts.[111]

This conflicting interpretive view of the FAA's purpose is the critical juncture where the alternative view mentioned in the previous section might be instructive. *Southland* must be based upon implied preemption because the FAA "contains no express pre-emption provision."[112] There is no indication that the FAA is necessarily incompatible with state arbitration laws, at least to the extent that the state laws do not ban arbitration clauses outright. Supremacy, under Gardbaum's alternative view, therefore is not at issue.[113] Determining whether the FAA trumps state law under the Supremacy Clause is a matter of statutory construction, similar to the

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[104] *Id*. at 1748.

[105] *Id.* at 1749.

[106] *See id.* at 1748.

[107] *Stolt-Nielsen*, 130 S. Ct. at 1773 (2010).

[108] *See generally* David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 544 (2004) (stating that "[t]he constitutional problem of applying the FAA to the states has been avoided or overlooked, simply by taking at face value the *Southland* Court's assertion that the FAA is 'substantive' law. But what if it is not?"); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 394 n.3 (2004) ("Despite the passage of time and the Supreme Court's reaffirmance of *Southland* in *Allied-Bruce*, 513 U.S. at 272-73, *Southland*'s holding that the FAA applies in state court remains controversial.").

[109] *Southland Corp*., 465 U.S. at 10.

[110] *Id.* at 22-23 (O'Connor, J., dissenting) ("The Court's decision is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements.").

[111] *See e.g.*, Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 285-86 (1995) (Thomas, J., dissenting) ("In *Southland Corp. v. Keating*, this Court concluded that [section] 2 of the FAA 'appl[ies] in state as well as federal courts,' and 'withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' In my view, both aspects of *Southland* are wrong." (citations omitted)).

[112] *Volt*, 489 U.S. at 477.

[113] *See* Gardbaum, *supra* note 5, at 770. ("The supremacy of federal law means that valid federal law overrides otherwise valid state law in cases of conflict between the two.").

procedure required for evaluating "whether one statute repeals another."[114] Because the alternative view eliminates the doctrine of implied preemption, O'Connor's view that the FAA applies only in federal courts is vindicated.

Although this discussion may seem trivial considering the Court's devotion to the present "categorical" approach to preemption[115] and wide adoption of the doctrine of implied preemption,[116] the distinction between preemption and supremacy is helpful for halting an expansive doctrine of preemption evidenced in *Concepcion*. As FAA obstacle preemption is based on a state law's conflict with Congress's purposes, an ever-narrowing construction of the kind of procedures the Court infers to be permitted under the FAA necessarily expands the FAA's preemptive effect. For instance, prior to *Stolt-Nielsen* (and to a certain extent *Green Tree Fin. Corp. v. Bazzle*[117]) the Court had not held that class arbitration was inconsistent with the concept of arbitration advanced in the FAA. To the extent that the Court had not yet considered whether the availability of class arbitration was inconsistent with the FAA, California's state law was, at that point, not preempted.

This of course highlights the fundamental problem with implied preemption: it is subject to change depending upon the interpretation of Congress's "purpose" by the Court's majority. As Justice O'Connor stated in *Allied-Bruce Terminix Cos. v. Dobson*: "over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[118] In the 59 years prior to *Southland*, the Supreme Court had never held that the FAA even applied in state courts.[119] A more predictable standard of preemption advocated by the alternative view above, where Congress's intent to displace state authority must be expressly stated, provides greater clarity for delineating the balance between state and federal law.[120]

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[114] Nelson, *supra* note 87, at 303.

[115] The "categorical" approach I refer to here is the practice of complicating what is argued above to be an enumerated power of Congress to preempt by creating different categories of preemption that each make different inferences about the nature of Congress's intent (e.g. "field," "conflict," "obstacle," "express," and "purpose-conflict"). *See* Gardbaum, *supra* note 5, at 61-62.

[116] Even Justice O'Connor later stated her belief that her dissent is *Southland* had failed to correct the fundamental problems with the Court's interpretation of the FAA. In *Allied-Bruce*, she stated her resignation: "I have long adhered to the view, discussed below, that Congress designed the Federal Arbitration Act to apply only in federal courts. But if we are to apply the Act in state courts, it makes little sense to read § 2 differently in that context. In the end, my agreement with the Court's construction of § 2 rests largely on the wisdom of maintaining a uniform standard." 513 U.S. at 282 (O'Connor, J., concurring).

[117] Green Tree Corp. v. Bazzle, 539 U.S. 444 (2003). In *Green Tree*, the Court considered whether a state court could order class-wide arbitration. The South Carolina Supreme Court had found that the arbitration agreement at issue was silent on the issue of class-wide arbitration, and on this basis had ordered such arbitration to resolve similar disputes of additional parties. The U.S. Supreme Court held that the arbitrator, rather than the state court should have decided whether the arbitration agreement permitted class-wide arbitration. Bales, *supra* note 80, at 424.

[118] Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 283 (2003) (O'Connor, J., concurring).

[119] *See id.* at 286 (Thomas, J., dissenting) (stating that the FAA's application in state courts was not even suggested by a court until 1959).

[120] Gardbaum, *supra* note 5, at 52 ("Congress can only exercise its preemption power expressly. As a matter of constitutional law, there should be no such thing as implied preemption. If Congress wishes to exercise its preemption power, it must say so by speaking directly to the issue. It is up to the courts to determine what Congress has said, using ordinary principles of statutory interpretation in the case of ambiguity, but not to premise an exercise of this power on "sheer implication" from congressional silence, as is now the case") (quoting Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 546 (1992) (Scalia, J., concurring in part and dissenting in part)).

III. WHAT *CONCEPCION* MEANS FOR THE CLASS-ACTION

Although the alternative view proposed in Section II would greatly improve clarity of judicial preemption doctrine, the Court's adherence to the current "categorical" approach combined with the resignation of previous dissenters to *stare decisis*[121] makes it unlikely that any real change is on the horizon. However, substantial questions remain regarding the effect the majority opinion in *Concepcion* will have on class actions and consumer agreements. Several commentators have suggested that *Concepcion* sounded the death knell of class actions.[122] This section considers the various concerns raised by those commentators.

In 2000, Professor Jean Sternlight wrote an article in the William & Mary Law Review that prophesied the coming of *Concepcion*.[123] She noted that companies would use arbitration clauses as vehicles to immunize themselves from class action lawsuits.[124] She referred to an arbitration clause packaged with a class waiver as a "Trojan horse."[125] Additionally, Professor Sternlight observed that companies would issue mandatory class waiver provisions after the filing of class actions and would be successful.[126] The similarities between her predicted worst case scenario for consumers and the actual case of *Concepcion* is striking, as nearly all came to pass. Sternlight, however, was incorrectly optimistic that courts would come around to reject class waivers from arbitration clauses as unconscionable under state law.[127]

Professor Brian Fitzpatrick believes that *Concepcion* will likely lead to the end of class actions against businesses altogether, not just consumer class actions.[128] He predicates this theory on the Supreme Court's decisions limiting the certification of tort class actions beginning in the 1990s.[129] In his opinion, potential class litigants now come primarily from individuals involved in a contractual business relationship, and where businesses have been given the green light to immunize themselves through class waivers in adhesion contracts, the result will greatly reduce the availability of class proceedings.[130] Correctly, Fitzpatrick points to the remaining solution to

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[121] I refer here primarily to Justice O'Connor's position in *Allied-Bruce*, discussed *supra* note 116.

[122] *See e.g.*, Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?* 42 WM. & MARY L. REV. 1, 5 (2000); Hiro Aragaki, *Status and contract in* AT&T Mobility v. Concepcion, SCOTUSBLOG (Sep. 14, 2011, 3:53 PM), http://www.scotusblog.com/2011/09/status-and-contract-in-att-mobility-v-concepcion; Cliff Palefsky, *Closing thoughts on the arbitration symposium*, SCOTUSBLOG (Sep. 26, 2011, 6:41 PM), http://www.scotusblog.com/2011/09/closing-thoughts-on-the-arbitration-symposium; Brian Fitzpatrick, *Is the end of the class actions upon us?* SCOTUSBLOG (Sep. 14, 2011, 9:35 AM), http://www.scotusblog.com/2011/09/is-the-end-of-class-actions-upon-us; David Scwartz, *Do-it-yourself tort reform: How the Supreme Court quietly killed the class action*, SCOTUSBLOG (Sep. 16, 2011, 10:52 AM), http://www.scotusblog.com/2011/09/do-it-yourself-tort-reform-how-the-supreme-court-quietly-killed-the-class-action.

[123] *See* Sternlight, *supra* note 122, at 5.

[124] *Id.*

[125] *Id.* at 125.

[126] *Id.* at 11.

[127] *Id.* at 126. Although Professor Sternlight could be correctly credited with predicting the district court and Ninth Circuit decisions in *Concepcion*, the result at the Supreme Court precludes the likelihood that courts will, in the future, enforce state law bans on class waivers ("This author predicts that, as courts begin to reject defendants' attempts to eliminate class actions altogether, it will become evident that the hybrid of classwide arbitration has few advocates. Rather, defendants, plaintiffs, and society as a whole, likely will adopt the securities industry's conclusion that class actions are most efficiently and justly handled through litigation.").

[128] Fitzpatrick, *supra* note 122.

[129] *Id.*

[130] *Id.*

the plight of the class action: federal intervention.[131] As the Court in *Concepcion* further limited the extent to which state law might survive obstacle preemption, only a contrary federal law or amendment to the FAA can return FAA jurisprudence to its rightful, presumably pre-*Southland*, place.

Professor David Schwartz agrees with Professor Sternlight, stating that "it has been an open secret for over a decade that a major motivation, perhaps *the* dominant motivation for the imposition of arbitration clauses in adhesion contracts has been the hope that these clauses would blossom into class action waivers."[132] Further, he argues that the Supreme Court has permitted, even manipulated, the FAA to become a functional, "do-it-yourself tort reform."[133] Arbitration agreements therefore have become supercontracts[134] that defy the Court's ruling in *Prima Paint Corp. v. Flood & Conklin Mfg.*,[135] that the FAA "make[s] arbitration agreements as enforceable as other contracts, *but not more so*."[136]

These commentators all recite a similar litany: that the *Concepcion* Court, by expanding the preemption doctrine to preclude state policies against exculpatory agreements through class waivers in adhesion contracts, authorized the death of the class action. Of course, the extent to which this statement is true depends upon several factors, such as whether Congress chooses to enact arbitration reform legislation, whether the membership of the Court changes to weigh in favor of those justices who dissented in *Concepcion*, and whether businesses themselves recognize the utility of class action litigation. Only time will tell, but for the short term it seems that the Court has certainly foreclosed most of the conceivable challenges states might bring against FAA preemption.

IV. CONCLUSION

The Supreme Court in *Concepcion* expanded its application of obstacle preemption to preclude states from enforcing public policies against unconscionable adhesion contracts.[137] In doing so, it carried on the logical conclusion from its holding in *Stolt-Nielsen*, that class arbitration is fundamentally opposed to the purposes of bilateral arbitration and the FAA.[138] However, even if the FAA's "principal purpose" as described by Scalia, "is to 'ensur[e] that private arbitration agreements are enforced according to their terms,'"[139] the FAA cannot be taken to mean that private agreements to arbitrate should be enforced in spite of their *unconscionable* terms. Surely the FAA stands for a fundamental agreement to contract, based on the consent *and intent* of *both* contracting parties.[140] Presuming this to be true, it is even more difficult to believe that the Court can find the freedom of contract embodied in agreements where the parties cannot

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[131] *Id.*

[132] Schwartz, *supra* note 108.

[133] *Id.*

[134] *Id.*

[135] 388 U.S. 395 (1967).

[136] *Id*. at 404 n.12 (emphasis added).

[137] *See Concepcion*, 131 S. Ct. at 1753.

[138] *See generally Stolt-Nielsen*, 130 S. Ct. at 1758.

[139] *Concepcion*, 131 S. Ct. at 1748.

[140] *See* Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 555 (1994) ("Application of the contract-enforcing rule of Section 2 [of the FAA] to choice-of-law clauses is entirely consistent with the freedom of contract core of the FAA.").

be shown to have entered freely.[141] "[I]t would be an odd conception of contractual liberty if a law were taken to restrict freedom of contract simply because it interfered with the parties' agreement as written."[142]

Despite concern over the practical effects of *Concepcion* and the very real threat to the availability of class actions, the primary issue focused on in this article is the Court's decision to permit an expansive interpretation of the purposes of Congress in enacting particular legislation. Obstacle preemption should be abandoned by the Court as a doctrine and substituted with the simplified approach to preemption proposed by Professor Gardbaum.[143] Doing so will certainly place a greater onus on Congress to be clear in asserting its power to displace state power, but this is not inconsistent with the Court's previous holdings on Congress's abrogation of sovereign immunity under the Eleventh Amendment.

Additionally, the Court's view that arbitration under the FAA is restricted to a particular form is not only absent from the text of the FAA, it is reminiscent of the prejudices and attitudes towards arbitration that precipitated its enactment. The Court's "essentialism," as termed by Professor Hiro Aragaki, is outmoded considering the modern capabilities and experience of arbitrators to handle aggregated claims.[144] Additionally, the Court's conclusion that banning class waiver provisions will disfavor arbitration because parties will be less inclined to enter into arbitration agreements merely guarantees that the "most loyal patrons" are favored over the "institution of arbitration."[145]

As Justice O'Connor stated in her *Allied-Bruce* concurrence, the "edifice" of the Court's FAA preemption caselaw has been largely of its own construction.[146] The fear is that this construction has become too impenetrable and that there is no way back through the woods in which the Court has led us. The Court's holding in *Concepcion* stands as a bleak indication that a state policy interest in protecting unsophisticated parties with little or no real bargaining power is an interest the Court believes is subservient to the rigid religion of the FAA.

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[141] *See* Palefsky, *supra* note 122 ("But the real vice of the Court's decision is not how they have contorted contract law and the FAA to reach their desired result, but rather that they have refused to analyze the issues under the Constitution or real statutory public policies which sit higher on the continuum of legal analysis and require the waiver or rights inherent in an arbitration agreement to be knowing and voluntary. And there shouldn't be a freedom of contract analysis when the contract was not entered into freely.").

[142] Aragaki, *supra* note 122.

[143] Gardbaum, *supra* note 5, at 59-64.

[144] *See* Aragaki, *supra* note 122.

[145] *Id.*

[146] *See Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring).

AT&T MOBILITY AND FAA OVER-PREEMPTION

Jill Gross*

It is no secret that pre-dispute arbitration clauses in adhesive consumer and employment agreements have been harshly criticized in this country in recent years. Critics label these clauses, which often contain one-sided provisions, such as class arbitration waivers and inconvenient venue and cost-shifting provisions, as oppressive and unfair to those with inferior bargaining power.[1]

The Supreme Court's most recent decisions under the Federal Arbitration Act ("FAA")[2] have only exacerbated this ongoing debate. These rulings have stripped the arbitrators of the power to construe silence in an arbitration agreement as consent to class arbitration,[3] reaffirmed the arbitrability of federal statutory claims,[4] upheld a clause in an arbitration agreement delegating to arbitrators the power to rule on the unconscionability of the arbitration clause,[5] and enforced a class arbitration waiver in an arbitration agreement.[6] Among other impacts, these decisions have effectively foreclosed the ability of consumers and employees to pursue low-dollar value claims, as they can no longer consolidate them in an arbitration proceeding.[7]

These decisions clearly reflect the Court's strong support of arbitration agreements. That strong support does not come without a cost, however, as these decisions also severely limit the states' powers to police the fairness of arbitration agreements. In particular, the Court's decision in *AT&T Mobility LLC v. Concepcion*[8] expands the FAA preemption doctrine beyond its prior boundaries, signaling how far the Court is willing to go to support arbitration clauses at the expense of states' rights and the values of federalism. This article will explore the impact of *AT&T Mobility* on the preemption of state law and the concomitant impact on the balance

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[1] *See, e.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (2004); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999). *But see* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements— With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 264 (2006) (arguing against legislation prohibiting enforcement of adhesive pre-dispute arbitration agreements and stating that "the general enforcement of adhesive arbitration agreements benefits society as a whole by reducing process costs and, in particular, benefits most consumers, employees and other adhering parties").

[2] 9 U.S.C. §§ 1-16 (2007).

[3] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp., 130 S. Ct. 1758 (2010).

[4] CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012).

[5] Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772 (2010).

[6] 131 S. Ct. 1740 (2011).

[7] *See* Jean Sternlight, *Tsunami: AT&T Mobility v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 723 (2012); Sarah Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457 (2011).

[8] *AT&T Mobility*, 131 S. Ct. at 1740.

between state and federal power in the arbitration arena. This article argues that *AT&T Mobility* results in FAA over-preemption,[9] as it unduly shifts arbitration law-making power away from the states, in violation of the FAA's savings clause.

I. THE FAA PREEMPTION DOCTRINE

Congress enacted the FAA in 1925 "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate."[10] Animated by the overarching principle of contractual autonomy, the FAA's primary purpose was to "require[] courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[11]

The Supreme Court has interpreted the FAA to embody a strong national policy favoring arbitration as an alternative dispute resolution mechanism.[12] In the past twenty-five years, the Court's FAA jurisprudence has imbued the FAA with super-status: it governs virtually every arbitration clause arising out of a commercial transaction,[13] and its substantive provisions apply in both state and federal court.[14] Although it is well-settled that the FAA does not create federal subject matter jurisdiction,[15] the Court has declared repeatedly that the FAA "creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[16]

Another consistent holding in the Supreme Court's FAA jurisprudence is that its primary substantive provision, § 2, which declares that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"[17] preempting state laws that place an arbitration agreement on unequal footing from other contracts.[18] Under the FAA preemption doctrine, § 2 preempts in federal and state court any state law that "actually conflicts with federal law, that is, to the extent that it 'stands as an

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[9] I have previously argued that state courts over-preempt their own laws providing grounds to vacate arbitration awards. *See* Jill I. Gross, *Over-Preemption of State Vacatur Law: State Courts and the FAA*, 3 J. AM. ARB. 1 (2004).

[10] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-20 (1985).

[11] *Volt*, 489 U.S. at 478.

[12] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (recognizing a "liberal federal policy favoring arbitration agreements").

[13] By its terms, the FAA governs agreements to arbitrate involving "transactions involving commerce." 9 U.S.C. § 2 (2010). The Supreme Court has interpreted this phrase very broadly to include any transaction that *in fact* involves interstate commerce, even if the parties did not anticipate an interstate impact. *See* Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003) (applying FAA to debt restructuring agreements as "involving commerce"); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) (applying FAA to securities arbitrations); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74, 281 (1995) (interpreting the reach of the FAA broadly to all transactions "involving commerce" and stating that "'involving' is broad and is indeed the functional equivalent of 'affecting'").

[14] *See* Southland Corp. v. Keating, 465 U.S. 1, 12 (1984) ("The statements of the Court in *Prima Paint* that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts.").

[15] *See* Vaden v. Discover Bank, 556 U.S. 49, 59 (2009); Hall Street Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581-82 (2008); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25 n.32.

[16] *See, e.g., Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. The Court defined arbitrability in this context as "the duty to honor an agreement to arbitrate." *Id.* at 25 n.32.

[17] 9 U.S.C. § 2. This latter phrase of § 2 is known as the FAA's "savings clause."

[18] *See* Preston v. Ferrer, 552 U.S. 346 (2008).

obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[19] Thus, FAA preemption is a sub-species of "conflict preemption" known as "obstacle preemption."[20]

The FAA's substantive provision, § 2, reflects a classic federalism balance. On the one hand, it displaces conflicting state law. Through FAA obstacle preemption, the Supreme Court has rebuffed state law-based defenses to the enforcement of arbitration agreements to the extent those defenses single out arbitration agreements for hostile treatment.[21] Thus, the Court has held that the FAA preempts state statutes that prohibit the arbitration of a particular type of claim,[22] state statutes that invalidate arbitration agreements on grounds different than those that invalidate other contracts,[23] and state judicial rules that display vestiges of the ancient judicial hostility to arbitration.[24] In these situations, lower courts have had no choice but to declare arbitration agreements enforceable under federal law even if they might be deemed unenforceable under state law.[25]

On the other side of the federalism balance, the savings clause of § 2 preserves for the states the ability to declare arbitration agreements invalid on grounds traditionally reserved for state law: common law contract defenses to the enforceability of any contract. Thus, courts (either state courts or federal courts applying state contract law) have struck down arbitration

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[19] *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 1; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); *see also* Perry v. Thomas, 482 U.S. 483 (1987) (preempting California statute requiring wage collection actions to be resolved in court).

[20] The Supreme Court has explained that it will find a state law preempted by a Congressional Act when: (1) the federal law expressly provides it displaces state law ("express preemption"); (2) Congress intends the federal law in an area to "occupy the field" ("field preemption"); (3) it is impossible for a party to comply with both the state and federal law ("impossibility preemption"); and (4) the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" ("obstacle preemption"). *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000) (internal citations and quotations omitted). Impossibility and obstacle preemption are both subcategories of conflict preemption. *Id.*; *see generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000) (describing preemption categories).

[21] None of these decisions preempt a state *arbitration* law—laws that primarily address arbitration procedures and award enforcement, and almost uniformly further a pro-arbitration policy. Rather, the Court has preempted state laws on non-arbitration matters that contain "lingering anti-arbitration sentiment." Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 195 (2002).

[22] *See Preston*, 552 U.S. 346, 356-57 (preempting California law granting exclusive jurisdiction to Labor Commissioner to decide disputes arising under the Talent Agencies Act); Southland Corp. v. Keating, 465 U.S. 1, 8 (1984) (preempting provision of the California Franchise Investment Law that required judicial, not arbitral, resolution of claims brought under the statute).

[23] *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 685 (1996) (preempting Montana statute requiring specific type of notice in contract containing arbitration clause); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 292-93 (1995) (preempting Alabama statute invalidating pre-dispute arbitration agreements in consumer contracts).

[24] *See* Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (preempting West Virginia Supreme Court rule voiding as against public policy pre-dispute arbitration clauses in nursing home contracts with respect to negligence claims); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (preempting Florida judicial rule that precluded arbitrators from deciding the legality of a an allegedly usurious contract containing an arbitration agreement); Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 (1995) (preempting New York law precluding arbitrators from awarding punitive damages). In contrast, the FAA does not preempt a state arbitration statute that merely dictates the order of proceedings with respect to an arbitration and related third-party litigation, but does not regulate the viability or scope of the arbitration agreement itself. *See Volt*, 489 U.S. at 471.

[25] Exhibit A to this article charts all of the Supreme Court's FAA preemption decisions and describes the state law at issue, the Court's preemption holding, and the outcome of the case.

agreements on contract law grounds such as lack of mutual assent,[26] unconscionability,[27] an illusory agreement,[28] or violating the contract's implied covenant of good faith and fair dealing.[29] As long as the ground for revocation of the arbitration clause is a ground applicable to all contracts, and not just arbitration agreements, the states are free to apply their law, free of FAA preemption. But what happens where courts apply a generally applicable contract defense, such as unconscionability, in a manner that arguably *de facto* disfavors arbitration?

II. THE *AT&T MOBILITY* DECISION

The Court faced such a question in its 2010-11 term. In *AT&T Mobility, LLC v. Concepcion,*[30] the Court held for the seventh time that the FAA preempted a state law, this time a state law that on its face was not anti-arbitration but was being applied by lower courts in a manner that *de facto* disfavored arbitration. The decision, while noteworthy for its condemnation of class arbitration, confirms the Court's intent to severely circumscribe the ability of state law to regulate the fairness of arbitration, and to that extent is consistent with its previous FAA jurisprudence.

In *AT&T Mobility,* the Court ruled that the FAA preempts California's *Discover Bank* rule, which "classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable."[31] In its consumer cellular phone service contracts, AT&T Mobility, LLC ("AT&T") included a pre-dispute arbitration agreement which, *inter alia*, prohibited plaintiffs from bringing class action arbitrations, instead requiring claims to be arbitrated on an individual basis. In 2006, the Concepcions sued AT&T in district court, alleging that AT&T's practice of charging sales tax on a phone advertised as "free" was fraudulent.[32] In December 2006, after the Concepcions filed their claim, AT&T revised the arbitration agreement to provide that AT&T would pay a customer $7,500 if an arbitrator found in favor of a California customer on the merits of a customer dispute, and awarded more than the last AT&T settlement offer.[33] Two years later, after the Concepcions' case was consolidated with a putative class action alleging, *inter alia*, identical claims of false advertising and fraud, AT&T moved to compel arbitration under the revised agreement.[34]

The district court refused to enforce the arbitration agreement under the savings clause of FAA § 2. The court concluded that the class action waiver of the arbitration agreement was unconscionable because it had a deterrent effect on class actions and the efficient resolution of third party claims.[35] After the Ninth Circuit affirmed, on an interlocutory appeal, the district

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[26] *See, e.g.*, Phillips v. Mazyck, 643 S.E.2d 172 (Va. 2007); Kloss v. Edward D. Jones & Co., 54 P.3d 1 (Mont. 2002).

[27] *See, e.g.*, State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders, 717 S.E.2d 909 (W. Va. 2011); Rivera v. Am. Gen. Fin. Servs., Inc., 259 P.3d 803 (N.M. 2011).

[28] *See, e.g.*, Penn v. Ryan's Family Steak Houses, 269 F.3d 753 (7th Cir. 2001) (applying Indiana law).

[29] *See, e.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999) (applying Restatement of Contracts and South Carolina contract law).

[30] AT&T Mobility LLC v. Concepcion 131 S. Ct. 1740 (2011).

[31] *Id.* at 1746.

[32] *See* Laster v. AT&T Mobility LLC, 584 F.3d 849, 853 (9th Cir. 2009), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (*Concepcion* was consolidated with *Laster* in September 2006).

[33] *Id.*

[34] *Id.*

[35] *Id.*

court's conclusion that the class-arbitration waiver was unconscionable and that the FAA did not preempt the *Discover Bank* rule,[36] AT&T sought review in the Supreme Court.

On April 27, 2011, the Supreme Court, in a 5-4 decision authored by Justice Scalia (joined by Justices Roberts, Kennedy, Thomas, and Alito), held that the FAA preempts California's *Discover Bank* interpretation of the state's unconscionability rule. The Court concluded that the *Discover Bank* rule created a different law of unconscionability for class action waivers in adhesive arbitration contracts.[37] Thus, the FAA preempts the rule as it singles out arbitration clauses for suspect treatment.[38]

The Court rejected the Concepcions' argument that the Court should defer to the California Supreme Court's analysis of its own unconscionability doctrine and instead use an objective determination on whether or not the rule is "tantamount to a rule of non-enforceability of arbitration agreements."[39] The majority was persuaded by research which demonstrated that state courts had become more likely to find an arbitration agreement unconscionable as opposed to other contracts.[40] The Court also noted that although California's "rule does not *require* class-wide arbitration, it allows any party to a consumer contract to demand it *ex post*," thus defeating the purposes of the FAA.[41]

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[36] *Id.* at 853-69.

[37] The Supreme Court noted that, under California law, a court may refuse to enforce a contract that it finds "'to have been unconscionable at the time it was made,'" or it may "'limit the application of any unconscionable clause.'" *AT&T Mobility*, 131 S. Ct. at 1746 (quoting CAL. CIV. CODE § 1670.5(a) (West 1985)) ("A finding of unconscionability requires a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results.") (citations omitted). In *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), *abrogated by AT&T Mobility*, 131 S. Ct. 1740, the California Supreme Court applied this unconscionability law to class-action waivers in arbitration agreements and held:

> [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Id. at 1110 (citation omitted).

[38] AT&T identified three principles from *Discover Bank* that it contended courts applied differently to arbitration agreements than to other contracts: (1) the effect on third parties; (2) the timing of the unconscionability decisions; and (3) the shock the conscience standard. *See* Transcript of Oral Argument at 12, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (No. 09–893).

[39] *Id.* at 39.

[40] *AT&T Mobility*, 131 S. Ct. at 1747.

[41] *Id.* at 1750. The Court discussed three characteristics of class arbitration that it concluded defeat the purposes of the FAA and hinder the flexible party-driven process of arbitration: (1) sacrifice of informality and speed; (2) a requisite increase in procedural formality; and (3) an increase in risks to defendants in the lack of judicial review. *Id.* at 1751-52. Although the plurality expressly included the procedural expediency of arbitration as one of the FAA's purposes with which the *Discover Bank* rule interferes, the dissent referred to the Court's *Dean Witter* decision in which it specifically "reject[s] the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims." *Id.* at 1758 (Breyer, J., dissenting) (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985)).

Justice Scalia's majority opinion was fueled by a singular distrust of class arbitration - a distrust that also appeared in the Court's 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation.*[42] In contrast, the *AT&T Mobility* dissent claimed that class proceedings are necessary to protect against small-value claims falling through the cracks of the legal system.[43] Justice Scalia responded to the dissent's concern by stating that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[44] Thus, the Court went so far as to characterize class arbitration as not arbitration at all within the meaning of the FAA, but a process that alters the fundamental attributes of arbitration.

Justice Thomas "reluctantly join[ed]" the majority, but wrote "separately to explain how [he] would find [a] limit" on contract defenses permitted by FAA § 2.[45] In his concurring opinion, Justice Thomas reasoned that the savings clause of the FAA permits exceptions to the enforceability of arbitration agreements only for defenses that "relate[] to the making of the [arbitration] agreement."[46] Because the *Discover Bank* rule did not relate to the formation of the arbitration agreement within the meaning of FAA §§ 2 and 4, Justice Thomas concluded that it was preempted by the FAA. While Justice Thomas' interpretation of FAA § 2 differed from prior Supreme Court jurisprudence and was not briefed or advocated by the parties, his vote was necessary for the 5-4 reversal.

In the *AT&T Mobility* dissent, Justice Breyer (joined by Justices Ginsburg, Sotomayor and Kagan) argued that California's *Discover Bank* rule "represents the 'application of a more general [unconscionability] principle.'"[47] Because it is a rule of state law applicable to all contracts and not just arbitration agreements, it falls within the savings clause and the FAA should not preempt it.[48] Additionally, the dissent criticized the plurality's conclusion that class arbitration is lacking the "fundamental attribute[s]" of arbitration within the meaning of the FAA. Justice Breyer opined that barring class arbitration and forcing lower courts to enforce adhesive class arbitration waivers would "have the effect of depriving claimants of their claims."[49]

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[42] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

[43] *AT&T Mobility*, 131 S. Ct. at 1760-61 (Breyer, J., dissenting).

[44] *Id.* at 1753 (majority opinion).

[45] *Id.* at 1753-54 (Thomas, J., concurring). Justice Thomas felt compelled to articulate his reading of the savings clause because, in past preemption cases, he dissented based on his view, first articulated in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284-97 (1995) (Thomas, J., dissenting), that the FAA does not apply in state courts. Since this case came up through the federal courts, that basis of dissent did not apply.

[46] *AT&T Mobility*, 131 S. Ct. at 1754-55 (Thomas, J., concurring) (quoting 9 U.S.C. § 4 (2010)).

[47] *Id.* at 1757 (Breyer, J., dissenting) (citing Gentry v. Superior Court, 165 P.3d 556, 564 (Cal. 2007)).

[48] *Id.*

[49] *Id.* at 1761. Justice Breyer asked the *Concepcion* majority, "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?" *Id.* (citing Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("…only a lunatic or a fanatic sues for $30.")). In doing so, he cited an appellate court which recognized previously the "*realistic* alternative to a class action is not 17 million individual suits, but zero individual suits,..." *Id.*

Finally, the dissent expressed deep concern for the impact of the decision on principles of federalism:

> Through [the savings clause], Congress reiterated a basic federal idea that has long informed the nature of this Nation's laws. We have often expressed this idea in opinions that set forth presumptions. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California's law, not strike it down. We do not honor federalist principles in their breach.[50]

Academic and media reaction to *AT&T Mobility* was swift and harsh.[51] Much of the criticism focused on the certain death of class arbitration as a method to redress small dollar value claims through arbitration.[52] Commentators agreed with the dissent that many consumers would not be able to pursue their claims, and thus vindicate their statutory rights, if they could not consolidate their claims with others into larger groups.[53] Is *AT&T Mobility* such an unparalleled disaster - a "tsunami," as Professor Sternlight termed it?[54]

III. *AT&T MOBILITY* AND FAA PREEMPTION

In some ways, *AT&T Mobility* is logically consistent with the Court's previous cases imposing FAA preemption. As in most of the Court's previous preemption cases (except *Mastrobuono*),[55] the Court's decision resulted in the imposition of arbitration on an unwilling disputant. This decision, like the previous ones, preempted a state law that did not involve arbitration procedures. And, like in its previous preemption opinions, the Court elevated principles of contractual autonomy over state law consumer protection regulations.

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[50] *Id.* at 1762 (citation omitted).

[51] *See, e.g.*, Jean Sternlight, *supra* note 7; S.I. Strong, *Does Class Arbitration 'Change the Nature' of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles*, HARV. NEGOT. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=1791928; Sarah Cole, *Continuing the Discussion of the AT&T v. Concepcion Decision: Implications for the Future*, ADR Prof Blog, Apr. 27, 2011, http://www.indisputably.org/?p=2312 ("It would appear that the era of class arbitration is over before it really ever began – unless Congress can be persuaded to amend the FAA to permit class arbitration, at least in cases involving low value claims, where consumers are unlikely to have practical recourse to a remedy through traditional bilateral arbitration."); Marcia Coyle, *Divided Justices Back Mandatory Arbitration for Consumer Complaints*, NEW YORK LAW JOURNAL, Apr. 28, 2011, *available at* http://www.law.com/jsp/article.jsp?id=1202491963074&slreturn=1 (quoting lawyer for Concepcions as stating "'[t]he decision will make it harder for people with civil rights, labor, consumer and other kinds of claims that stem from corporate wrongdoing to join together to obtain their rightful compensation'").

[52] Sternlight, *supra* note 7, at 704 ("It is highly ironic but no less distressing that a case with a name meaning "conception" should come to signify death for the legal claims of many potential plaintiffs."); Sarah Cole, *On Babies and Bathwater*, *supra* note 7, at 464 ("most pressing issue in consumer arbitration, in the wake of recent Supreme Court decisions, is the lack of a viable forum for consumers with low value claims").

[53] *See, e.g.*, Myriam Gilles, *AT&T Mobility v. Concepcion: From Unconscionability to Vindication of Rights*, SCOTUSBLOG, Sept. 15, 2011, http://www.scotusblog.com/2011/09/att-mobility-vs-concepcion-from-unconscionability-to-vindication-of-rights (last visited Jan. 28, 2012) ("The *AT&T* ruling is the real game-changer for class action litigation, as it permits most of the companies that touch consumers' day-to-day lives to place themselves beyond the reach of aggregate litigation by simply incorporating class waiver language into their standard-form contracts.").

[54] *See* Sternlight, *Tsunami*, *supra* note 7.

[55] *See* Exhibit A.

Indeed, the Court's very first FAA preemption case, *Southland v Keating*,[56] preempted a California state law that, as interpreted by California's high court, provided a ground for the revocation of any contract - just as in *AT&T Mobility*. In *Southland*, several 7-Eleven franchisees sued franchisor Southland in California state court alleging various common law claims, as well as claims arising under the California Franchise Investment Law (CFIL).[57] After the claims were consolidated with other franchisees' similar claims, Southland invoked the arbitration clause in the franchise agreements and moved to compel arbitration of the action.[58] Ultimately, the issue of the arbitrability of the CFIL claims made its way to the California Supreme Court, which held that they were not arbitrable in light of § 31512 of the statute – a provision that voided any "condition, stipulation or provision purporting to bind [a franchisee] to waive compliance with any provision of [the CFIL]."[59]

The Supreme Court of the United States reversed, holding that the FAA preempted § 31512 of the CFIL. Dismissing the dissent's contention that the savings clause preserves this defense to arbitration for the states, the Court concluded that § 31512 was *not* a ground for the revocation of *any* contract (and thus not within the scope of the savings clause), but was a "ground that exists for the revocation of arbitration provisions in contracts subject to the [CFIL]."[60] The Court reached this conclusion even though § 31512 on its face did not mention arbitration and presumably applied to many different kinds of agreements, not just arbitration agreements. When considered through the lens of *Southland*'s preemption of a seemingly contract-neutral state law, *AT&T Mobility* paves no new ground.

In some ways, however, this case appears to stretch the FAA preemption doctrine beyond its previous scope, as it reflects the Court's first preemption of a traditional common law defense to the enforcement of any contract (here, unconscionability).[61] The Court found latent anti-arbitration animus in California's unconscionability defense in the way that California courts *applied* the *Discover Bank* doctrine to arbitration agreements.[62] At the core of previous preemption decisions was not a traditional common law defense to contracts that easily associated with the savings clause.[63] Those decisions involved the preemption of a state statute or rule that was enacted to remove forum choice from contracting parties (*Southland, Preston, Allied-Bruce Terminix, and Perry*) or was patently anti-arbitration (*Cassarotto and Mastrobuono* (and post-*AT&T Mobility, Marmet*)).

Another striking difference from prior preemption cases is the *AT&T Mobility* Court's measures to strip arbitrators of a power – the power to conduct class arbitration proceedings (unless all parties expressly agreed to them). In contrast, the Court's previous preemption cases endorsed arbitrators' broad powers to fashion procedures and remedies to suit the parties' needs

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[56] *See* Southland Corp. v. Keating, 465 U.S. 1, 2-3 (1984).

[57] *Id.* at 4.

[58] *Id.*

[59] *Id.* at 10 (citing CAL. CORP. CODE § 31512 (West 1977)). The California high court interpreted this language to require judicial consideration of claims arising under the law.

[60] *Id.* at 16 n.11.

[61] Although California codified the unconscionability doctrine (*see* CAL. CIV. CODE § 1670.5(a) (West 1979)), and thus *AT&T Mobility* involved a California statute as interpreted by California courts, unconscionability has long-standing roots in the common law of contracts.

[62] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011).

[63] *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements without contravening § 2.") (emphasis added).

and the dispute.[64] Ironically enough, the end result in *Southland*, which arose out of a purported class action of convenience store franchisee claims, was forcing unwilling franchisees into arbitration, possibly using class action-type procedures.[65] The end result in *AT&T Mobility* is somewhat the inverse – forcing consumers who sought class arbitration into individual, small claims arbitration.

Why didn't the *Southland* Court balk at sending franchisees into class arbitration? Possibly because the parties did not litigate the issue of the propriety of class arbitration in 1984.[66] Or was class arbitration in 1984 closer to FAA arbitration than it is in 2011?

What was different in 1984 was that the FAA federalism see-saw still tipped towards the states, and the Supreme Court had just begun its expansion of the preemptive force of the FAA. In fact, as recently as 2009, before the Court's "third arbitration trilogy,"[67] the Court in *Vaden* stated that "[g]iven the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate."[68] The third arbitration trilogy, and, in particular, *AT&T Mobility*, strips the courts of one of the only doctrines remaining to play that enforcer role, raising serious federalism concerns.[69] Despite the *Vaden* Court's polite nod to the states acknowledging that they have a "prominent role to play," state courts have few weapons left to police the fairness of arbitration agreements.[70]

IV. FAA PREEMPTION POST-*AT&T MOBILITY*

Where does *AT&T Mobility* leave the FAA preemption doctrine? States are now struggling to regulate the fairness of arbitration agreements sought to be enforced within their borders. It is now crystal-clear that states cannot enact substantive statutes either expressly or implicitly hostile to arbitration. States also cannot circumvent the enforceability of arbitration

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[64] *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 56-57 (1995) (preempting state law that stripped arbitrators of power to award punitive damages).

[65] *See Southland*, 465 U.S. at 2-3. Interestingly, the Court noted that "as to the question whether the Federal Arbitration Act precludes a class action arbitration and any other issues not raised in the California courts, no decision by this Court would be appropriate at this time." *Id.* at 17.

[66] *Id.* at 17 ("as to the question whether the Federal Arbitration Act precludes a class action arbitration and any other issues not raised in the California courts, no decision by this Court would be appropriate at this time").

[67] *See* Thomas Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-a-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323 (2012) (labeling *Stolt-Nielsen, Rent-A-Center* and *AT&T Mobility* as the third arbitration trilogy because they "represent[] a milestone in American arbitration" as they "aggressively expand[] the 'revealed' penumbra of substantive arbitration law under the Federal Arbitration Act and shore[] up the bulwarks of private, binding dispute resolution under standardized contracts of adhesion binding employees and consumers").

[68] Vaden v. Discover Bank, 556 U.S. 49, 59 (2009). The Court reiterated this view post-*AT&T Mobility* in KPMG LLP v. Cocchi, 132 S. Ct. 23, 24 (2011) (holding that, even if a lower court concludes that some claims in a multi-claim action are not arbitrable, court must compel arbitration of remaining claims).

[69] Professor Stipanowich points out that language in dicta in *Perry v. Thomas*, 482 U.S. 483 (1987), foreshadowed this preemption of unconscionability doctrine. *See* Stipanowich, *supra* note 67, at 356 (citing *Perry*, 482 U.S. at 492 n.9).

[70] *See Vaden*, 556 U.S. at 59. Even more disturbing is the reasoning of Justice Thomas' concurrence. Under his unprecedented and narrow reading of the savings clause, the only exceptions to §2's enforcement of arbitration clauses are common law contract defenses that go to the *making of the arbitration agreement*, rather than all common law defenses to the enforcement of any contract. If his view is adopted by other Justices in future FAA decisions, state law would have virtually no ability to successfully invalidate arbitration agreements.

agreements through administrative regulations that prefer administrative forums over arbitration for the resolution of disputes. And state courts cannot create common law rules that *de facto* are hostile to arbitration, even if on their face they treat all agreements equally. The Supreme Court's FAA preemption decisions have reduced the savings clause to a largely symbolic nod to federalism, toothless in its application. By over-preempting state law grounds for revocation of any contract, the Court has ignored federalism concerns and tipped the carefully prescribed balance of power away from the states, expanding the FAA even more than it had before.

How can courts invalidate unfair arbitration agreements under the current FAA over-preemption regime? Some decisions emanating from states' high courts post-*AT&T Mobility* reflect unyielding FAA preemption of state law with respect to the enforceability of arbitration agreements containing class action waivers.[71] Likewise, Professor Sternlight's analysis of federal court reaction in the six months after the case revealed that most decisions applied the *AT&T Mobility* holding rigorously, despite ample grounds for distinction from *AT&T Mobility*.[72]

However, a few federal courts have been more willing to distinguish *AT&T Mobility* and strike down a class action waiver under the "vindicating statutory rights" doctrine.[73] Under this doctrine, derived from the Supreme Court's pronouncement in *Mitsubishi*[74] that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [federal] statute [providing that cause of action] will continue to serve both its remedial and deterrent function," a disputant can argue that an arbitration agreement is unenforceable because an unfair aspect of the arbitration process would preclude that party from vindicating its statutory rights.[75]

For example, in *In Re American Express Merchants' Litigation*,[76] a purported class action arising under federal antitrust laws, the Second Circuit Court of Appeals reconsidered, in light of *AT&T Mobility*, its prior decisions that a class action waiver clause in a credit card agreement was unenforceable under the FAA[77] because "enforcement of the clause would effectively preclude any action seeking to vindicate the [plaintiffs'] statutory rights."[78] The Court of Appeals found that *AT&T Mobility* did not alter its prior analysis, which rested on a different ground than *AT&T*

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[71] *See, e.g.*, State *ex rel.* Richmond Am. Homes of W. Va., Inc. v. Sanders, 717 S.E.2d 909, 924 (2011) (upholding class action waiver in arbitration clause under *AT&T Mobility* but declaring clause unconscionable on other grounds); NAACP of Camden County. E. v. Foulke Mgmt. Corp., 24 A.3d 777 , 794-95 (2011) (upholding class action waiver but denying motion to compel arbitration on ground that arbitration provisions lacked mutual assent).

[72] *See* Sternlight, *supra* note 7, at 708 (concluding that "most courts are rejecting all potential distinctions and are instead applying *Concepcion* broadly as a 'get out of class actions free' card").

[73] *See, e.g.*, Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950 (LBS) (JCF), 2011 WL 2671813 at *3 (S.D.N.Y July 7, 2011) (refusing to reconsider its holding in at Title VII action that an arbitration clause was unenforceable because plaintiffs would not be able to vindicate their statutory rights absent the availability of class proceedings and distinguishing *AT&T Mobility*).

[74] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

[75] *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000) (recognizing in *dicta* that, if a party showed that pursuing its statutory claims through arbitration would be prohibitively expensive, and thus it could not vindicate its statutory rights, a court could validly refuse to enforce a pre-dispute arbitration agreement).

[76] *See In re* Am. Express Merchants' Litig., 667 F.3d 204 (2d Cir. 2012) (*Amex III*).

[77] *See In re* Am. Express Merchants' Litig., 634 F.3d 187 (2d Cir. 2011) (*Amex II*); *In re* Am. Express Merchants' Litig., 554 F.3d 300 (2d Cir. 2009) (*Amex I*). The Court of Appeals reconsidered *Amex I* in light of the Supreme Court's subsequent ruling in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

[78] *Amex I*, 554 F.3d at 304.

Mobility.[79] Rather, the Court of Appeals recognized, "[h]ere…our holding rests squarely on a 'vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.'"[80] Because plaintiffs demonstrated through expert testimony that pursuing their statutory claims individually, as opposed to through class arbitration, would not be economically feasible, thereby "effectively depriving plaintiffs of the statutory protections of the antitrust laws,"[81] the Second Circuit directed the district court to deny defendant's motion to compel arbitration.[82]

Amex III does not equalize the federalism balance because it dealt with the federal law of arbitrability, not the preemption of an arguably conflicting state law.[83] However, states can distinguish *AT&T Mobility* on numerous grounds to limit its federalism impact.[84] Courts can limit it to the class action waiver contract, yet still find other grounds for unconscionability of the arbitration clause. Courts also can apply a contract-neutral state unconscionability doctrine to void a class action waiver.[85]

Additionally, if a primary reason parties try to void arbitration agreements is to avoid a process they perceive as unfair, then states can offer secondary protection to those parties in the form of regulation of the process. The Supreme Court has not ruled that a section of the FAA other than § 2 applies in state court or preempts conflicting state law, nor has it held that state arbitration law is preempted to the extent it regulates arbitration *procedures*. In fact, the one time the Court considered and *rejected* an FAA preemption argument involved a state procedural law that governed the order of proceedings, not the viability of arbitration itself.[86] Thus, states can still enact procedural arbitration law that can have some impact on the integrity of the process, and then to some extent, address the concerns of disputants seeking to avoid an arbitration agreement.

State courts can also seize upon the "vindicating rights" federal law doctrine and carve out an exception to arbitrability under *state law* if a party can show some aspect of the arbitration contract or agreement precludes it from being able to vindicate its state statutory rights in arbitration. Courts can still resuscitate the savings clause by applying relevant common law

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[79] *See Amex III*, 667 F.3d at 214 ("What *Stolt-Nielsen* and *Concepcion* do not do is require that all class-action waivers be deemed *per se* enforceable. That leaves open the question presented on this appeal: whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims.").

[80] *Id*. at 213 (quoting *Amex I*, 554 F.3d at 320).

[81] *Id.* at 217.

[82] *Id.* at 219-20. Professor Sarah Cole wrote about the Second Circuit's decision: "It would seem, then, that a plaintiff subject to a class action waiver in an arbitration agreement could attack that provision on the ground of unconscionability if it can show that bilateral arbitration would effectively preclude it from vindicating its statutory rights. Although this analysis must be done on a case-by-case basis, according to the Second Circuit, it certainly gives plaintiffs a basis for challenging a class action waiver. American Express says that it is going to appeal the decision." Sarah Cole, *Class Action Waiver in Arbitration Agreement Unenforceable*, INDISPUTABLY BLOG, Feb. 2, 2012, http://www.indisputably.org/?p=3326.

[83] The National Labor Relations Board carved out another non-state law based exception to *AT&T Mobility* in the labor and employment context, finding that federal labor law bars class action waivers in labor and employment contracts. *See* D. R. Horton, Inc., 357 N.L.R.B. No. 184 at *9 (2012).

[84] Professor Sternlight lists several possible bases of distinction. *See* Sternlight, *supra* note 7, at 726-27.

[85] This option remains open to the West Virginia State Supreme Court of Appeals on remand in *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (On remand, the West Virginia court must consider whether, absent that general public policy, the arbitration clauses in Brown's case and Taylor's case are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA).

[86] *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 470-79 (1989).

contract defenses to the enforcement of arbitration agreements. Unless Congress amends the FAA to eliminate the savings clause altogether, the Supreme Court would be hard-pressed to find that the FAA preempts common law defenses to the enforcement of any contract.

V. CONCLUSION

There seems to be little doubt that *AT&T Mobility* will have an adverse impact on consumer arbitration, as it effectively eliminates the states' ability to preserve class arbitration as a procedural method of aggregating low-value claims. In my view, the Court's decision differs from its prior preemption cases in both the type of rule preempted and its respect for arbitrators' powers. These differences contribute to the resulting over-preemption of the FAA.

Yet, despite the Court's consistent message to the states that there is no room to circumvent the FAA's ironclad support of arbitration agreements, I remain hopeful that - even post *AT&T Mobility* - lower state and federal courts will find ways to counter the seemingly over-preemptive, super-status of the FAA. The FAA preempts only state laws, not federal laws, thus, federal unconscionability law may still invalidate a class arbitration waiver. In addition, other federal statutes may trump the FAA, such as the Securities Exchange Act of 1934's anti-waiver provision, which may prevent the enforcement of a class arbitration waiver in the securities context.[87] Finally, like the Second Circuit did in *Amex III*, courts can give more teeth to the "vindicating statutory rights" ground as the ultimate policer of the fairness of arbitration, and thus rebalance the allocation of power between the states and federal government in the arbitration law arena.

[87] *See* Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 LAW & CONTEMP. PROBS. 107, 116-18 (2012) (arguing that a class action waiver in the securities context could violate anti-waiver provisions of federal securities laws because it would weaken investors' ability to recover under those laws).

Exhibit A

Case name	Year	Law at issue	Preemption?	Outcome
Southland Corp. v. Keating	1984	§ 31512 of California Franchise Investment Law requiring judicial resolution of claims	Yes, of California Supreme Court's ruling on anti-arbitration state statute	Convenience store franchisees must bring their CFIL claims in arbitration, possibly using class procedures
Perry v. Thomas	1987	California Labor Law § 229 allowing wage collection actions to be resolved in court, regardless of arbitration agreement	Yes, of California Supreme Court's refusal under anti-arb state statute to compel arbitration of securities broker's claim against firm for commissions	Kidder Peabody could force its broker into arbitration
Volt Information Sciences v. Bd. of Trs. of Leland Stanford Junior Univ.	1989	§ 1281 of California Arbitration Act allowing stay of arbitration pending outcome of related litigation with third party	No; affirmed California Court of Appeals' denial of contractor's motion to compel arbitration in favor of University; arbitration procedural rule	Enforced CAA in construction contract; stayed arbitration; allowed litigation to proceed with third party
Allied-Bruce Terminix Cos. v. Dobson	1995	Alabama statute invalidating pre-dispute arbitration agreements in consumer contracts	Yes, of Alabama Supreme Court's refusal to compel arbitration under anti-arbitration state statute	Homeowners had to arbitrate claims against termite company
Mastrobuono v. Shearson Lehman Hutton	1995	New York judicial rule precluding arbitrators from awarding punitive damages	Yes; reversed Seventh Circuit vacatur of punitive damages award under anti-arbitration state judicial rule	Permitted recovery for investors from completed arbitration
Doctor's Assocs. v. Cassarotto	1996	Montana statute requiring specific type of notice in contract	Yes; reversed Montana Supreme Court's refusal to enforce PDAA in franchise agreement under anti-arb state statute	Franchisees forced into arbitration

Exhibit A - Continued

Case name	**Year**	**Law at issue**	**Preemption?**	**Outcome**
Buckeye Check Cashing, Inc. v. Cardegna	2006	Florida judicial rule precluding arbitrators from deciding legality of contract containing arbitration agreement	Yes; reversed Florida Supreme Court's refusal to permit arbitrators to decide whether allegedly usurious contract was void *ab initio* for illegality	Borrowers forced to arbitrate their claim of usury
Preston v. Ferrer	2008	California statute allowing administrative forum for claims arising under Talent Agencies Act	Yes, reversed California Court of Appeals' grant of stay of arbitration pending proceedings before Labor Commissioner under anti-arbitration state statute	Attorney allowed to proceed with fee claim against Judge Alex in arbitration
AT&T Mobility LLC v. Concepcion	2011	California judicial decision declaring class arbitration waivers unconscionable in most consumer agreements	Yes, of California Supreme Court's anti-arbitration judicial rule interpreting state unconscionability statute	Consumer forced to bring arbitration claim on an individual, not class, basis
Marmet Health Care Ctr. v. Brown	2012	West Virginia Supreme Court rule voiding as against public policy pre-dispute arbitration clauses in nursing home contracts with respect to negligence claims	Yes, remanding back to West Virginia Supreme Court to decide unconscionability of contract apart from anti-arbitration public policy rule	Highest state court forced to reconsider its own state law

AT&T MOBILITY V. CONCEPCION AND THE ANTIDISCRIMINATION THEORY OF FAA PREEMPTION

Hiro N. Aragaki*

In the year since it came down, the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*[1] has variously been described as a "watershed,"[2] a "game-changer,"[3] and perhaps even "[t]he most significant"[4] case of the Court's 2010 Term. I share this assessment, but not for the familiar reasons. In my view, *Concepcion* is significant not so much because of what it

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[1] 131 S. Ct. 1740 (2011).

[2] Richard C. Reuben, *FAA Law, Without the Activism: What if the Bellwether Cases Were Decided By a Truly Conservative Court?*, 60 KAN. L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2024582.

[3] Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 L. & CONTEMP. PROBS. 107, 120 (2012).

[4] Adam Liptak, *Supreme Court Weighs Class Action Suits*, N.Y. TIMES (Nov. 9, 2010), http://www.nytimes.com/2010/11/10/business/10bizcourt.html?_r=1&ref=adam_liptak; Debra Cassens Weiss, *The End of Consumer Class Actions? Supreme Court Upholds AT&T Arbitration Contract*, A.B.A. J. (Apr. 27, 2011, 9:29 AM), http://www.abajournal.com/news/article/the_end_of_consumer_class_actions_supreme_court_upholds_att_arbitration_con/; Paula M. Weber, *From Hire to Fire: Contracts During the Employment Relationship*, 1924 PLI/CORP 309 (2012).

portends for the future of aggregate litigation or the ability of small-dollar plaintiffs to redress systematic wrongdoing by large-scale defendants,[5] but because it signals something of a paradigm shift in the law of Federal Arbitration Act (FAA)[6] preemption.

Because the facts of *Concepcion* are now well known, I recite only those details relevant to my argument: The Concepcions signed up for AT&T service, which AT&T advertised as coming with a free phone. Although they received the free phone, the Concepcions were charged an additional $30.22 in sales tax based on the phone's retail value, so they filed a putative class action against AT&T for fraud and false advertising. When AT&T moved to compel arbitration pursuant to a clause in its customer agreement, the Concepcions argued that the clause was unconscionable under a 2005 precedent from the California Supreme Court by the name of *Discover Bank v. Superior Court*.[7] *Discover Bank* held that collective action waivers (whether in arbitration *or* litigation) are presumptively unconscionable when they are

> found in [1] a consumer contract of adhesion [2] in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and [3] when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.[8]

The district court and the Ninth Circuit agreed with the Concepcions and, moreover, held that *Discover Bank* was not preempted by the FAA. The U.S. Supreme Court reversed these lower court preemption holdings.

This Essay proceeds as follows. I begin Part I with what I think of as the puzzle of *Concepcion*: Notwithstanding the majority's declarations to the contrary, *Concepcion* represents a significant break from the traditional justifications offered for FAA preemption of state law. What, then, is the explanation for the Court's decision to preempt *Discover Bank*? In Part II, I offer an answer: *Concepcion* turns on what I have elsewhere described as an antidiscrimination theory of FAA preemption. Understanding how that theory plays out both in the majority's decision and in the parties' briefing of the issues will, I argue, help account for many aspects of the opinion that have so far been left unexplained.

To say that *Concepcion* is animated by an antidiscrimination theory of the FAA does not, however, imply anything about the nature of that theory or whether the Court got it correct. In Part III, I demonstrate that even though the theory has routinely been invoked over the past three decades to legitimize the FAA's displacement of state law, it remains vastly underdeveloped and poorly understood. From this point of view, the problem with *Concepcion* is less that a majority

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[5] *See, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1928071; James Vicini, *Supreme Court Rules for AT&T in Arbitration Case*, REUTERS (Apr. 27, 2011, 4:30 PM), http://www.reuters.com/article/2011/04/27/us-att-arbitration-idUSTRE73Q4N520110427.

[6] *See* 9 U.S.C. §§ 1–16 (2009).

[7] 113 P.3d 1100 (Cal. 2005).

[8] *Id.* at 1110.

of the Court decided the case based on ideology or policy preferences, as many have argued,[9] and more that the lack of any clear standards or limits to the antidiscrimination theory leaves the theory prone to abuse in whichever direction the wind happens to blow. In Part IV, I draw on the collective learning in the antidiscrimination area to critique the Court's opinion and to suggest that, with a more sophisticated understanding of what it means to discriminate against arbitration, the result in *Concepcion* would and should have been very different.

I. THE PUZZLE OF *CONCEPCION*

To understand the puzzle at the core of *Concepcion*, it will be necessary first to review the law of FAA preemption. FAA preemption is a species of conflict preemption, pursuant to which state law will be displaced if and only if it somehow conflicts with or "stands as an obstacle" to the text or purpose of a federal statute.[10]

The text of FAA section 2 provides that a "[1] written provision . . . to submit [specified disputes] to arbitration . . . shall be valid, irrevocable, and enforceable, [2] save upon such grounds as exist at law or in equity for the revocation of any contract."[11] The first clause of section 2 has generally been understood as a mandate to "rigorously enforce"[12] arbitration agreements "according to their terms."[13] Following Richard Nagareda, I refer to this as the "command clause."[14] Any state law that stands as an obstacle to the command clause will be preempted by the FAA. For example, where the parties' agreement contains an agreement to arbitrate any and all disputes, a state law that prohibits the arbitration of wage disputes will be preempted because it prevents enforcement of the agreement strictly as written.[15]

The second clause of section 2 contains the only exceptions to the command clause thus far recognized by the Court. This so-called "savings clause" has widely been understood as allowing states to regulate arbitration agreements so long as they do so using "generally applicable contract defenses, such as fraud, duress, or unconscionability."[16] As the Court put it, "*if* [a state] law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," then the law is not preempted.[17] Applications of the unconscionability defense to invalidate arbitration clauses have for this reason almost uniformly avoided

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[9] In any event, this is arguably true of most cases decided by the High Court. *See, e.g.*, Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

[10] *See* Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 873 (2000) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[11] 9 U.S.C. § 2 (2009). Section 2 is the only provision of the FAA that the Court has used to preempt state law. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 447 (2006).

[12] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

[13] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989). The injunction to enforce arbitration agreements to the letter effectively means that arbitration clauses must be enforced "notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[14] *See* Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1075–76 (2011).

[15] *See* Perry v. Thomas, 482 U.S. 483 (1987).

[16] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (citation omitted).

[17] *Perry*, 482 U.S. at 492 n.9.

preemption, even when the application is alleged to "single out" arbitration agreements for unfavorable treatment.[18]

As part of California's common law of unconscionability, *Discover Bank* fell within the savings clause and for this reason should have been spared from preemption according to the principles outlined above. But the Court did just the opposite. *Concepcion* therefore violates much of what we thought we knew about the interaction between the command and savings clauses.

To be sure, conflict preemption is not limited to situations in which the state law collides head-on with the plain language of a federal statute; it also covers situations in which the state law is consistent with the statutory text but nonetheless frustrates the text's "'purposes and objectives.'"[19] *Concepcion* might, therefore, be understood as making this type of determination about *Discover Bank*. To determine whether this is the case, we must first come to grips with the purposes and objectives behind section 2's command and savings clauses.

Perhaps the leading view is that those clauses, and the FAA more generally, seek to honor arbitration agreements *qua* contracts.[20] "Arbitration agreements are purely matters of contract, and the effect of the [FAA] is simply to make the contracting party live up to his agreement."[21] State laws are accordingly preempted when they undermine the enforceability of arbitration agreements. I refer to this as the "contract theory." Another view, which might be referred to as the "favoritism theory," holds that state laws are preempted if they disfavor arbitration or arbitration agreements. Most commentators (both critical and supportive of the opinion) appear to believe that *Concepcion* can be squared with one or both of these purposes and objectives.[22]

I begin this Essay with the following bold claim: *Concepcion* cannot be explained on either the contract or the favoritism theories. If I am correct, the basic puzzle of *Concepcion* comes into focus: What is the real reason why the Court held *Discover Bank* preempted? Otherwise stated, to what purpose or objective of the FAA did the Court believe *Discover Bank* stood as an obstacle?

A. The Twilight of Contract

Prior to the enactment of the FAA in 1925, it was virtually impossible to compel arbitration of disputes. The traditional explanation is that early common law courts, jealous of competition from private adjudicative forums, had devised artificial rules that thwarted the

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[18] *See* Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1287–88 (2011).

[19] Geier v. Am. Honda Motor Co., 529 U.S. 861, 873 (2000) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[20] *See Moses Cone*, 460 U.S. at 25 n.32.

[21] GEORGE S. GRAHAM, TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION, H.R. REP. NO. 68–96, at 1 (1924).

[22] *See, e.g.*, Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 144–45 (2012); Craig Hoover et al., *Supreme Court Rules that Arbitration Agreements Can Foreclose Classwide Arbitration Proceedings*, MONDAQ (May 4, 2011), *available at* http://www.mondaq.com/unitedstates/x/131144/Arbitration+Dispute+Resolution/Supreme+Court+Rules+That+Arbitration+Agreements+Can+Foreclose+Classwide+Arbitration+Procedures.

enforcement of promises to arbitrate for no apparent reason other than an "irrational," "unjust," and "anachronis[tic]" hostility toward the arbitral process.[23]

On the contract theory, the "basic purpose of the Federal Arbitration Act [was] to overcome [these] refusals to enforce agreements to arbitrate."[24] The rationale is that there is little defensible basis for enforcing an arbitration agreement with less determination than any other contract.[25] This is why arbitration agrements may be regulated only through rules that "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally"[26]—not through rules like the old common law ouster and revocability doctrines that applied only to arbitration agreements.[27] Thus, "[s]uccessful challenges to arbitration [agreements] must find their basis in contract law, not some other source of law" like employment or consumer protection law.[28] Consistent with the contract theory, the district court and the Ninth Circuit in *Concepcion* reasoned that *Discover Bank* avoided preemption because it was nothing more than a judicial precedent for the application of the common law unconscionability defense.[29]

But the Court reached the opposite conclusion. It held that *Discover Bank* conflicted with section 2's "overarching purpose to 'ensure the enforcement of arbitration agreements according to their terms.'"[30] Although this may sound consistent with the contract theory, on closer inspection it is not. The only way to square the Court's conclusion with the contract view is if the *Discover Bank* rule somehow does not qualify as a generally applicable contract defense—for example, because it is a rogue version of unconscionability otherwise unknown to the common law of contracts. During briefing on *certiorari* and on the merits, AT&T and its *amici* pressed this very point, arguing that the California rule was a "distortion" that "b[ore] no resemblance" to traditional unconscionability law.[31]

This argument did not win the day, however. It was rejected in no uncertain terms by justices on both sides of the aisle during oral argument,[32] and it was also quietly dismissed in the

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[23] Aragaki, *supra* note 18, at 1253.

[24] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995); *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

[25] *See* JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 28, 51–52 (1918).

[26] Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

[27] *See generally* Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147 (1921) (describing ouster and revocability doctrines).

[28] *See* STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 738 (2001); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements–With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 265 (2006); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 195 (1998).

[29] *See* Laster v. AT&T Mobility LLC, 584 F.3d 849, 856–57 (9th Cir. 2009), *rev'd sub nom.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Laster v. T-Mobile U.S.A., Inc., No. 05–CV–1167, 2008 WL 5216255, at *7–8 (S.D. Cal. Aug. 11, 2008).

[30] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

[31] *See* Petition for Writ of Certiorari at 25–26, 31, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2010) (No. 09–893); Brief for Petitioner at 18, 32, 47, *Concepcion*, 131 S. Ct. 1740 (No. 09–893). *See generally* Brief Amici Curiae of Distinguished Law Professors in Support of Petitioner, *Concepcion*, 131 S. Ct. 1740 (No. 09–893) (arguing that California courts have "distorted" traditional common law unconscionability principles beyond recognition); Brief of DRI—The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner, *Concepcion*, 131 S. Ct. 1740 (No. 09–893) (arguing that *Discover Bank* "departs" from traditional unconscionability doctrine).

[32] *See infra* notes 152–153 and accompanying text.

Court's opinion. After noting that general unconscionability requires both a procedural and a substantive element, for instance, the majority concluded that *Discover Bank* had in fact "applied this framework" fair and square to class action waivers.[33] Indeed, any other conclusion would have put the Court in the deeply problematic posture of accusing the final arbiter of California law of misapprehending its own doctrine of unconscionability when it decided *Discover Bank*. The Court therefore had little choice but to accept *Discover Bank* as a *bona fide* principle of state contract law.

Concepcion therefore amounts to the proposition that a perfectly valid application of a generally applicable contract doctrine is nonetheless preempted by the FAA.[34] This is evident in Justice Scalia's remark that "[a]lthough § 2's savings clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[35] In other words, it is possible for a state-law rule to frustrate the FAA *even if* it counts as generally applicable.

This is a complete and substantial break from the contract theory. If there was one thing that had seemed settled, it was that the FAA's commitment to arbitration as a creature of contract meant that arbitration agreements would be made "enforceable as other contracts, *but not more so*."[36] *Concepcion* changed all of that overnight.[37] If FAA preemption no longer turns on whether the state law is a genuine contract law defense, the contract paradigm cannot fully explain FAA preemption after *Concepcion. A fortiori*, it no longer captures the purposes and objectives of the FAA in quite the same way it did before. Something else, therefore, must be at work.

Here it is often retorted that *Concepcion* is perfectly consistent with the contract theory because the Court enforced the collective action waiver in AT&T's customer agreement strictly according to its terms, *Discover Bank* notwithstanding.[38] The problem with this retort is that it confuses the contract paradigm with one based on freedom of contract. The Court's decision might well be described as consistent with freedom of contract insofar as it displaced a state rule that limited the parties' prerogative to "structure their arbitration agreements as they see fit."[39] But that is not the same as the contract theory's emphasis on "bring[ing] private contractual arbitration agreements into general contract *law*"[40]—that is, on holding arbitration contracts to the same requirements of validity and enforceability imposed on other contracts. Far from synonymous with the ideal of unbridled private autonomy, contract law represents a continuing

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[33] *Concepcion*, 131 S. Ct. at 1746; *see also* Phillip M. Lax, *Collective Action Waivers in Labor Law: Why They are Unenforceable Even After* AT&T Mobility v. Concepcion 11 (Mar. 7, 2012) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017950.

[34] *See, e.g.*, Kaltwasser v. AT&T Mobility LLC, 812 F. Supp. 2d 1042, 1046 (N.D. Cal. 2011) (observing that *Concepcion* "characterize[d]" the *Discover Bank* standard "as arising from the 'generally applicable' contract law doctrine of unconscionability").

[35] *Concepcion*, 131 S. Ct. at 1748.

[36] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (emphasis added).

[37] *Accord* Cunningham, *supra* note 22, at 144–45 (arguing that, if *Concepcion* had been faithful to contract principles, it would have struck AT&T's class waiver consistent with state contract law).

[38] *See, e.g.*, Andrew McBride & Thomas McCarthy, *Supreme Court Observations*: AT&T Mobility v. Concepcion, THE LEGAL PULSE (Apr. 29, 2011), http://wlflegalpulse.com/2011/04/29/supreme-court-observations-att-mobility-v-concepcion/.

[39] *Volt*, 489 U.S at 479.

[40] David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J.L. & POL'Y 129, 137–38 (2004) (emphasis added).

endeavor to balance that ideal against the protection of public values. This is why, as far back as the classical period, the common law singled out a variety of contracts and contract provisions for regulation in the public interest.[41] Even during the height of the *Lochner* era, courts never pretended to enforce contracts exactly as written.[42]

Moreover, it is not even clear that *Concepcion* is consistent with freedom of contract. Many would argue that consumers are not in any real sense "free" when they acquiesce to terms contained in adhesion contracts like AT&T's service agreement.[43] If so, preempting *Discover Bank* would seem to exacerbate rather than mitigate this unfreedom. It is also doubtful whether a law such as *Discover Bank* can be understood as reducing liberty of contract simply because it interferes with the parties' agreement as written, and thus whether displacing *Discover Bank* tends to increase that liberty.[44] For example, would we consider contracting parties to be freer if the state held them to an agreement that had been procured by fraud or duress?[45] An agreement that turns out to be impracticable? Or one that lacks consideration? The lesson here is that common law defenses such as unconscionability can do just as much to augment freedom of contract as they can to diminish it. Taken to its logical terminus, the retort leads to the untenable proposition that contracts should be enforced just for the sake of enforcement, no matter what their effect on other values such as voluntary consent, procedural fairness, or the reasonable expectations of the parties.

B. The Twilight of Favoritism

A discussion of the favoritism theory cannot proceed without resolving a threshold question about the supposed object of favoritism: Does the FAA seek to favor arbitration or arbitration agreements? The Court has used both formulations interchangeably,[46] which in turn

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[41] *See* Gregory S. Alexander, *The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 103, 103, 108 (F.H. Buckley ed., 1999); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 482–86 (1909); Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 373 (1921) (noting that English courts before the 19th century refused to enforce a variety of contracts contrary to public policy).

[42] *See* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 448–49 (1993).

[43] *See, e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 675–77 (1996).

[44] *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 315 (1975) ("Properly understood, [freedom of contract] does not require a court to enforce every contract brought before it.").

[45] Richard Epstein, among others, has argued that economic duress, nondisclosure, the statute of frauds, and certain applications of the doctrine of capacity are not in fact consistent with the freedom of contract ideal. *See id*. at 297–302. This would suggest that many general contract defenses currently presumed to fall within the savings clause might become problematic if freedom of contract were taken to be the touchstone for FAA preemption.

[46] The lack of precision here is truly astounding. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 479–81 (1989) (noting the FAA's policy of "strongly favor[ing] the enforcement of agreements to arbitrate" and later referring to favoritism of "arbitration proceedings" as a "method of resolving disputes"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625, 630 (1985) (explaining that the "'liberal federal policy favoring arbitration agreements' . . . is at bottom a policy guaranteeing enforcement of private contractual arrangements" and then relying on the "emphatic federal policy in favor of arbitral dispute resolution"); Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (noting at once that Section 2 embodies a "liberal federal policy favoring arbitration agreements" and that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.").

enables lower courts to exploit the indeterminacy to justify FAA preemption outcomes based on policy rather than principle. To be sure, it is entirely possible to favor both the arbitration process and the agreements that give rise to it. Nonetheless, I shall argue that the best interpretation of the theory is that federal arbitration law seeks to favor arbitration *qua* process, not *qua* contract. There are at least three reasons why.

First, one of the main objectives of the FAA was to overturn the old "revocability" doctrine,[47] which allowed a reluctant party to revoke her promise to arbitrate existing or future disputes at any time prior to issuance of the award. Revocability does not go to the question of whether the arbitration *agreement* is valid or enforceable, because the non-revoking party was always entitled to money damages for breach.[48] Instead, because the right of revocation simply prevents a court from ordering specific performance of the promise to arbitrate, revocability goes only to the question of remedy—whether a court may compel resort to the arbitration *process*.[49] A significant part of the FAA's charge, therefore, was the vindication of arbitration as a process rather than a promise.

Second, favoring arbitration agreements is better understood as a means to an end rather than an end in itself.[50] If arbitration agreements were ends in themselves, there would be little more for the FAA to do beyond reversing the old ouster doctrine, which made pre-dispute arbitration agreements void. The validity of a pre-dispute arbitration agreement could then be enforced by the award of money damages without so much as a single arbitration proceeding ever taking place.[51] But the FAA does so much more: Among other things, it creates procedures for compelling arbitration, for staying or barring related litigation, for appointing arbitrators and

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[47] This is one of the chief reasons why the command clause makes arbitration clauses falling within its purview "valid, *irrevocable*, and enforceable." 9 U.S.C. § 2 (2009) (emphasis added); *see* Note, Erie, Bernhardt, *and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 YALE L.J. 847, 854–56 (1960). The other reason was to overturn the ouster doctrine. *See infra* note 49.

[48] *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 20 (1992) (adding that money damages were typically nominal); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 973 (1999).

[49] By contrast, the ouster doctrine went to the question of validity, although apparently only to the validity of pre-dispute arbitration agreements. *See* Scott v. Avery, [1856] 10 Eng. Rep. 1135, 1138 (H.L.); Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238, 238 (1929); Note, *supra* note 47, at 854 n.46. Post-dispute arbitration agreements were considered perfectly valid, even though the revocability doctrine could still be invoked to deny specific performance. Thus, pre-FAA law allowed a court to compel the enforcement of *some* arbitration agreements (namely, post-dispute arbitration agreements, through the remedy of money damages), but never to compel the arbitration process.

[50] Although they might agree in the final analysis, most judges and commentators remain confused about this basic point. *See* Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1238–39 (2011); Brief of Arbitration Professors as Amici Curiae in Support of Respondents at 14–18, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2010) (No. 09–893). A notable exception is Justice Stevens, who demonstrated a particularly lucid understanding of the means-ends distinction in his dissenting opinion in *Hall Street Associates., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). There, he reasoned that "American courts were generally hostile to *arbitration*. They refused, with rare exceptions, to order specific enforcement of executory agreements arbitrate. Section 2 of the FAA responded to this hostility by making written *arbitration agreements* 'valid, irrevocable, and enforceable.'" *Id*. at 593 (Stevens, J., dissenting) (emphasis added).

[51] Whether the agreement is enforced by specific performance or money damages is not, after all, an issue of enforcement or validity but one of remedy. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 293–94 (1995) (Thomas, J., dissenting).

conducting hearings, for enforcing arbitral awards as court judgments, and for vacating and modifying such awards.[52] The FAA's true object of concern, therefore, is not so much the agreement itself as the process that the agreement makes possible.[53]

Third, it is difficult to appreciate what it means to favor arbitration *agreements* other than eliminating needless impediments to their enforcement.[54] But if so, this begins to sound much like the contract theory's emphasis on "rigorously enforc[ing]" such agreements. To avoid redundancy, therefore, the favoritism theory is best interpreted as directed toward the arbitration process.

If the foregoing is correct, *Concepcion* is anything but favorable to arbitration. As many of us have already noted,[55] the opinion is infected to the core with the very same limiting beliefs about arbitration that the Court has spent the better part of three decades attempting to debunk. "Arbitration," the majority declared, "is poorly suited to the higher stakes of class litigation."[56] "Arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification," so that it is "at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied."[57] Unlike the *de novo* review of class certification questions available in court, arbitrators' class certification decisions are not appealable.[58] And although the resulting award is subject to the FAA's vacatur standards, those standards amount to "no effective means of review."[59]

In an early line of cases, the Court used similar uncharitable assessments about arbitration to undo valid, broadly-worded arbitration agreements.[60] Thus, in holding that a claim under the Fair Labor Standards Act (FLSA)[61] was nonarbitrable, the Court held that:

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[52] *See* 9 U.S.C. §§ 3–7, 9–11 (2009).

[53] *See* STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 33 (2d ed. 2007) ("Central to the FAA is its requirement that courts enforce arbitration agreements with the remedy of specific performance."). In the same vein, even critics argue that the real motivation behind the Court's FAA jurisprudence is to secure an alternative forum to help alleviate crowded court dockets. *See, e.g.*, Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 830 (2002); Sternlight, *supra* note 43, at 661.

[54] *Accord* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 625 (1985) (defining the "liberal federal policy favoring arbitration agreements" as "at bottom a policy guaranteeing the enforcement of private contractual arrangements . . . .").

[55] *See* Ian D. Mitchell & Richard Bales, *Concepcion and Preemption Under the Federal Arbitration Act*, 4 Y.B. ARB. & MED. (forthcoming 2012); Hiro Aragaki, *Status and contract in* AT&T Mobility v. Concepcion, SCOTUSBLOG (Sept. 14, 2011, 3:53 PM), http://www.scotusblog.com/2011/09/status-and-contract-in-att-mobility-v-concepcion/.

[56] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011).

[57] *Id.* at 1750, 1752.

[58] *Id*. at 1752.

[59] *Id*.

[60] *See, e.g.*, McDonald v. City of W. Branch, Mich., 466 U.S. 284, 290 (1984) (stating that arbitration is "[not] an adequate substitute for a judicial proceeding"); Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (calling arbitration "inferior" to courtroom adjudication); *cf.* Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967) (Black, J., dissenting) (considering it "fantastic" that arbitrators could "decide legal issues").

[61] 29 U.S.C. §§ 201–262 (2011).

> [M]any arbitrators may not be conversant with the public law considerations underlying the FLSA. FLSA claims typically involve complex mixed questions of fact and law . . . . Although an arbitrator may be competent to resolve many preliminary factual questions, such as whether the employee "punched in" when he said he did, he may lack the competence to decide the ultimate legal issue [of] whether an employee's right to a minimum wage or to overtime pay under the statute has been violated.[62]

Similarly, in *Wilko v. Swan*,[63] the Court declared that arbitration was not an adequate substitute for a trial with respect to claims under the Securities Act of 1933, in part because the FAA's vacatur standards were no substitute for "judicial review for error."[64]

The Court's more recent position is that these earlier cases were "pervaded by . . . 'the old judicial hostility to arbitration'"[65]—in other words, that they positively "*disfavor[ed]* arbitration" and were "far out of step" with the Court's "current strong . . . *favori[tism]* [of] this method of resolving disputes."[66] If *Concepcion*'s limiting beliefs about arbitration are not materially different from those found in the early nonarbitrability cases, it is difficult to appreciate how the decision can possibly be squared with the favoritism theory.[67]

Concepcion is further unfavorable toward arbitration because it tends to close off new possibilities—possibilities consistent with the early reformers' desire to "raise arbitration to the status and dignity of judicial process."[68] In large part, modern FAA jurisprudence has been a jurisprudence of enablement. The "'national policy favoring arbitration'"[69] has been joined at the hip with a trend toward greater inclusiveness with respect to the scope of disputes covered by an arbitration agreement,[70] the type of claims justiciable in arbitration,[71] the range of gateway issues

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[62] Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 743 (1981).

[63] 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

[64] *Id*. at 433, 436–37; *see also* Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 203 (1956).

[65] Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480 (1989) (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).

[66] *Id*. at 481 (emphasis added); *see also* Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626–27 (1985).

[67] As the California Supreme Court presciently observed over a decade ago and later again in *Discover Bank*, the proposition that arbitration is unsuitable to class actions itself "reflects, . . . 'the very mistrust of arbitration that has been repudiated by the United States Supreme Court.'" Discover Bank v. Superior Court, 113 P.3d 1100, 1113 (Cal. 2005) (citing Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 693–94 (Cal. 2000)).

[68] Joseph Wheless, *Arbitration as a Judicial Process of Law*, 30 W. VA. L.Q. 210, 216 (1924); *see also* Sec. Indus. Ass'n v. Connolly, 883 F.2d 1114, 1116 (1st Cir. 1989) (describing the FAA's purpose to "legitimate" arbitration); *cf.* REV. UNIF. ARBITRATION ACT §§ 6 cmt., 23 cmt. B (2000), *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm [hereinafter RUAA] (describing the RUAA's purpose to provide a "credibl[e]" and "true" alternative to litigation).

[69] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).

[70] *See* Thomas J. Stipanowich, *Punitive Damages in Arbitration:* Garrity v. Lyle Stuart, Inc. *Reconsidered*, 66 B.U. L. REV. 953, 972 (1986).

[71] *See* Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 7–8 (1997).

that may be entrusted to arbitrators,[72] and the menu of remedies that arbitrators may consult when granting relief.[73] A truly pro-arbitration ruling, therefore, would have seen *Concepcion* as an opportunity for enriching the arbitration alternative to class action litigation; it would have found a place at the table for this brave new thing called "class arbitration."

By contrast, *Concepcion* makes arbitration and class relief mutually exclusive almost by definition,[74] and in this way represents a profoundly *disabling* moment in the history of modern arbitration law.[75] Arbitration and the class mechanism are conceived as static and brittle, unable to evolve in new directions or to accommodate one another as times change. As a result, a distinctive process of collective claiming—one responsive to not just to the weaknesses but also to the strengths of the arbitral forum—is unlikely to see the light of day.[76] This does not just mean that there will be fewer class arbitrations; ironically, it also means that there will also be fewer *individual* arbitrations.[77] As Justice Breyer put it, "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"[78] This cannot possibly be favorable to arbitration's future development.

Those who persist in the belief that *Concepcion* is pro-arbitration make one of two errors. The first is to confuse the policy of favoring arbitration with that of favoring arbitration agreements. But rules that disfavor the strict enforcement of arbitration agreements, such as the unconscionability defense and the statutory and common law vacatur rules, play an important role in underwriting the legitimacy of the arbitration process.[79] Consider a hypothetical law that would limit the enforceability of arbitration agreements like the one at issue in *Hooters of America, Inc. v. Phillips*.[80] Preempting such a law would certainly favor arbitration agreements, but would we so easily conclude that it thereby favors arbitration?

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[72] *See* Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2783–85 (2010) (holding that gateway decisions about the validity of arbitration agreements may be delegated to the arbitrators); *Prima Paint*, 388 U.S. 395 at 402–04 (holding that arbitration clauses are severable, such that disputes over the validity of the container contract must be heard in arbitration).

[73] *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 61 n.7 (1995).

[74] *Concepcion*, 131 S. Ct. at 1753 (stating that class arbitration "is not arbitration as envisioned by the FAA").

[75] *Accord* Thomas Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L. ARB. 68–69 (2012).

[76] *Cf.* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 122–24 (2011) ("[O]ne could find class arbitration attractive not only because of its potential to deal equally with similarly situated disputants but also because it might respond to . . . asymmetries between disputants."). To be sure, parties might still choose to incorporate class arbitration procedures, but this would "not [be] arbitration as envisioned by the FAA," *Concepcion*, 131 S. Ct. at 1753, and might therefore be prone to attack in other ways. *See infra* notes 254–260 and accompanying text.

[77] *See* Colin P. Marks, *The Irony of* AT&T v. Concepcion, 87 IND. L.J. SUPP. 31, 32 (2012).

[78] *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting).

[79] *See* Lawrence A. Cunningham, *Supreme Court Arbitration Rhetoric v. Reality and AT&T*, CONCURRING OPINIONS (Apr. 15, 2011, 6:08 AM), http://www.concurringopinions.com/archives/2011/04/supreme-court-arbitration-rhetoric-v-reality-and-att-mobility.html (arguing that simply to favor arbitration does not necessarily answer whether a clause banning class arbitration promotes or retards that policy).

[80] 173 F.3d 933 (4th Cir. 1999); *see also* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) (suggesting that, consistent with the FAA, states could prohibit parties from agreeing to have their disputes presided over by a "panel of three monkeys . . . .").

The second error is to confuse favoring arbitration with favoring the big businesses that are most apt to use it.[81] It is difficult to quarrel with the observation that *Concepcion* favors big business, especially those keen on avoiding collective action claims (in arbitration or litigation).[82] But that is not the same as saying that it favors arbitration. Consider in this vein the one thousand or so duplicative arbitrations filed late last year by plaintiffs' law firms on behalf of AT&T customers seeking to block AT&T's announced merger with T-Mobile.[83] Instead of honoring its own agreement to arbitrate, AT&T filed multiple actions in federal court seeking to block even these *individual* arbitrations. It argued that arbitrating these disputes (whether individually or as a class) would cause it irreparable injury, in part because arbitrators would be called on to evaluate "highly sophisticated and complex econometric and engineering models" and conduct "a detailed assessment of this evidence as it relates to the benefits to consumers and businesses"—tasks that presumably cannot be expected from an essentially fast, cheap, and simple adjudicative forum.[84] These statements may have come from the mouthpiece of arbitration's supposed champion, but they certainly do not favor arbitration. They are better seen as embodying the type of limiting beliefs that the Court's own jurisprudence in this area has sought to overturn.[85]

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[81] For examples of this error, see Adam Liptak, *Supreme Court Allows Contracts that Prohibit Class-Action Arbitration*, N.Y. TIMES (Apr. 27, 2011), http://www.nytimes.com/2011/04/28/business/28bizcourt.html; Jim Hamilton, *Supreme Court Ruling Continues Strong Federal Policy Favoring Arbitration*, JIM HAMILTON'S WORLD OF SEC. REG. (Apr. 28, 2011, 11:44 AM), http://jimhamiltonblog.blogspot.com/2011/04/supreme-court-ruling-continues-strong.html; Fisher & Phillips, LLP, *Supreme Court Expands Use of Arbitration Agreements*, FISHER & PHILLIPS BLOGS (Apr. 27, 2011), http://www.laborlawyers.com/shownews.aspx?Supreme-Court-Expands-Use-Of-Arbitration-Agreements&Ref=list&Type=1122&Show=13985.

[82] *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions:* Wal-Mart v. Dukes *and* AT&T Mobility v. Concepcion, 7 DUKE J. CONST. L. & PUB. POL'Y 1, 74, 96 (2011) (special issue); Andrew Cohen, *No Class: The Supreme Court's Arbitration Ruling*, THE ATLANTIC, (Apr. 27, 2011, 5:33 PM), http://www.theatlantic.com/national/archive/2011/04/no-class-the-supreme-courts-arbitration-ruling/237967/.

[83] *See, e.g.*, Complaint, AT&T Mobility LLC v. Gonnello, No. 11–CV–05636 (PKC), 2011 WL 4716617 (S.D.N.Y. Oct. 7, 2011). *See generally* Terry Baynes, *AT&T Sues Customers Who Seek to Block T-Mobile Deal*, THOMSON REUTERS NEWS & INSIGHT (Aug. 17, 2011), http://newsandinsight.thomsonreuters.com/Securities/News/2011/08_-_August/AT_T_sues_customers_who_seek_to_block_T-Mobile_deal/.

[84] Complaint at ¶ 6, *Gonnello*, 2011 WL 4716617. Although these statements are highly suspect, the same is not necessarily true of AT&T's argument that an arbitral forum would not sufficiently protect the interests of the public and third parties who were not signatories to AT&T's arbitration agreement. The latter argument is based on unavoidable structural limitations of the arbitral forum rather than on a mistrust of the competence of arbitrators or the arbitration process, and for this reason does not appear to pose the same danger of hostility. *Cf.* Aragaki, *supra* note 50, at 1250–54.

[85] *See supra* notes 60–64 and accompanying text.

II. *CONCEPCION* THROUGH THE LENS OF ANTIDISCRIMINATION

If contract and favoritism do not provide a persuasive account of *Concepcion*, what does? One answer may be that the decision is unabashedly political and abandons all pretense of a reasoned justification.[86]

Against this view, I wish to suggest that *Concepcion* remains faithful to the general obstacle preemption framework described in Part I. Rather than abandon that framework altogether, it simply brings to the fore an alternative interpretation of the FAA's purposes and objectives, and thus an alternative theory of what a state law must look like in order to stand as an obstacle to those objectives. As the title of this Essay suggests, that alternative theory is grounded in the idea of antidiscrimination: of reversing the common law's unfounded "suspicion," "prejudice[]," and unjustified "hostility" toward arbitration.[87] Coming to grips with that theory and its implications for the FAA's preemptive reach will prove indispensable not just for making sense of an opinion that at first blush defies explanation, but also for developing a more ambitious critique—one that goes beyond the accusations of judicial partisanship or hypocrisy that have so far dominated commentary on the case.

To appreciate *Concepcion*'s antidiscrimination moorings, one must dig beneath the surface. I begin, then, by exhuming the parties' briefs on the merits. What is immediately striking here is that, despite the deep ideological chasm that separated them, AT&T and the Concepcions were in complete agreement that the outcome of the case hinged on whether the state law "discriminated" against arbitration.[88] Thus, rather than challenge AT&T's contention that *Discover Bank* should be preempted because it "runs afoul of th[e] fundamental nondiscrimination principle" enshrined in section 2,[89] the Concepcions fully embraced it.[90] "The preemption inquiry," they concurred, "turns on whether the state law in question discriminates against arbitration."[91] The Concepcions simply disagreed that *Discover Bank* was discriminatory in the way that AT&T supposed.[92]

To be sure, framing the FAA preemption question in this way seems peculiar, perhaps even jarring. Most of us rightly doubt whether arbitration can be understood as a victim of "discrimination." Be that as it may, numerous courts and commentators have appreciated what I have elsewhere referred to as the equal opportunity underpinnings of the Court's FAA

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[86] *See generally* Reuben, *supra* note 2 (criticizing the Court's FAA jurisprudence, including *Concepcion*, as unprincipled and based on little more than judicial activism); Cliff Palefsky, *Closing thoughts on the arbitration symposium*, SCOTUSBLOG (Sept. 26, 2011, 6:41 PM), http://www.scotusblog.com/2011/09/closing-thoughts-on-the-arbitration-symposium/.

[87] *See* Aragaki, *supra* note 50, at 1197.

[88] *See, e.g.*, Brief for Petitioner, *supra* note 31, at 28–29, 36–37, 42; Transcript of Oral Argument at 24, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2010) (No. 09–893) [hereinafter Transcript].

[89] *See* Brief for Petitioner, *supra* note 31, at 28.

[90] They surely did not need to do so, because it was by no means a settled proposition even among arbitration scholars that one of the "purposes and objectives" of the FAA was to reverse "discrimination" against arbitration.

[91] Brief for Respondents at 17, AT&T Mobility LLC. v. Concepcion, 131 S. Ct. 1740 (2010) (No. 09–893); *see also id*. at 9–10, 11, 13, 14.

[92] *Concepcion* thus became the first case on the merits before the U.S. Supreme Court to frame the question of FAA preemption explicitly in terms of whether the state law "discriminated" against arbitration.

preemption jurisprudence.[93] And for at least a decade, commentators have criticized state unconscionability rulings using the very same antidiscrimination arguments advanced by AT&T in *Concepcion*.[94] My point in this Essay is not to defend or attack the way in which FAA preemption doctrine has come to be organized around the idea of antidiscrimination. Instead, it is to draw attention to the undeniable fact of this organization and how it enables courts to deploy a potent rhetoric—often in ways that are internally inconsistent or incoherent—to legitimize the FAA's extraordinary displacement of state law.[95]

Surprisingly, few have ventured beyond the occasional, one-line reference to the FAA as an "anti-discrimination statute"[96] or as "a kind of equal protection clause" for arbitration provisions[97] in order to explain the meaning behind those claims. As a result, the antidiscrimination foundations of federal arbitration law remain to this day poorly understood and vastly under-theorized.[98] This would prove particularly problematic in *Concepcion* because the precise antidiscrimination issue raised by AT&T was itself far more complex than what had previously come before the Court.[99] The Court has typically preempted state laws that purposefully target arbitration—laws that "singl[e] out arbitration provisions for suspect status" on their face.[100] By contrast, the *Discover Bank* standard seeks only to regulate class waivers. It is "facially neutral"[101] both in the sense that it does not specifically mention arbitration and because it applies equally to class waivers in arbitration *and* litigation. The Concepcions argued that this facial neutrality rendered *Discover Bank* presumptively nondiscriminatory. AT&T countered that ostensibly neutral laws may nonetheless be used as a pretext for reviving the old judicial hostility toward arbitration, and that *Discover Bank* was a clear example of just that.

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[93] *See* Aragaki, *supra* note 18, at 1265–66.

[94] *See, e.g.*, Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469 (2006); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61 (2005); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004).

[95] This is not an argument I have the luxury to explain here. *See generally* Aragaki, *supra* note 18 (arguing that the Court's FAA preemption jurisprudence should be understood as animated by a theory of nondiscrimination toward arbitration).

[96] Joshua Ratner & Christian Turner, *Origin, Scope, and Irrevocability of the Manifest Disregard of the Law Doctrine: Second Circuit Views*, 24 QUINNIPIAC L. REV. 795, 797–98 (2006).

[97] Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1955 (2003).

[98] I say "federal arbitration law" rather than "the FAA" because the antidiscrimination theory arises from the Court's interpretation of the FAA and of its legislative history more so than from the text of the statute itself. *See* Aragaki, *supra* note 18, at 1238, 1250, 1283. When I refer to the antidiscrimination principle of the FAA throughout this Essay, therefore, I mean that principle as gleaned from FAA jurisprudence as a whole rather than from the text or original intent of the FAA in 1925.

[99] *Accord* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011).

[100] Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

[101] Brief for Petitioner, *supra* note 31, at 29; Brief for Respondents, *supra* note 91, at 24; Transcript, *supra* note 88, at 35.

By definition, pretextual discrimination means purposeful discrimination.[102] To describe an ostensibly neutral law as "pretextual" is not simply to claim that it *happens* to produce discriminatory results; rather, it is to claim that the law serves as a front for discrimination by design. Although this nuance appears to have been lost on counsel, it was immediately apparent to the justices during oral argument. Several of them, for instance, asked for a "test" that could be used to assess whether *Discover Bank* was in fact a "subterfuge"—that is, a "facially neutral contract law defense[] that implicitly discriminate[s] against arbitration."[103] Justice Breyer cut to the heart of the issue with the following colorful hypothetical:

> I would guess it's like Switzerland having a law saying, we only buy milk from cows who are in pastures higher than 9,000 feet. That discriminates against milk from the rest of the continent. But to say we want cows that have passed the tuberculin test doesn't. . . . And here, my impression is—correct me if I am wrong—the class arbitration exists. It's . . . not like having a jury trial. You could have it in arbitration. You can have it in litigation. So where is the 9,000-foot cow, or whatever it is? Where is the discrimination?[104]

Although the import of this hypothetical has remained obscure to most commentators,[105] it is made plain once we understand the underlying issue as one of pretext. The hypothetical asks whether *Discover Bank* is more like a rule against low altitude milk or more like one against unpasteurized milk. Although both are ostensibly neutral with respect to country of origin, we suspect only the former to be a foil for hostility toward foreign milk. Why? Because there are good reasons to discriminate against unpasteurized milk. By contrast, altitude does not bear even a *prima facie* relationship to any valid purpose such as national health. The apparent arbitrariness of the 9,000 foot rule, in other words, makes it more likely to be motivated by xenophobia.[106]

These and other exchanges during oral argument, together with the parties' briefing of the issues, teed up the Court to resolve one and only one question: Was *Discover Bank* a cover for intentional and unjustified discrimination against arbitration?[107] Although the majority never uses the word "discrimination" in its holding,[108] it effectively answers this question in the affirmative. It begins by observing that the FAA was enacted to rectify a widespread judicial hostility toward

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[102] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (equating proof of "pretext[ual]" discrimination with proof of "intentional discrimination"); Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1284–85 (1988); *see also* BLACK'S LAW DICTIONARY 1307 (9th ed. 2009).

[103] Transcript, *supra* note 88, at 35 (Sotomayor, J.); *see also id.* at 16 (Sotomayor, J.); *id.* at 17 (Kagan, J.).

[104] *Id*. at 14.

[105] *See, e.g.*, Dahlia Lithwick, *Can You Hear Them Now?*, SLATE (Nov. 9, 2010, 6:54 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2010/11/can_you_hear_them_now.html.

[106] Justice Breyer also associated the 9,000 foot rule with "lying," which again implies intentional misconduct. *See* Transcript, *supra* note 88, at 38.

[107] This, I take it, is related to Michael Helfand's point that what was problematic to the *Concepcion* Court about *Discover Bank* is the way the standard facilitated the lower courts' perceived "knee-jerk" hostility to AT&T's arbitration clause. *See* Michael A. Helfand, *Purpose, Precedent, and Politics: Why* Concepcion *Covers Less Than You Think*, 4 Y.B. ARB. & MED. (forthcoming 2012).

[108] It did, however, characterize AT&T's claim as a claim that "California law discriminated against arbitration" in its recitation of the procedural history. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011). The dissent more explicitly frames the issue in terms of discrimination. *See id*. at 1758–59, 1761 (Breyer, J., dissenting).

arbitration[109]—a purpose that is just as easily frustrated by state laws that single out arbitration as by more subtle variants that nevertheless "'derive their meaning from the fact that an agreement to arbitrate is at issue.'"[110] It then considers whether *Discover Bank* can be distinguished from the following "parade of horribles": (a) a rule requiring the availability of judicially monitored discovery in all public and private dispute resolution processes; (b) a rule requiring use of the Federal Rules of Evidence in such processes; or (c) a rule imposing jury fact finding in such processes.[111] The Court suggests that these facially neutral rules are problematic not so much because they might *end up* destroying arbitration, but because we have reason to suspect that they were specifically "*aimed at* destroying arbitration."[112] Our suspicions, moreover, would hardly be "fanciful, since the judicial hostility towards arbitration that prompted the FAA ha[s] manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy."[113] As an example of a "rationalization" for the first rule, a court could claim with a straight face that "no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing."[114] Or, to "help avoid preemption," the third rule could be dubbed a requirement to convene "'a panel of twelve lay arbitrators.'"[115] The crux of the Court's holding is that *Discover Bank* is equally suspect because it is indistinguishable from any of these hypothetical laws.

Properly understood, *Concepcion* thus stands for the proposition that *Discover Bank* somehow purposefully discriminates against arbitration. Many other commentators both within and outside of this Symposium have made the same observation, although they often employ the term "hostility" rather than "discrimination."[116] By locating *Concepcion* within an antidiscrimination paradigm, I do not mean to say that the contract and favoritism theories are no longer relevant. Contract and favoritism are important and enduring themes, not just in federal arbitration law but also in antidiscrimination theory. But as FAA preemption has increased in complexity, bringing within its purview not just state laws that single out arbitration but also those that are facially neutral, the older theories have begun to lose some of their explanatory power. Courts and litigants have more openly embraced antidiscrimination as an alternative

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[109] *Id.* at 1745, 1747 (majority opinion).

[110] *Id*. at 1746 (quotation omitted). This is very similar to the standard the Court has articulated in more traditional purpose-based antidiscrimination contexts. There, the fact that employers or state actors knew or could have foreseen that a protected group would be adversely affected by the law or measure in question is generally insufficient to prove intentional discrimination. *See, e.g.*, Frazier v. Garrison, 980 F.2d 1514, 1526–27 (5th Cir. 1993). Instead, the law or measure must somehow take its meaning from the fact that a protected group will be adversely affected, in the sense that it was designed at least in part "because of, not merely in spite of," its impact on the group. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (internal quotation marks omitted).

[111] *See Concepcion*, 131 S. Ct. at 1747. To be sure, neither *Discover Bank* nor any of these hypothetical laws "requires" or "imposes" anything in arbitration; it simply prohibits the waiver of certain procedural mechanisms such as class actions. *See infra* note 274. I use this particular formulation for the sake of simplicity only.

[112] *Concepcion*, 131 S. Ct. at 1747 (emphasis added).

[113] *Id*.

[114] *Id*.

[115] *Id*.

[116] *See, e.g.*, Marks, *supra* note 77, at 31, 41; Resnik, *supra* note 76, at 125–26; Stipanowich, *supra* note 75, at 376, 380; Jill Gross, *AT&T Mobility, FAA Preemption, and Class Arbitration*, SCOTUSBLOG (Sept. 15, 2011, 9:29 AM), http://www.scotusblog.com/2011/09/att-mobility-faa-preemption-and-class-arbitration/ (stating that the Court held *Discover Bank* to be preempted by the FAA because of its "anti-arbitration animus").

paradigm that is both more robust and more nuanced for purposes of addressing these new challenges.

The basic problem, however, is that there is so far no widely-accepted consensus about the details of this alternative paradigm. To be sure, the cases are replete with cryptic maxims that sound in a distinctively antidiscrimination register: "Congress precluded States from singling out arbitration provisions for suspect status";[117] "the FAA is pre-emptive of state laws hostile to arbitration";[118] the savings clause does not protect a judicial holding that "rel[ies] on the uniqueness of an agreement to arbitrate as a basis for" a determination of unconscionability.[119] The most famous of these is perhaps the following:

> What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent.[120]

Most of us think we know what these maxims mean. We think we know, for example, how to spot a law that "takes its meaning precisely from the fact that a contract to arbitrate is at issue"[121] or that fails to place arbitration agreements on an "equal footing." But the truth is that we do not. We have been lulled into a false confidence about the nature, scope, and limits of these propositions and the legal arguments they can be expected to support. The litigation of *Concepcion* is a testament to this, and so it is to this issue that I now turn.

III. LITIGATING *CONCEPCION*: THE PERILS OF PROTO-THEORY

The parties' framing of the FAA preemption issue in terms of whether *Discover Bank* "discriminated" against arbitration forced the Court to confront a complex set of questions not just about the nature of the FAA's antidiscrimination mandate, but also about the circumstances in which a facially neutral law can be deemed to discriminate against arbitration by pretext.[122] Not surprisingly, the justices surfaced many of these questions during oral argument. But upon reading the transcript of the argument, it becomes painfully evident that counsel on both sides lacked the analytic tools and even the vocabulary to engage them on a meaningful level. The

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[117] Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

[118] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 112 (2001).

[119] Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

[120] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995).

[121] *Perry*, 482 U.S. at 492 n.9.

[122] To be sure, some of these questions had begun to surface in the lower courts and had even come knocking on the Court's door in the recent past. *See, e.g.*, Petition for a Writ of Certiorari at 16, Cingular Wireless LLC v. Mendoza, 126 S. Ct. 2353 (2006) (No. 05–1119) ("Although we do not here challenge the Court's recognition of unconscionability as a potentially valid state-law basis for refusing to enforce an arbitration provision, this case demonstrates the need to provide guidance as to when a court's invocation of this extraordinarily malleable doctrine truly is arbitration-neutral as opposed to being a subterfuge for engaging in anti-arbitration animus."). *See generally* Petition for a Writ of Certiorari, Beverly Enters.-Ill., Inc. v. Blazier, 130 S. Ct. 1698 (2009) (No. 09–747); Petition for a Writ of Certiorari, Ryan's Family Steak Houses, Inc. v. Walker, 126 S. Ct. 730 (2005) (04–1672).

reason for this has less to do with the quality of counsel's representation—which by all accounts was first rate and which I do not mean to criticize here—and more to do with the dearth of conceptual resources available to them for constructing sophisticated antidiscrimination arguments.

My goal in this Part is to draw attention to and to critique the surprisingly underdeveloped state of the law in this area by focusing on three central questions that the parties were unable adequately to address during the litigation of *Concepcion*. Coming to grips with these questions will be indispensable if we are to have any hope of mastering the antidiscrimination theory of FAA preemption.

A. What is the Subject of Discrimination?

One of AT&T's leading arguments for why *Discover Bank* discriminated against arbitration was that, instead of applying across the board to *all* agreements under the sun, it only applied to a subset of agreements—namely, consumer contracts that contain class waivers.[123] In other words, the mere fact that some arbitration agreements fall within this subset while a whole range of other agreements do not (think of pharmaceutical, physician-patient, plumbing, prenuptial, prostate removal, and countless other agreements) is sufficient to establish discriminatory treatment. The obvious point that *Discover Bank* does not treat class waivers in arbitration any differently from those in litigation recedes into obscurity.

AT&T's flagship argument that a state law "discriminates" for FAA preemption purposes if it fails to "'place[] arbitration agreements on equal footing with *all other contracts*'"[124] is, however, hopelessly incoherent. No law—not even the defense of fraud or duress—applies in any meaningful sense, as one group of *amici* put it, to "'any' and *every* contract."[125] More to the point, the argument betrays a vital misunderstanding about the subject of the FAA's antidiscrimination mandate. Most courts and commentators assume that the FAA's purpose is to make arbitration agreements as enforceable as other contracts. But as I have already argued, making arbitration *agreements* as enforceable as other contracts was never an end in itself; rather, it was a means to enable the arbitration *process* to stand on an equal footing with litigation.[126] At root, therefore, the subject of the FAA's mandate must be the latter and not the former.

A simple example from the antidiscrimination context will explain. The claim that a prosecutor's use of the peremptory challenge to exclude African Americans from petit criminal juries violates the Equal Protection Clause is at root a claim that eligible African Americans are being discriminated against in favor of a comparison group. The comparison group plainly cannot consist of *all* other individuals, for the peremptory challenge is inapplicable to whole classes of persons (non-citizen permanent residents, children, convicted felons in custody, persons who

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[123] Brief for Petitioner, *supra* note 31, at 17–18, 28–31.

[124] *Id*. at 28 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)); *see also* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 25, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2010) (No. 09–893); Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 8.

[125] Brief of the Chamber of Commerce of the United States of America, *supra* note 124, at 25 (emphasis added) (citation omitted). This is a complex argument that I have set out elsewhere. *See* Aragaki, *supra* note 50, at 1218–23.

[126] *See supra* notes 50–53 and accompanying text; Aragaki, *supra* note 50, at 1223–24, 1228–35.

have served in the past twelve months, and residents of other states, to name a few). Yet this lack of universal applicability hardly shakes our confidence in the prosecutor's evenhanded use of the challenge. What is relevant is only whether, given two or more groups whose members are *functionally interchangeable* in the sense that each could perform jury service in the same way, one is being disfavored for no reason other than race.[127] Thus, one way of raising an inference of race-based discrimination would be to show that the prosecutor used his peremptories more frequently against eligible African Americans than he did against eligible whites.[128]

Now consider three different contract clauses: (i) an arbitration clause containing a class arbitration waiver, (ii) an attorney fee-shifting clause, and (iii) a release of liability clause. Like the prosecutor's use of the peremptory challenge in my example, *Discover Bank* arguably has an adverse effect only on the arbitration clause; it has no application whatsoever to the other two or indeed to most other contract clauses. But the fact that *Discover Bank* does not apply in this way to "all" clauses is surely not what it means for *Discover Bank* to discriminate. We do not suspect, for instance, that the California Supreme Court devised the *Discover Bank* standard in order to enable more attorney fee-shifting clauses to be enforced or to encourage contract drafters to include more releases in their form contracts. Striking the arbitration clause as unconscionable does not somehow favor the other two clauses in the way that excluding eligible African Americans from jury service favors eligible whites. The reason is that the other clauses are not functionally interchangeable with the arbitration clause and thereby provide no salient comparison group for purposes of establishing discrimination.

To the extent that the facially neutral *Discover Bank* rule can be considered discriminatory at all, therefore, it must be because the rule treats *arbitration and litigation* differently for essentially arbitrary reasons—reasons that we suspect derive from the common law's legacy of "jealousy" toward the arbitral forum.[129] This makes eminent sense not just as a matter of logic but also in light of the history of Anglo-American arbitration law. The central question that flows through that history—from *Scott v. Avery*[130] to *Tobey v. Bristol*[131] to *Wilko v. Swan*[132] and finally, I argue, *AT&T Mobility v. Concepcion*—is the question of whether arbitration and litigation are functionally equivalent dispute resolution forums, not whether arbitration agreements are or should be interchangeable with other contracts.

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[127] Robert Post identifies this type of "functional rationality" as a basic premise behind the dominant conception of American antidiscrimination law. *See* ROBERT C. POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 24–26 (2001).

[128] By contrast, evidence that African Americans in the jury venire were being disfavored relative to persons who wear crimson sweatshirts, persons whose last name begins with "A," or persons whose diet includes durian, without more, is of absolutely no moment until we know which of these persons were also members of the class of eligible whites.

[129] *See Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong. 16 (1924) (statement of Julius Henry Cohen); STERLING, TO MAKE VALID AND ENFORCEABLE CERTAIN AGREEMENTS FOR ARBITRATION, S. REP. NO. 68–536, at 2–3 (1924); H.R. REP. NO. 68–96, at 1–2 (1924); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 283 (1926).

[130] [1856] 10 Eng. Rep. 1135 (H.L.).

[131] 23 F. Cas. 1313 (C.C.D. Mass. 1845).

[132] 346 U.S. 427 (1953).

Despite what may in hindsight appear to be a fairly obvious point, FAA preemption doctrine continues to exhibit a bewildering indecisiveness about something as foundational as the subject of its antidiscrimination principle. Consider that the essentially specious "all contracts" *ratio* has for more than ten years been the leading standard used by lower courts to determine whether facially neutral laws other than standard contract law defenses are preempted by the FAA.[133] The confusion is so widespread and unquestioned that not even AT&T saw through it clearly. If it had, it surely would not have led with an argument that even justices who joined the majority dismissed as a non-starter.[134] Instead, AT&T would have focused its efforts on developing an argument that was still inchoate in its brief but that eventually carried the day: the claim that *Discover Bank*, like the Court's parade of horribles, is tainted by the impermissible "assumption that arbitration cannot vindicate the public interest to the same extent as judicial class actions."[135]

Confusion about the subject of discrimination is problematic not simply because it breeds imprecision or inconsistency but because it tempts obfuscation. When courts mobilize the rhetoric of antidiscrimination to justify preempting state laws without being clear about the very subject of their purported solicitude, the resulting lack of transparency can be exploited to reach result-driven decisions. Consider a forum selection statute, facially neutral in the way I describe above,[136] that voids any agreement by persons with little or no bargaining power (*e.g.*, a franchisee or consumer) to resolve disputes outside her home state. The overwhelming majority of courts hold that such laws violate the maxim to place arbitration agreements on an "equal footing with all other contracts"[137] because the laws apply (i) only to forum selection clauses in (ii) only one type of contract (*e.g.*, franchise, consumer).[138] What gets occluded by this analysis, of course, is that the law still treats arbitration and litigation exactly the same.[139]

When the tables are turned, however, precisely the opposite argument is invoked. Thus, when the law at issue is a common law defense that (according to FAA lore) applies to all

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[133] *See* Aragaki, *supra* note 50, at 1204–06.

[134] Justices Scalia and Kennedy expressed incredulity at the argument, pointing out the obvious fact that most legislative enactments—including those that AT&T readily conceded were *not* discriminatory—do not in fact apply to "all" contracts. *See* Transcript, *supra* note 88, at 4, 11, 23 (Scalia, J.); *id.* at 22 (Kennedy, J.). I have elsewhere sought to show that the argument is fundamentally incoherent. *See* Aragaki, *supra* note 50, at 1218–23; Brief of Arbitration Professors, *supra* note 50, at 25–29. The fact that two of the three justices in the majority signaled their strong inclination to reject the "all contracts" standard is perhaps one of the saving graces of *Concepcion*. It suggests that what is currently the majority approach to FAA preemption of facially neutral statutes in the lower courts, exemplified by cases such as *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890, 892 (9th Cir. 2001), would not survive if presented to the Court for decision.

[135] Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 10, 25; *see also* Brief for Petitioner, *supra* note 31, at 50–51 (implying that state laws contravene the FAA when they impose on arbitration "'procedural accoutrements'" characteristic of litigation, which effectively "amount[s] to 'an attack on the character of arbitration itself'" (quoting Iberia Credit Bureau v. Cingular Wireless LLC, 379 F.3d 159, 175–76 (5th Cir. 2004)).

[136] *See supra* note 101 and accompanying text.

[137] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

[138] *See, e.g.*, *Bradley*, 275 F.3d at 890; KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42, 51–52 (1st Cir. 1999); Doctor's Assocs., Inc. v. Hamilton, 150 F.3d 157, 163 (2d Cir. 1998). *But see* Keystone, Inc. v. Triad Sys. Corp., 971 P.2d 1240, 1245 (Mont. 1998).

[139] Moreover, the two are similarly situated with respect to the purpose behind such laws, which is to protect weaker parties from unfair hardship and to make it more difficult for stronger parties to evade liability for wrongful conduct.

contracts, those seeking preemption argue that the law "rests on nothing less than an assumption that arbitration, just because it is arbitration, is less desirable than litigation."[140] In other words, when it is no longer feasible to claim that arbitration *agreements* have been placed on a different footing than other contracts, the axis of comparison switches to arbitration *vs.* litigation. "Heads we win, tails you lose."

B. Is Discrimination Equivalent to Doctrinal Deviation?

AT&T's other leading argument was that *Discover Bank* discriminated against arbitration because it represented such a "distortion" of California unconscionability doctrine that "[w]e have not located a single precedential California decision" to support it.[141] The gravamen of this claim is not that *Discover Bank* merely extends or adapts the doctrine in questionable ways—ways that a reviewing court would leave undisturbed.[142] Instead, it is that *Discover Bank* is unprecedented and erroneous as a matter of law, among other things because it considers the fairness of a clause (i) to persons who are not parties to the agreement and (ii) in light of subsquent events, rather than events at the time of contracting.[143] These "significant" and "extreme" doctrinal "deviat[ions],"[144] AT&T argued, are sufficient to "*demonstrate*[] impermissible discrimination."[145]

But a moment's thought should reveal that there is no necessary connection between discrimination and doctrinal error. Incorrect applications of the law may well be considered nondiscriminatory, as when laws are misapplied because of incompetence, oversight, or a self-confessed desire to further other, more important ends. And depending on how discrimination is defined, even incorrect applications that produce starkly disproportionate outcomes, if unaccompanied by improper motives, may not count as discriminatory.[146]

By the same token, correct applications of the law may well be discriminatory. A good example of this is *Batson v. Kentucky*,[147] the inspiration for my previous example involving the

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[140] McGuinness & Karr, *supra* note 94, at 83; *see also* Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 25, 29; Burton, *supra* note 94, at 486, 488; Randall, *supra* note 94, at 198–220 (arguing that hostility in the application of the unconscionability rule may be inferred from stark differences in the way courts assess the fairness of a dispute resolution term relating to arbitration versus litigation). The flip side of this is that courts find *no* hostility, and thus no FAA preemption, when the unconscionability defense appears to be applied in a manner that does not "express the impermissible view that arbitration is inferior to litigation . . . ." Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 170 (5th Cir. 2004); *see also* Fensterstock v. Educ. Fin. Partners, 611 F.3d 124, 134 (2d Cir. 2010), *vacated sub nom.*, Affiliated Computer Services, Inc. v. Fensterstock, 131 S. Ct. 2989 (2011); Carbajal v. H&R Block Tax Servs., Inc., 372 F.3d 903, 905–06 (7th Cir. 2004).

[141] *See* Brief for Petitioner, *supra* note 31, at 36; *see also id*. at 32–33, 37, 39; *supra* note 31 and accompanying text.

[142] *Accord* Brief for Respondents, *supra* note 91, at 35–36 (describing AT&T's argument as raising "a question of state law, which this Court does not sit to review" (citation omitted)).

[143] *See* Brief for Petitioner, *supra* note 31, at 34–38.

[144] *Id*. at 32, 39.

[145] *Id*. at 37 (emphasis added); *see also id*. *at* 36; Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 18; Transcript, *supra* note 88, at 6–7 (arguing that *Discover Bank*'s doctrinal deviations, without more, "quite clear[ly]" establish discrimination).

[146] *See infra* note 163 and accompanying text.

[147] 476 U.S. 79, 95 (1986).

peremptory challenge. The gist of Mr. Batson's equal protection claim was not that the prosecutor had exercised his preremptories incorrectly (for example, because he had used too many). Quite the contrary: It was that it is virtually impossible for the prosecutor to do so, which is precisely what makes the discrimination so difficult to prove. If Mr. Batson had been required to establish an error of state law before he could establish his federal constitutional claim, equal protection law would entirely fail to capture much of what we consider pretextual discrimination. By overlooking this hallmark of a claim sounding in pretext—namely, the use of something *legitimate* to cover something illegitimate—AT&T underappreciated the crux of its own pretext-based claim.

Equipped with a more sophisticated account of discrimination under the FAA, AT&T might have marshaled a much stronger argument: Even if *Discover Bank* were a perfectly valid application or "refinement" of longstanding unconscionability principles (as the Concepcions and their *amici* had contended), it was *still* discriminatory and thus preempted.[148] The argument was hardly beyond contemplation. A loud chorus of courts and commentators has increasingly warned that unconscionability is being used as a ruse for a "new judicial hostility" toward arbitration.[149] In its strongest form, the contention is not so much that courts are getting the law of unconscionability wrong (even though, for want of a better alternative, this is indeed how many have framed it).[150] Instead, it is that the absence of bright line rules in the unconscionability area allows them to get it *right* and thereby to perpetuate the legacy of anti-arbitration hostility in ways that escape easy detection.[151]

Using doctrinal deviation as a proxy for discrimination did not just prevent AT&T from advancing much stronger arguments. Crucially, it also collapsed the federal preemption inquiry into a question of state contract law.[152] This effectively put AT&T in the odious position of asking the Court to review the California Supreme Court's *Discover Bank* decision on the merits—a request that even AT&T must have realized was deeply problematic from a federalism

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[148] By the same token, the Concepcions might have argued that, even if AT&T were correct that the California Supreme Court had misapplied established unconscionability principles in *Discover Bank*, there were other, perfectly plausible explanations for this having nothing to do with discrimination. But they did not. *See* Brief for Petitioner, *supra* note 31, at 31–39. The reason for this, again, is not a failing on counsel's part; instead, it stems from the problem that FAA jurisprudence currently lacks the doctrinal and theoretical resources with which to construct such an antidiscrimination-based argument.

[149] Burton, *supra* note 94, at 489–500; McGuinness & Karr, *supra* note 94, at 62; Thomas H. Riske, Note, *No Exceptions: How the Legitimate Business Justification for Unconscionability Only Further Demonstrates California Courts' Disdain for Arbitration Agreements*, 2008 J. DISP. RESOL. 591, 600–01 (2008).

[150] *See, e.g.*, Randall, *supra* note 94, at 186.

[151] This distinction appears to have been entirely lost on AT&T's *amici*. The thrust of the "new judicial hostility" claim is not, as the *amici* put it, that courts are "hid[ing] this *distortion* [of the common law defense] in the garb of general unconscionability law." Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 32. Rather, it is that they are hiding *discrimination* within it.

[152] This is especially problematic in a case like *Concepcion* for two reasons. First, unconscionability determinations are notoriously difficult to review. *See* Aragaki, *supra* note 18, at 1289–92. Second, when a state court's application of the unconscionability defense is raised to a federal court, it implicates a host of other federalism concerns. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1444–59 (2008).

perspective.[153] The fact that AT&T persisted with the argument all the same speaks volumes about the reigning confusion over what it means to "discriminate" for purposes of FAA preemption.

Here one might reasonably ask how AT&T and others who fear the pretextual use of the unconscionability doctrine can prove discrimination without the crutch of doctrinal misapplication. An answer is suggested by a distinctive characteristic of pretext claims that we considered earlier: They presuppose intentional discriminatory treatment. As such, it should be possible to demonstrate that an adverse unconscionability determination, even if doctrinally unremarkable, was nonetheless motivated by impermissible hostility to arbitration.[154] For instance, a court might enunciate the familiar unconscionability rule yet apply it in a way that betrays "outmoded presumptions" about arbitration's inferiority to litigation.[155] A court might also drop other hints in its opinion that suggest a visceral rather than reasoned opposition to arbitration.[156] A good example of the former is the California Supreme Court's much-discussed opinion in *Armendariz v. Foundation Health Psychcare Services, Inc*.[157] *Armendariz* raises far fewer doctrinal red flags than *Discover Bank*. But because the holding in *Armendariz* rests in part on questionable assumptions about arbitration's competence and desirability as a dispute resolution forum, it is arguably beset by the same anti-arbitration hostility prohibited by the FAA.[158]

A final retort is that doctrinal irregularities and departures from the ordinary course, without more, are sometimes sufficient to raise an inference of discrimination.[159] Although this is certainly true, AT&T was not making this much more subtle point. Even if it were, it failed to offer persuasive reasons for drawing such an inference in the case of *Discover Bank*. In particular, it did not even attempt to explain how and why the doctrinal deviations it identified might be indicative of hostility specifically toward arbitration rather than toward class waivers.[160] Recall that *Discover Bank* does not apply only to arbitration clauses or even to all arbitration clauses; its

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[153] Many justices expressed strong disinclination even to entertain AT&T's claim that *Discover Bank* was erroneous as a matter of California state law. *See, e.g.*, Transcript, *supra* note 88, at 5, 7 (Scalia, J.) ("Are we going to tell the State of California what it has to consider unconscionable?"); *id.* at 8 (Ginsburg, J.); *id*. at 19 (Kagan, J.); *id*. at 21 (Breyer, J.); *id*. at 24 (Sotomayor, J.).

[154] *See* Aragaki, *supra* note 18, at 1293–1303.

[155] This, indeed, is the approach followed by many courts when holding that a particular application of the unconscionability defense is *not* discriminatory and thus saved from preemption by the FAA. *See, e.g.*, Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 170 (5th Cir. 2004); Carbajal v. H&R Block Tax Servs., Inc., 372 F.3d 903, 906 (7th Cir. 2004).

[156] *Accord* Bruhl, *supra* note 152, at 1451–52 (suggesting that "anti-arbitration comments" by a court may be sufficient to establish a discriminatory application of the unconscionability defense). For a good example, see Casarotto v. Lombardi, 886 P.2d 931, 940–41 (Mont. 1994) (Trieweiler, J., specially concurring) (describing the "total lack of procedural safeguards" in arbitration and blaming arbitration of "subvert[ing] our system of justice as we have come to know it."), *vacated*, 515 U.S. 1129 (1995).

[157] 6 P.3d 669 (Cal. 2000).

[158] *See* Aragaki, *supra* note 18, at 1300–02.

[159] Even in the equal protection context, departures from the ordinary course are not sufficient in themselves to warrant the inference; the court must also consider the totality of the circumstances. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977).

[160] *See* SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION 103–04 (2009) (analyzing empirical data showing great variation in frequency with which class waivers appear in arbitration clauses).

real target is class waivers in consumer contracts. Thus, even when *Discover Bank* is used to void such a waiver, there are no necessary ramifications for the promise to arbitrate because courts may still order the case to class arbitration (as many have).[161] Moreover, *Discover Bank* imposes the identical restriction on class waivers in the litigation process. Something more is therefore needed to support the conclusion that *Discover Bank*'s irregularities (if any) "express the impermissible view that arbitration is inferior to litigation."[162] Doctrinal departures alone do not get us there.

C. Purpose- or Effects-Based Discrimination?

Mature antidiscrimination theories broadly recognize the distinction between intent-based and impact-based discrimination, and they make a self-conscious choice to rectify one or the other (or sometimes both). For instance, the heightened scrutiny afforded to suspect and quasi-suspect classes under the Equal Protection Clause requires proof of invidious purpose; the mere fact that the law's impact "may be more burdensome to the poor and to the average black than to the more affluent white"[163] is insufficient. By contrast, reasonable accommodation claims and statutory "disparate impact" claims seek to rectify more than purposeful discrimination. They therefore require no proof of intent; the only relevant question is whether a particular measure produces a certain type or degree of unequal outcome.[164]

In the FAA context there has been comparatively little if any consideration of whether the FAA's antidiscrimination principle is aimed at remedying the law's purposeful disparate treatment of arbitration or merely its unintended effects on arbitration. Courts and commentators routinely blur this distinction, as a result of which the all-important question of just what must be proven to establish discrimination has remained largely unasked and unanswered.

This basic ambiguity about whether the FAA represents a purpose- or effects-based antidiscrimination regime haunted the litigation of *Concepcion* from start to finish. Justice Kagan put her finger on it during oral argument, when she pointedly asked counsel whether the test for discrimination under the FAA was "a purpose test or an effects test." That is, "[i]s it a test that says the State is doing this in order to kill arbitration, or is it a test that says the State is doing

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[161] This typically happens when the clause contains a severability clause or the court otherwise determines that the class waiver is severable. *See, e.g.*, Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 912 A.2d 88, 103 (N.J. 2006); Woods v. Q.C. Fin. Servs., 280 S.W.3d 90, 99–100 (Mo. Ct. App. 2008); Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight From Arbitration?*, 37 HOFSTRA L. REV. 71, 106–08 & n.169 (2008). This was not a possibility in *Concepcion* only because AT&T's arbitration clause contained a "blowout" provision to the effect that if a court should strike the class waiver, the entire clause would fail and the dispute would be heard in a court of law. *See* Brief for Respondents, *supra* note 91, at 3.

[162] Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 170 (5th Cir. 2004) (denying FAA preemption challenge to state unconscionability rule for this reason; cited in Brief for Petitioner, *supra* note 31, at 32, 50–51).

[163] Washington v. Davis, 426 U.S. 229, 248 (1976).

[164] *See* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 835–36 (2003); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 648–58 (2001).

something that will kill arbitration?"[165] What is striking as one reads the transcript of oral argument is that counsel did not appear to have the first idea about how to answer this question. The state of confusion surrounding this critical issue, in turn, had strategic consequences for both parties.

For example, in response to Justice Kagan's question, counsel for the Concepcions stated that "I think you can look to both."[166] In other words, *either* purpose or effects might be sufficient, which is the same as saying that proof of discriminatory purpose is strictly unnecessary. As the party resisting the charge of discrimination, however, the Concepcions should have argued precisely the opposite. Discriminatory intent, after all, is extremely difficult to establish because it must almost always be inferred from circumstantial evidence.[167] By following this strategy, the Concepcions would have put AT&T to the test of proving not just that class-wide relief happens to place intolerable burdens on arbitration, but that the California Supreme Court willed those burdens when it issued its ruling back in 2005—a time, moreover, when class arbitration did not seem especially antithetical to arbitration.[168]

But the Concepcions did not adopt this strategy even though it was perfectly viable given the way the Court and AT&T had characterized *Discover Bank* as a pretext.[169] At best, the Concepcions seemed hazy, sometimes arguing that *Discover Bank* should avoid preemption because it was not "aimed at destroying arbitration"[170] and at other times contending that the mere fact that it destroys arbitration was sufficient.[171] At worst, they affirmatively endorsed an effects-based paradigm. This surfaced most clearly in the Concepcions' attempts to distinguish *Discover Bank* from AT&T's parade of horribles. In their brief, the Concepcions argued that the latter were preempted because they "demand[ed] procedures incompatible with arbitration" and would

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[165] Transcript, *supra* note 88, at 49; *see also id.* at 17 (Kagan, J.); *id*. at 35–36 (Sotomayor, J.) ("I don't want to look through legislative history and determine whether some committee person said something that sounds like subterfuge. How do I look at the law and its effects and determine that subterfuge or that discrimination?"); *id*. at 48 (Breyer, J.) ("What do I look to? It's not logic . . . . [W]hat should I read to show, in your opinion, you're right?").

[166] *See* Transcript, *supra* note 88, at 49.

[167] *See, e.g.*, Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987); Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1074 (2009).

[168] Consider that *Discover Bank* was handed down less than two years after the U.S. Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003)—widely interpreted as donning implicit approval to class arbitration—and five years before *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), where the Court first suggested that class arbitration might not even be arbitration at all. In large part because of the *Bazzle* decision, the AAA and a number of other arbitration providers developed class arbitration rules. *See* Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 9–12, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2009) (No. 08–1198).

[169] *See supra* notes 101–115 and accompanying text. Moreover, as I have elsewhere argued, the best interpretation of the Court's FAA jurisprudence is that only purpose-based discrimination is prohibited. *See* Aragaki, *supra* note 50, at 1210–18 (distinguishing between formal and fair equality of opportunity).

[170] Brief for Respondents, *supra* note 91, at 32; *see also* Transcript, *supra* note 88, at 48–51.

[171] *See, e.g.*, Brief for Respondents, *supra* note 91, at 11 (arguing that the FAA does not permit states to impose procedures that are "fundamentally incompatible" with arbitration); *id.* at 32–35; Transcript, *supra* note 88, at 38–39 (arguing that the test is whether the state law is "tantamount to a rule of non-enforceability of arbitration agreements"); *id.* at 47–48 (arguing that the hypothetical laws discriminate because of their "systematic effect[s]"); *id.* at 49.

thereby end up "destroy[ing]" the FAA unless they were preempted.[172] Likewise, they suggested that the problem with the ouster rule (which they assimilated to the parade of horribles) was its "discriminatory effect[s]" on arbitration[173] rather than, as is commonly supposed, the anti-arbitration *motives* behind those effects.[174] By focusing on effects at the expense of purpose, these arguments reduced the resolution of the case to one of simple line-drawing: Does *Discover Bank* burden arbitration to quite the same degree as the parade of horribles? Ironically, it was the Concepcions' own framing of the issue in this way that led an exasperated Justice Alito to foretell the outcome of the case in this exchange with the Concepcions' counsel during oral argument:

> What is the difference . . . between a rule that says you must follow the rules of evidence in every adjudication and a rule that says that class adjudication must always be available? I think your answer comes down to the proposition that the former is inconsistent with the idea of arbitration, and therefore, that's why it's not allowed, and the latter is not inconsistent with the idea of arbitration, and therefore, it is allowed. . . . [I]n the end . . . . we have to make a value judgment about whether these things, one thing or the other, fits with arbitration. *That's what it comes down to*.[175]

For its part, AT&T appeared just as confused as the Concepcions about the purpose/effects distinction and its importance to the outcome of the case. AT&T took the state of California to task for intentionally targeting arbitration, not for devising well-meaning rules that unexpectedly interfered with the enforceability of arbitration agreements.[176] The ostensibly "even-handed" *Discover Bank* rule, in its view, was "gerrymandered to target arbitration provisions,"[177] "devise[d]" to encumber arbitration with all the accoutrements of litigation,[178] "aimed directly at agreements to resolve disputes—[which] almost invariably [means] arbitration agreements,"[179] and for these reasons "resuscitat[es] . . . judicial hostility to arbitration."[180] Similarly, when comparing *Discover Bank* to the parade of horribles, AT&T suggested that the

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[172] Brief for Respondents, *supra* note 91, at 32. Even a "mere preference for procedures that are incompatible with arbitration," they argued, would be preempted. *See id*. at 33. This makes proof of calculated hostility to arbitration strictly unnecessary, because a state's "mere preference" for a procedure might stem from a variety of arbitration-neutral considerations including tradition, economic efficiency, or a concern about the reasonable expectations of parties. The real reason behind the claim that even a "mere preference" would be preempted must, therefore, be that incompatibility alone is sufficient to warrant preemption.

[173] *Id*. at 33–34.

[174] *See, e.g.*, Aragaki, *supra* note 18, at 1250–54.

[175] Transcript, *supra* note 88, at 46–47 (Alito, J.) (emphasis added).

[176] *See, e.g.*, Brief for Petitioner, *supra* note 31, at 42.

[177] *Id*. at 20; *see also id*. at 40.

[178] *Id.* at 29; *see also id*. at 42.

[179] *Id*. at 47; *see also id*. at 50–51.

[180] *Id*. at 41 (quoting Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406 (2d Cir. 1959) for the proposition that "the FAA was enacted to overrule 'a great variety' of judicial 'devices and formulas' declaring arbitration agreements 'against public policy'"); *see also id*. at 32.

problem with the latter was the bad motives they betrayed rather than their destructive effect on arbitration.[181]

A far easier and more direct route to proving discrimination would have been to piggy back on the Concepcions' argument by contending that *Discover Bank*'s devastating effect on arbitration, without more, was sufficient to prove discrimination.[182] This was certainly a plausible contention.[183] AT&T was moreover astute enough to realize that Justice Scalia, at least, would have been receptive to it given the tenor of his questions during oral argument in *Green Tree Financial Corp.* v. *Bazzle*,[184] the other High Court case to address class arbitration. There, he asked: "Why isn't the Federal Arbitration Act more reasonably interpreted as directed at those State laws that . . . are destructive of arbitration, that . . . are hostile not in the sense of any . . . mental intent, but that in their operation make it difficult for parties to enter into arbitration agreements?"[185] Sure enough, the majority's opinion—authored by none other than Justice Scalia—adopted precisely this effects-based standard.[186] For rather than attempt to determine whether *Discover Bank*, like the hypothetical laws in the parade of horribles, disguised a purpose to discriminate, the majority characterized those laws as "fundamentally incompatible" with arbitration and simply asked whether *Discover Bank* was likewise incompatible.

IV. THE MAJORITY'S REASONING: A CRITIQUE AND RECONSTRUCTION

The parties' above-described handicaps in presenting persuasive accounts of what makes *Discover Bank* discriminatory (or not) for FAA preemption purposes left the Court largely to its own devices when deciding the case. Notably, even though it agreed with the result advocated by

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[181] *Id*. at 50 (describing the parade of horribles as evincing a "concern[] that traditional arbitration hinders parties situated similarly to the plaintiff from learning of infringements of their legal rights," or a "convi[ction] of the superiority of jury trials"). Likewise, AT&T's *amici* argued that *Discover Bank* and other California unconscionability precedents evince a purpose to "target arbitration agreements for disfavored treatment." Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 10.

[182] To be sure, AT&T argued in passing that *Discover Bank* had a disparate "impact" on arbitration because it had the "effect . . . [of] transfor[ming] arbitration in the ways the Court described in *Stolt Nielsen*." Transcript, *supra* note 88, at 10; *see also* Brief for Petitioner, *supra* note 31, at 21, 30–31. But these remarks were so understated that they sound more like afterthoughts or arguments made for the sake of completeness. It is moreover unclear whether AT&T meant to say that these disparate impacts are important for drawing an inference of intentional discrimination or whether they are sufficiently actionable in themselves. For instance, AT&T argued that *Discover Bank*'s disparate *impact* on arbitration would "as a practical matter allow use of 'the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Id*. at 30–31. Because a state would only consider the uniqueness of an arbitration agreement if it intended to target arbitration, the argument suggests that impacts are simply a means of establishing intent.

[183] In unsuccessful *certiorari* petitions filed in similar cases, AT&T's counsel Mayer, Brown, Rowe & Maw LLP advanced precisely this type of effects-based argument for FAA preemption. *See, e.g.*, Petition for a Writ of Certiorari at 15–16, Cingular Wireless LLC v. Mendoza, 547 U.S. 1188 (2006) (No. 05–1119). The majority opinion in *Concepcion* not only ends up adopting an effects-based discrimination test, its declarations about the incompatibility between collective actions and the arbitration process also read as if they had been lifted straight from the arguments made by Mayer Brown in these unsuccessful *certiorari* petitions.

[184] 539 U.S. 444 (2003).

[185] Transcript of Oral Argument at 53 (Scalia, J.), Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (No. 02–634).

[186] *Accord* Marks, *supra* note 77, at 43–44.

AT&T, the Court did not rely on any of AT&T's leading arguments.[187] Instead, it held that *Discover Bank* discriminated against arbitration because the rule imposed a procedure that had the effect of destroying arbitration.

In this Part, I argue that the Court's adoption of an effects-based standard of discrimination—and, more importantly, its reliance on essentialism to vindicate that standard—was a mistake for reasons that extend far beyond the confines of this particular case. I then argue that the Court should have stayed true to its longstanding position that the FAA was enacted to reverse the "'old judicial law hostility to arbitration'"[188] by asking whether *Discover Bank* evinced a discriminatory purpose.

A. The Causes and Consequences of Essentialism

A keystone of the Court's holding in *Concepcion* is the assertion that class arbitration is not really "arbitration." Class-wide relief, we are told, produces a "structural" change that "interferes with *fundamental attributes* of arbitration."[189] Class arbitration is time consuming, formalistic, and procedurally complex—all the things that arbitration under the FAA is neither supposed to be nor likely *can* be. These and similar claims in the Court's decision are problematic not so much because they are empirically dubious[190] as because they unnecessarily essentialize arbitration: They purport to identify, once and for all, certain constitutive or definitional features of the arbitral process.

It may be tempting here to think of this essentialism as following inescapably from the Court's decision one year earlier in *Stolt-Nielsen S.A. v. AnimalFeeds International*.[191] There, the Court opined that class proceedings were inconsistent with the very "nature of arbitration," such that the shift from bilateral to class-wide arbitration would change the arbitral process in

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[187] *See supra* notes 134, 153 and accompanying text. Although it is true that the parade of horribles originated in AT&T's brief, AT&T did not use it to make an affirmative argument that *Discover Bank* was discriminatory. Rather, AT&T used it to rebut the Ninth Circuit's conclusion that *Discover Bank* should withstand preemption because it applied equally to arbitration and litigation. *See* Brief for Petitioners, *supra* note 31, at 28–31. The mere fact that a state law applied to both forums, AT&T argued, could not be dispositive of the discrimination question because one can imagine many such laws that are clearly inimical to the FAA, such as a law requiring the use of jury trials in any dispute resolution context. Thus, AT&T's argument was fundamentally defensive in nature.

[188] 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 266 (2009) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480 (1989)).

[189] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (emphasis added); *see also id.* at 1751; *supra* note 56 and accompanying text.

[190] *See, e.g.*, Resnik, *supra* note 76, at 122–23; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 40–42 & n.149 (2000); S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?*, 17 HARV. NEGOT. L. REV. (forthcoming 2012) (manuscript at 4–5), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791928.

[191] 130 S. Ct. 1758 (2010).

"fundamental" ways.[192] These sweeping pronouncements likely informed the majority's analysis in *Concepcion*. But as others have noted, they did not preordain that analysis.[193]

An alternative or perhaps more compelling explanation for *Concepcion*'s essentialism is that it helps establish that arbitration and litigation are differently situated, such that treating them exactly the same (as *Discover Bank* does) amounts to a type of discrimination.[194] Using the FAA to preempt *Discover Bank* then begins to look perfectly consistent with the goal of nondiscrimination, because it effectively allows the two forums to be treated differently in ways that reflect their essential differences.[195] From this standpoint, *Concepcion* appears simply to reaffirm the principle that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."[196] If this is, in fact, the underlying logic of the majority's reasoning in *Concepcion*, then it is a very complex logic indeed, one that raises more questions than it answers and one whose consequences must be carefully considered.

It may be helpful here to look at how claims of equality predicated on the need for differential treatment—rather than on the default rule of similar treatment—have played out in more traditional antidiscrimination contexts. The dominant paradigm of American antidiscrimination law perceives the wrong of discrimination in terms of a failure to recognize our inherent sameness across race, gender, and other status-based categories.[197] It constructs a world in which men and women are presumed to have the same ability to become, say, firefighters or care givers; a world in which African-Americans and whites are presumed interchangeable for purposes of becoming office managers or jurors.[198] Status-based differences are thereby rendered irrelevant; what matters is simply the individual's functional capacity to perform the task at hand.[199]

As intuitively appealing as it is in form, however, this "sameness" model is potentially problematic because it overlooks real and unavoidable differences between groups. Gender

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[192] *Id*. at 1775–76. The Court's essentialistic proclivities arguably surfaced even before *Stolt-Nielsen*. *See, e.g.*, Preston v. Ferrer, 552 U.S. 346, 357 (2008) (foreshadowing similar remarks in *Concepcion* by holding that a "prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results'"); Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 588 (2008) (describing arbitration's "essential virtue" in terms of "resolving disputes straightaway" without any substantive review of the merits of arbitration awards).

[193] *See* Nagareda, *supra* note 14, at 1106–09. *Stolt-Nielsen* raised a question of party intent or contractual gap-filling. There, essentialism was used to establish that class-wide relief "changes the nature of arbitration to such a degree that *it cannot be presumed the parties consented to* it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. at 1775 (emphasis added). That is not, however, the same as saying that the change is so great that a state may not legitimately require class-wide relief to be available in certain disputes brought in arbitration.

[194] *See* Tigner v. Texas, 310 U.S. 141, 147 (1940) ("[T]hings which are different in fact . . . [need not] be treated in law as though they were the same."); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15–2, at 1306–07 (2d ed. 1988); Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981, 998 (1992).

[195] Because *Concepcion* is limited to FAA preemption, *Discover Bank* remains in force with regard to class waivers that are not governed by the FAA.

[196] Jenness v. Fortson, 403 U.S. 431, 442 (1971).

[197] *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 968 (1984); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286–88(1991).

[198] *See* POST, *supra* note 127, at 25–26; Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 235 (1971); Law, *supra* note 197, at 963.

[199] *See* POST, *supra* note 127, at 14.

presents an especially salient context in which "innate physical differences between the sexes"[200] are such that treating men and women the same may sometimes be intolerable or, worse, impossible.[201] For example, the Court has relied on the biological fact that only women bear children in order to uphold state statutes that treat unwed mothers and fathers differently when it comes to parental rights.[202] It has also upheld the exclusion of women from such things as the draft and liability for statutory rape because of supposed "fundamental" and "physiological" differences between the sexes in matters relating to military combat and sexual predation.[203]

Many feminists supported these decisions. They argued that even if the decisions rested on gender-based stereotypes, those stereotypes were often overwhelmingly accurate: Women do, in fact, take primary responsibility for the nurture and care of children (often at great sacrifice to their own professional advancement), and they are statistically far more likely than males to be victims of physical and sexual aggression.[204] Some feminists also warned that by demanding similar treatment to men in these contexts, women would on a deeper level risk "betraying [them]selves and supporting what [they] find least acceptable about the male world."[205] These arguments reflected a growing consciousness of women's unique and "different voice," one

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[200] Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 862 (1979). This type of biological essentialism has frequently been invoked to justify excluding males from female athletic teams and *vice versa* in order to promote equal opportunity between the sexes in college athletics. *See* Clark, By and Through Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982) (relying on "average physiological differences"); Cape v. Tenn. Secondary Sch. Athletic Ass'n, 563 F.2d 793, 795 (6th Cir. 1977) (relying on "differences in physical characteristics and capabilities between the sexes"). *See generally* Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (2009).

[201] For example, if some women but no men become pregnant, how can the sexes be considered similarly situated for purposes of pregnancy benefits or exclusions? And if they cannot, is it so inconsistent with the norm of equality to fail to treat them the same for such purposes? Or might true equality demand even more, by imposing an affirmative duty to treat them differently? *See generally* Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985) (arguing that biological differences make it literally impossible to treat men and women equally in certain contexts); Law, *supra* note 197 (arguing that unavoidable biological differences such as pregnancy must be taken into account in order to achieve true equality between the sexes).

[202] The rationale is that childbirth almost always makes the woman an identifiable parent and the primary caretaker, whereas the father's identity may never be discovered or he may never assume any responsibilities in child rearing. *See, e.g.*, Parham v. Hughes, 441 U.S. 347, 355 (1979) (finding no equal protection violation in a law that required unmarried fathers, but not mothers, to legitimate their children as a condition for filing a wrongful death claim); Lehr v. Robertson, 463 U.S. 248, 267 (1983) (finding that because men and women are "[not] in fact similarly situated with regard to their relationship with the child," a statute that accorded unwed fathers fewer rights than unwed mothers in adoption proceedings did not violate the equal protection clause); *cf.* Caban v. Mohammed, 441 U.S. 380, 399 (1979) (Stewart, J., dissenting) (relying on the "physical reality" and the "undeniable social reality that the unwed mother is always an identifiable parent and the custodian of the child" to defend a law that gave unmarried mothers (but not fathers) the right to block the adoption of their biological children).

[203] *See* Rostker v. Goldberg, 453 U.S. 57, 76 (1981) (citing Department of Defense Authorization Act of 1981, S. REP. NO. 826, for the proposition that "[t]he principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people"); Michael M. v. Superior Court, 450 U.S. 464, 471 (1981) (justifying statutory rape law's differential treatment of men and women in part because "[o]nly women may become pregnant"); *cf.* Dothard v. Rawlinson, 433 U.S. 321, 336 (1977) (upholding explicit restriction on hiring women as guards in all-male maximum security prison under Title VII BFOQ exception on the ground that "[t]he employee's very womanhood would . . . directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility").

[204] *See* Law, *supra* note 197, at 995–97, 1000–01.

[205] Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN'S RTS. L. REP. 151, 163 (1992).

grounded in an ethic of care and relationship as contrasted with a (perceived) male ethic of aggression and individualism.[206] This consciousness, in turn, led women to envision a non-assimilationist, "difference theory" of equality, one that did not require women to become like men in order to be equal to them.[207]

By taking the position that arbitration and litigation are inherently different for purposes of class-wide relief, *Concepcion* traces its pedigree to something like the difference theory. From this perspective, it represents a more evolved state of thinking about the FAA's antidiscrimination mandate because it avoids the facile presumption that arbitration and litigation must always be treated the same in order to be placed on an "equal footing." But *Concepcion* is also problematic because it reifies differences that are arguably contingent and mutable. This, in turn, exposes it to the same critique of essentialism that has long been the Achilles' heel of difference theory.[208]

Thus, many feminists have argued that the Court's more recent, difference-based equal protection cases—even those that favor women by exempting them from requirements otherwise applicable to men—are in truth scarcely distinguishable from paternalistic decisions from the turn of the century that rested on deeply suspicious stereotypes about the 'fairer sex.'[209] Clearest among these were early cases that restricted women's choices in the world of work—a world traditionally dominated by men. In *Muller v. Oregon*,[210] for instance, the Court upheld a statute making it a crime to employ women (but not men) in certain establishments for more than ten hours per day, even if the women wished to work longer. The rationale was that a woman's "physical organization," "maternal functions," and role in child rearing and "the maintenance of the home" placed her in a position "inherent[ly] differen[t]" from that of a man.[211] Only in more recent times would the Court come to appreciate the way that *Muller* and cases like it used the supposedly inexorable dictates of biology to legitimize arrangements that are now recognized as socially and historically contingent.[212]

Not unlike what it did in *Muller*, in *Concepcion* the Court locates arbitration's principal virtue over litigation in terms of "achiev[ing] 'streamlined proceedings and expeditious

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[206] *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); ELIZABETH WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN (1980).

[207] *See* MacKinnon, *supra* note 197, at 1290–93.

[208] *See, e.g.*, Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 931–43 (1983); MacKinnon, *supra* note 197, at 1287 (arguing that difference theory masks the extent to which so-called "real" differences are socially and legally constructed). *See generally* Williams, *supra* note 205.

[209] MacKinnon, *supra* note 197, at 1286–92. *See generally* Williams, *supra* note 205 (arguing that different treatment of men and women, even where well-intentioned, has historically resulted in the reinforcement of traditional gender roles).

[210] 208 U.S. 412 (1908).

[211] *Id.* at 419 n.1, 422–23. Likewise, in *Bradwell v. Illinois*, 83 U.S. 130 (1872), the Court upheld a state law prohibiting women from becoming members of the bar. Concurring in the judgment, Justice Bradley reasoned that "[c]ivil law, *as well as nature herself*, has always recognized [that] . . . . [t]he paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother" rather than as a lawyer." *Id.* at 141 (Bradley, J., concurring) (emphasis added).

[212] *See* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (criticizing these cases as "put[ting] women, not on a pedestal, but in a cage").

results,'"[213] and professes to protect that virtue from perceived threats such as *Discover Bank*. But it is precisely the notion that arbitration has a fixed *telos* waiting to be discovered that is so dangerously susceptible to abuse. Consider *Wilko v. Swan*,[214] a case that those who support *Concepcion* tend to consider a low point in the history of federal arbitration law. In words strikingly evocative of *Concepcion*, the Court in *Wilko* held that arbitration's primary "advantage[]" in "secur[ing] prompt, economical and adequate" decisions made it correspondingly unsuited to decide weighty and complicated issues under the federal securities laws.[215] Similarly, in *Alexander v. Gardner-Denver*,[216] the Court opined that "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts."[217]

These status-based judgments "centered on the nature of arbitration"[218] have been used time and again to justify invalidating broadly worded arbitration agreements.[219] They also fuel the claims of some of arbitration's fiercest critics: "[T]here is inherent in the institutions of private dispute resolution an endemic disinclination to enforce legal rights rigorously";[220] there is a "total lack of procedural safeguards inherent in the arbitration process";[221] "[n]ow we all know, that arbitrators . . . . are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases."[222] By resurrecting similar generalizations about arbitration's essence—generalizations that are likely no longer even empirically accurate[223]—*Concepcion* is a case study in how easily the (otherwise legitimate) concern for

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[213] *Concepcion*, 131 S. Ct. at 1749; *see also id*. (stating that the "*point* of affording parties discretion in designing arbitration processes" is not to honor autonomy or freedom of contract, but rather to promote "efficient, streamlined procedures" (emphasis added)). The elasticity of these claims is illustrated by AT&T's shifting positions on the matter during the litigation. *Compare* Petition for Writ of Certiorari, *supra* note 31, at 25 (arguing that "the entire point of the FAA is to enable parties to . . . tailor the features of arbitration, especially the procedures, to their needs), *with* Brief for Petitioners, *supra* note 31, at 51 ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'").

[214] 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

[215] *Wilko*, 346 U.S. at 438. Compare this with the Court's more modern *rejection* of the view that the "overriding goal of the [FAA] was to promote the expeditious resolution of claims." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985); *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

[216] 415 U.S. 36 (1974).

[217] *Id*. at 58.

[218] 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009).

[219] *See* Aragaki, *supra* note 18, at 1260; *supra* notes 60–67 and accompanying text.

[220] Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 346 (1996).

[221] Casarotto v. Lombardi, 886 P.2d 931, 940–41 (Mont. 1994) (Trieweiler, J., specially concurring), *vacated*, 515 U.S. 1129 (1995).

[222] Tobey v. Cnty of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065).

[223] *See, e.g.*, Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 11–23 (describing the ways in which arbitration has gradually come to resemble litigation in terms of procedural complexity and delay—so much so that it is losing its popularity as the forum of choice for commercial disputes).

difference can be co-opted in ways that undermine rather than support the goal of nondiscrimination.[224]

Concepcion's essentialism is further problematic because it reinforces what in the gender context has been described as a "separate spheres ideology."[225] Men and women are so ineluctably different, the argument goes, that they can be equal only in their separate and mutually exclusive realms. The answer to man's domination in the sphere of work or politics is therefore not to make woman an equal participant in the same sphere, but rather to give her dominion over an entirely different sphere—that of the hearth and home.[226] To merge the spheres would so upset the essential order of things that women would stop marrying and procreating, and the species would face imminent extinction.[227] The almost apocalyptic fear behind these contentions is of a piece with the fear of racial amalgamation that lies barely concealed beneath the surface of *Plessy v. Ferguson*.[228] In both contexts, separateness is used to justify equality in form but subordination in substance.[229]

This same amalgamation anxiety animates *Concepcion*. It is evident, for instance, in the Court's suggestion that once states are permitted to make class-wide relief non-waivable in arbitration, it is a short step to state laws that require arbitration proceedings to incorporate jury fact finding or judicially monitored discovery.[230] It drives AT&T's prediction that unless *Discover Bank* were preempted as to class arbitration waivers, states could "'chip away at [the FAA] by indirection,'" and thereby "kill arbitration by converting it into litigation."[231] And it is

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[224] Defenders of arbitration have rightly attacked these generalizations as either misrepresenting, misinterpreting, or altogether ignoring available empirical data. *See, e.g.*, Christopher Drahozal, *Arbitration Innumeracy*, 4 Y.B. ARB. & MED. (forthcoming 2012); Drahozal & Wittrock, *supra* note 161; Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267 (2008); PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION—A GOOD DEAL FOR CONSUMERS (2008), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/200804ArbitrationGoodForConsumers-Rutledge.pdf. But after *Concepcion*, the temptation by courts and advocacy groups to parrot these and other simplistic judgments about arbitration's inherent shortcomings vis-à-vis courtroom adjudication—empirical evidence to the contrary notwithstanding—will become harder to resist.

[225] Williams, *supra* note 205, at 153–54.

[226] *See, e.g.*, Pamela S. Karlan & Daniel R. Ortiz, *In a Different Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 892–93 (1993).

[227] *See* BETTY A. DEBERG, UNGODLY WOMEN: GENDER AND THE FIRST WAVE OF AMERICAN FUNDAMENTALISM 53, 57 (1990).

[228] 163 U.S. 537, 544 (1896), *overruled by* Brown v. Bd. of Ed. of Topeka, Kan., 347 U.S. 483 (1954). The uneasy alliance between the "separate but equal" logic of *Plessy* and difference-based claims in the gender context has been widely noted. *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–21 (1997); Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177, 182 (1999) (arguing that by requiring separate male and female athletic teams, Title IX enforces a "separate but equal" framework). The connection between *Plessy* and *Concepcion* has likewise been noted. *See* Cliff Palefsky, *Separate and unequal*, SCOTUSBLOG (Sep. 14, 2011, 12:57 PM), http://www.scotusblog.com/2011/09/separate-and-unequal/.

[229] *See* MacKinnon, *supra* note 197, at 1289–98; Siegel, *supra* note 228, at 1119–20.

[230] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747–48 (2011); Transcript, *supra* note 88, at 38 (Breyer, J.).

[231] Brief for Petitioner, *supra* note 31, at 17 (quotation omitted), 21; *see also* Petition for Writ of Certiorari, *supra* note 31, at 30–32.

latent in other recent decisions from the Court, such as *Hall Street Associates v. Mattel*,[232] that seek to enforce a clear boundary between the respective provinces of arbitral and judicial proceedings.[233]

To be sure, there are compelling policy reasons for advocating a "separate but equal" approach in the arbitration area in a way that does not obtain in the context of race. No matter what we believe (or are told by the Court to believe) about arbitration's capacity to function as a surrogate for litigation in the vast majority of civil cases, there are certain undeniable architectural differences between the two forums—differences that make it impossible for arbitration to function in all the ways that a court of law can (and *vice versa*).[234] The point is just that what we take to be "real" differences are not ideologically neutral and are more often than not socio-legally constructed and self-fulfilling.[235] Care must therefore be taken before using essentialism to justify exceptionalism.

Consider the way in which the Court manages to exaggerate the differences between litigation and arbitration by eliding the extent to which collective actions are arguably just as incompatible with the former as they are with the latter.[236] For example, the rigorous requirements for class certification[237] reflect a judgment that not all litigated cases are suitable for class-wide relief (and for exactly the same reasons of complexity, delay, and absent third parties that *Concepcion* identified in the context of arbitration).[238] This judgment is borne out by extant (but admittedly sparse) empirical data suggesting that well below half of all putative class actions

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[232] 552 U.S. 576 (2008).

[233] In *Hall Street*, the Court held that private parties could no longer contract for *de novo* review of arbitral awards by a court of law, in part because doing so "opens the door to . . . full-bore legal and evidentiary appeals," which would compromise "arbitration's *essential virtue* of resolving disputes straightaway." *Id*. at 588 (emphasis added).

[234] I have previously made this very point in the arbitration context. *See* Aragaki, *supra* note 50, at 1250–54. Feminists have likewise argued that certain undeniably "real," biological differences between the sexes justify treating men and women differently in order to achieve equality in substance. *See supra* notes 200–207 and accompanying text.

[235] *See supra* note 208. Moreover, the bare fact of difference—even a so-called "essential" difference—does not in itself dictate the proper legal response to that difference. This point has been made forcefully in the context of disability discrimination. *See, e.g.*, Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 597–608 (2004).

[236] The Court has on numerous occasions declared that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," *see* Hansberry v. Lee, 311 U.S. 32, 40 (1940), and that "[t]his rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" Martin v. Wilks 490 U.S. 755, 726 (1989) (quotation omitted), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1072, *as recognized in* Landgraf v. USI Film Products, 511 U.S. 244 (1994).

Consider also that state class action rules vary widely. Some are modeled on Fed. R. Civ. P. 23 (either pre- or post-1966 revision), but others are based on the old nineteenth century Field Code, on the Uniform Class Action Act, or some combination thereof. *See* Thomas D. Rowe, *State and Foreign Class-Actions Rules and Statutes: Differences From—And Lessons For?—Federal Rule 23*, 35 W. ST. U. L. REV. 147, 148–51 (2007). Some states do not even have a class action rule. These differences suggest a disagreement even with litigation systems about the extent to which class-wide relief is compatible with the adjudicative process.

[237] *See* FED. R. CIV. P. 23(b)(1)–(3).

[238] *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 571 (2d Cir. 1968) (Lumbard, J., dissenting) (describing "practical and insurmountable difficulties . . . . inherent" in maintaining the case at bar as a class action).

are certified.[239] In language reminiscent of *Concepcion*, scholars such as Martin Redish have claimed that "all class action models . . . should be rejected because they ignore, undermine, or dilute *fundamental* notions of process-based individual autonomy that are *essential* to the functioning of a civil justice system."[240] Likewise, when the 1966 revisions to Rule 23 of the Federal Rules of Civil Procedure were issued, many viewed them as doing "more to *change the face of federal practice* than any other procedural development of the twentieth century, including the promulgation of the Civil Rules in 1938."[241] As in *Concepcion*, the fear was that class actions would make "litigation so complex as to be beyond the power of judicial tribunals to adjudicate on any rational basis."[242] By showcasing the way that class-wide relief conflicts with arbitration while suppressing the way in which it is likewise incompatible with litigation, therefore, the Court manages to invent differences that are not necessary or unavoidable. This, in turn, downplays the important ways in which the two adjudicative forums are the same and thus the reasons why they should be regulated accordingly.

Once we commit ourselves to *Concepcion*'s premise that certain things commonly associated with litigation such as the class mechanism or the Federal Rules of Evidence frustrate the essence of arbitration, it seems to me we must now begin to re-evaluate many things that we previously took for granted. For example, the state of Illinois requires that in certain circumstances, the "Rules of Evidence that apply in the circuit court for placing medical opinions into evidence shall govern" in motor vehicle insurance coverage arbitrations.[243] California deems

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[239] *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 NOTRE DAME L. REV. 591, 635 (2006) (reporting class certification rate of 22% or lower); JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, CLASS CERTIFICATION IN CALIFORNIA: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION 5 (2010) (reporting class certification rate of 22%); THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 9 (1996), *available at* http://ftp.resource.org/courts.gov/fjc/rule23.pdf (reporting class certification rate of 37%).

[240] MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 90 (2009) (emphasis added); *see also* Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits-the Twenty Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) (describing class actions as a "*de facto* depriv[ation] of [defendants'] constitutional right to a trial on the merits"); *cf.* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1345 (1995) (describing the increased acceptance of mass tort class action as something of "a paradigm shift, signaling a fundamental movement away from the traditional bipolar organization of litigation to a new, more collectivized structure").

[241] *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem*," 92 HARV. L. REV. 664, 665–66 (1979) (emphasis added). Compare this with the Court's recent declaration that class arbitration "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010).

Likewise, in *Wal-Mart Stores, Inc. v. Dukes*, decided the very same Term as *Concepcion*, Justice Scalia acknowledged that the class action was an "'exception'" and a "departure" from "'the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" 131 S. Ct. 2541, 2550 (2011).

[242] Am. Bar Ass'n., *Report of Pound Conference Follow Up Task Force*, 74 F.R.D. 159, 194 (1976); *see also* Miller, *supra* note 241, at 665–66.

[243] *See* 215 ILL. COMP. STAT. ANN. 5/143a(1) (West 2008). The same statute makes certain provisions of the Illinois Code of Civil Procedure relating to subpoenas and cross examination applicable to such arbitration proceedings. *Id*. at 5/143a(2)(C) & (D).

incorporated into every agreement to arbitrate wrongful death or injury claims "a right to take depositions and to obtain discovery" in the same manner and to the same extent available in a comparable action pending before a superior court.[244] Some regulatory bodies, trade associations, and dispute resolution providers not only prohibit waivers of, but affirmatively require, certain procedural protections similar (but not identical) to what might be found in litigation, such as (a) a right to discovery,[245] (b) a right to file a motion to dismiss or a motion for summary judgment,[246] (c) a right of appeal to an appellate arbitration panel,[247] (d) a right to peremptory and cause-based challenges to appointed arbitrators,[248] (e) a right to permissive joinder and consolidation,[249] and (f) a right to written, publicly available awards.[250] These are all examples of

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Some private dispute resolution providers also require arbitrators to follow applicable state and federal rules of evidence or privilege. *See, e.g.*, AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES, R–31(c) (2009); AM. ARBITRATION ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon II(H) (2004); INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, NON-ADMINISTERED ARBITRATION RULES, R. 12.2 (2007); *see also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 840 (1994) ("In general, lower U.S. courts have assumed that privileges are unaffected either by the parties' agreement to arbitrate."); Bruce A. McAllister & Amy Bloom, *Evidence in Arbitration*, 34 J. MAR. L. & COM. 35, 50–51 (2003) ("The attorney client privilege may be, and is often, asserted in arbitration proceedings. Arbitrators should, after in camera review of the assertedly privileged documents, uphold the privilege where appropriate."); James H. Carter, *The Attorney-Client* Privilege *and Arbitration*, 2:1 ADR CURRENTS, Winter 1996–97, at 1, 15 ("The courts have held, in the main, that arbitrators should honor legal privileges as would judges.").

[244] *See* CAL. CIV. PROC. CODE §§ 1283, 1283.05, 1283.1 (West 2008).

[245] *See* FIN. INDUS. REGULATORY AUTH. RULES, R. 10213 (superseded for claims filed after April 16, 2007) [hereinafter FINRA RULES]; *id*. 13500–13514; AM. ARBITRATION ASS'N, MINNESOTA NO-FAULT, COMPREHENSIVE OR COLLISION DAMAGE AUTOMOBILE INS. ARBITRATION RULES, R. 12 (2010) [hereinafter MINNESOTA NO-FAULT RULES]; *cf*. NAT'L CONSUMER DISPUTES ADVISORY COMM., CONSUMER DUE PROCESS PROTOCOL, princ. 13 (2011) (encouraging the use of discovery); TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMP'T, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMP'T RELATIONSHIP (1995) (same).

[246] *See* FINRA RULES, *supra* note 245, R. 12504, 13504; AM. ARBITRATION ASS'N, NAT'L RULES FOR THE RESOLUTION OF EMP'T DISPUTES, R. 34(d) (1999); *cf.* 2005 AAA Employment LEXIS 50 (Robert T. Simmelkjaer, Arb.) ("[S]ince courts are empowered to grant summary judgment pursuant to the Federal Rule of Civil Procedure . . . as well as through comparable state rules, this Tribunal is similarly authorized."); RUAA, *supra* note 68, § 15(b)(2) (providing for summary disposition procedure).

[247] *See, e.g.*, AM. ARBITRATION ASS'N, SUPPLEMENTARY PROCEDURES FOR THE ARBITRATION OF ANTI-DOPING RULE VIOLATIONS, R–45 (2009) [hereinafter ANTI-DOPING PROCEDURES]; AM. ARBITRATION ASS'N, RULES FOR ARBITRATION OF NO-FAULT DISPUTES IN THE STATE OF NEW YORK (2007) [hereinafter NEW YORK NO-FAULT RULES]; GREEN COFFEE ASS'N, RULES OF ARBITRATION, art. XVII, *available at* http://www.greencoffeeassociation.org/images/uploads/resources/PROFESSIONAL_RESOURCES-Arbitration_Rules.pdf; *cf.* James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT'L ARB. 9 (2004) (urging providers to adopt procedures allowing parties to obtain reconsideration of arbitral awards).

[248] FINRA RULES, *supra* note 245, R. 10308(d) & (f) (superseded for claims filed after April 16, 2007); *id*. 10311 (same); *id*. 13410; NEW YORK STOCK EXCH. DEPT. OF ARBITRATION, NYSE CONSTITUTION AND ARBITRATION RULES, R. 609(a) & (b) (2003) [hereinafter NYSE RULES]; MINNESOTA NO-FAULT RULES, *supra* note 245, R. 8; NEW YORK NO-FAULT RULES, *supra* note 247.

[249] *See* FINRA RULES, *supra* note 245, R. 10314(d) (superseded for claims filed after April 16, 2007); NYSE RULES, *supra* note 248, R. 612(d).

[250] FINRA RULES, *supra* note 245, R. 10330 (superseded for claims filed after April 16, 2007); *id.* 13904(h); AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATION, R. 9, 10 (2003); ANTI-DOPING PROCEDURES, *supra* note 247, R–42; *cf*. CAL. CIV. PROC. CODE § 1281.96 (West 2008) (requiring private arbitration providers to make publicly available key details of arbitration award).

imposing litigation-like procedures in arbitration—procedures that, according to *Concepcion*, are no less incompatible with arbitration than is the class mechanism.[251] Are they likewise preempted or otherwise displaced by the FAA?

A similar set of questions arises when, over the objection of one side, an arbitrator relies on state or federal rules of evidence or procedure in a way that affects the outcome of a case.[252] If the imposition of such rules of decision is fundamentally incompatible with the arbitration process after *Concepcion*, may the disappointed party now successfully argue for vacatur of the resulting award on the ground that the arbitrator has "exceed [her] powers" or violated (federal) public policy?[253]

These are serious and viable questions in a post-*Concepcion* world. If rules that operate to ensure fairness in the default context of litigation conflict with the very definition of arbitration, then efforts to regulate procedural fairness in arbitration (whether by states, private regulatory bodies, or arbitrators themselves) that are modeled on such rules will be prone to attack as underhanded attempts to conform arbitration to litigation's image. Courts will increasingly use FAA preemption as an excuse to exempt arbitration from rules such as *Discover Bank* while continuing to enforce those rules in the litigation context. Efforts to uphold the same minimum standards in both forums will thereby be stymied. This perpetuates the very discrimination that the Court claims it seeks to eradicate because it reinforces arbitration's separate sphere—a sphere in which the usual standards of fairness do not apply (and, after *Concepcion*, *cannot* apply without destroying the very nature of arbitration under the FAA).

Now consider the problem presented by the opposite of *Discover Bank*—laws that forbid rather than impose class arbitration, or that prohibit rather than require use of the Federal Rules of Evidence. Such laws would upset the contractual expectations of parties who currently incorporate all manner of litigation-like rules and procedures into their arbitration agreements: not just class-wide relief,[254] but also appellate review,[255] comprehensive discovery,[256] the federal rules

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[251] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011).

[252] *See, e.g.*, Painewebber Grp., Inc. v. Zinsmeyer Trusts P'ship, 187 F.3d 988, 992 (8th Cir. 1999) (describing arbitration panel's compliance with Fed. R. Civ. P. 26(b)(5)); 2009 AAA Employment LEXIS 240 (James Greenwood, III, Arb.) (applying state rules of evidence); 2009 AAA Employment LEXIS 203 (David H. Stacy, Arb.) (applying Fed. R. Civ. P. 36(a)(3) to discovery dispute in arbitration); 2005 AAA Employment LEXIS 331 (G. Phillip Shuler, III, Arb.) (applying Fed. R. Civ. P. 56 to grant summary judgment in arbitral proceeding); 2000 AAA Employment LEXIS 152 (William H. Ewing, Arb.) (stating that "legal rules of evidence . . . should apply in arbitration proceedings unless there is a very good reason for departing from them"); 1999 AAA Employment LEXIS 58 (Pamela J. White, Arb.) (noting that arbitrator was "guided by the Federal Rules of Evidence"); 1999 AAA Employment LEXIS 47 (Kevin B. Krauss, Arb.) (stating that the arbitrator used state rules of evidence and civil procedure "as a guide in processing this claim").

[253] *See* 9 U.S.C. § 10(a)(4) (2009); United Paperworkers Int'l v. Misco, 484 U.S. 29, 43 (1987).

[254] *See* Skirchak v. Dynamics Research Corp., 508 F.3d 49 (1st Cir. 2007) (noting stipulation by both parties to class arbitration); Sandra K. Partridge, *Arbitration post*-AT&T Mobility v. Concepcion *at the American Arbitration Association—A Service Provider's Perspective*, 4 Y.B. ARB. & MED. (forthcoming 2012) (noting that 347 class arbitrations have been filed with the AAA alone since 2003, 53 of which after *Stolt Nielsen*).

of evidence[257] and even the federal rules of civil procedure.[258] The Court has emphasized time and again that "[a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."[259] The FAA should therefore preempt state laws that seek to curtail that freedom of contract. But after *Concepcion*, it is difficult to appreciate how a law that merely forbids the very things that the Court believes are fundamentally incompatible with arbitration's true nature can possibly frustrate the FAA's purpose.[260]

This second set of examples highlights the way in which the Court's preoccupation with arbitration's status belies its purported fealty to freedom of contract in matters arbitration. Just as *Muller* restricted women's choices in the sphere of employment, so *Concepcion* threatens one of the cardinal virtues of arbitration: the freedom it affords in the design of a disputing process. Modern arbitration law has largely been organized around vindicating this freedom by enabling arbitration to become whatever the contracting parties agreed it would become—even if this means it might never become anything at all.[261] By contrast, *Concepcion* returns arbitration to the yoke of status. It implies that an agreement audacious enough to contemplate inefficient and complex class procedures does not deserve the FAA's protection.[262] Freedom of contract and favoritism toward arbitration, in other words, are ultimately qualified—they are to be pursued only in the name of a particular conception of arbitration as a quick and dirty version of litigation.

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[255] Several arbitral providers have promulgated procedures for appealing arbitral awards to an appellate arbitral panel, suggesting that the practice is not unknown. *See, e.g.*, AM. ARBITRATION ASS'N, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE 37 (2007); JUDICIAL ARBITRATION & MEDIATION SERVS. (JAMS), OPTIONAL ARBITRATION APPEAL PROCEDURES 2–5 (2003); INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, ARBITRATION APPEAL PROCEDURE (2007). Several published court decisions have also described the use of appellate arbitration provisions. *See, e.g.*, Little v. Auto Stiegler, Inc., 63 P.3d 979, 982, 987 (Cal. 2003); *In re* Hospitality Emp't Grp., LLC, 234 S.W.2d 832, 835 (Tex. App. 2007).

[256] *See, e.g.*, Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 541 (E.D. Pa. 2006) (describing arbitration clause providing for discovery pursuant to state rules of civil procedure); Zebrasky v. Valdez, 888 N.E.2d 1130, 1131 (Ohio App. 2008) (same); COMMERCIAL CONTRACTS: STRATEGIES FOR DRAFTING AND NEGOTIATING § 5.04[F][4], at 5–48 (2012) (recommending inserting a provision for discovery in accordance with the Federal Rules of Civil Procedure); Stipanowich, *supra* note 75, at 383.

[257] *See infra* note 258.

[258] *See, e.g.*, 2008 AAA Employment LEXIS 381 (Robert T. Simmelkjaer, Arb.) (noting that parties had agreed to be bound by the Federal Rules of Evidence and the Federal Rules of Civil Procedure); 2002 AAA Employment LEXIS 150 (Chuck Miller, Arb.) (same); 2001 AAA Employment LEXIS 53 (Ellen J. Alexander, Arb.) (noting that, per the parties' agreement, "[t]he arbitrator shall also apply the Federal Rules of Evidence"); Stipanowich, *supra* note 75, at 383.

[259] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

[260] To take an extreme example, would we say that a law forbidding men (but not women) from becoming pregnant in any meaningful sense violates the constitutional guarantee of equal protection?

[261] *See Volt*, 489 U.S at 478–79 ("[W]e have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so.").

[262] *See supra* note 74.

B. The Touchstone of Intentional Discrimination

My goal in the prior section was to explain *Concepcion*'s essentialism as a classic antidiscrimination move, one that nonetheless comes with significant and well-known costs that our experience in the gender discrimination context suggests are not worth paying. In this section, I seek to show that these costs did not need to be (and should not have been) paid in the first place.

The Court used essentialism to answer the question of how we tell whether a facially neutral law "discriminates" against arbitration. It was led down this path, however, only because it mistakenly ended up focusing on "disproportionate impact" as the touchstone for discrimination[263]—that is, on *Discover Bank*'s *de facto* unequal treatment of arbitration and litigation in the way that it imposes on both forums a procedure that is fundamentally incompatible only with the former. This overlooks a much more compelling alternative, which was to focus on whether California's context-specific unconscionability rule constituted *de jure* discrimination. Doing so would have forced the Court to make good on its own claim that *Discover Bank* exhibits the same "judicial hostility towards arbitration that prompted the FAA [and that] had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy."[264]

Hostility is not a word we associate with chance. To say that a law or employment practice is "hostile" toward a particular group is to say that it was motivated—however subliminally—by a purpose to discriminate.[265] Thus, if we are to take seriously the Court's longstanding position that the FAA was enacted to reverse the "old common law hostility toward arbitration,"[266] it follows that the FAA should be construed to preempt only state laws that are *intentionally* anti-arbitration.[267] This is consistent with AT&T's framing of the preemption issue in terms of pretext and with the Court's own discussion of *Discover Bank* and the parade of horribles.[268] Federal arbitration law, in short, represents a purpose-based antidiscrimination regime.[269] This interpretation is not only more faithful to the Court's accumulated FAA jurisprudence, it is also more sensible from a federalism perspective. Because proving discriminatory purpose is exceptionally difficult, intent-based antidiscrimination regimes afford less protection than their effects-based counterparts.[270] In the arbitration context, this means that

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[263] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011).

[264] *Id*. (quoting Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406 (2d Cir. 1959)).

[265] *See* BLACK'S LAW DICTIONARY 806 (9th ed. 2009) (defining "hostility" as "[a] state of enmity between individuals or nations" and as "[a]n act . . . displaying antagonism"; defining "hostile" as "[s]howing ill will or a desire to harm"). By contrast, antisubordination claims, while perhaps a response to a legacy of hostility toward certain groups, are not necessarily predicated on hostility. Instead, they tend to be focused more on remedying the effects of that hostility, even where the hostility itself has largely disappeared.

[266] Southland Corp. v. Keating, 465 U.S. 1, 14 (1984); *see also supra* notes 109–110 and accompanying text.

[267] This, I take it, is the point behind Alan Rau's claim that *Concepcion* does not prevent an arbitrator (as opposed to a court) from declaring class waivers unconscionable. *See* Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 507–09 (2011).

[268] *See supra* notes 107–115 and accompanying text.

[269] This is a point I have argued at length elsewhere. *See* Aragaki, *supra* note 50, at 1210–18.

[270] *See* Siegel, *supra* note 228, at 1135–1140.

fewer claims of discrimination against arbitration will survive, and thus that fewer state laws will suffer preemption.[271]

By declaring that class arbitration is incompatible with arbitration's true nature, the Court managed to find a colorable ground for conflict with the FAA without delving into the messier question of whether that conflict was haphazard or the product of improper motives. For if a state law can be described as striking at the essence of arbitration, it does not seem to matter much whether it does so through hostility or by accident. In either case, the FAA's purposes and objectives would appear to be quite clearly frustrated. But notice that the *reason* why they are frustrated has now changed: It is no longer that the state law in question functions as a pretext, perpetuating anti-arbitration policies behind the guise of a facially neutral regulation, as AT&T had originally claimed. Instead, it is that the law—however well-intentioned toward arbitration—has managed to turn arbitration into something that it plainly is not.[272]

Had the requirement to prove purposeful discrimination been better appreciated by the litigants and the Court, it would have provided a clean and simple way to distinguish *Discover Bank* from AT&T's parade of horribles. These hypothetical laws are problematic not because they just happen to produce disparate impacts on arbitration. Rather, they are problematic because we suspect them to be predicated on little more than knee-jerk litigation chauvinism: the bare assumption that only the judicial forum—or features designed for that forum or otherwise unique to it, such as the Federal Rules of Evidence and jury fact-finding—is adequate to resolve certain types of consumer claims.[273]

In order to analogize *Discover Bank* to these examples, it would need to be fairly evident that *Discover Bank* likewise purposefully discriminates against arbitration. But even if it could be taken to "impose" class arbitration,[274] *Discover Bank* does not dictate the particular *form* that such a procedure must take. It does not, for instance, require the wholesale importation of judicial class action rules and procedures such as Rule 23 of the Federal Rules of Civil Procedure into the arbitration context, and so does not betray the same type of chauvinism evident in the parade of horribles. The most that can be said about *Discover Bank* is that it mandates the availability of *some type* of class mechanism (and then only if the Concepcions could satisfy the requirements

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[271] On the current "over-preemption" of state laws by the FAA, see Aragaki, *supra* note 18, at 1269–85; Jill I. Gross, AT&T Mobility *and FAA Over-Preemption*, 4 Y.B. ARB. & MED. (forthcoming 2012).

[272] To be sure, the majority's holding might be understood as a claim that *Discover Bank*'s attack on class waivers somehow represented the intentional targeting of the arbitration process itself. But AT&T offered no persuasive reasons to rebut the strong inference that a law that applies equally to class waivers in arbitration and litigation could possibly be construed as hostile only to arbitration. *See supra* notes 159–162 and accompanying text. Moreover, there are legitimate reasons for opposing class waivers (*e.g.*, protecting consumers, policing large-scale wrongdoing by companies, leveling the litigation playing field) that have nothing to do with—and do not readily suggest—hostility toward arbitration *per se*. In other antidiscrimination contexts, Justice Scalia has had no problem making this very point to conclude that purposeful discrimination had not been established. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270–73 (1993) (Scalia, J.).

[273] *See supra* notes 107–115, 176–181 and accompanying text; *see also* Transcript, *supra* note 88, at 47 (Alito, J.) (hypothesizing that a state might require the use of evidence rules in arbitration on the ground that they are somehow "necessary in order for parties to be treated fairly").

[274] As others have pointed out, *Discover Bank* does not mandate anything other than the nonenforcement of class waivers in certain contexts. *See, e.g.*, Transcript, *supra* note 88, at 15–16 (Sotomayor, J.); Rau, *supra* note 267, 526–27; Jean R. Sternlight, *Tsunami:* AT&T Mobility v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 707 (2012).

for class certification). Because the parties had agreed to arbitrate before the American Arbitration Association (AAA), that mechanism would have conformed to the AAA's class arbitration rules.[275] But it did not need to. AT&T could just as well have drafted its own class arbitration rules, thereby protecting itself from all of the defense-side risks cited by the Court to defend its preemption holding. Alternatively, the arbitrator could have been entrusted to formulate a class arbitration procedure that stayed true to the supposed essential virtues of arbitration. Or the parties could have agreed on a class arbitration procedure after the fact, which likely would have been sufficient to protect the integrity of the process, at least from AT&T's perspective.[276] Absent further explanation, therefore, *Discover Bank* does not betray any necessary hostility to arbitration.

Given these features of *Discover Bank*, a more appropriate comparison for the Court to draw would have been to (a) laws requiring the availability of *some type* of discovery process or evidentiary rules in arbitration and litigation, rather than to (b) laws requiring the availability specifically of judicially monitored discovery or the Federal Rules of Evidence. But it is not entirely clear that laws falling within category (a) are all that hostile to arbitration.[277] Most arbitral providers allow each party some minimal discovery,[278] and arbitral awards would likely be vacated if relevant material evidence were arbitrarily excluded.[279] Moreover, because laws falling within category (a) impose the same generic restrictions in the litigation context, it suggests that they were intended to regulate the applicable process feature (discovery, evidence rules, etc.) rather than the particular forum in which those features are used. If the Court is correct that *Discover Bank* is indistinguishable from these laws, therefore, it follows from my argument that *Discover Bank* also does not evince the type of purposeful discrimination toward arbitration that the FAA was designed to reverse.

As the party seeking preemption based on a pretext theory, AT&T bore the burden to rebut this conclusion—to prove that a rule that declares class waivers unconscionable to the same extent in arbitration as in litigation somehow purposefully discriminates only against arbitration. In more traditional antidiscrimination contexts, a plaintiff asserting a claim of pretext is typically required to prove not just that employers or state actors were aware of the consequences of their

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[275] *See* Laster v. AT&T Mobility LLC, 584 F.3d 849, 856 n.10 (9th Cir. 2009). True, the AAA modeled its rules after Fed. R. Civ. P. 23. But the same can be said for other rules commonly used in arbitration, such as those relating to discovery and appeal to an appellate arbitration panel. These rules have been in use for decades; yet nobody has thought to claim that they somehow change the fundamental nature of arbitration simply because they were modeled on a rule of court procedure.

[276] By contrast, the Court's conclusion that class arbitration is fundamentally inconsistent with arbitration implies that no type of class arbitration, no matter how well tailored to the arbitral process, can get off the ground without vitiating the entire enterprise of FAA arbitration itself. It amounts to a ruling that the class mechanism is not a legitimate feature of adjudication generally, but is rather so intimately bound up with the litigation process that making it nonwaivable in other adjudicative forums would effectively convert those forums into litigation.

[277] This is especially so where, as here, the application of such laws is further limited to "consumer contract[s] of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

[278] *See supra* note 245.

[279] *See* 9 U.S.C. § 10(a)(3) (2009); Generica Ltd. v. Pharmaceutical Basics, Inc., 125 F.3d 1123, 1130 (7th Cir. 1997); RUAA, *supra* note 68, § 15 cmt. 1.

actions on protected groups but that they affirmatively intended those consequences.[280] AT&T made nothing close to this showing, however.[281] The majority should, therefore, have held that AT&T had failed to discharge its burden to prove discrimination, as it has been apt to do in more traditional discrimination contexts.[282]

Instead, the majority decided the FAA preemption issue by speculating about the effect that class actions would have on arbitration's essential nature, thereby relieving itself and AT&T from inquiring into discriminatory intention. In form, therefore, *Concepcion* amounts to a type of reasonable accommodation decision: It exempts arbitration from a neutral, generally applicable rule such as *Discover Bank* based solely on a perceived intolerable tension between the rule and the "essence" of arbitration.[283] From the standpoint of an antidiscrimination theory of FAA preemption, this was the crucial mistake in *Concepcion*.

V. CONCLUSION

In a trenchant critique of the majority's opinion, Alan Scott Rau argues that "whatever one can possibly spin out of all this in the way of 'doctrine' begins to seem increasingly pointless . . . . [because] we are clearly quite far here from anything that bears a recognizable resemblance to any neutral and informed process of adjudication."[284] By contrast, in this Essay I have argued that *Concepcion* is in fact organized around a distinct logic of antidiscrimination—a logic that, while perhaps still unrefined and poorly understood, makes a claim to neutrality and principle nonetheless.

It is time for us to take that logic seriously. For far too long, our failure to do so at both the practitioner and academic levels has allowed courts and litigants to exploit ambiguities and lacunae in our collective understanding of that logic to justify partisan, result-driven outcomes. A more sophisticated engagement with that logic, I argue, opens up an avenue for holding courts and litigants to the full implications of their own antidiscrimination-based arguments and holdings. This, I hope, will help place sensible limits on FAA preemption of state law.

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[280] *See supra* note 102 and accompanying text; *supra* note 110.

[281] *See supra* notes 159–162 and accompanying text.

[282] Michael Dorf put this point well: "In the *AT&T* case, moreover, the majority opinion exhibits tension with another jurisprudential principle favored by Justice Scalia and other conservatives. In cases under the Equal Protection Clause and the Free Exercise Clause, Justice Scalia and his fellow travelers have repeatedly argued against disparate impact tests." Michael C. Dorf, *Arbitration Decision Suggests SCOTUS Majority Are Pro-Business More Than Jurisprudential Conservatives*, DORF ON LAW (Apr. 29, 2011, 12:42 AM), http://www.dorfonlaw.org/2011/04/arbitration-decision-suggests-scotus.html; *see also* Employment Div. v. Smith, 494 U.S. 872, 878–84 (1990) (Scalia, J.) (holding that a generally applicable law does not offend the Free Exercise Clause absent proof that it was intended to discriminate against religion).

[283] *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 210, 217–19 (1972) (finding generally applicable law to violate the Free Exercise Clause because it directly conflicted with "fundamental," "essential," and "central" commands of the Amish faith).

[284] *See* Rau, *supra* note 267, at 550; *see also id.* at 544.

ARBITRATION POST-*AT&T MOBILITY V. CONCEPCION* AT THE AMERICAN ARBITRATION ASSOCIATION - A SERVICE PROVIDER'S PERSPECTIVE

Sandra K. Partridge[*]

I. INTRODUCTION

After the Supreme Court hands down an opinion about arbitration, scholars debate what it means to the law of arbitration and service providers decide how it will affect cases in practice. Some Court decisions change the manner and scope of the cases a provider may administer. *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*[1] and *AT&T Mobility v. Concepcion*[2] changed class action arbitration for ongoing and future cases.

Class arbitration began in earnest as a result of the Court's directive in 2003 in *Greentree Financial Corp. v. Bazzle* where the court allowed that an arbitration clause silent on the issue of class arbitration could be found by an arbitrator to permit class adjudication.[3] Having selected arbitration rather than litigation, parties with small claims from the same contract were able to form putative classes and take steps to be certified and move their claims forward in arbitration. From this decision, arbitrators were viewed to have gained the authority to grant class status to groups of similarly situated Claimants[4] and over the next eight years the American Arbitration Association ("AAA") saw 347 class arbitration cases filed under Class Arbitration Rules that were issued shortly after the *Bazzle* decision. Special panels of arbitrators, a public class action docket, and a dedicated team of case managers came into being as the AAA sought to administrate these cases fairly and openly.

A sea change to class arbitration arrived with *Stolt-Nielsen's* pronouncement that the arbitrators in that case exceeded their powers when they certified a putative class without a basis in law or express contractual evidence of the parties' desire to arbitrate as a class.[5] Questions surfaced. Was class arbitration dead? As parties are unlikely to agree pre-dispute to a process that may apply to an unknown class for an unanticipated dispute, and even more unlikely to agree to class arbitration post-dispute, the Court appeared to raise significant questions about the viability of class arbitration. And if there were no class arbitrations, did state court rulings that class action waivers in arbitration agreements were unconscionable mean parties were required to arbitrate as individuals or to litigate their claims? Could the absence of arbitrators' authority to permit a class action arbitration to proceed where the arbitration agreement is silent on the issue

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[1] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

[2] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[3] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447 (2003).

[4] *See id.*

[5] *Stolt-Nielsen*, 130 S. Ct. at 1770.

mean that class arbitration cases would no longer be filed and the existing cases would be terminated?

In 2011, the Court held that a class action waiver contained in an arbitration agreement could be enforced thereby negating California's *Discover Bank* rule.[6] In doing so, the Court directed the parties to arbitrate as individuals. In *AT&T Mobility v. Concepcion*, the Court referenced its prior holding in *Stolt-Nielsen*, stating:

> We then held that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental."[7]

Further, when addressing the public policy arguments that were asserted in favor of class actions the Court held "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[8] Thus after *Concepcion*, arbitration clauses with class action waivers could be enforced despite the existence of states with common law that held to the contrary. The AAA's Consumer Due Process Protocols[9] continued to be a cornerstone for protecting the rights of consumers with new disputes arbitrating as individuals. This paper looks at the AAA's experience administrating class arbitrations from *Bazzle* to post-*Concepcion* from a service provider's perspective.

II. *BAZZLE* ALLOWS CLASS ARBITRATION AND THE AMERICAN ARBITRATION ASSOCIATION RESPONDS

When *Greentree Financial Corp. v. Bazzle* was decided in 2003, it was apparent that arbitration would be presented with novel questions regarding whether a class could be certified in arbitration and whether that question should be determined by the arbitrators.[10] The American Arbitration Association recognized that its Commercial Rules then in effect, did not contain procedures that would adequately address the issues that *Bazzle* suggests should be decided by arbitrators; namely whether an arbitration clause permits class proceedings and if it does, what procedures should be followed for the resolution of the class' claims. Arbitration had been, up to that point, an event primarily between individual parties and several multi-parties. Another consideration was the Class Arbitration Panel - what qualifications, experience and training should members of this panel possess?

On October 8, 2003, the American Arbitration Association developed its Supplementary Rules for Class Arbitration[11] and selected a national panel to hear cases under the new

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[6] *See* Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

[7] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011).

[8] *See id.* at 1753.

[9] *See AAA Consumer Arbitration*, AM. ARB. ASS'N, http://www.adr.org/consumer_arbitration (last visited May 22, 2012).

[10] *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452-53 (2003).

[11] *See Supplementary Rules for Class Arbitrations*, AM. ARB. ASS'N, http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004129&_afrLoop=421945609641502&_afrWindowMode=0&_afrWindowId=y4z8872x1_1#%40%3F_afrWindowId%3Dy4z8872x1_1%26_afrLoop%3D421945609641502%26doc%3DADRSTG_004129%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dy4z8872x1_53 (last visited May 22, 2012).

Supplementary Rules in combination with the underlying AAA Rules. The Supplementary Rules "shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class." In the Supplementary Rules, arbitrators first review the arbitration clause and then issue a partial final award determining whether the clause can permit class action arbitration. In the next phase, using the standards generally provided for in Federal Rule of Civil Procedure 23, arbitrators decide whether the class can be certified and issue a reasoned partial award. If the determination is that the class should be certified, the arbitrators will then hear the merits of the case and issue a final award. The Supplementary Rules provide that "at least one of the arbitrators shall be appointed from the AAA's national roster of class arbitration arbitrators."[12]

A set of minimum qualifications was developed for the AAA Class Arbitration Panel that includes: extensive class action experience - specifically where an individual has experience such that a substantial portion of her practice is devoted to litigating class action matters in arbitration or in other dispute resolution forums; experience with a broad range of practice areas and has knowledge of recent class action court decisions; experience with class action litigation as a state or federal judge; and extensive experience in conflict management and leadership role(s) in legal professional association(s).

In order to ensure class action arbitration would be a public and transparent process, and in an effort to protect absent class members, the AAA created a publicly available online docket of all class arbitrations. This searchable online docket allows users to track cases through each stage of the AAA Class Arbitration process, from the Clause Construction process through the final award.[13] The names of the Claimants and their counsel as well as Respondent and their counsel are shown on the title page of the case. Also on this page is the disposition of the case and links to any activity including hearings, partial final awards, and dismissals. Additionally, the AAA posted a policy statement concerning the class arbitrations:

> Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.
>
> The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association.[14]

[12] *Id.*

[13] *See Searchable Class Arbitration Docket*, AM. ARB. ASS'N, http://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket (last visited May 22, 2012).

[14] *AAA Policy on Class Arbitrations*, AM. ARB. ASS'N, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003840 (last visited May 22, 2012).

III. AAA'S CLASS ARBITRATION DOCKET

Examination of the AAA's Class Arbitration Docket reveals the activity of the 347 class arbitrations filed with the AAA since the *Bazzle* decision in 2003. As of December 6, 2011, most of these cases had been closed (248) with the remaining cases ongoing (98). Upon filing, the cases were classified by the AAA as Commercial (182), Employment (133), and Construction (32) and a special team of case managers began administrating the cases. After their selection, the arbitrators conducted the Clause Construction phase to determine whether the arbitration clause permitted arbitration under the Class Arbitration Supplementary Rules.

Nearly half of these cases (170) resulted in clause construction awards or stipulations; the majority of these awards (110) interpreted the arbitration clause to permit class arbitration while nineteen awards found the clause did not permit class arbitration. In an additional forty-one stipulations parties affirmatively agreed that the arbitration could proceed on a class-wide basis. Claims in fifty-six cases out of the 151 cases that could move forward were still at issue after the Clause Construction phase.

Settlements were reached in 131 cases; thirteen settled with consent awards and 118 settled without consent awards. The arbitrators certified slightly more than half the cases that proceeded to the Class Certification phase (29) and denied certification to the remaining classes (22) with an additional five cases reaching class certification by stipulation between the parties.

IV. *STOLT-NIELSEN*: THE EFFECT ON AAA'S CLASS ACTIONS

The *Stolt-Nielsen* decision created uncertainty in the class arbitrations being administered by the AAA at the time and an expected paucity of future filings. Arbitrators in the midst of the Clause Construction phase in particular were faced with new law mid-case. Arbitrators approached this new set of circumstances by allowing parties to bring forward arguments reflecting *Stolt-Nielsen.* Respondents in some ongoing cases successfully argued the Court's ruling in opposing a class process in Clause Construction and Class Certification phases.

In fact, the filing of class arbitrations did not cease post-*Stolt-Nielsen* as parties filed fifty-three class arbitration cases with AAA after the Court's decision. Because parties may still file demands for class arbitration under AAA's Class Arbitration Rules, Claimants have continued to seek class arbitration, often arguing to distinguish their case from that of *Stolt-Nielsen*. These arguments are based in limitations of the applicability of *Stolt-Nielsen* because the case was a business-to-business dispute rather than the present consumer or employee case. Or, parties argued that while the outcome was based on the Federal Arbitration Act (FAA),[15] there were state contract law principles that would permit class arbitration. Or, parties cited a unique fact that existed in *Stolt-Nielsen* in that the parties stipulated that the arbitration clause was silent concerning class action:

[15] *See* 9 U.S.C. §§ 1-16 (2006).

> But the panel had no occasion to "ascertain the parties' intention" in the present case because the parties were in complete agreement regarding their intent. In the very next sentence after the one quoted above, the panel acknowledged that the parties in this case agreed that the Vegoilvoy charter party was "silent on whether [it] permit[ted] or preclude[d] class arbitration," but that the charter party was "not ambiguous so as to call for parol evidence." *Ibid.* This stipulation left no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task.[16]

V. POST-*CONCEPCION*: WHERE WE ARE NOW AT AAA

After *Concepcion*, the class arbitration landscape was changed further by the Court's explanation of its ruling in *Stolt-Nielsen* as well as its holding concerning class action waivers. While *Stolt-Nielsen* addressed whether the Federal Arbitration Act permits class action proceedings where the contract did not expressly allow them, *Concepcion* decided whether the FAA requires the enforcement of an explicit class action waiver in light of state law that would hold to the contrary:

> Although we have had little occasion to examine classwide arbitration, our decision in *Stolt-Nielsen* is instructive. In that case we held that an arbitration panel exceeded its power under §10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation.[17]

As an alternative to filing a class action demand, members of the would-be class may instead file as individuals under AAA's Supplementary Procedures for Consumer-Related Disputes[18] based on AAA's Consumer Due Process Protocols.[19] This Protocol guarantees due process by assuring the right to representation, forbidding businesses from requiring an inconvenient forum, and cost-shifting from consumers to businesses. And, the Protocols require there be no limitations on damages, a neutral decision maker, and access to small claims court should a consumer prefer that forum.[20]

The cost-shifting is arguably one of the most important guarantees of due process and access to justice for these claimants. Consumers with claims of $10,000 or less pay one-half the arbitrators compensation but no more than a maximum of $125, and for claims of more than

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[16] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1770 (2010).

[17] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011).

[18] *See Consumer-Related Disputes Supplementary Procedures*, AM. ARB. ASS'N, http://www.adr.org/aaa/faces/s/sitesearch/sitesearchdetail?doc=ADRSTG_015806&_afrLoop=422949359255662&_afrWindowMode=0&_afrWindowId=y4z8872x1_382#%40%3F_afrWindowId%3Dy4z8872x1_382%26_afrLoop%3D422949359255662%26doc%3DADRSTG_015806%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dy4z8872x1_446 (last visited May 22, 2012).

[19] *See Consumer Due Process Protocol*, principle 3.2 (1998), AM. ARB. ASS'N, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014 (last visited May 22, 2012).

[20] *See id.* at principle 4-5, 14.

$10,000 but less than $75,000, consumers pay a maximum of $375.[21] All other arbitration fees and arbitrator compensation are paid by businesses; compliance is ensured by a requirement that AAA receive, review, and approve the arbitration clauses of these contracts prior to their use and a further requirement that the clauses maintain their compliance with the due process protocols. Cases arising out of contracts with clauses not in compliance are refused administration by the AAA.

The AAA also makes data concerning the consumer cases it administrates available on its website as a quarterly report indicating participants, claims activity, and costs of the individual arbitrations. The current file posted on AAA's website,[22] shows data from the third quarter of 2011 and contains 64,471 records from 61,843 cases.

Northwestern University Law School's *Searle Civil Justice Institute Task Force on Consumer Arbitration* conducted a study of AAA consumer cases in 2009 and concluded in summary:

- Consumers won some relief in 53.3% of the cases they filed and recovered an average of $19,255; business claimants won some relief in 83.6% of their cases and recovered an average of $20,648.

- No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business.[23]

The Report also discussed the important issue of costs and access for consumers involved in individual arbitrations with businesses, in the case of AAA arbitrations where consumers filed demands against businesses.

> The upfront cost of arbitration for consumer claimants in cases administered by the AAA appears to be quite low.
>
> In cases with claims seeking less than $10,000, consumer claimants paid an average of $96 ($1 administrative fees + $95 arbitrator fees). This amount increases to $219 ($15 administrative fees + $204 arbitrator fees) for claims between $10,000 and $75,000. These amounts fall below levels specified in the AAA fee schedule for low-cost arbitrations, and are a result of arbitrators reallocating consumer costs to businesses.
>
> AAA consumer arbitration seems to be an expeditious way to resolve disputes.[24]

While businesses may be increasingly drawn to arbitration in the consumer area as a result of *Concepcion*, these businesses must ensure their compliance with the AAA's Due Process

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[21] *See Consumer Arbitration Costs, Administrative Fee Waivers, and Pro Bono Arbitrators*, AM. ARB. ASS'N, http://www.adr.org/aaa/faces/aoe/gc/consumer (follow "Consumer Arbitration Costs, Administrative Fee Waivers, and Pro Bono Arbitrators" hyperlink).

[22] *See Consumer Statistics*, AM. ARB. ASS'N, http://www.adr.org/aaa/faces/aoe/gc/consumer (follow "Consumer Arbitration Statistics" hyperlink).

[23] *See* SEARLE CIVIL JUSTICE INSTITUTE, CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION-PRELIMINARY REPORT, at xiii (Mar. 2009).

[24] *Id.*

protocols for consumer and employment disputes. The Searle study found that in practice, consumers participating in AAA arbitrations under the Consumer Due Process Supplement actually paid less than the fees specified in the AAA Rules.[25]

Under AAA's Rules, consumers may also choose not to arbitrate post-dispute and instead select the option of filing in small claims court for claims up to the jurisdictional limits of the court. The AAA Commercial Rules provide a carve-out for consumer-related disputes whether filed by the consumer or the business.[26] In California the small claims court's limit of $7,500 per claim and a general rule requiring self-representation can make this an attractive option for consumers, especially with the free small claims advisor service the state provides to explain court and enforcement procedures, help with claim or defense preparation, work out payment plans, and answer other questions.[27]

VI. THE RESPONSE TO CONCEPCION

One salient factor of *Concepcion* is the provision in the arbitration clause for cases where Claimants recover more from the arbitrator than the last, best offer from AT&T. A self-imposed penalty of $10,000 and payment of attorney's fees provides Claimants with small claims with a sizeable potential recovery for the small claim sizes that are customary in class litigation and arbitration. In the Court's view, these two factors demonstrate the likelihood a dispute will be resolved without the necessity of the Claimants banding together as class actions. The Court notes:

> "Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which "could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Laster*, 2008 WL 5216255, at *12.[28]

Since *Concepcion* allowed AT&T's class action waiver to stand, certain law firms filed hundreds of individual arbitrations against AT&T aimed at stopping the company's bid to merge with a competing wireless provider and AT&T responded by filing suit in the Southern District of New York[29] seeking to stop them from filing many individual arbitration demands with AAA, one of which is "388 paragraphs in length and contains 641 footnotes."[30] AT&T argued these claims should not be decided in arbitration because they were brought under the Clayton Act.[31] The company cited its clause's provision that consumers were allowed to bring claims only in an "individual capacity" and not as a "class member in any purported class or representative proceeding"[32] and noted that a Florida court granted AT&T Mobility a preliminary injunction in a

[25] *See id*.

[26] *See* Rule R-1, *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N (June 1, 2010).

[27] *See* CAL. DEP'T OF CONSUMER AFFAIRS, THE SMALL CLAIMS COURT: A GUIDE TO ITS PRACTICAL USE 4-7, *available at* http://www.dca.ca.gov/publications/small_claims/small_claims.pdf (last visited Jan. 3, 2012).

[28] AT&T Mobility LLC v. Concepion, 131 S. Ct. 1740, 1753 (2011).

[29] *See* AT&T Mobility LLC v. Gonnello, 11 Civ. 5636, 2011 U.S. Dist. LEXIS 116420, at *1 (S.D.N.Y. Oct. 7, 2011).

[30] *Id*. at *2.

[31] *See id*. at *6.

[32] *Id.*

similar case finding "the customers' arbitration demands 'bear the hallmarks of a class action.'"[33] The Southern District of New York court added "the Supreme Court upheld the validity of a clause both requiring that arbitration proceed on an individualized basis and prohibiting any form of class or representative action."[34]

In the end, the court in *Gonello* ruled that the attempt to stop the merger was outside the scope of the arbitration clause because "the parties withheld from the arbitrator the power to decide questions that would necessarily affect the rights of more than the parties to the dispute through the grant of declaratory or injunctive relief."[35] Nonetheless, AT&T found itself arguing the other side of arbitrability from its position in *Concepcion*.

VII. SUMMARY

In summary, while the Court's decisions in *Stolt-Nielsen* and *Concepcion* appeared to some to be a death knell for class arbitration, in practice there seems to be life for parties seeking a class arbitration dispute resolution process and for lawyers representing large numbers of consumers seeking redress for claims against businesses by bringing forward many individual small claims that businesses are required to pay for under the American Arbitration Association's Consumer Due Process Protocols.

[33] *Id*. at *8 n.1.
[34] *Id.*
[35] *Gonnello*, 2011 U.S. Dist. LEXIS 116420, at *4.

ARBITRATION INNUMERACY

Christopher R. Drahozal*

> Innumeracy, an inability to deal comfortably with the fundamental notions of number and chance, plagues far too many otherwise knowledgeable citizens.[1]

I. INTRODUCTION

Both sides in the public policy debate over consumer and employment arbitration have recognized the importance of empirical research to making sound policy.[2] Even Public Citizen, a vocal critic of consumer arbitration, has stated that it "agree[s]" that "congressional scrutiny of arbitration 'can be dangerous if the terms of the debate focus too much on anecdote and too little on systematic study.'"[3] According to Professor Peter B. Rutledge, "it now appears to be common ground that the policy debate over the Arbitration Fairness Act should focus on empirical data."[4]

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[1] JOHN ALLEN PAULOS, INNUMERACY: MATHEMATICAL ILLITERACY AND ITS CONSEQUENCES 3-4 (2001). With the exception of the quote from First Lady Michelle Obama, *see infra* text accompanying note 61, the quotes that begin each part of this article are either from Paulos's book or from MICHAEL BLASTLAND & ANDREW DILNOT, THE NUMBERS GAME: THE COMMONSENSE GUIDE TO UNDERSTANDING NUMBERS IN THE NEWS, IN POLITICS, AND IN LIFE (2009). Blastland and Dilnot originated the BBC radio program "More or Less," which "explains — and sometimes debunks — the numbers and statistics used in political debate, the news and everyday life." *See* BBC, *More or Less*, http://www.bbc.co.uk/programmes/b006qshd (last visited Jan. 25, 2012); and BBC, *About More or Less*, http://news.bbc.co.uk/2/hi/programmes/more_or_less/1628489.stm (last visited Jan. 25, 2012).

[2] Given the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that debate is likely to move even more firmly into the legislative and regulatory arenas. *See, e.g.*, Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 2(3) (2011); Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1028(a) (2010) (requiring the Consumer Financial Protection Bureau to study pre-dispute arbitration clauses in consumer financial services contracts). Courts likely will continue to play a role in regulating consumer and employment arbitration agreements, as other papers in this symposium have demonstrated, but that role will be a reduced one after *Concepcion.*

[3] PUBLIC CITIZEN, THE ARBITRATION DEBATE TRAP: HOW OPPONENTS OF CORPORATE ACCOUNTABILITY DISTORT THE DEBATE ON ARBITRATION 2 (2008) (quoting Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J. L. PUB. POL'Y 549, 589 (2008)), http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf.

[4] Peter B. Rutledge, *The Case Against the Arbitration Fairness Act*, DISP. RESOL. MAG., Fall 2009, at 4; *see also* Peter B. Rutledge, *Common Ground in the Arbitration Debate*, 1 Y.B. ARB. & MEDIATION 1, 8 (2009) ("[T]here now appears to be a consensus that the future of arbitration should be decided by data, not anecdote.") (emphasis omitted).

If so, that is an important and valuable development. Anecdotes alone do not provide a solid basis for legislative or regulatory action.

But of course one must be cautious in evaluating empirical data. Even the best empirical studies have limits or are subject to qualifications. And numbers can be misleading if misinterpreted. As Michael Blastland and Andrew Dilnot have written: "[Numbers] can bamboozle not enlighten, terrorize not guide, and all too easily end up abused and distrusted."[5] So empirical studies must be used thoughtfully as a basis for making policy, recognizing both their value and their limitations.

Arbitration innumeracy, as I use the phrase here, is the "inability to deal comfortably with the fundamental notions of number and chance" in evaluating arbitration, particularly consumer and employment arbitration. This article discusses a number of examples of possible arbitration innumeracy — cases in which statistics about arbitration are incomplete or outdated, misunderstood or misused. In particular, it examines empirical studies on:

- The use of arbitration clauses in credit card agreements;
- Outcomes in consumer arbitration;
- Arbitrator selection by the National Arbitration Forum;
- Class arbitration waivers in consumer arbitration clauses;
- The incentives of arbitrators and repeat-player bias; and
- Unintended consequences of restrictions on consumer and employment arbitration clauses.

Each of these topics illustrates a different issue of arbitration innumeracy, ranging from samples that are not representative of the population as a whole to comparisons that do not compare like cases. The sections of this Article put the issue in more complete empirical context and discuss briefly how the arbitration innumeracy impacts the policy debate over consumer and employment arbitration.

[5] BLASTLAND & DILNOT, *supra* note 1, at x-xi.

II. "WHAT TO COUNT": THE USE OF ARBITRATION CLAUSES IN CREDIT CARD AGREEMENTS

> It is, for a start, a fundamental of almost any statistic that, in order to produce it, something somewhere has been defined and identified. Never underestimate how much nuisance that small practical detail can cause.[6]

A central theme in criticisms of consumer arbitration is that consumers do not have any choice if they want to avoid arbitration.[7] But how to measure the extent of consumer choice — *i.e.*, what to count?

Credit card agreements are commonly cited as a type of contract as to which consumers have no choice but to agree to arbitration.[8] Thus, commentators have asserted both that "[i]n the fine print [of credit card agreements], almost always, is an arbitration clause"[9] and that "[n]early every credit card issuer includes an arbitration agreement in [its] ... contracts with cardholders."[10] In fact, those are not the same thing — the number of credit card agreements is very different from the number of credit card issuers — and neither assertion, at present, is accurate.

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[6] *Id.*, at 5. Blastland and Dilnot focus on the difficulty of classifying things before counting them. *Id.* I recognize that difficulty, but am concerned here with the preliminary question of what should be counted at all.

[7] *E.g.*, Arbitration Fairness Act of 2011, S. 987, 112th Cong., § 2(3) (2011).

[8] Other studies of the use of arbitration clauses in consumer contacts include Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62 (2004) ("Across the industries studied, fifty-seven of the 161 sampled businesses (35.4%) included arbitration clauses in their consumer contracts."); Florencia Marotta-Wurgler, *Unfair Dispute Resolution Clauses: Much Ado About Nothing?*, *in* BOILERPLATE: THE FOUNDATIONS OF MARKET CONTRACTS 45, 50 (Omri Ben-Shahar ed., 2007) (finding that only 6.0% of software license agreements studied included arbitration clauses, although noting that some of the contracts studied were commercial rather than consumer contracts); and Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 tbl.2 (2008) (finding that 20 of 26, or 76.9%, of sample of consumer contracts included arbitration clauses; sample included consumer financial services and telecommunications contracts).

[9] Yuki Noguchi, *Credit Card Arbitration Trumps Lawsuits, Court Says*, NPR, Jan. 11, 2012, http://www.npr.org/2012/01/11/144990644/credit-card-arbitration-trumps-lawsuits-court-says; *see also* PUBLIC CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE 3 (Sept. 14, 2009), http://www.citizen.org/documents/UnfairAndEverywhere.pdf (reporting that "the use of forced arbitration remains rampant," citing credit card agreements as an example); *see also* Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 747 (2009) ("A binding arbitration clause is a staple of credit card agreements....").

[10] *Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims?*: Hearing Before the H. Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 1-2 (2009) (statement of Congressman Cohen), *available at* http://judiciary.house.gov/hearings/printers/111th/111-39_49475.PDF; *see also Memo to Elizabeth Warren: How to Protect Consumers*, REUTERS, Sept. 17, 2010 (quoting David Arkush, director, Public Citizen's Congress Watch division), http://blogs.reuters.com/reuters-wealth/2010/09/17/memo-to-elizabeth-warren-how-to-protect-consumers ("Nearly every consumer lender puts a clause in the standard-form contract saying that the consumer can never sue the company, for anything.").

It has never been the case that "[n]early every credit card issuer" used arbitration clauses. As of December 31, 2009, over 80 percent (247 of 298, or 82.9%) of credit card issuers did *not* use arbitration clauses in their cardholder agreements.[11] Many, but not all, of those issuers were credit unions that offered credit cards to their members. Barely 17 percent (51 of 298, or 17.1%) of issuers used arbitration clauses in their credit card agreements.[12]

The reason for the perception that consumers have limited choice as to credit cards is that until recently almost all of the very large credit card issuers used arbitration clauses. But even that has changed. As of December 31, 2009, just over 95 percent of credit card loans outstanding were by issuers that used arbitration clauses in their cardholder agreements.[13] One year later, as of December 31, 2010, that percentage had declined to 48 percent.[14] The most recent data thus suggest that consumers have a much larger degree of choice (and, indeed, always have had a much larger degree of choice) than commonly perceived. And the extent of that choice depends very much on what is counted: credit cards or credit card issuers.

III. "IS THAT A *BIG* NUMBER?": OUTCOMES IN CONSUMER ARBITRATION

> The best prompt to thinking is to ask the question that at least checks our presumptions, simple-headed though it may sound: "Is that a *big* number?"[15]

Critics of consumer arbitration have cited what they see as excessively high win rates for businesses as evidence that arbitration is unfair to consumers. For example, a letter in support of the creation of the Consumer Financial Protection Bureau, signed by over eighty professors of Banking and Consumer Law, stated that "[s]tudies have found the arbitrators find for companies

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[11] The Credit CARD Act of 2009 required credit card issuers to supply their credit card agreements to the Federal Reserve, which in turn was to make them available to the public via the Federal Reserve web page. *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, §204(a), 123 Stat. 1734, 1746-47 (May 22, 2009) (codified at 15 U.S.C. § 1632(d)(3) (2012)). The data described in the text were collected from credit card agreements available on the Federal Reserve web page. The Consumer Financial Protection Bureau now maintains the database of credit card agreements on its web site. *See* Consumer Financial Protection Bureau, Credit Card Agreement Database, http://www.consumerfinance.gov/credit-cards/agreements/ (last visited May 25, 2012).

[12] *See* Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. ___ (forthcoming 2012).

[13] *See id.* at ___. Credit card loans outstanding are not the same as the number of credit card accounts, but the two are highly correlated, and better data is available on credit card loans outstanding.

[14] Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. ___ (forthcoming). Most of the decline appears to be due to two factors: (1) the decision of the National Arbitration Forum to cease administering new consumer arbitrations in settlement of the Minnesota Attorney General's consumer fraud suit against the NAF; and (2) the decision of four large issuers to settle an antitrust suit against them by agreeing to remove arbitration clauses from their cardholder agreements for three-and-one-half years. *Id.* at __. Whether those issuers will resume use of arbitration clauses after that period expires is unknown.

[15] BLASTLAND & DILNOT, *supra* note 1, at 30.

against consumers 94 to 96% of the time, suggesting that arbitration providers are responding to the incentive to find for those who select them: the companies that insert their names in their form contracts."[16] While I applaud the letter's reliance on data rather than anecdotes, the conclusion it draws from that data is incorrect.

A win rate of 94 to 96 percent sounds really high. Surely a forum that rules in favor of businesses such a high percentage of the time must be biased — or at least that seems to be the intuition underlying statements such as the one cited above. But while 94 to 96 percent sounds high, we still need to ask the question: "Is that a big number?" And to answer that question we need to ask further: "as compared to what?"

Evaluating whether a win rate is too high (or too low) cannot be done in the abstract. It must be based on a comparison to a base line — or, in other words, you need to have a control group. The obvious control group to use here is courts: outcomes in arbitration cases need to be compared to outcomes in comparable cases in court in order to draw any conclusions about how consumers fare.[17] This is easier said than done, of course. It is hard to control for differences across types of cases. Important differences, such as the legal and factual strength of the case, are difficult to observe. That said, there is one type of case in which the characteristics of the cases seem likely to be at least roughly comparable in arbitration and in court: debt collection cases brought by businesses — which happens to be the exact type of case cited by the critics as showing a high business win rate in arbitration.[18]

So how do consumers fare in debt collection cases? In arbitration, as the data cited above suggest, businesses win the vast majority of the cases. The Searle study, for example, found that "[c]reditors won some relief in 86.2 percent of the individual AAA debt collection arbitrations and 97.1 percent of the AAA debt collection program arbitrations that went to an award."[19] But the study found that creditors won some relief at an even higher rate (ranging from 98.4 percent to 100.0 percent of the cases) in debt collection cases in court.[20] Likewise, while prevailing creditors were awarded from 92.9 percent to 99.2 percent of the amount sought in AAA

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[16] *E.g.*, Letter from Professors of Consumer Law and Banking Law to Senators Dodd and Shelby and Congressmen Frank and Bachus, Statement in Support of Legislation Creating a Consumer Financial Protection Agency 6 (Sept. 29, 2009), http://law.hofstra.edu/pdf/Media/consumer-law%209-28-09.pdf. (citing PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), http://www.citizen.org/publications/release.cfm?ID=7545; Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, CHRISTIAN SCIENCE MONITOR, July 16, 2007, http://www.csmonitor.com/2007/0716/p13s01-wmgn.html).

[17] *E.g.*, Memorandum from William N. Lund, Superintendent, Bureau of Consumer Credit Protection, Department of Professional and Financial Regulation on Report to Committee: Compilation of Information Reported by Consumer Arbitration Providers to Senator Peter Bowman, Senate Chair; Representative Sharon Anglin Treat, House Chair of the Joint Standing Committee on Insurance and Financial Services 7 (Apr. 1, 2009), http://www.maine.gov/pfr/consumercredit/documents/ArbitrationProvidersReport.rtf ("[A]lthough credit card banks or assignees prevail in most arbitrations, this fact alone does not necessarily indicate unfairness to consumers. The fact is that the primary alternative to arbitration (a civil action in court) also commonly results in judgment for the plaintiff.").

[18] *See* PUBLIC CITIZEN, THE ARBITRATION TRAP, *supra* note 16, at 5.

[19] Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77, 80 (2011).

[20] *See id.*

arbitrations, they were awarded from 96.2 percent to 99.5 percent of the amount sought in debt collection cases in court.[21]

I certainly do not claim that these data show that arbitration is better for consumers than litigation. But likewise the data provide no support for the view that consumers fare worse in arbitration than they do in comparable cases in court.[22] And the data show definitively that high business win rates in arbitration do not in and of themselves prove that arbitration is unfair to consumers. For the types of cases studied, a win rate of 94 to 96 percent is not big enough to suggest that arbitrators are biased in favor of businesses.

IV. "IS THE COMPARISON OF LIKE WITH LIKE?": ARBITRATOR SELECTION AND THE NATIONAL ARBITRATION FORUM

> [P]olitics has precisely that bad habit of ... overlooking definitional differences. To detect this, the principle to keep in mind is one everyone knows, but has grown stale with overuse. It is true and relevant as ever, ... and it is this: is the comparison of like with like?[23]

The poster child for all that is seen as wrong with consumer arbitration is the National Arbitration Forum. Although the criticisms of the NAF are multiple,[24] here I address only the striking finding by Public Citizen that the twenty-eight arbitrators appointed most often by the National Arbitration Forum (the "Top 28 NAF arbitrators") ruled in favor of businesses at a much higher rate than other NAF arbitrators.[25] The Top 28 NAF arbitrators, Public Citizen reported, handled 89.5% of NAF's cases and ruled in favor of the business in those cases 95% of the time. By comparison, the next 120 arbitrators handled only 10% of the cases, and ruled in favor of businesses only 86% of the time.[26] According to Public Citizen, this finding shows that "the busiest arbitrators produce the results corporations seek."[27] The implication of Public Citizen's

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[21] *See id.* at 80-81. Controlling for confounding factors using multiple regression analysis did not change the results. *See id.* at 98-101.

[22] For evidence on comparative outcomes in employment cases in arbitration and court, *see, e.g.*, Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov.2003-Jan. 2004, at 44, 53 ("The results are consistent with arbitrators, at least those participating in AAA-sponsored arbitration, not acting in a materially different fashion than in-court adjudicators."). However, it is much more difficult to be confident that the cases being compared are actually comparable in the employment setting than in the debt collection setting.

[23] BLASTLAND & DILNOT, *supra* note 1, at 162.

[24] *See, e.g.*, Complaint, Minnesota v. National Arbitration Forum, Inc., No. 27-CV-09-18559 (Minn. Dist. Ct. July 14, 2009), *available at* www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf.

[25] *See* PUBLIC CITIZEN, ARBITRATION TRAP, *supra* note 16, at 2.

[26] *See id.* at 15.

[27] *Id.* at 2 (capitalization and boldtype omitted).

finding, according to Paul Bland, is that the NAF was "steering a vast majority of cases to a handful of people for reliable votes."[28]

But comparing outcomes in the cases decided by the Top 28 NAF arbitrators with outcomes in other NAF arbitrations is not "the comparison of like with like."[29] Public Citizen's finding disregards an important difference between the cases: the Top 28 NAF arbitrators apparently decided almost exclusively cases in which the consumer failed to appear (at least based on the NAF's classification of those cases), while the remaining NAF arbitrators only rarely decided default cases. Law Professor David Sorkin, who served as an NAF arbitrator, suggested this possibility at a Roundtable on debt collection litigation and arbitration conducted by the FTC:

> I have handled about ... 60 collection cases for National Arbitration Forum over about eight years. I didn't get any of the default cases. My understanding is that the forum will send out default cases in bulk to an arbitrator, and an arbitrator might get a stack of 50 or 100 or 200 cases, all of which had very similar files with no response by the respondent/consumer, and those cases probably went to a very small number of arbitrators consistent with the experience in California ....[30]

An examination of the data used by Public Citizen confirms this understanding.[31] Of the 16,330 cases that were decided by the Top 28 NAF arbitrators (and not settled or dismissed), 15,890, or 97.3% were classified by the NAF as default cases — *i.e.*, cases in which the consumer did not show up. By comparison, only 166 of the 1745 cases (or 9.5%) decided by the remaining NAF arbitrators were default cases. The Top 28 NAF arbitrators decided 99.0% of all default cases administered by the NAF.

It is not surprising, then, that the win rate for businesses in cases decided by the Top 28 NAF arbitrators is higher than the win rate for businesses in cases decided by the remaining NAF arbitrators. Parties tend to do less well when they default than when they show up and defend themselves.[32] That is true both in arbitrations administered by providers other than the NAF as well as cases in court.[33]

When like cases are compared to like, the disparity between the two groups of arbitrators looks very different, as can be seen in Table 1. In default cases, the Top 28 NAF arbitrators ruled

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[28] Federal Trade Commission, *Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion*, transcript at 59 (Aug. 6, 2009) [hereinafter FTC Roundtable] (remarks of Paul Bland), *available at* http://www.ftc.gov/bcp/workshops/debtcollectround/090805-CHIL/transcript-90806.pdf.

[29] For an alternative analysis of the NAF data, see Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051 (2009).

[30] FTC Roundtable, *supra* note 28, at 71-72 (statement of David Sorkin).

[31] *See* PUBLIC CITIZEN, NAF CALIFORNIA DATA, http://www.citizen.org/congress/civjus/arbitration/NAFCalifornia.xls (last visited May 21, 2012). The calculations in the text are by the author.

[32] *See infra* Table 1. Alternatively, some consumers might default because they believe they are likely would lose even if they show up, either because of some belief about arbitration or because they know they have a weak case.

[33] *See* Drahozal & Zyontz, *supra* note 19, at 91.

overwhelmingly in favor of businesses. But so did the other NAF arbitrators, albeit addressing a much, much smaller number of cases. And in cases decided after a hearing, the Top 28 NAF arbitrators actually ruled in favor of consumers slightly more often than the other NAF arbitrators, although the difference is not statistically significant.

Table 1. Outcomes in National Arbitration Forum Arbitrations (California data, Jan. 2003-Mar. 2007)[34]

	Top 28 NAF Arbitrators	All Other NAF Arbitrators	Total
Cases Decided on Default			
Business prevailed	15,889 (100.0%)	165 (99.4%)	16,054
Consumer prevailed	1 (0.0%)	1 (0.6%)	2
Total	15,890	166	16,056
Cases Decided After Hearing			
Business prevailed	432 (98.2%)	1559 (98.7%)	1991
Consumer prevailed	8 (1.8%)	20 (1.3%)	28
Total	440	1579	2019
Total Cases	16,330	1745	18,075

To be clear, I am not defending the NAF from any of the other claims of wrongdoing to which it has been subjected. And, of course, these data do not answer the question of why the NAF sent almost all of its default cases to the same group of arbitrators. Perhaps it was because those arbitrators more reliably ruled in favor of the business, or perhaps it was for another reason.[35] My point is a narrower one: that to attempt to answer that question statistically requires one to compare like cases to like, and Public Citizen did not do so.

[34] *See* PUBLIC CITIZEN, ARBITRATION TRAP, *supra* note 16, at 15. This table does not include cases classified by the NAF as "dismissed" (772 cases), "settled" (422 cases), or resolved by "award by settlement" (25).

[35] The data might support a different "steering" explanation — that the NAF sent default cases to one group of arbitrators because they ruled more reliably in favor of businesses in that type of case, and contested cases to a different group of arbitrators because they ruled more reliably in favor of businesses in that type of case. But the differences between the groups are not statistically significant.

V. ARE THOSE COUNTED REPRESENTATIVE OF THE REST?: ARBITRATION CLAUSES AND CLASS ARBITRATION WAIVERS

> This is the sample, the essence of a million statistics, like the poet's drop of water containing an image of the world in miniature — we hope. It is wonderful, when it works. But if the few that are counted don't mirror the others, the whole endeavor fails. So which few? Choose badly and the sample is skewed, the mirror flawed, and for a great many of the basic facts about us,... all that is multiplied is the size of the error.[36]

An important and as yet unanswered question is the effect of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*[37] on the use of arbitration clauses. It is too soon after the decision in *Concepcion* to be able to evaluate empirically its effects, but some inferences can be drawn from existing empirical studies — to the extent the samples in those studies are "representative of the rest."

First, prior to *Concepcion*, not all consumer arbitration clauses included class arbitration waivers, suggesting that businesses use arbitration clauses for reasons other than only avoiding class actions.[38] Studies finding widespread use of class arbitration waivers prior to *Concepcion* focused on mass contracting businesses such as credit card issuers and telecommunications companies.[39] But the use of class arbitration waivers varied by widely by type of business, and many consumer arbitration agreements did not include class arbitration waivers at all. The Searle study found that of the arbitration clauses giving rise to AAA consumer arbitrations during the time period studied, only 36.5 percent (109 of 299) included class arbitration waivers.[40] All of the cell phone contracts included class arbitration waivers, as did all of the credit card contracts. But none of the insurance contracts and none of the real estate brokerage agreements included class arbitration waivers. And somewhat over half of the car sale contracts (53.1%) and home builder contracts (64.7%) included class arbitration waivers.[41] Studying only credit card or cell phone contracts can provide important information about those types of contracts, but in this case generalizing from those types of contracts to consumer contracts as a whole is not appropriate.

Second, even after *Concepcion*, it is unlikely that all consumer contracts — or even all credit card contracts, which ordinarily include class arbitration waivers when they include

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[36] BLASTLAND & DILNOT, *supra* note 1, at 111-12.

[37] 131 S. Ct. 1740 (2011).

[38] *See* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (and not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 470-74 (2010).

[39] *E.g.*, Eisenberg, Miller & Sherwin, *supra* note 8, at 891-92.

[40] *See* Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 349 (2012).

[41] *Id.* One implication of this data is that making all consumer arbitration clauses unenforceable because of concerns about the availability of class relief would be overbroad. *See* Christopher Drahozal, *Concepcion and the Arbitration Fairness Act*, SCOTUSBLOG, Sep. 13, 2011, http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act/.

arbitration clauses — will begin using arbitration clauses. As Professor Rutledge and I conclude in a forthcoming paper:

> Our finding that issuers are less likely to use arbitration clauses when located in states that (prior to *Concepcion*) had held class arbitration waivers unenforceable suggests that the use of arbitration clauses will increase as a result of *Concepcion*. But the significance of other variables in the model (the riskiness of the credit card portfolio, the degree of specialization in credit card loans, the size of the issuer, and the issuer's organizational form) suggests that not all credit card issuers are likely to use arbitration clauses following the decision in *Concepcion*.[42]

To illustrate the point: very few credit card issuers (5 of 97, or 5.2%) located in states that had held class arbitration waivers unenforceable prior to *Concepcion* used arbitration clauses. But even in states that had held class arbitration waivers enforceable prior to *Concepcion*, only a minority of credit card issuers (23 of 103, or 22.3%) used arbitration clauses.[43] That percentage likely will increase after *Concepcion*. But given the other factors that seem to explain the use of arbitration clauses by credit card issuers, these data suggest that the use of arbitration clauses will not become ubiquitous after *Concepcion*, even in the credit card industry.[44] Central to this finding is the fact, described earlier, that the substantial majority of credit card issuers do not include arbitration clauses in their credit card agreements. A sample consisting only of large credit card issuers, almost all of which until recently used arbitration clauses in their credit card agreements, would not have been representative of credit card issuers as a whole.

VI. CORRELATION DOES NOT PROVE CAUSATION: INCENTIVES OF ARBITRATORS AND REPEAT-PLAYER BIAS

> Correlation and causation are two quite different words, and the innumerate are more prone to mistake them than most. Quite often, two quantities are correlated without either one being the cause of the other.[45]

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[42] Drahozal & Rutledge, *supra* note 12, at ___.

[43] *Id.* at ___.

[44] As discussed previously, *see supra* text accompanying notes 8-10, an important question here is what to count: is the relevant measure the number of credit cards (or dollar value of credit card loans) or the number of credit card issuers?

[45] PAULOS, *supra* note 1, at 159.

> This is the oldest fallacy in the book, that correlation proves causation, and also the most obdurate.... Do not rest on the first culprit, the explanation nearest at hand or most in mind.... Keep the instinct for causation restless in its search for explanations and it will serve you well.[46]

A common concern about outcomes in arbitration is that the structure of the arbitration process results in decisions that are biased in favor of businesses. Because arbitrators get paid only when they are selected to serve, rather than being paid salaries like judges are, critics assert that arbitrators will tend to favor "repeat players" — parties that will likely appear in arbitration on multiple occasions and so have more opportunities to appoint arbitrators than non-repeat players.

The evidence on whether repeat players have a higher success rate in arbitration is mixed. Business claimants do have a higher win rate in arbitration than consumer claimants, but that is likely due to the different types of claims businesses assert.[47] The usual test for the existence of a repeat-player effect has been to compare win rates for repeat businesses in arbitration to win rates for non-repeat businesses in arbitration.[48] The Searle study, for example, found that under this usual approach, repeat businesses had a slightly higher win rate against consumers than non-repeat businesses, but that the difference was not statistically significant. Under an alternative definition of repeat business, the study found a greater repeat-player effect, albeit even then one that was only weakly statistically significant.[49] Other studies, usually of AAA employment arbitrations, also have found that repeat businesses have a higher win rate in arbitration than non-repeat businesses.[50]

But bias is not the only, or even the most likely, explanation for such a repeat-player effect. Correlation is not causation. We must keep our "instinct for causation restless in its

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[46] BLASTLAND & DILNOT, *supra* note 1, at 182-83.

[47] For example, the Searle study found that consumer claimants won some relief in 53.3 percent of the AAA consumer arbitrations studied, and that, in those cases, consumers were awarded 52.1 percent of the amount they sought. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 843, 897-99 (2010). By comparison, business claimants won some relief in 83.6% of the AAA arbitrations studied, and in those cases recovered 93.0% of the amount sought. *Id.* at 898-99. The reason for the difference, as stated in the study, is not that arbitration is biased in favor of businesses but rather that businesses bring different types of claims than consumers. *Id.* at 901 ("Business claimants usually bring claims for specific monetary amounts representing debts for goods provided or services rendered. Many of the cases are resolved *ex parte*, with the consumer failing to appear. By comparison, cases with consumer claimants are much less likely to involve liquidated amounts and more likely to be contested by businesses.").

[48] E.g., Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 189-90 (1997). An alternative test would be to compare win rates for repeat businesses in arbitration to win rates for repeat businesses in court.

[49] Drahozal & Zyontz, *AAA Consumer Arbitration*, *supra* note 47, at 909-11.

[50] Bingham, *Employment Arbitration: The Repeat Player Effect*, *supra* note 48, at 213; Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, IRRA 50TH ANN. PROC. 33, 38-39 (1998); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 223 (1998); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMP. LEGAL STUD. 1, 11-16 (2011).

search for explanations."[51] An alternative explanation for the higher win rate of repeat businesses is that repeat businesses are likely to be more sophisticated at screening cases and settling disputes than non-repeat businesses. As such, one would expect them be more likely than non-repeat businesses to settle the strong claims against them and arbitrate only the weak claims. If so, one would expect to find exactly the pattern described above: that repeat businesses have higher win rates than non-repeat businesses. One implication of this alternative theory is that repeat businesses will likely settle cases at a higher rate than non-repeat businesses. And that is exactly what the Searle study found: "that repeat businesses are more likely to settle or otherwise close cases before an award than non-repeat businesses."[52] Accordingly, the study concludes, "the repeat-player effect is more likely due to case screening by repeat businesses than arbitrator (or other) bias."[53]

It may be that there is some other explanation for the higher settlement rate for repeat businesses than non-repeat businesses — that correlation is not causation in that context either. But at present, at least, the available empirical evidence suggests that arbitrator bias is not the cause of higher win rates for repeat businesses.

VII. TRADEOFFS: UNINTENDED CONSEQUENCES OF RESTRICTIONS ON CONSUMER AND EMPLOYMENT ARBITRATION CLAUSES

> There is no such thing as a free lunch, and even if there were, there'd be no guarantee against indigestion.[54]

After teaching contract law for seventeen years, it is clear to me that when parties face restrictions on one type of contract term, such as an arbitration clause, they often respond by changing other terms of their contract. And, in some cases, they might even respond by refusing to enter into a contract altogether. The obvious benefits of a restriction for one group may turn into hidden costs for another. Too often decision makers do not consider these sorts of tradeoffs, or unintended consequences, in evaluating the costs and benefits of proposed laws. There is no such thing as a free lunch — that is, all regulations have costs that offset, at least in part, their benefits.

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[51] BLASTLAND & DILNOT, *supra* note 1, at 182-83.

[52] Drahozal & Zyontz, *AAA Consumer Arbitration*, *supra* note 47, at 913.

[53] *Id.* at 916. Lisa Bingham likewise concludes that the repeat-player effect in her studies was likely due, not to bias, but rather to better case screening by businesses. Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, *in* ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 323 tbl.2 (Samuel Estreicher & David Sherwyn eds. 2004).

[54] PAULOS, *supra* note 1, at 147. The phrase "there is no such thing as a free lunch" also is used to refer to the economic concept of opportunity cost — that by choosing to eat a "free" lunch, one incurs the cost of forgoing the opportunity eat lunch elsewhere.

Several such unintended consequences might result from restrictions on the use of pre-dispute arbitration clauses in consumer and employment contracts.

First, consumers and employees without disputes — who have no complaint with their treatment by a business — likely will be made worse off by legal restrictions on the use of arbitration. The cost savings that businesses achieve through arbitration benefit consumers by enabling the businesses to reduce prices and employers to increase wages.[55] Removing those cost savings by restricting the use of arbitration will have the opposite effect. The effect is likely to be particularly pronounced for those least able to afford it. For example, the consumers most likely to be affected by restrictions on the use of arbitration clauses in credit card agreements are those with low credit ratings who have few alternative sources of credit. A statistical examination of the factors explaining the use of arbitration clauses by credit card issuers finds a strong correlation between the riskiness of the issuer's credit card portfolio and its use of arbitration clauses.[56] If credit card issuers can no longer include arbitration clauses in their cardholder agreements, they may become less willing to lend to those higher risk consumers.

Second, restrictions on the enforceability of arbitration agreements may reduce rather than enhance the ability of some consumers and employees to have their claims heard. The available empirical evidence suggests that for relatively low-dollar claims, arbitration may be a more accessible forum than court.[57] Employment lawyer Lewis Maltby makes the point in the context of employment arbitration: "[M]ost employees will not be able to secure their employer's agreement to arbitrate once a dispute arises. The vast majority of employment disputes, however, do not involve enough damages to support contingent fee litigation. Therefore, outlawing pre-dispute agreements to arbitrate will leave many employees with no access to justice."[58]

Finally, some consumers will be less able to have their cases actually heard if the availability of arbitration is restricted. Very few court cases actually make it trial. Indeed, in 2009, only 1.2 percent of federal court dispositions were by either jury trial or bench trial.[59] Most court cases are resolved instead by dispositive motions or settlement. Consumers who bring those cases never have a "day in court" to tell their story to a judge or jury. By comparison, the Searle study found that over 50 percent of consumer claims in AAA arbitrations made it to a hearing before an arbitrator, and over 30 percent were resolved by the issuance of an award after

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[55] *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-57 (2006).

[56] *See* Drahozal & Rutledge, *supra* note 12, at ___. Again, correlation is not causation. It may be, for example, that risk-taking consumers tend to prefer credit card agreements with arbitration clauses. That explanation seems unlikely, however.

[57] *See* Eisenberg & Hill, *Arbitration and Litigation of Employment Claims*, *supra* note 22, at 53.

[58] Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 314 (2003).

[59] *See* ADMIN. OFFICE OF U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.4.10 (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/Table410.pdf.

a hearing.[60] To the extent there is value in consumers actually being able to present their claim to a neutral decision maker, restricting the availability of arbitration will deprive consumers of that value.

VIII. CONCLUSIONS

> I'm a lawyer because I was bad at [math and science]. All lawyers in the room, you know it's true. We can't add and subtract, so we argue.[61]

First Lady Michelle Obama's assertion, at a recent National Science Foundation event, reflects a popularly held view that lawyers are not good at math. Perhaps that explains some of the prevalence of arbitration innumeracy.[62] But avoiding arbitration innumeracy does not require sophisticated math skills. For consumers of empirical data, avoiding arbitration innumeracy requires a sensitivity to basic statistical concepts and a willingness to look skeptically at empirical research, even when it confirms one's previously held views. For producers of empirical data, avoiding arbitration innumeracy requires a willingness to apply proper empirical techniques and, importantly, to recognize the limitations of one's data. As empirical data becomes ever more important to the intensifying debate over consumer and employment arbitration, avoiding arbitration innumeracy is essential to making sound public policy.

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[60] Drahozal & Zyontz, *AAA Consumer Arbitration*, *supra* note 47, at 881 fig.5. Of the hearings in the consumer cases studied, 62.1% were either in person or by telephone; the remaining cases involved document-only hearings. *Id.* at 893. But in the cases with document-only hearings, the consumer had the right to request an in-person or telephone hearing and evidently did not do so. *Id.* at 865 ("For claims seeking $10,000 or less, the default rule is that the case will be resolved on the basis of documents only. Either party may request a telephone or in-person hearing, however. Likewise, the arbitrator may hold a telephone or in-person hearing if he or she decides one is necessary. For claims seeking over $10,000, the default rule is that the arbitrator will hold either a telephone or in-person hearing unless the parties agree otherwise.").

[61] Michelle Obama, Remarks at the National Science Foundation Family-Friendly Policy Rollout (Sept. 26, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/26/remarks-first-lady-national-science-foundation-family-friendly-policy-ro.

[62] A more cynical explanation would be that arbitration innumeracy sometimes might result not from ignorance but rather from knowing attempts to misuse the empirical record. I have no way to know whether that in fact is the case.

DOES *AT&T MOBILITY LLC V. CONCEPCION* JUSTIFY THE ARBITRATION FAIRNESS ACT?

Steven C. Bennett*

Shortly after the Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*,[1] Senators Al Franken, Richard Blumenthal, and Representative Hank Johnson announced their intention to re-introduce proposed legislation, known as the "Arbitration Fairness Act" (the "AFA" or the "Act"). Senator Franken described *AT&T Mobility* as "another example of the Supreme Court favoring corporations over consumers," and claimed that the AFA would "rectify the Court's most recent wrong by restoring consumer rights."[2] Many consumer and employment rights groups echoed that sentiment.[3]

Yet, as this Article explains, the AFA does not address the essential concerns of opponents of the *AT&T Mobility* ruling. Indeed, the central mechanism of the Act (invalidating pre-dispute arbitration agreements in various categories) may create more problems than it solves. This Article suggests that the Court's ruling in *AT&T Mobility* does not justify congressional action. Moreover, as an alternative, this article suggests that refinement in arbitration procedures and technologies, coupled with heightened consumer and employee education and awareness campaigns may substantially solve the perceived problems advanced as justifications for the Act.

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[1] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[2] Press Release, Franken.Senate.gov, Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power In The Courts Against Corporations (Apr. 27, 2011), http://www.franken.senate.gov/?p=press_release&id=1466. Rep. Johnson's statement similarly referred to *AT&T Mobility*, and noted: "Forced arbitration clauses undermine our indelible Constitutional right to take our disputes to Court[.] . . . They benefit powerful business interests at the expense of American consumers and workers." *See* Press Release, HankJohnson.House.Gov, Rep. Hank Johnson, Sens. Franken and Blumenthal Introduce Legislation to Protect Legal Rights of Consumers (May 17, 2011), http://hankjohnson.house.gov/2011/05/sens-franken-blumenthal-rep-hank-johnson-to-hold-press-conference-announcing-legislation-to-protect.shtml.

[3] *See, e.g.*, Press Release, Alliance for Justice, AFJ Praises Legislative Fix for Anti-Consumer Ruling in AT&T Mobility v. Concepcion (May 17, 2011), http://www.afj.org/press/05172011.html. ("This Corporate Court, at the behest of big-business interests, has time and again sought to restrict the rights of everyday Americans, but in this case there is a remedy. Alliance for Justice strongly supports the Arbitration Fairness Act . . . ."); Press Release, National Consumers Leauge, National Consumers League Applauds Legislative Fix For The Court's Anti-Consumer Ruling In AT&T Mobility v. Concepcion (May 18, 2011), http://www.nclnet.org/newsroom/press-releases/506-national-consumers-league-applauds-legislative-fix-for-the-courts-anti-consumer-ruling-in-atat-mobility-v-concepcion; Press Release, National Employment Lawyers Association, NELA Vows To Overturn U.S. Supreme Court Decision, *AT&T v. Concepcion* Validating Class-Action Bans in Arbitration Agreements (Apr. 27, 2011), http://www.nela.org/NELA/docDownload/32871 ("'The *Concepcion* decision effectively eliminates an important means for enforcing longstanding civil rights and employee protections[.]' . . . 'This case presents a missed opportunity for the Supreme Court to protect America's workers from ad-hoc, arbitrary, and unexamined decisions by their employers[.]' . . . NELA is at the forefront in banning forced arbitration and will continue to advocate in Congress for the passage of the Arbitration Fairness Act (AFA) of 2011."); Editorial, *Gutting Class Action*, N.Y. TIMES, May 13, 2011, at A26, *available at* http://www.nytimes.com/2011/05/13/opinion/13fri1.html (referring to *AT&T Mobility* as a "model" for how corporations "can avoid class actions," and suggesting that AFA is a "welcome effort to protect consumers, employees and others" in response).

I. BACKGROUND OF THE ARBITRATION FAIRNESS ACT

Over the course of the last decade, congressional policy-makers have considered the merits of various forms[4] of an Arbitration Fairness Act.[5] Although the specific terms of the proposals have varied,[6] the essential notion of the Act's proponents is that Congress should modify the Federal Arbitration Act ("FAA")[7] to render unenforceable pre-dispute arbitration agreements involving consumers, employees and others who may have little understanding of the arbitration process, or a limited ability to negotiate terms for arbitration in advance of a dispute.[8] Proponents of the Act describe these agreements as "forced" or "mandatory" arbitration contracts,[9] in which the "deck is stacked" against employees and consumers by procedures that favor the corporation over the individual.[10]

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[4] Some forms of AFA-style legislation have focused on specific segments of the economy, or specific statutory claims. *See, e.g.*, 15 U.S.C. § 1226(a)(2) (barring pre-dispute arbitration agreements between automobile manufacturers and car dealerships); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (1st Sess. 2009); Civil Rights Act of 2008, H.R. 5129, 110th Cong. (2d Sess. 2008); Rape Victims Act of 2009, S. 2915, 111th Cong. (1st Sess. 2009) (prohibiting employer from enforcing arbitration agreements in employment contracts where employee alleges rape).

[5] *See, e.g.*, H.R. 815, 107th Cong. (2001); H.R. 2282, 107th Cong. (2001); S. 2435, 107th Cong. (2002); H.R. 3809, 108th Cong. §§ 511-514 (2004); H.R. 2969, 109th Cong. (2005); H.R. 3010, 110th Cong. (2007); H.R. 5129, 110th Cong. §§ 421–424 (2008); S. 931, 111th Cong. (2009); H.R. 1873, 112th Cong. (2011). *See generally* Thomas E. Carbonneau, *"Arbitracide": The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT'L ARB. 233 (2007); Thomas V. Burch, *Regulating Mandatory Arbitration*, (FSU College of Law, Public Research Paper No. 493, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793303. Arguably, the debate over a need for congressional action on arbitration began even earlier. *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 402 (1996) (suggesting that, "[i]f we are to have sound arbitration law, there is no place to look for it except in the halls of Congress.").

[6] A version of the proposed Act, introduced by Rep. Johnson in 2009, for example, included a reference to "franchise" disputes. *See* H.R. 1020, 111th Cong.§4(b)(1) (1st Sess. 2009), text available at www.govtrack.us. That reference was omitted in the 2011 version of the Act.

[7] The Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

[8] For background on the lower court decisions in *AT&T Mobility*, *see* Samuel Estreicher & Steven C. Bennett, *Preemption of California's Standard of Review of Class Arbitration Waivers*, N.Y.L.J., June 25, 2010. For background on the debate over adhesion arbitration contracts, *see* Steven C. Bennett & Dean Calloway, *A Closer Look at the Raging Consumer Arbitration Debate*, 65 DISP. RESOL. J. 28 (2010); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 108 (suggesting that individuals are in "no position" to understand and avoid or alter the "form contract terms presented by the market"; "if all the firms in the market impose the same terms, shopping is impossible").

[9] *See, e.g.*, Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN. ST. L. REV. 1081 (2009); Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act*, 12 J. CONSUMER & COM. L. 151 (2009); Michael A. Satz, *Mandatory Binding Arbitration: Our Legal History Demands Balanced Reform*, 44 IDAHO L. REV. 19 (2007); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631 (2005); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (2004). There has been some effort to avoid the term. *See* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 105 (1996) (noting potential confusion over use of the term "mandatory" in the context of employment arbitration); Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury Trial Rights*, 38 U.S.F. L. REV. 39, 43 (2003) (suggesting that theorists "stop calling contractual arbitration—mandatory arbitration"); *id.* at 44 ("Arbitration is not mandatory when it arises out of a contract, because contracts are formed voluntarily."). *See generally* Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole and Drahozal*, 8 NEV. L.J. 271, 273 (2007) (noting that "labels can be important in dispute resolution, both for the legitimacy of the process as well as its legal and ethical consequences").

[10] *See* National Employment Lawyers Association, *An Assault on Civil and Workers' Rights: Why Congress Must Ban Forced Arbitration of Employment Cases*, NELA.org (June 2010),

Indeed, the "findings" suggested in the version of the Act recently offered by Senators Franken, Blumenthal, and Representative Johnson[11] directly criticize the fairness of arbitration in employment, consumer, and civil rights disputes.[12] The drafters suggest that "[a]rbitration can be an acceptable alternative" to litigation, but only "when consent to the arbitration is truly voluntary, and occurs after the dispute arises."[13] The 2011 version of the Act would require that "a court, rather than an arbitrator," decide whether the AFA applies to a specific dispute, applying "federal law."[14]

Although not expressly stated as a justification in the "findings" supporting the Act, a secondary justification for the AFA also arises. On this view, "forced" arbitration agreements are not simply unfair because of the lack of "truly voluntary" consent from the individual, but also because such arbitration agreements may actually be intended by large institutions to "suppress" the exercise of civil rights.[15] Thus, the argument goes, large institutions seek to prevent "low

(continued…)

http://www.nela.org/NELA/docDownload/29983 (suggesting that "[m]any arbitrators work repeatedly for the same companies," "[a]rbitrators don't have to be lawyers or know the law," "there is no effective appeal from an arbitrator's decision," "[a]rbitration is secret . . . and there is no public record of what happens," and "[a]rbitrators don't have to justify their decisions, render written decisions, or even follow the law"); Letter from various interest groups to Patrick Leahy, Chairman, and Chuck Grassley, Ranking Member, U.S. Senate Committee on the Judiciary (Oct. 14, 2011), http://www.fairarbitrationnow.org/sites/default/files/AFA%20Senate%20Support%20Letter%20Oct2011.pdf. ("Forced arbitration erodes traditional legal safeguards as well as substantive civil rights and consumer protection laws… [w]ith nearly no oversight or accountability, businesses or their chosen arbitration firms set the rules for the secret proceedings, often limiting the procedural protections and remedies otherwise available to individuals in a court of law."). *See generally* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, And Preclusion Principles*, 38 U.S.F. L. Rev. 49, 53 (2003).

[11] *See* S. 987, 112th Cong. (1st Sess. 2011), *available at* www.govtrack.us. Representative Johnson introduced the identical text of the Act in H.R. 1873, 112th Cong. (1st Sess. 2011), *available at* www.govtrack.us.

[12] *See* S. 987 § 2 (stating that the FAA was intended to apply to "commercial entities of generally similar sophistication and bargaining power"; the Supreme Court has "changed the meaning" of the FAA to apply it to consumer and employment disputes; "[m]ost consumers and employees have little or no meaningful choice whether to submit their claims to arbitration"; and "[m]andatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions").

[13] *Id.* § 2(5). The 2011 version of the AFA does not outline what might be required to make a post-dispute agreement to arbitrate "truly voluntary."

[14] *Id.* § 402(b)(1).

[15] *See Arbitration: Is It Fair When Forced?: Hearing on S. 931 Before the S. Comm. on Judiciary*, 112th Cong. 2 (2011) (statement of F. Paul Bland, Jr., Senior Attorney, Pub. Justice), http://judiciary.senate.gov/pdf/11-10-13BlandTestimony.pdf ("mandatory" arbitration clauses "have the effect of immunizing corporations from any liability or accountability," and "undermines the marketplace when there is no enforcement of the rules of the road"); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1761675 ("The compelling logic of what is commonly called 'mandatory arbitration' is that it is intended to suppress claims."); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1323 (2009); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 MICH. J. L. REFORM 871, 876 (2008) (study claiming that "absence of arbitration provisions [in corporations'] material contracts suggests that many firms value, even prefer, litigation over arbitration to resolve disputes with peers."); Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 173 (2006) ("Every indication is that the imposed arbitration clauses are nothing but a shield against legal accountability by the credit card companies."); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 412 (2005) (suggesting "vast potential reach" of class action waivers as shield for misconduct).

stakes" cases from becoming "high stakes" matters, by avoiding consolidated or class action proceedings in court.[16]

That the AFA has been introduced repeatedly in Congress without progressing past committee suggests that the legislation lacks any real chance of adoption.[17] Yet, proponents have achieved some success in enacting pre-dispute arbitration agreement bans in specific areas.[18] For example, the 2006 Talent-Nelson Amendment to the Defense Authorization Act provided the Defense Department with authority to ban or restrict mandatory arbitration clauses in lending agreements with service members.[19] In 2009, moreover, in response to a notorious military case,[20] Congress enacted the "Jamie Leigh Jones Amendment" regarding 2010 Defense Department appropriations, prohibiting the award of large Defense contracts to any company using mandatory pre-dispute arbitration agreements covering Title VII and sexual assault-related tort claims.[21] Congress also enacted a "whistleblower" protection provision in the 2009 stimulus bill, which provides that certain whistleblower claims cannot be subject to arbitration.[22] Further, the Dodd-Frank Act of 2010 provided for creation of a Bureau of Consumer Financial Protection with the authority (among other things) to regulate pre-dispute arbitration agreements between

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[16] *See* David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, *supra* note 15, at 240 (citing Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Pre-dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 567 (2001) and other authorities).

[17] *See* Russ Bleemer, *Senate Judiciary Committee Testimony for Today's Arbitration Fairness Hearing, Resources*, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (Oct. 13, 2011), http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/729/Senate-Judiciary-Committee-Testimony-for-Todays-Arbitration-Fairness-Hearing-Oct-13.aspx (AFA bill "won't get through the Republican-controlled House"); Steven J. Mintz, *Supreme Court Favors Class Action Waivers In Arbitration, Litigation News*, AM. BAR ASSOC (Aug. 30, 2011), http://apps.americanbar.org/litigation/litigationnews/articles-print/summer2011-supreme-court-class-action-waivers.html ("Given that the relevant House committees are now controlled by Republicans and that one of the [AFA's] strong proponents [Sen. Feingold] was not reelected in 2010, passage in this Congress seems unlikely. But the issue will not go away[.]").

[18] *See* Deepak Gupta, Why and How We Should Ban Class-Action Bans, 4 (Mar. 17-18, 2011) (unpublished manuscript, http://www.law.gwu.edu/News/2010-2011Events/Documents/Gupta%20Submission.pdf) (suggesting that AFA "faces widespread opposition from virtually the entire business community," and that a "more successful and promising legislative approach has been to target mandatory pre-dispute arbitration clauses in particular contexts, such as mortgage lending and auto contracts").

[19] *See* 10 U.S.C. § 987(e)(3) (2006) (providing authority to ban or restrict pre-dispute arbitration clauses in lending agreements with military service personnel).

[20] *See generally* Jones v. Halliburton Co., 583 F.3d 228 (5th Cir. 2009); Wade Goodwyn, *Rape Case Highlights Arbitration Debate*, NPR (June 18, 2009), http://www.npr.org/templates/story/story.php?storyId=105153315.

[21] Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8166, 123 Stat. 3409, 3454.

[22] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(d), 123 Stat. 115, 297.

consumers and financial service providers.[23] Thus, it appears that the debate over pre-dispute arbitration agreements will continue, at least in some form.[24]

II. SUMMARY OF THE AT&T MOBILITY LLC V. CONCEPCION DECISION

On its face, the notion that *AT&T Mobility* justifies the enactment of the AFA is overbroad.[25] The essential structure of the AFA was proposed long before the decision in *AT&T Mobility*.[26] The decision, moreover, did not validate all forms of pre-dispute arbitration agreements; nor did it suggest that exceptions to enforcement of pre-dispute agreements, already outlined in the FAA and judicially recognized, must be limited.[27] Instead, in *AT&T Mobility*, the

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[23] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); Christopher J. Keller & Michael W. Stocker, *Is the Shield Beginning to Crack?*, N.Y.L.J., Nov. 15, 2010, at S8. *See generally* Lea Haber Kuck & Gregory A. Litt, *Will Stolt-Nielsen Push Consumer, Employment and Franchise Disputes Back Into the Courts?*, 4 N.Y.S.B.A. NEW YORK DISPUTE RESOL. LAWYER 16 (2011). The Dodd-Frank law requires the Bureau to complete a formal study of the use of binding arbitration agreements, after which it may use its regulatory power to limit or fully prohibit arbitration agreements in financial services contracts. *See* Pub. L. No. 111-203 § 1028.

[24] *See* Amy Schmitz, *Arbitration Ambush in a Policy Polemic*, 3 PENN ST. YEARBOOK ON ARB. & MED. 52, 53 (2011) (noting that debate over arbitration has been caught up in a "firestorm" of issues involving "public power and control over private contracts," arising out of the financial crisis); F. Paul Bland & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 393 (2009) (enforceability of class action waivers is "one of the most hotly contested issues in all of consumer and employee litigation").

[25] *See* Christopher Drahozal, Concepcion *and the Arbitration Fairness Act*, SCOTUSblog (Sep. 13, 2011), www.scotusblog.com ("enacting the AFA would be an overbroad response to the Court's decision in *Concepcion*"; the Act "would do more than simply reverse *Concepcion*"); *see also* David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett*, 19 CORNELL J.L. & PUB. POL'Y 419, 458 (2010) (suggesting that AFA is "a gross overreaction to the proven efficacy and fairness of labor and employment arbitration"); E. Gary Spitko, *Exempting High-Level Employees and Small Employers From Legislation Invalidating Pre-dispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 600 (2009) (suggesting that AFA is "too broad," and that it should "exempt claims by or against certain high-level employees and claims by or against certain small employers").

[26] Indeed, nearly a year before *AT&T Mobility* was decided, one commentator had already predicted a "showdown" between Congress and the Court on arbitration law. *See* Marcia Coyle, *Arbitration Showdown Looms Between Congress, Supreme Court; Congress, high court take opposing views of mandatory agreements*, THE NAT'L L. J. (ONLINE), June 14, 2010, http://www.lexisnexis.com/lawschool/research/Default.aspx?e=&pp=002&com=2&com=2&ORIGINATION_CODE=00086&searchtype=get&search=128+s%20ct.%202709&autosubmit=yes&topframe=on&powernav=on&tocdisplay=off&cookie=yes.

[27] The Court in *AT&T Mobility* recognized the "saving" clause of the FAA (Section 2), which preserves "generally applicable contract defenses." *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1742 (2011); *see also* 9 U.S.C. § 2 (providing for enforcement of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract"). The Court held that the intent of the FAA cannot be to "destroy itself," thus, the "grounds" available under FAA Section 2 "should not be construed to include a State's mere preference for procedures that are incompatible with arbitration." *AT&T Mobility*, 131 S. Ct. at 1748 (quotation omitted).

Court applied a relatively straightforward analysis. Under the FAA,[28] a state law that "prohibits outright" the arbitration of claims is preempted by federal law.[29] Therefore, a rule classifying an arbitration agreement as "unconscionable," for failure to follow specific procedures, may be invalid.[30] The Court applied these precepts to the rule established by the California Supreme Court in the *Discover Bank* case to the effect that waiver of rights to consumer class action, even in the context of an arbitration agreement, may be unconscionable.[31] In effect, the Court held that the California rule required a specific form of procedure (class arbitration) for a certain class of arbitration agreements, thus violating principles of federal preemption.[32]

The dissent in *AT&T Mobility* did not suggest that application of the *Discover Bank* rule would generally invalidate consumer arbitration agreements, in favor of class actions.[33] Instead, the dissent focused on the majority view that *Discover Bank* would compel "class arbitration" procedures for consumer disputes, thus discouraging the use of arbitration agreements.[34] Indeed, the dissent challenged the majority view that arbitration is somehow "poorly suited" to "high-stakes" class action litigation (thereby challenging the view that a rule compelling class arbitration of certain disputes might discourage arbitration).[35]

Whatever the merits of in-court class action procedures versus class arbitration, little evidence supports the view that *AT&T Mobility* may somehow produce a "gold rush" of corporations embracing arbitration (coupled with class arbitration waivers) to avoid large stakes

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[28] In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court held that the Interstate Commerce Clause (on which the FAA is based) and the Supremacy Clause of the U.S. Constitution require that state laws singling out arbitration clauses for special limitations must be voided. "In enacting § 2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration[.]" *See id.* at 10. The Court has repeatedly reaffirmed that view. *See, e.g.*, Preston v. Ferrer, 552 U.S. 346, 349 (2008); Doctor's Assoc. v. Casarotto, 517 U.S. 681, 685 (1996). Some vehement criticisms of the Court's *Southland* preemption doctrine have arisen. *See, e.g.*, David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 6 (2004) (arguing that "*Southland* is wrong, and the justifications for it are wrong").

[29] *AT&T Mobility*, 131 S. Ct. at 1747.

[30] *See id.*

[31] In *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), the California Supreme Court held an arbitration provision unconscionable in the context of a consumer contract of "adhesion." The court stated: "But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for its own fraud, or willful injury to the person or property of another.' . . . Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *Id.*

[32] *See AT&T Mobility*, 131 S. Ct. at 1751–53; *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010) ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."). *But see* S.I. Strong, *Does Class Arbitration "Change The Nature" of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles*, 17 HARV. NEGOT. L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791928 (suggesting that "class arbitration is not significantly more complicated than international or investment arbitration").

[33] *See AT&T Mobility*, 131 S. Ct. at 1757 (suggesting that *Discover Bank* rule is "consistent" with the basic purpose of the FAA).

[34] *See id.* at 1758 ("[C]lass arbitration is consistent with the use of arbitration.").

[35] *See id.* at 1760 (noting "numerous counterexamples" of high-stakes disputes in arbitration).

class disputes.[36] As Professor Christopher R. Drahozal summarized, in testimony before the Senate Judiciary Committee, most consumer contracts do not contain arbitration clauses, and it is "unlikely" that many businesses will respond to the decision by switching to arbitration.[37]

If Congress wished to do so, moreover, it could mandate that arbitration of consumer, employment or other types of cases must include an option for class arbitration procedures. Alternatively (and more broadly) Congress might grant consumers, employees and others a right to avoid arbitration (at their option) in favor of class action proceedings in court for all, or a selected set of cases.[38]

Thus, the National Labor Relations Board, in its recent decision in *D.R. Horton, Inc. v. Cuda*,[39] held that Section 7 of the National Labor Relations Act ("NLRA"), which protects the rights of employees to engage in "concerted activities" for purposes of collective bargaining or "other mutual aid or protection,"[40] necessarily includes protection of the rights of employees to proceed by class action to address grievances against their employers.[41] According to the Board, the NLRA precludes employers from requiring employees to waive their rights to such "protected" class action activity.[42]

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[36] Editorial reaction to *AT&T Mobility* immediately suggested this possibility. *See* Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, SAN FRANCISCO CHRONICLE, Nov. 7, 2010, at E8, *available at* www.articles.sfgate.com ("If the court goes down AT&T's path, the consequences could be staggering. It could be the end of class action litigation."); Adam T. Liptak, *Supreme Court Allows Contracts that Prohibit Class-Action Arbitration*, N.Y. TIMES, April 28, 2011, at B3, *available at* http://www.nytimes.com/2011/04/28/business/28bizcourt.html ("The decision basically lets companies escape class actions, so long as they do so by means of arbitration agreements." (quoting Brian T. Fitzpatrick, law professor at Vanderbilt University); Ashby Jones, *After AT&T Ruling, Should We Say Goodbye to Consumer Class Actions?*, WALL ST. J. L. BLOG http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/ (April 27, 2011, 14:36 EST) ("Once given the green light, it is hard to imagine any company would not want its shareholders, consumers and employees to agree to such provisions." (quoting Brian T. Fitzpatrick, law professor at Vanderbilt University).

[37] *See* Statement of Christopher R. Drahozal, John M. Rounds Professor of Law, University of Kansas School of Law, *Arbitration: Is it Fair when Forced?: Before the S. Comm. on the Judiciary*, 112th Cong. (Oct. 13, 2011), *available at* http://www.judiciary.senate.gov/pdf/11-10-13DrahozalTestimony.pdf. Professor Drahozal is, among other things, co-author of the Searle Civil Justice Institute Report on consumer arbitration. *See* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study Of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 843 (2010).

[38] *See infra* Part V, final paragraph.

[39] Case No. 12-CA-25764, 357 N.L.R.B. No. 184 (2012).

[40] 29 U.S.C. § 157 (1947) (right of employees as to organization, collective bargaining, etc.).

[41] *D.R. Horton*, 357 NLRB No. 184 at 4 ("When multiple named-employee-plaintiffs initiate the action, their activity is clearly concerted. . . . Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.").

[42] *See id*. at 4–5 (citing 29 U.S.C. § 158(a)(1) (noting NLRA Section 8 "makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of their rights" guaranteed in Section 7")). The EEOC reached a similar conclusion (although not specific to class actions) in 1997. *See* Beth M. Primm, *A Critical Look At The EEOC's Policy Against Mandatory Pre-dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMP. L. 151 (1999).

Whatever the merits of the Board's decision,[43] and whatever the possibilities for further appeals or other proceedings that may modify or overturn the Board's ruling, the decision[44] demonstrates (at least in principle) that Congress could specifically act to preserve class action rights in one or more fields of law that may be affected by arbitration.[45] Where Congress has not done so, the choice is significant.[46]

The Supreme Court's most recent arbitration-related decision, in *CompuCredit Corp. v. Greenwood*,[47] highlights this point. In *CompuCredit*, the Court cited the "liberal federal policy" favoring enforcement of arbitration agreements, which requires courts to enforce such agreements "even when the claims at issue are federal statutory claims," unless the FAA's enforcement mandate "has been overridden by a contrary congressional command."[48] The Court, noting the "clarity" with which Congress has restricted the use of arbitration in some contexts,[49] held that a statutory provision that merely references or contemplates judicial enforcement does not suffice to establish a "congressional command" to override the FAA.[50] In short, if Congress wishes to eliminate arbitration of specific claims, or wishes to ensure class actions in support of specific claims, it is entirely free to do so, and Congress certainly knows how to do so.[51]

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[43] The Board acknowledged a potential conflict between its ruling and the Supreme Court's decision in *AT&T Mobility*. *See D.R. Horton*, 357 NLRB No. 184 at 10 (noting the question of conflict between NLRA and FAA is "an issue of first impression" for the Board); *id.* at 15 (distinguishing *AT&T Mobility*). In 2010, moreover, the Board's General Counsel suggested a conclusion quite different from the Board's ruling in *D.R. Horton*. *See* NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, MEMORDANDUM GC 10-06, GUIDELINE MEMORANDUM CONCERNING UNFAIR LABOR PRACTICE CHARGES INVOLVING EMPLOYEE WAIVERS IN THE CONTEXT OF EMPLOYERS' MANDATORY ARBITRATION POLICIES (2010) at 6 (suggesting that NLRA permits employees to band together to "test the validity of their individual agreements and to make their case to a court that class or collective action is necessary if their statutory rights are to be vindicated," *not* that the NLRA invalidates all arbitration agreements that preclude class actions).

[44] The *D.R. Horton* case was heavily litigated, with the Board inviting (and receiving) extensive amicus briefs from interested parties. *See* Case 12-CA-025764, Invitation To File Briefs, (June 16, 2011) *available at* www.nlrb.gov; Case 12-CA-025764, Docket Sheet (2011) *available at* www.nlrb.gov (listing briefs received from U.S. Chamber of Commerce, National Retail Federation, National Employment Lawyers Association and other groups). No doubt the case will produce additional litigation. *See* Steven Greenhouse, *Labor Board Backs Workers on Joint Arbitration Cases*, N.Y. TIMES, Jan. 6, 2012, available at http://www.nytimes.com/2012/01/07/business/nlrb-backs-workers-on-joint-arbitration-cases.html ("[T]he business community will be up in arms because you have federal labor law being applied in a nonunion setting.") (quoting Professor Alex Colvin, professor at Cornell School of Industrial and Labor Relations)). Indeed, at least one court has already considered, and apparently rejected, the reasoning in *D.R. Horton*. *See* LaVoice v. UBS Fin. Servs., Inc., No. 11 Civ. 2308 at 16 (S.D. N.Y. Jan. 13, 2012) (court "declines to follow *D.R. Horton*); *see also* Samuel Estreicher & Kristina A. Yost, *NLRB Reaches Into Employment Law to Invalidate Class Action Waivers*, N.Y.L.J., Feb. 2, 2012 at 4, 8 (D.R. Horton represents a "problematic ruling").

[45] The *D.R. Horton* decision does not affect the rights of unions to waive individual rights (such as the right to pursue a class action) as part of the collective bargaining process. *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009); *see also* Steven C. Bennett, *Arbitration Of Employment Discrimination Claims: Impact of the Pyett Decision on Collective Bargaining*, 42 TEX. TECH L. REV. 23 (2009).

[46] *See* Scott v. Cingular, 160 Wash. 2d 843, 852 (2007); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 378 (2005).

[47] CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2011).

[48] *Id*. at 669 (quoting Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

[49] *See id*. at 672 (citing examples).

[50] *See id*. at 671 ("[W]e have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court.").

[51] The opposite rule, that "mere formulation of the cause of action" with reference to suit in court might preclude arbitration would mean that "valid arbitration agreements covering federal causes of action would be rare indeed." *Id*. at 670.

III. OVERRULING AT&T MOBILITY LLC V. CONCEPCION BY STATUTE

Congress made the FAA, and Congress may, if it wishes, amend or repeal the law.[52] In 1970, for example, Congress amended the FAA, to add Chapter Two, dealing with international arbitration agreements and awards under the New York Convention, and in 1990 Congress added Chapter Three, dealing with the Panama Convention.[53] In theory, amendment of the FAA (through the AFA or any other similar enactment) could be used to overrule *AT&T Mobility* and any other pro-arbitration decisions of the Supreme Court in recent years.

Yet, legislative revision of the judicially-constructed doctrine is fraught with (known and unknown) perils.[54] Although proponents of the legislative modification of "incorrect" Supreme Court rulings point to some successful "narrow" legislative "overrides" of the Court;[55] even "narrow" legislative efforts may produce unintended consequences.[56] Inevitably, the Court (and the courts in general) may face circumstances that are similar to the original case, but not clearly within the statutory language of the override itself.[57] Congress may draft "opaque" statutory terms,[58] and thus "plain meaning," legislative history and "purpose" analyses can produce wildly varying and unpredictable results.[59] Where the Court has not invited legislative action,[60] moreover, there is some danger that the Court may strain to restrict new legislative terms.[61]

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[52] *See* William W. Park, *Amending the Federal Arbitration Ac*t, 13 AM. REV. INT'L ARB. 75, 77 (2002) ("The time has come to considering amending the FAA to provide greater clarity for international arbitration."); Joseph D. Becker, *Fixing the Federal Arbitration Act by the Millennium*, 8 AM. REV. INT'L ARB. 75 (1997) (suggesting need for "renovation" of the FAA; "the dusting of an antique, not a revolution").

[53] *See generally* STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS, 131–50 (2002) (summarizing U.S. law on international arbitration); Jarred Pinkston, *Toward a Uniform Interpretation of the Federal Arbitration Act: The Role of 9 U.S.C. § 208 in the Arbitral Statutory Scheme*, 22 EMORY INT'L L. REV. 639 (2008) (reviewing interplay between FAA and U.S. international arbitration treaty commitments); John P. Bowman, *The Panama Convention and its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT'L ARB. 1 (2000).

[54] *See* Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 428 (1992) (noting "few identifiable patterns in the types of decisions that Congress overrules").

[55] *See* Megan Coluccio, *Fait Accompli?: Where the Supreme Court and Equal Pay Meet a Narrow Legislative Override Under the Lilly Ledbetter Fair Pay Act*, 34 SEATTLE U. L. REV. 235 (2010).

[56] *See* Kathryn Eidmann, *Ledbetter in Congress: The Limits of a Narrow Legislative Override*, 117 YALE L.J. 971 (2008).

[57] Deborah Widis, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 515 (2009) (citing examples in the area of employment discrimination and noting in these circumstances, the original "shadow" precedents may "continue[] to hold sway"); *id.* at 423 ("[O]verrides often fail to play their role as a check on judicial lawmaking.").

[58] *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA L. REV. 419, 431 (2005); *see also* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 594 (2002) (citing examples of "deliberate ambiguity" in statutory drafting); GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2003) (suggesting that Congress deliberately drafts ambiguous statutes in order to defer to Supreme Court rulings on difficult issues).

[59] *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 31–37 (Amy Gutmann ed., 1997) (criticizing use of legislative history), *and* Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U.L. REV. 807, 812–14 (1998) (noting frequent misuse of legislative history) *with* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847–61 (1992) (noting value of legislative history) *and* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 230–32 (arguing for legislative history as reasonable guide to congressional intent); *see also* Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO L.J. 1119, 1122 (2001) ("[A]cademic theorists have no coherent idea of Congress, nor one based on what experts know about how Congress works.").

The risk of congressional action also includes the prospect that, in some instances, Congress may agree with the Court's ruling and expressly codify that view through legislation.[62] To a degree, the constitutional system of checks and balances operates on the assumption that the Court can accurately predict whether a congressional override might result from a controversial ruling.[63] Further, in taking up a controversial topic, the legislature may attract lobbying attention, producing an entirely different structure from the "narrow," even well-intentioned purposes of the initial proponents of the override.[64] If anything, the stark alignment of interest groups on the questions that surround consumer and employee arbitration suggests that a "narrow" revision of

(continued…)

[60] *See generally* Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162 (1999).

[61] Professor Richard Paschal has called this phenomenon the "continuing colloquy" between Court and Congress. *See* Richard Paschal, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. 143, 199–203 (1991); *see also* JEB BARNES, OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 43 (2004). Some hint of this tension may be seen in the "game" played between the Supreme Court and state courts over the application of unconscionability rules in the context of the FAA. *See* Aaron-Andrew Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008); *see also* Ramona L. Lampley, *Is Arbitration Under Attack? Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 484 (2009); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469; Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004).

[62] *See* Nancy C. Staudt, Rene Lindstadt & Jason O'Connor, *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 N.Y.U. L. REV. 1340 (2007) ("Overrides, although the main focus of the extant literature, account for just a small portion of the legislative activity responding to the Court. In fact, Congress is nearly as likely to support and affirm judicial decision-making through the codification of a case outcome as it is to reverse a decision through a legislative override."); Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEGIS. STUD. Q. 5, 7–8 (2005) (suggesting that Congress is most likely to override the Court when legislators are ideologically distant from the Court); Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729, 729 (1991) (overrides may reflect "political upheaval or turmoil in which the Court's erroneous interpretations appear to reflect deliberate attempts to frustrate the policy objectives of Congress").

[63] *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335 (1991) (noting that the Court must consider congressional preferences in order to avoid risk of override); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) (applying game theory to interactions between branches of government on policy-making).

[64] *See* Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEGIS. STUD. Q. 5, 10 (2005); Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353, 358 (1994); Harry P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377, 391 (1965). Indeed, the very purpose of congressional overrides, in some instances, may be linked to interest group politics. See Victor M. Sher & Carol Sue Hunting, *Eroding The Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435, 487 (1991) (describing lobbying efforts for overrides that provide project-specific exemptions from environmental laws).

the FAA is almost impossible.[65] Once modified, moreover, a new form of FAA could wreak havoc for years.[66]

Experience with the Revised Uniform Arbitration Act ("RUAA") provides some indication of the scope and character of the problem in codifying a legislative solution to the issues addressed in *AT&T Mobility*.[67] The Uniform Arbitration Act ("UAA"), largely modeled on the FAA, was first promulgated in 1955 by the National Commission on Uniform State Laws, and has been adopted by 35 states, with some 14 more using the UAA as a model for varied forms of state arbitration legislation.[68] Drafting of the RUAA (starting in 1997) included consideration of the problem of adhesion contracts and unconscionability. Yet, the drafters were unable to agree on a universal means to deal with the problem, and thus the RUAA merely mentions the problem and leaves to developing state (and federal) common law the means to its solution.[69] Similarly, although the RUAA drafters took up the question of consolidation of arbitration proceedings, they chose not to include any specific provision in the RUAA regarding class action arbitral proceedings.[70] If the framers of the RUAA, after three years of study, and eight formal meetings, including representatives from the American Bar Association, the American Arbitration Association and similar national arbitration service providers, and numerous interest group representatives, could not agree on solutions to these essential problems, it seems somewhat unlikely that Congress, in the context of overriding a Supreme Court precedent, is any more likely to make useful progress.[71]

The legislative fate of the proposed Fair Arbitration Act ("FairArb") further illustrates the difficulty.[72] This statutory scheme, offered by Senator Sessions, aims at providing a

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[65] *AT&T Mobility*, like most of the recent Supreme Court cases on consumer and employment arbitration, especially in the context of questions about class action treatment, drew amicus briefs from consumer and employee advocates, corporate counsel, trade groups and other interest groups. *See* Frank Blechschmidt, *All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers*, 160. U. PA. L. REV. 541, 542 (2012) (noting extensive briefing in light of "far-reaching implications for consumer and employment contracts and class action policy"); *see also* Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 417 (2009) (noting the "maul[ing]" of U.S. arbitration law by the "claws of politicization").

[66] *See* Peter B. Rutledge & Christopher R. Drahozal, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1170 (2011) (noting risk that, once Congress amends FAA, "Congress will naturally turn to other matters, and occasions for reexamination will be scant").

[67] The texts of the UAA and the RUAA are available at www.nccusl.org. For a summary of the RUAA, UAA, and other legislative efforts at modification of arbitration law, *see* Mary A. Bedikian, *Alternative Dispute Resolution*, 55 WAYNE L. REV. 21, 74–76 (2009).

[68] *See* Sarah Rudolph Cole, *The Revised Uniform Arbitration Act: Is it the Wrong Cure?*, DISP. RESOL. MAG., Summer 2002, at 10.

[69] *See id.* at 11; *see also* Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 3 (2001).

[70] *See* Heinsz, *supra* note 69, at 15 (RUAA "does not address the hotly debated issue of class-action arbitrations").

[71] Significantly, the RUAA has not received anywhere near the legislative support from the states seen in response to the original, more bare bones, form of the UAA. *Arbitration Act (2000)*, UNIFORM LAW COMMISSION, *available at* http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20 (2000) (ten years after completion, RUAA has been adopted by only 14 states and the District of Columbia); *see also* Jack M. Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WM. & MARY BUS. L. REV. 227, 247 (2011) (noting that "bare bones" form of FAA, instead of a "comprehensive and systematic approach" to the law of arbitration, "relies almost entirely on the common law of contracts, along with the developing federal common law" of arbitration, to fill statutory gaps).

[72] Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007); Fair Arbitration Act of 2011, S. 1186, 112th Cong. (2011). These bills have not addressed class action, class arbitration, or the *AT&T Mobility* case.

comprehensive set of "default" arbitration procedural rights for consumers and employees.[73] This kind of scheme serves as an alternative to banning all pre-dispute arbitration agreements, or otherwise addressing the interplay between arbitration and class action procedures.[74] The bill, like the AFA, however, has never progressed to a vote in either congressional chamber.[75]

IV. POTENTIAL ADVERSE CONSEQUENCES OF THE AFA

The risk with introduction of the AFA in Congress is not simply that the legislation may go astray (failing to achieve its intended purposes). The potential adverse consequences of the AFA, even if enacted precisely as its sponsors suggest, are manifest. First, the AFA may actually *reduce* access to justice for some consumers and employees.[76] For cases not subject to class action treatment, arbitration may provide a faster, cheaper justice system for individuals,

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[73] Senator Sessions, in describing the most recent form of the FairArb bill, stated: "Arbitration is a quick and cost-effective means of resolving disputes, but the process could be further improved to address some recent cases where individuals claimed that arbitrations were not conducted under fair conditions. My legislation would establish reforms to make absolutely certain that arbitration is as fair as possible for all parties involved." *See Sessions Comments On Fair Arbitration Act*, June 16, 2011, JEFF SESSIONS, *available at* http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=9e1c07bf-9116-cd9f-68a9-44be4f5a4a17&Region_id=&Issue_id=; *see also* Andrew L. Sandler & Victoria Holstein-Childress, *Supreme Court and Congress Focus on Mandatory Pre-Dispute Arbitration Agreements: The Debate Continues*, 27 CORP. OFFICERS & DIRECTORS LIABILITY, July 5, 2011, at 4 (suggesting that "Congress should address the fairness considerations [addressed in *AT&T Mobility*] by implementing specific procedural rules to balance arbitral mechanisms between businesses and their consumers or employees"); *id.* at 8 (FairArb bill is "[b]ased largely on the AAA's Consumer Due Process Protocol," and "seeks to ensure the continuing viability of arbitration while enhancing its effectiveness through certain reforms").

[74] *See* Thomas W. Stipanowich, *Revelation and Reaction: The Struggle to Shape Arbitration, Contemporary Issues in International Arbitration and Mediation* (Pepperdine Univ. Legal Studies Research Paper No. 2011/11), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1757258 (noting recent Supreme Court decisions on "gateway" issues involving consolidation of claims in arbitration, and calling for legislation to establish due process standards for arbitration).

[75] *See* David D. Caron & Seth Schreiberg, *Anticipating the 2009 U.S. "Fairness in Arbitration Act"*, 2 WORLD ARB. & MEDIATION REV. 15 (2008); *see also* Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361 (2010).

[76] The Association for Conflict Resolution ("ACR"), a group including more than 3,000 mediators, arbitrators, educators and others, issued a comprehensive report on the AFA, concluding: "Pre-dispute mandatory arbitration has the potential for developing a fast, efficient, fair, low-cost dispute resolution process to which all citizens could gain access[.] By broadly making void and unenforceable pre-dispute agreements to arbitrate a future consumer, employment, franchise, or civil rights controversy, the proposed AFA eliminates this potential. . . . [I]n the absence of a post dispute agreement to arbitrate, the AFA requires that all controversies be adjudicated in an appropriate court. However, there is no reasonable evidence that such a court forum is accessible to all parties[.]" ASSOC. FOR CONFLICT RESOL., AN EXAMINATION OF THE ARBITRATION FAIRNESS ACT OF 2009 7 (2009), *available at* http://www.acrnet.org/uploadedFiles/Publications/FinalReport%2012-1-09.pdf. The ACR recommended against any form of the AFA that "broadly prohibits the use of pre-dispute arbitration agreements[.]" *Id.* at 13.

especially those who cannot afford counsel.[77] Available evidence suggests, moreover, that when administered in accordance with essential due process standards, arbitration outcomes may be as favorable to employees and consumers as conventional litigation.[78] Once a dispute arises, however, parties are much less likely to agree to arbitrate, because the calculus of litigation (higher cost, but with greater procedural protection) versus arbitration (generally lower cost, but more informal) may change.[79]

The AFA also introduces new questions of statutory interpretation and doctrine, which could *increase* the cost of conventional litigation. The terms "consumer" and "civil rights" disputes, for example, presenting gateway issues in determining the application of the AFA, are

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[77] *See* Jyotin Hamid & Emily J. Mathieu, *The Arbitration Fairness Act: Performing Surgery with a Hatchet Instead of a Scalpel?*, 74 ALBANY L. REV. 769, 780 (2010–2011); Kirk D. Knutson, *Anti-Arbitration Bills Imperil the Universal Benefits of Consumer Arbitration*, METROPOLITAN CORP. COUNS., Aug. 1, 2008 ("[S]tudies have consistently shown that where similar subject matter is at issue, arbitration produces the same outcomes as court but in less time and at less expense." (referencing research at www.adrforum.com/benefitsofarbitration)); Amy Cook, *ADR is A-OK*, CBA REC. (Chi. Bar Ass'n, Chicago, Il.), Apr. 1, 2008, at 6 (noting ABA survey finding that 78% of lawyers believe that arbitration was "timelier" than litigation, "and most said it was more cost effective"); Mark Fellows, *Limits on Arbitration Would Burden Courts and Taxpayers*, METROPOLITAN CORP. COUNS., Dec. 1, 2007, at 8 ("Surveys of arbitration participants consistently show that they spend less money resolving disputes in arbitration than in court."); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALBANY L. REV. 241, 241 (1999) ("in exchange for reduced costs and speedier resolution, arbitrating parties agree to limit their right to appeal"); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 429 (1988) ("[O]bservers frequently depict arbitration as a speedy and economical process.").

[78] *See* CTR. FOR LEGAL SOLUTIONS, EMPIRICAL RESEARCH ON ARBITRATION OUTCOMES, *available at* http://www.centerforlegalsolutions.org/arbitration.data.shtml; Lisa Bingham, *Is There a Bias in Arbitration of Non-Union Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. OF CONFLICT MGMT. 369 (1995) (study finding that employees won more often than employers and received a greater percentage of their demands, in arbitration).

[79] *See* Peter B. Rutledge, *Who Can be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 280 (2008) ("[A] variety of empirical measures suggest that postdispute arbitration will not work."); David Sherwin, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1 (2003); Lewis J. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313 (2003). Such a post-dispute agreement may be particularly difficult to achieve in the context of multi-party controversies. *See* Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party — Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. INT'L L. REV. 711, 717-18 (2003) (where commonality of facts is sole link between parties, "impossible" to obtain consent to arbitrate from all parties).

not crystal clear.[80] The anti-arbitration "findings" of the AFA, moreover, could have meddlesome consequences, even outside of consumer, employment and civil rights arbitration.[81]

Commentators have warned that fundamental changes in the FAA could adversely affect the position of the United States as a site for global dispute resolution.[82] Due to the large volume of international commerce involving this country, the United States has become an important center for dispute resolution.[83] The AFA, however, would overturn a "fundamental principle" of international arbitration law, to the effect that arbitrators normally may proceed with arbitration notwithstanding jurisdictional challenges.[84]

Finally, despite the current controversy surrounding Supreme Court interpretation of the law, the FAA has served the U.S. (and international) arbitration community for roughly 80

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[80] *See* Mauricio Gomm Santos & Rodney Quinn Smith, *The Changing Landscape of Arbitration in the United States and its Effects on International Arbitration*, 14 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654354 ("The definitions of consumer and civil rights disputes remain quite broad. Litigants seeking to avoid arbitration will be able to plead their claims through one of these two areas and require a judicial decision before going to arbitration. These decisions would require opinions from all levels of the courts in order to define their parameters. In the meantime, arbitration would experience a significant delay."); David Caron & Seth Schreiberg, *Anticipating the 2009 U.S. "Arbitration Fairness Act"*, 2 WORLD ARB. & MEDIATION REV. 3 (2008) (AFA would alter doctrine of "separability" of arbitration contracts, requiring judicial interpretation).

[81] *See* Mark Kantor, *Legislative Proposals Could Significantly Alter Arbitration in the United States*, 74 ARB. 444 (2008); Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 49 (2010) ("very likely" that AFA and FairArb laws "will affect day-to-day commercial arbitration practice in unhelpful ways"); Alicia J. Surdyk, *On the Continued Vitality of Securities Arbitration: Why Reform Efforts Must Not Preclude Predispute Arbitration Clauses*, 54 N.Y.L. SCH. L. REV. 1131 (2009-2010); NEW YORK CNTY. LAWYERS ASS'N COMM. ON THE FED. COURTS, REPORT ON THE PROPOSED ARBITRATION FAIRNESS ACT OF 2007, 249 F.R.D. 402 (Apr. 15, 2008) ("the findings of the AFA could have the unintended consequence of undermining all arbitrations," not simply those within the "sectors" on which the law focuses).

[82] *See* Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT'L ARB. 455, 463 (2007) ("The proposed legislation would have a marked impact on the acceptability of the United States as an arbitration-friendly jurisdiction. It would not only reverse the trend over the past years towards more frequent selection of the U.S. as a seat for arbitration and potentially reduce the retention of U.S. dispute resolution institutions and arbitration specialists, but would also make U.S. businesses less attractive as trading partners."); *see also* Mark Kantor, *Congress Considers Legislation that Could Significantly Alter Arbitration in the United States*, 1 N.Y. DISP. RESOL. LAW. 38, 39 (2008) (overturning doctrines of arbitrator competence to decide jurisdiction, and separability of arbitration agreements from remainder of contracts would "place the United States in opposition to decades of arbitration developments worldwide and arguably violate international obligations under a variety of international arbitration treaties"); Emmanuel Gaillard, *International Arbitration Law*, N.Y.L.J., Apr. 22, 2008, at 3 (stating that the AFA "pos[es] a serious threat to the promotion of efficient international dispute resolution and of the United States as a friendly place to arbitrate"); Thomas W. Stipanowich, *Revelation and Reaction: The Struggle to Shape Arbitration, Contemporary Issues in International Arbitration and Mediation*, at 50 (Pepperdine University Legal Studies Research Paper No. 2011/11, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1757258 ("the breadth and ambiguity of the [AFA], and the potential impact of the statute on international transactions, is of great concern to the international business community"); *cf.* S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017 (2009).

[83] *See* PEDRO J. MARTINEZ-FRAGA, AMERICAN INFLUENCES ON INTERNATIONAL COMMERCIAL ARBITRATION, 133–34 (2009); Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 84 (2003).

[84] *See* N.Y. STATE BAR ASSOC., REPORT OF THE DISPUTE RESOLUTION SECTION ON THE ARBITRATION FAIRNESS ACT AND OTHER FEDERAL ARBITRATION BILLS, Mar. 18, 2009, at 7, *available at* http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&ContentID=52543&Template=/CM/ContentDisplay.cfm; *see id.* at 8 (noting risk that AFA could have "a grave and harmful impact on international commerce").

years.[85] Critics suggest that the AFA, and any suggested reform of the nation's fundamental arbitration law, must pass a "first, do no harm" test (which, to date, proponents have not satisfied).[86] Further, to the extent that any reforms to the FAA might tend to decrease incentives to use arbitration, thus placing additional strains on overstretched courts, caution seems advisable.[87]

V. ALTERNATIVES TO THE AFA

The search for appropriate alternatives to the AFA must start with competent empirical evidence.[88] To the extent that *AT&T Mobility* implicates a choice between in-court, class action proceedings and individual proceedings in arbitration, questions include: (1) the frequency of use

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[85] Justin Kelly, *Republican Senator Proposes Changes to FAA,* THE DISP. RESOL. ADVOCATE (Disp. Resol. Sect. of the State Bar of Ga.), Summer 2007, at 2, *available at* http://www.gabar.org/committeesprogramssections/sections/disputeresolution/upload/summer07news.pdf ("My preference would be to leave the FAA alone, because it is working well for the vast majority of users.") (quoting John M. Townsend); John M. Townsend, *Leave the Federal Arbitration Act Alone*, A.B.A. BUS. LITIG. COMM. NEWSLETTER, Summer 2007, (suggesting that FAA has worked well for 80 years); John M. Townsend, *The Federal Arbitration Act is Too Important to Amend,* INTL'L ARB. NEWS 2, 19 (2004).

[86] Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. 169, 170 (2007) (suggesting that FAA should be preserved, as courts are "more likely than legislators to get it right" and "the most plausible outcome would be to let loose all sorts of unanticipated errors and evils"); Thomas Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427 (2007) (suggesting need for careful consideration of any statutory reform of arbitration law, and suggesting possibility of a Restatement of Dispute Resolution as a means to produce new guidance in the field).

[87] *See* Edna Sussman, *The Dodd-Frank Act: Seeking Fairness and the Public Interest in Consumer Arbitration*, 18 DISP. RESOL. MAG. 25, 27 (2011) ("Court congestion and the recent cutbacks in judicial budgets are also relevant to the analysis [of need for arbitration systems] as they affect access to the courts for the resolution of disputes."); David Allen Larson, *The End of Arbitration as We Know it? Arbitration Under Attack*, 3 PENN ST. Y.B. ON ARB. & MEDIATION 93, 96 (2011) ("State budgets are in turmoil and legislators must make significant cuts. Underfunded court systems that already were carefully rationing resources will have to find additional ways to reduce expenditures, which probably will require a further reduction in services. As a result and as a simple, practical matter, the Judiciary needs healthy arbitral institutions and smoothly functioning arbitral processes."); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 440 (2011) ("[A]rbitration arguably reduces the judiciary's workload and reduces litigation costs, allowing companies to offer lower prices and higher wages."). Recent surveys of the impact of the economic crisis on courts support this concern. *See* AM. BAR ASSOC. COALITION FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.authcheckdam.pdf (60% of judges reported seeing a greater number of self represented parties; 62% of these judges believed not having an attorney negatively impacted the outcomes for self represented parties); Editorial, *Thread Bare American Justice*, N.Y. TIMES, Aug. 18, 2011, at A20 ("State courts, which handle the vast majority of civil and criminal cases, are in a state of crisis. . . . [These courts are] less and less able to deliver justice."); *see also* Judith Resnik, *Compared to What?: ALI Aggregation and Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 632 (2011) (noting concern regarding "growing population" of persons in court without legal representation).

[88] Amy Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEG. L. REV. 115, 118 (2010) ("The potential value of precluding or regulating arbitration clauses is . . . unclear. . . . [P]olicymakers propose policies in the dark by failing to consider existing empirical data that is critical to crafting effective and efficient arbitration reforms."); *see also* N.Y. STATE BAR ASSOC., DISPUTE RESOL. SECT., COMMENTS TO THE CONSUMER FINANCIAL PROTECTION BUREAU 4 (2011) *available at* http://www.sussmanadr.com/articles.htm ("assessment of the public interest should include consideration of fairness to consumers" from changes in arbitration law) (listing specific questions); Peter B. Rutledge, *Arbitration Reform: What We Know and What We Need to Know*, 10 CARDOZO J. CONFLICT RESOL. 579 (2009).

of pre-dispute arbitration clauses containing class action waivers;[89] (2) the degree to which such class action waiver clauses may preclude consumers and employees from vindicating their rights,[90] and deterring wrongful conduct;[91] (3) the degree to which class action devices would

[89] *See* Peter Rutledge, *Point: The Case Against the Arbitration Fairness Act*, 16 DISP. RESOL. MAG. 4, 7 (2009) (suggesting need for additional empirical research to determine whether adoption of class action waivers is a widespread problem); Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 503 (2009) (noting creation of new class arbitration waiver clauses, in light of judicial developments); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007) (reviewing empirical studies and noting "consistent pattern of significant expansion of employment arbitration in the decade and a half since the *Gilmer* decision"); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 225 (1998) (suggesting that the "use of employment arbitration began to accelerate dramatically after the United States Supreme Court decided *Gilmer*"); *see also* Philip J. Loree, Jr., *Stolt-Nielsen Delivers a New FAA Rule—and then Federalizes the Law of Contracts*, 28 ALTERNATIVES TO HIGH COST LITIG. 124 (2010) (suggesting that Stolt-Nielsen "put the kibosh on class arbitration in the commercial context and most probably also in the context of adhesive contracts").

[90] *See* Christopher R. Drahozal & Stephen J. Ware, *Why do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 437 (2010) (stating that the "received wisdom" is that some businesses use arbitration clauses to avoid exposure to class actions and potential large-scale damage awards); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1319 (2009) (suggesting that businesses choose consumer arbitration agreements to avoid class action proceedings; "their primary concern is to deter claims, not to ensure that all claims against them are aired more cheaply"); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004). Conversely, one may ask whether class actions necessarily provide "bang for the buck" results for consumers and employees. *See* Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 85 (2008) (noting debate on whether class procedures encourage frivolous claims for settlement purposes); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1189 (2009) ("In some settlements, such as 'coupon' settlements . . . class counsel receive large fees while class members receive little or nothing of actual value."); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343 (2005) (noting examples where plaintiffs' lawyers are paid fees, and consumers receive no substantial compensation); *see also* S. Rep. No. 109-14, at 15 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 16 (Senate Committee Report on Class Action Fairness Act) (noting "numerous class-action settlements approved by state courts in which most—if not all—of the monetary benefits went to the class counsel").

[91] An essential assumption in class action doctrine is to the effect that class proceedings tend to vindicate public rights, and deter wrongdoing, especially in small-stakes cases. *See* AmChem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (noting that "small recoveries do not provide the incentive for any individual to bring a sole action," and suggesting that class actions can aggregate potential recoveries "into something worth someone's (usually an attorney's) labor"); *In re Am. Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012) ("[T]he class action is the only economically rational alternative when a large group of individuals . . . has suffered an alleged wrong but the damages due to any single individual . . . are too small to justify bringing an individual action."); Class Action Fairness Act of 2005, 28 U.S.C. § 1711 (2005) ("Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm."); *see also* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1902 (2006) (noting central argument in opposition to class-action waivers, to the effect that they may affect public legislation by withdrawing a private right of action); David Rosenberg, *Mandatory-Litigation Class Actions: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 843 (2002) (stating that the class action device is essential for "optimal deterrence" of wrongdoing).

solve these problems,[92] and (4) the relative costs and benefits of an arbitral versus in-court class action system.[93] More generally, if pre-dispute arbitration clauses are to be made invalid under the AFA (or similar legislation), policy-makers must consider: (1) the degree to which "mandatory" arbitration clauses produce results at odds with in-court procedures;[94] (2) the degree to which access to arbitration may be adversely affected by a ban;[95] and (3) impacts on the judicial system of reduced access to arbitration.[96] The answers to these kinds of questions may determine whether any reform is necessary, and shed light on the most appropriate means of reform.[97]

The "least harm" alternative to the AFA is precisely what has occurred over the past decade,[98] since the AFA was first proposed: expanded development of arbitration "common law,"

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[92] *See Arbitration: Is it Fair When Forced?: Hearing Before the S. Judiciary Comm*., 112th Cong. 14 (2011) (statement of Victor E. Schwartz) (noting that "the vast majority of consumer claims are individualized;" class actions "are of no help in these circumstances"); Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1082 (2011) ("Class certification may well not be 'superior' to individual litigation—indeed, it may be inferior—on 'fairness' grounds due to the lack of need for aggregation of the prescribed dollar sum in order to provide a sufficient incentive" for claims) (quotation omitted).

[93] Is it correct, for example, as the Court assumed in *AT&T Mobility*, that the advantages of arbitration necessarily would be lost if the class action device were superimposed on arbitration? *See* AT&T Mobility v. Concepcion, 141 S. Ct. 1740, 1750–53 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1773 (2010); David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55 (2007).

[94] Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 9 (2011); Bradley Dillon-Coffman, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095, 1108 (2010) (reviewing studies); Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051, 1062 (2009) (reviewing empirical data); Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549, 556 (2008) (reviewing studies); Kirk D. Jensen, *Summaries of Empirical Studies and Surveys Regarding How Individuals Fare in Arbitration*, 60 CONSUMER FIN. L.Q. REP. 631 (2006) (summarizing studies and surveys); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1569 (2005) (reviewing studies).

[95] Darren P. Lindamood, *Redressing the Arbitration Process: An Alternative to the Arbitration Fairness Act of 2009*, 45 WAKE FOREST L. REV. 291, 310 (2010) (preventing consumers from signing pre-dispute arbitration agreements "will result in less access to a remedy for plaintiffs with small claims. . . . [W]hen employers or manufacturers are not bound by a pre-dispute arbitration agreement, they can refuse to agree to arbitrate small claims with the knowledge that the high cost of litigation will prohibit the plaintiff from obtaining counsel."); Andrew L. Sandler & Victoria Holstein-Childress, *Supreme Court and Congress Focus on Mandatory Pre-Dispute Arbitration Agreements: The Debate Continues*, 27 CORP. OFFICERS & DIRECTORS LIABILITY 1, 7 (2011) ("Prohibiting mandatory pre-dispute agreements likely would leave many consumers and employees without access to a viable dispute-resolution forum, and would reward only the trial lawyer's bar, which would stand to profit from the inevitable increase in litigation.").

[96] *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why it's Better than it Looks*, 41 U. MICH. J.L. REFORM 783, 792 (2008) (study suggests that only 5% of employees claiming discrimination can gain access to court system; "it looks like arbitration—or nothing" as a remedy); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251 (2006); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RESOL. J. 8, 10–11 (2003) (summarizing additional studies).

[97] Some empirical review of the effects of the Talent-Nelson Amendment, the Jamie Leigh Jones Amendment, and similar AFA-like enactments, *see* Part I, *supra*, might offer particularly valuable insights. Similarly, the results of the analysis of arbitration processes in the consumer financial section, by the Consumer Financial Protection Bureau, pursuant to the Dodd-Frank law, may bear heavily on the debate over appropriate solutions. *See id.*

[98] For a contemporary discussion of risk and policy-making (including the concept of "least harm" analysis), *see* RICHARD B. JONES, 20% CHANCE OF RAIN: EXPLORING THE CONCEPT OF RISK (2nd ed. 2011).

at both the federal and state level.[99] Judicial development of doctrine offers the advantage of nuanced response to perceived problems in arbitration law, versus the broad (and unpredictable) legislative approach.[100] In particular, the scope of the unconscionability doctrine has yet to be fully explored.[101] The Supreme Court has acknowledged that unconscionability is a general defense to enforcement of contracts that can be applied to arbitration clauses consistent with the FAA.[102] Further, the Court has held that dispute resolution schemes that impinge on the ability to vindicate statutory rights may be invalidated.[103] Although, given the presumption in favor of enforcement of arbitration agreements, the burden may fall on the party seeking to void an arbitration clause,[104] that burden is not impossible to sustain.[105] In particular, the unconscionability doctrine, a state law concept, offers a flexible form of protection for individual

[99] *See* Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233 (2008) (tracing history of Supreme Court doctrine on enforcement of arbitration agreements).

[100] *See* Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1165 (2011) (suggesting "a blend of industry self-regulation and case-by-case judicial scrutiny, over more blunt approaches such as regulation by an administrative agency or outright statutory prohibitions").

[101] Despite claims of "overpreemption" of state law in Supreme Court jurisprudence on arbitration, Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PENN. L. REV. 1233, 1236 (2011), the Court has not fundamentally departed from the essential principle of preemption, that courts may not "invalidate arbitration agreements under state laws applicable only to arbitration provisions." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (emphasis omitted). The precise balance between federal preemption and state law, however, remains a matter for elaboration. *See* David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J.L. & POL'Y 129 (2004); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541 (2004).

[102] *See Doctor's Assocs.*, 517 U.S. at 687 (stating that arbitration agreements may be invalidated by "generally applicable contract" defenses, including "fraud, duress, or unconscionability"); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 555–56 (1995) ("[A]n arbitration clause may be invalid without violating the FAA if . . . the provision is unconscionable[.]").

[103] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (stating that arbitration may substitute for judicial forum only "[s]o long as the prospective litigant may vindicate his or her statutory cause of action in the arbitral forum") (quotations omitted) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)); *see also* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 249 (2009) ("The decision to resolve [age discrimination] claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance[.]").

[104] *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000) (stating that the burden is on the opponent of arbitration to show the likelihood of incurring prohibitive costs in arbitration).

[105] *See In re* Am. Express Merchs. Litig., 634 F.3d 187, 199 (2d Cir. 2011) ("[A]s the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable."); *see also* Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1002, 1004–06 (9th Cir. 2010) (ruling that arbitration is inappropriate where plaintiff showed that lack of mutuality and unconscionability permeated the arbitration clause itself); Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1292-93 (9th Cir. 2006) (refusing to enforce arbitration agreement placing venue for hearing far from non-drafting party); Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 386–88 (6th Cir. 2005) (invalidating arbitration agreement where employer chose arbitration provider); Murray v. United Food & Commercial Workers Int'l Union, 289 F.3d 297, 304 (4th Cir. 2002) (invalidating arbitration agreement where employee's choice of arbitrator was limited to candidates initially screened by employer); Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 600, 614–15 (D.S.C. 1998) (refusing to enforce arbitration agreement that allowed drafting party to control pool of arbitrator candidates); Wisconsin Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 173 (Wis. 2006) (refusing to enforce arbitration agreement that only allowed drafting party to seek relief in court); Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 255–56 (N.Y. App. Div. 1998) (finding terms unconscionable in shrink-wrap arbitration contract relating to ICC arbitration).

rights, which legislation could not duplicate.[106] Thus, claims that *AT&T Mobility* will somehow fundamentally alter state unconscionability law appear exaggerated.[107] Although some courts have applied *AT&T Mobility* to uphold arbitration clauses against challenges,[108] others have construed it quite narrowly.[109]

Abundant additional "least harm" suggestions aim at potential abusive forms of pre-dispute arbitration agreements and encouragement of the development of efficient, fair arbitration

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[106] *See* Thomas Stipanowich, *The Third Arbitration Trilogy: Revelation, Reaction and Reflection on the Direction of American Arbitration*, SCOTUSBLOG (Sept. 21, 2011, 8:36 AM), www.scotusblog.com/2011/09/the-third-arbitration-trilogy-revelation-reaction-and-reflection-on-the-direction-of-american-arbitration/ (noting that unconscionability doctrine gives judges a "potent tool to set boundaries on arbitration provisions in standardized contracts," including limits on discovery, "unfair arbitrator selection schemes, requirements to arbitrate in a distant venue, and remedy-stripping clauses"); *id*. ("Although some worry that unconscionability affords courts too much discretion to strike down or modify arbitration agreements, there are currently no effective alternatives."); Nina Pillard, *Federal or State Regulation of Arbitration Procedure?*, FUTURE OF ARBITRATION CONFERENCE (Mar. 2011), www.law.gwu.edu/News/2010-2011Events/Documents/Pillard%20Submission.pdf (suggesting that "state law is better equipped to serve as a protector of procedural fairness in arbitration than any newly fashioned federal version of FAA contract law of unconscionability likely would be"); *see also* Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 616-19 (2009) (noting that unconscionability judicial decisions have grown in response to mandatory arbitration clauses).

[107] *See* Terry Moritz, *AT&T Mobility and the End of Consumer Class Action Through Commerce Clause Jurisprudence: Not so Fast*, SCOTUSBLOG (Sept. 23, 2011, 10:21 AM), www.scotusblog.com/2011/09/att-mobility-and-the-end-of-consumer-class-action-through-commerce-clause-jurisprudence-not-so-fast/ (concerns motivating the AFA may be "premature" because "some lower courts are reading *AT&T Mobility* very narrowly"); Albert A. Foer & Evan P. Schultz, *Will Two Roads Still Diverge*? *Private Enforcement of Antitrust Law is Getting Harder in the United States. But Europe May be Making it Easier*, 3 GLOBAL COMPET. LITIG. REV. 107, 109 (2011) ("[C]lass actions are not likely to completely disappear in practice. This is partially because the facts of *Concepcion* limit it as a precedent[.]").

[108] *See, e.g.*, Bellows v. Midland Credit Mgmt., Inc., No. 09CV 1951-LAB (WMc), 2011 WL 1691323, at *3 (S.D. Cal. May 4, 2011) ("[*Concepcion*] disapproved of "[the California Supreme Court opinion in] *Discover Bank*, holding it impermissibly interfered with the Federal Arbitration Act. That decision disposes of Bellow's best argument, making clear the agreement to arbitrate is not substantively unconscionable merely because it includes a class action waiver. It is therefore not invalid, and will be enforced."); Boyer v. AT&T Mobility Servs., LLC, Civil No. 10CV1258 JAH (WMc), 2011 WL 3047666 (S.D. Cal. July 25, 2011) (arbitration class action dismissed); Daugherty v. Encana Oil & Gas (USA), Inc., Civil Action No. 10-cv-02272–WJM-KLM, 2011 WL 2791338 (D. Colo. July 15, 2011) (*AT&T Mobility* followed and arbitration class claims dismissed).

[109] *See, e.g.*, Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950 (LBS)(JCF), 2011 WL 2671813, at *4 (S.D.N.Y. Jul. 7, 2011) (distinguishing AT&T Mobility, as not involving federal statutory rights); *In re* Checking Account Overdraft Litig., No. 09–MD–02036–JLK, 2011 WL 6225275 (S.D. Fla. Dec. 15, 2011) (holding that defendants had waived rights to demand arbitration); Wolf v. Nissan Motor Acceptance Corp., No. 10-CV-3338 (NLH) (KMW), 2011 WL 2490939 (D.N.J. June 22, 2011) (holding fee provision in arbitration agreement unconscionable, but severing that provision from remainder of agreement, which included class action waiver); NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 24 A.3d 777 (N.J. Super. Ct. App. Div. 2011) (invalidating arbitration agreement on grounds that it was too confusing, too vague, and too inconsistent to be enforced); Rivera v. Am. Gen. Fin. Servs., Inc., 259 P.3d 803 (voiding arbitration where named arbitration service was no longer available to conduct proceedings, and describing the agreement as unfairly one-sided and substantively unconscionable irrespective of *AT&T Mobility* holding).

systems.[110] Major arbitration-sponsoring organizations have developed "due process" protocols for small-stakes arbitration.[111] The development and use of such systems could be encouraged, through publicity and education,[112] support for research and adoption of "model" systems by government units.[113] In particular, on-line systems may offer low-cost means for mass dispute

[110] *See* Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration* (Univ. of Kan. Sch. of L., Working Paper No. 2011-4) (Aug. 3, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm ?abstract id=1904545 (suggesting that courts and policy-makers reinforce arbitration due process protocols, rather than banning pre-dispute arbitration agreements); Andrew L. Sandler & Victoria Holstein-Childress, *Supreme Court and Congress Focus on Mandatory Pre-Dispute Arbitration Agreements: The Debate Continues*, 27 CORP. OFFICERS & DIRS. LIAB. 1, 4 (2011) (same); Amy Schmitz, *Regulation Rash? Questioning the AFA's Approach for Protecting Arbitration Fairness*, 10 BANKING & FIN. SERV. POL'Y REP. 16 (2009) (suggesting need for encouragement of use of arbitration due process protocols, in lieu of AFA, and identifying "top ten suggestions" for protocols); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 258-60 (2007) (suggesting that, rather than resisting enforcement of arbitration clauses, consumer advocates should focus on arbitral impartiality and adherence to substantive law); Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L.J. 37 (2007) (advancing need for procedural regulation in lieu of statute barring pre-dispute arbitration agreements). Such systems, of course, are not a panacea. *See* Thomas J. Stipanowich, *Future Lies Down a Number of Divergent Paths*, 6 DISP. RESOL. MAG. 16, 16 (2000) ("One-size-fits-all approaches [to arbitration] are outmoded and intrinsically problematic."); Margaret M. Harding, *The Limits of Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 372 (2004) ("The lack of [enforcement] provisions makes it impossible to determine if the due process protocols are in fact being followed by individual arbitrators and arbitration service providers in actual cases."). Further, at least some suggest that legislation is required, to enforce such protocols. *See* Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 117 (2010) (suggesting that "shoulds" of arbitration due process protocols should become legislated "musts").

[111] *See, e.g.*, *Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes Advisory Committee* (Apr. 17, 1998), AM. ARB. ASS'N, http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_005014&revision=latestreleased (last visited May 23, 2012); *JAMS Policy on Consumer Arbitrations Pursuant to Predispute Clauses: Minimum Standards of Procedure Fairness (effective July 15, 2009)*, JAMS, http://www.jamsadr.com/consumer-arbitration/ (last visited May 23, 2012). *See generally* Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 385–87 (2008) (differentiating between "mass" and "custom" arbitration proceedings).

[112] Consumer and employee education on the operation of arbitration systems may be essential to an effective system. *See* Amy J. Schmitz, *Considerations of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123, 160 (2007) (noting that "consumers rarely read or understand" arbitration clauses); Debra Pogrund Stark & Jessic M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & BUS. 617 (2009) (discussing studies suggesting that consumers are unlikely to read standard form contracts); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 57 (1997) (noting concern that individuals signing arbitration agreements do not understand the nature of arbitration).

[113] For general discussion on the notion of the government as a "model employer," demonstrating the effectiveness of new systems for resolving disputes, *see* PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION (Dale Belman et al. eds., 1996).

resolution.[114] Courts, moreover, may play a role in encouraging the use of fair and effective alternative dispute resolution.[115]

Moving from encouragement and support to legislation that alters arbitration procedure, "least harm" alternatives to the AFA might focus on the essential problem posed by *AT&T Mobility* (and other recent decisions). Is the class action system fundamentally inconsistent with arbitration processes?[116] Additional research and experimentation certainly would help to answer that question.[117] Further, if class arbitration is feasible and effective, should it be available as an option, even where parties have not agreed (in advance) to use that procedure?

One alternative to the AFA would put the choice to "opt out" from arbitration in the hands of the individual. A more targeted approach, focused on the potential need for class action treatment of certain disputes, might give both sides the option to opt out. Where an individual claimant (subject to a pre-dispute arbitration agreement) could show that class action treatment is necessary for effective relief, the individual might demand class action arbitration. If the responding party agreed, then the question of class certification in arbitration would be decided by an arbitration tribunal.[118] If the responding party refused, then the individual might have the right to proceed with a request for class action treatment in federal court (subject to referral to individual arbitration if no class were certified).[119] This form of "Class Arbitration Fairness Act"

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[114] The Online Dispute Resolution ("ODR") program adopted for eBay buyers and sellers, for example, has produced successful resolution of tens of thousands of disputes. *See* ebay.com, Resolving Transaction Problems in the Resolution Center, http://pages.ebay.com/help/buy/resolving-problems.html (last visited May 23, 2012). For a discussion of other ODR programs, *see, e.g.*, David A. Larson, *"Brother, Can You Spare a Dime?" Technology Can Reduce Dispute Resolution Costs When Times are Tough and Improve Outcomes*, 11 NEV. L.J. 523 (2011) (suggesting that creation of culture familiar with internet, cellular telephones and other electronic communications systems may foster use of technology-mediated dispute resolution); David A. Larson, *Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR*, 21 OHIO ST. J. ON DISP. RESOL. 629 (2006); Jim Keane & Debi Miller-Moore, *Linking Information Technology and Dispute Resolution: Framing the Future of Online Dispute Resolution Using OdrXML*, 59 DISP. RESOL. J. 58, 58-59 (2004) (discussing Cybersettle system, used in the insurance industry to produce 70,000 settlements).

[115] *See* Steven C. Bennett, *Court-Ordered ADR: Promises and Pitfalls*, 71 PA. B.A. Q. 23 (2000).

[116] *Compare* Neal Troum, *Drawing a Line After AT&T Mobility: How Far Does the FAA Reach into State Contract Regulation?* 29 ALTERNATIVES 129, 135 (2011) ("Arbitration is not the place for class treatment, where there is a preemption of absent class members' claims but no rigorous rules to ensure that such claims are preempted only after notice and lots of procedural hoops have been jumped through."), *with* Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1074 (2011) (noting "doctrinal convergence" between litigation and arbitration); Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 265 (1990) ("nonsense" to equate arbitration and litigation, in expecting one to operate like the other).

[117] Such information may include experiences from abroad. *See* S.I. Strong, *Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared*, 37 N.C. J. INT'L L. & COM. REG. 921 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1967101 (manuscript at 2) (noting that "[i]nterest in class and collective relief in arbitration is increasing all over the world").

[118] Due process protocols for class arbitration have been proposed, and might be encouraged in the same manner as (more generally) due process protocols for consumer arbitration have developed. *See* Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 259–63 (2006) (proposing due process protocols for class arbitration).

[119] Presumably, ordinary standards for class action certification would apply in federal proceedings, including proof of commonality of interest of the class members. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553 (2011) (holding that variations in circumstances of plaintiffs precluded class action treatment; plaintiffs must offer "significant proof" that employer operated under a "general policy" of discrimination, to establish commonality). One can also imagine the addition of some form of sanction for frivolous demands of class treatment, where intended merely to avoid arbitration.

would, in part, overrule *AT&T Mobility*, but would also preserve the essence of FAA jurisprudence: the grounding of arbitration in freedom of contract.[120] Although the ability to waive class action rights altogether would be affected, the choice of class arbitration treatment, and the methods of class arbitration, would remain in the hands of the parties.[121] Thus, even if businesses consistently preferred in-court class litigation over class arbitration,[122] the choice would be theirs, rather than imposed by court or Congress.[123]

VI. CONCLUSION

Vigorous debate on the wisdom of the Supreme Court decision in *AT&T Mobility* and related cases will, no doubt, continue.[124] So, too, variations on the AFA legislative scheme may regularly appear in Congress.[125] Finally, the newly-constituted Consumer Financial Protection Bureau may influence the debate with release of its conclusions regarding arbitration procedures and the need for regulation.[126] All three branches of government may take up these issues at the state level as well.

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[120] *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (quotations omitted) (citing United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)).

[121] In this regard, the proposal would involve much less change than a complete ban on pre-dispute arbitration agreements, or even an automatic right to class action treatment in court. *See* Sarah Randolph Cole, *On Babies and Bath Water: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 498 (2011) (suggesting that any amendment of the FAA should focus on the need for a class vehicle for consumer arbitration, rather than banning all pre-dispute arbitration agreements; proposing an FAA amendment to the effect that an arbitration agreement with a consumer is "invalid to the extent that it precludes the consumer from accessing the court or arbitral system to participate in a class action").

[122] *See* Jeffrey J. Greenbaum & Jason L. Jurkevich, *Class Action Waivers in Arbitration Agreements: Can They Survive?*, 11 CLASS ACTION LITIG. RPT. 39, 49 (2010) ("Companies tend to be averse to class arbitration, believing it combines the disadvantages of class action litigation . . . with the disadvantages of arbitration[.]"); David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 62 (2007) (same).

[123] *See* W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 100–02 (2007) (suggesting that class arbitration processes could be modified to become more cost-effective and efficient, making them more attractive to individuals and businesses for resolution of large scale disputes); John H. Quisenberry & Susan Abitanta, *Can Employers Preclude Class Actions Through Mandatory Arbitration Agreements that are Silent as to Whether Classes are Permitted?*, CONSUMER ATT'YS OF CAL. FORUM MAG., June 2005, at 22, 24–26 (suggesting that classwide arbitration, if properly administered, can provide parties with same benefits as in-court class proceedings). *See also* Philip Allan Lacovara, *Class Action Arbitrations—The Challenge for the Business Community*, 24 ARB. INT'L 541 (2008).

[124] *See* Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938565 (noting that the Supreme Court's arbitration jurisprudence "will continue to generate endless discussion").

[125] *See* Nancy Welsh, *What is "(Im)partial Enough" in a World of Embedded Neutrals*, 52 ARIZ. L. REV. 395, 405 (2010) (describing AFA as "oft-introduced, oft-ignored" in Congress).

[126] Richard Cordray, newly appointed as Director of the Bureau, recently remarked: "We understand the importance of this issue, and we'll be moving forward as required by Congress." Michelle Singletary, *Why You Cannot Take Your Credit Card Company to Court*, WASH. POST, Jan. 22, 2012, at G1. *See also Arbitrate This!*, COMPLIANCE RPTR., Aug. 8, 2011 (stating that it is not "outlandish" to foresee "a change in the landscape" from CFPB action); Kate Davidson, *Supreme Court Gives Banks a Win on Arbitration, but Will CFPB Trump it?*, AM. BANKER, Apr. 28, 2011 (noting that "[s]ome banking lawyers said they do not think the CFPB has much room to change the law").

We probably cannot (and should not) engage in a wholesale reconstruction of the American arbitration system.[127] One hopes, at least, that the national debate can proceed with decorum and deliberation, and some common sense of purpose.[128]

[127] The field of dispute system design, however, can improve understanding of the potential consequences of changes in the system. *See* Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009) (offering framework for analysis of dispute systems); Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1 (2008) (providing an overview of the field of dispute systems design).

[128] In 2011, the Senate Judiciary Committee held hearings related to the AFA, entitled "Arbitration, Is It Fair When Forced?" *See Arbitration, Is It Fair When Forced?: Hearing Before the S. Judiciary Comm.*, 112th Cong. 108 (2011) (statement of Sen. Al Franken) ("We may not all agree on the best ways to move forward, and on which legislative proposals are needed[.] . . . Perhaps today's hearing can help us determine whether there is a sound middle ground[.]").

PURPOSE, PRECEDENT, AND POLITICS: WHY *CONCEPCION* COVERS LESS THAN YOU THINK

Michael A. Helfand*

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I. INTRODUCTION

The Supreme Court's landmark decision in *AT&T Mobility v. Concepcion* has undeniably changed the rules of the arbitration game.[1] To supporters of the decision, *Concepcion* finally put an end to judicial use of common law principles to undermine the enforceability of many arbitration agreements.[2] Such judicial incursions into the realm of arbitration had increasingly left arbitration on unequal footing with all other contracts.[3] To critics of the decision, *Concepcion* served as a crushing blow to consumer protection on the one hand and principles of

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[1] For a comprehensive discussion of the recent flurry of Supreme Court arbitration decisions, see Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323 (2012).

[2] In recent years, a number of articles have criticized the increased judicial use of unconscionability to void otherwise valid arbitration agreements. *See, e.g.*, Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006) (arguing that California courts improperly apply lower standards of unconscionability in determining the enforceability of arbitration agreements than in resolving other contractual issues); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469 (arguing that many courts favor litigation over arbitration by erroneously applying the unconscionability doctrine to strike down arbitration agreements); Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761 (2003) (arguing against attempts to broadly apply the unconscionability doctrine to arbitration agreements).

[3] *See supra* note 2.

federalism on the other.[4] By restricting the use of common law principles to invalidate arbitration agreements, the Supreme Court stripped lower courts of the meager judicial tools in their arsenal that could prevent arbitration from engulfing the entirety of employee and consumer claims.[5]

Indeed, the Supreme Court's decision provides ample reason to conclude that *Concepcion* has fundamentally altered the way lower courts apply the Federal Arbitration Act (FAA) to arbitration agreements. Most notably, the Court provided a narrow reading of § 2 of the FAA and an expansive reading of the FAA's purpose, thereby refusing to allow lower courts to invalidate arbitration provisions on common law grounds where doing so would "stand as an obstacle to the accomplishment of the FAA's objective."[6] Indeed, many decisions issued by lower courts on the heels of the Court's decision in *Concepcion* further bolster the impression that the rules of the arbitration game have been radically transformed for the foreseeable future.[7]

However, while *Concepcion* will have a far-reaching impact on the enforceability of arbitration agreements going forward, there is good reason to believe that this impact will not be quite as far reaching as some have presumed. Notwithstanding some of the Court's sweeping statements in the decision, this Article aims to highlight why *Concepcion* covers less legal terrain and fewer cases than you might otherwise think. In so doing, it hopes to sketch three limits to how *Concepcion* will impact the enforceability of arbitration agreements and thereby outline some of the litigation fault lines that are beginning to appear in a post-*Concepcion* world.[8]

First, the Court's opinion in *Concepcion* focuses largely on how the "*Discover Bank* rule," in knee-jerk fashion, allowed plaintiffs to avoid arbitration agreements with class-action waivers so long as the contract was adhesive, the damages were predictably small, and the consumer alleged a scheme to cheat consumers.[9] Such a sweeping rule did not take into account the variety of provisions in AT&T's form contract that, at least facially, provided plaintiffs with an alternative mechanism to resolve individualized disputes.[10] Accordingly, lower courts may read the majority's decision as holding the *Discover Bank* rule was preempted by the FAA because it was too broad; it provided plaintiffs too much leeway to void otherwise valid

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[4] *See, e.g.*, Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189 (2011) (citing *Concepcion* as an example of how state law is "losing ground in the U.S. Supreme Court"). Critics of the Supreme Court's arbitration jurisprudence have for some time argued that the Court's decisions have severely undermined principles of federalism. *See, e.g.*, David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 54 (2004) ("*Southland* and its progeny are the result of bad statutory interpretation and even worse federalism."). For a discussion of the central importance of federalism in the arbitration scheme, *see* Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 176 (2002).

[5] *See, e.g.*, Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 463 (2011) ("Finally, the Court appears to have placed the nail in the coffin on consumers' ability to pursue class processes when bound by an arbitration agreement in *AT&T v. Concepcion*.").

[6] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011).

[7] *See infra* note 32.

[8] I do not discuss the "vindication-of-rights" doctrine – maybe the most celebrated potential limitation on the Court's holding in *Concepcion* – which has already been applied post-*Concepcion* by the Second Circuit to render a class-action waiver unenforceable. *See In re* American Express Merchants' Litigation, 634 F.3d 187 (2d Cir. 2011); *see also* David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 KANSAS L. REV. (forthcoming 2012) (outlining the origins of and theory behind the vindication of rights doctrine).

[9] *See Concepcion*, 131 S. Ct. at 1750.

[10] *See id.* at 1744-45.

arbitration agreements simply because they contained a class-action waiver without considering pro-consumer provisions in the same agreement.[11] Reading the Court's opinion in *Concepcion* in this way narrows its impact by empowering courts to continue to use common law contract rules to invalidate agreements which fail to adequately protect consumers.

Second, reading *Concepcion* as severely undermining the viability of common law contract defenses to invalidate arbitration agreements underestimates the impact of Justice Thomas's concurrence on the precedential value of the decision. While Justice Thomas did sign the majority opinion, his concurrence provides a wholly distinct – and in some instances, more limiting – ground for reaching the result outlined in majority's opinion.[12] Indeed, Justice Thomas joined the majority's invalidation of the *Discover Bank* rule because he held that § 2 of the Federal Arbitration Act did not empower lower courts to employ defenses such as public policy or substantive unconscionability to revoke otherwise valid arbitration agreements.[13] However, Justice Thomas presumably remains of the view that a class action waiver may serve as a factor in invalidating an arbitration agreement so long as the primary consideration in invalidating the agreement is some form of procedural unconscionability that speaks to the failure of the agreement's formation.[14] As a technical matter, by signing the majority opinion, Justice Thomas did provide five votes for the majority's rationale.[15] However, similar concurring opinions such as Thomas's – those that differ so explicitly with the majority – can have a significant impact on how lower courts apply the majority's decision.[16] Indeed, we are already beginning to see lower courts lean on Thomas's concurrence in applying *Concepcion*.[17] In this way, Thomas's concurrence may very well limit *Concepcion*'s precedential value.

Third, given the "strategic judging" that animates judicial interpretation of arbitration doctrine,[18] the tenuous nature of the Court's majority will likely effect state court application of *Concepcion*. Most notably, because Justice Thomas has consistently contended that the FAA only applies in federal courts,[19] state courts are likely aware that there are not enough votes on the Supreme Court to reverse a *state court* decision aggressively applying common law contract principles to invalidate an arbitration agreement. Accordingly, state court judges are likely to push back on the Court's holding in *Concepcion*, limiting its application in order to retain authority over the enforcement of arbitration agreements. Indeed, the first round of California state courts applying *Concepcion* already provide some indication that state courts are likely to be more aggressive in rejecting a broad reading of the Court's holding.[20]

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[11] *See infra* Part II.

[12] *See infra* Part III.

[13] *See infra* notes 71-76 and accompanying text.

[14] *See infra* notes 77-89 and accompanying text.

[15] *See Concepcion*, 131 S. Ct. at 1743.

[16] *See infra* notes 89-102 and accompanying text.

[17] *See infra* note 102.

[18] *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1420 (2008).

[19] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 285 (1995) (Thomas, J., dissenting).

[20] *See, e.g.*, Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854, 856, 865 (Ct. App. 2011), *cert. denied*, No. 11-880, 2012 WL 136923 (U.S. Apr. 16, 2012); Macintosh v. Powered, Inc., No. A129063, 2011 WL 2237938, (Cal. Ct. App. June 8, 2011).

II. PURPOSE

For many, the Supreme Court's decision in *AT&T Mobility v. Concepcion* not only undermined the viability of class action lawsuits,[21] but it also severely undermined principles of federalism by limiting the ability of states to create limitations that hamper the enforceability of arbitration provisions.[22] Indeed, there was much in the Supreme Court's decision that supported such dire conclusions – most notably, the Court's treatment both of the FAA's purpose and its determination of disproportionate impact on arbitration agreements.

First, the Court focused on the "principal purpose" of the FAA, describing it "as embod[ying] [a] national policy favoring arbitration . . . and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[23] Contrary to the contentions of the dissent,[24] the Court's majority argued that part of the FAA's objective was to create "streamlined proceedings and expeditious results"[25] and not to "frustrate" or "hinder" the "speedy resolution of [] controvers[ies]."[26]

Second, and in turn, the Court took aim at the "*Discover Bank* rule," a rule announced by the California Supreme Court in *Discover Bank v. Superior Court*,[27] which was "California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable."[28] The Court concluded that the *Discover Bank* rule was preempted by the FAA because it "interfere[d] with arbitration" by enabling "any party to a consumer contract to demand [classwide arbitration] *ex post*."[29] In finding that the *Discover Bank* rule was preempted by the FAA, the Court focused on how such a rule had a "disproportionate impact on arbitration agreements," citing various statistical studies that demonstrated how unconscionability had been used by California courts to target and void arbitration agreements.

In this way, the Court determined that the *Discover Bank* rule applied the doctrine of unconscionability in a manner that disfavored arbitration and represented a prime example of a state law doctrine that was preempted by the FAA.[30] Accordingly, the Court emphasized that standard state law contract defenses would be preempted by the FAA where they created hurdles to the enforceability of arbitration provisions that "rely on the uniqueness of an agreement to arbitrate."[31] Such a holding could be read to not only endanger judicial use of unconscionability to void arbitration agreements, but also the use of other state laws that similarly apply common

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[21] *See, e.g.*, Cole, *supra* note 5, at 467 ("The Supreme Court's recent decision in *AT&T v. Concepcion*, in which the Court held that the FAA preempts a state court decision mandating that an arbitration agreement is unconscionable if the consumer with a low value claim is not permitted to proceed in a class arbitration, sounds the death knell for the class arbitration process."); *see also* Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, S.F. CHRON., Nov. 7, 2010, at E8, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/11/06/INA41G6I3I.DTL (arguing that the Court's decision in *Concepcion* could end class actions).

[22] *See, e.g.*, *supra* note 4.

[23] *Concepcion*, 131 S. Ct. at 1749 (internal quotation marks and citations omitted).

[24] *See id.* at 1758 (Breyer, J., dissenting).

[25] *Id.* at 1749 (quoting Preston v. Ferrer, 552 U.S. 346, 357-58 (2008)).

[26] *Id.* (quoting *Preston*, 552 U.S. at 358).

[27] 113 P.3d 1100 (Cal. 2005).

[28] *Concepcion*, 131 S. Ct. at 1746.

[29] *Id.* at 1750.

[30] *See id.* 1744.

[31] *Id.* (quoting Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)).

law principles to limit the scope of enforceable arbitration agreements. In the wake of *Concepcion*, some lower courts have latched on to these portions of the Court's opinion and thereby applied *Concepcion* broadly.[32]

But the majority's opinion, while it did contain much broad language, was also a creature of its facts. The Court addressed the enforceability of the arbitration provision in AT&T Mobility's agreement for the sale and servicing of cellular phones. The agreement itself contained a number of unique provisions that structured specific methods for the resolution of disputes between the company and its customers. The agreement[33] provided that customers could initiate proceedings to resolve a dispute via a one-page online form.[34] After receiving the form, the dispute resolution system created by the agreement allowed AT&T to offer the customer a settlement to resolve the claim. If the claim remained unresolved for 30 days, the customer could submit another online form demanding arbitration.[35]

Importantly, the terms of the arbitration were significantly constrained by the agreement in a variety of ways that, at least on their face, provided significant protections for consumers.[36] AT&T was required to pay all the costs of non-frivolous claims.[37] The arbitration had to take place in the county where the consumer was billed.[38] In addition, for all claims of $10,000 or less, the customer was empowered to have the arbitration proceed either by telephone or to be decided based solely on submissions from the parties – in fact, for claims of such a size, either party could bring the claim in small claims court instead of pursuing arbitration.[39] Moreover, the agreement prohibited AT&T from seeking reimbursement of attorney's fees and "in the event that

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[32] *See, e.g.*, Cardenas v. AmeriCredit Fin. Servs., No. 09-4978 SBA, 2011 U.S. Dist. LEXIS 78282, at *7-8 (N.D. Cal. July 19, 2011) (holding that *Concepcion* preempts California state decisional law that found certain claims for injunctive relief under various consumer protection laws and unfair competition laws were not arbitrable); Nelson v. AT&T Mobility LLC, No. C10-4802 TEH, 2011 U.S. Dist. LEXIS 92290 (N.D. Cal. Aug. 18, 2011) (same); Wolf v. Nissan Motor Acceptance Corp., No. 10-cv-3338, 2011 U.S. Dist. LEXIS 66649, at *19-20 (D.N.J. June 22, 2011) ("Based on the United States Supreme Court's holding and reasoning in *AT&T Mobility*, the Court cannot find that any public interest articulated in this case, either in connection with the SCRA or New Jersey law, overrides the clear, unambiguous, and binding class action waiver included in the parties' arbitration agreement. New Jersey precedent notwithstanding, the Court is bound by the controlling authority of the United States Supreme Court."); Bernal v. Burnett, 793 F. Supp. 2d 1280, 1288 (D. Colo. 2011) ("Thus, the Supreme Court considered the fact that the Concepcions and other class plaintiffs would be denied any recovery by its ruling, and ruled against the class plaintiffs nonetheless. The Court is bound by this ruling and, therefore, cannot be persuaded in this case by the fact that ordering the parties to arbitration may impact Plaintiffs' ability to recover."); Alfeche v. Cash Am. Int'l, Inc., No. 09-0953, 2011 U.S. Dist. LEXIS 90085, at *17 (E.D. Pa. Aug. 12, 2011) ("The FAA preempts Pennsylvania's unconscionability law with regard to class action waivers in arbitration agreements."); Ipcon Collections LLC v. Costco Wholesale Corp., No. 7:10-cv-9012, 2011 U.S. Dist. LEXIS 95468, at *13 n.5 (S.D.N.Y. Aug. 24, 2011) ("Plaintiff argues in its opposition that this case asks the question '[w]ill an entity with overwhelming economic power escape accountability before the court system after it has implemented a fraudulent scheme, and been complicitous in other fraudulent activities which have destroyed a business, the lives of people working in that business and taken away their homes.' However, the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, makes clear that the parties' respective sizes or economic power are irrelevant in determining whether an arbitration provision should be enforced." (citation omitted)).

[33] The court actually was addressing a revised agreement, executed by AT&T pursuant to its contractual authority to make unilateral amendments to its agreement with cellular customers. *Concepcion*, 131 S. Ct. at 1744.

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] *See Concepcion*, 131 S. Ct. at 1744.

a customer receives an arbitration award greater than AT&T's last written settlement offer" the agreement required AT&T "to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees."[40]

While some lower courts have explicitly disregarded the factual context of the decision,[41] successfully extracting the holding from *Concepcion* would appear to require more attention to the pro-consumer provisions in the AT&T agreement. Indeed, it is worth noting that the target of the Court's analysis was not the underlying agreement implicated in the litigation, but whether the *Discover Bank* rule was preempted by the FAA.[42] The Court's holding, as well, was directed at the *Discover Bank* rule, which the Court held did not provide adequate safeguards against enabling each and every plaintiff to *ex post* void all arbitration agreements with class-action waivers.[43]

The Court's critique largely focuses on the fact that the *Discover Bank* rule allows plaintiffs to avoid arbitration agreements with class-action waivers so long as the contract satisfied three requirements: (1) the contract is adhesive, (2) the damages are predictably small, and (3) the consumer alleges a scheme to cheat consumers.[44] The Court noted that plaintiffs could all too easily satisfy these three requirements: consumer contracts are almost always adhesive in some sense, California courts had deemed damages of $4,000 to be sufficiently "small," and the scheme to cheat need not be proven, but only alleged, to satisfy the *Discover Bank* rule.[45] Accordingly, the Court referred to these requirements as "toothless and malleable," failing to providing any true "limiting effect" on the *Discover Bank* rule.[46]

In this way, the Court's concern appeared to rest primarily with the wide scope of the *Discover Bank* rule and the fact that it enabled plaintiffs to easily avoid the terms of a duly executed arbitration provision.[47] This was particularly startling in the case before the Court where AT&T – at least facially – had incorporated a variety of pro-consumer provisions in the arbitration agreement. Accordingly, the pro-consumer provisions could have been read to counteract the impact of the class action waiver in AT&T's arbitration agreement. And the *Discover Bank* rule, as articulated by the California Supreme Court, failed to account for these pro-consumer provisions, using an all-too simplistic checklist to determine whether an arbitration agreement was unconscionable. As the Court noted, the district court below had described AT&T's arbitration procedures "favorably"[48] and yet within the framework created by the *Discover Bank* rule, such favorable provisions had no impact on the unconscionability analysis.

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[40] *Id.*

[41] *See* Kaltwasser v. AT&T Mobility LLC, No. 07-00411, 2011 U.S. Dist. LEXIS 106783, at *17 (N.D. Cal. Sept. 20, 2011) ("[I]t is incorrect to read *Concepcion* as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs and benefits at stake.").

[42] *See id.* at *9-10 (describing the Court's holding as "California's Discover Bank rule is preempted by the FAA" and remanding the case).

[43] *See Concepcion*, 131 S. Ct. at 1750 ("Although the rule does not require classwide [sic] arbitration, it allows any party to a consumer contract to demand it ex post.").

[44] *See id.*

[45] *See id.*

[46] *Id.*

[47] It is also worth noting that this more limited interpretation of the Court's holding is further bolstered by the Court's order. The Court did not simply grant AT&T's motion to compel, but instead, limited its holding to finding that the *Discover Bank* rule was preempted and then remanded for further proceedings. *See id.* at 1753.

[48] *Id.* at 1745.

On such an interpretation, the problem with the *Discover Bank* rule was its failure to take a holistic approach to arbitration agreements; instead, the *Discover Bank* rule made it too easy for plaintiffs to demand *ex post* invalidation of an arbitration agreement that contained a class-action waiver. If we read *Concepcion* this way then there is no reason to conclude that the Court's decision rang the death knell for class actions or even the ability of common law contract defenses to render arbitration agreements unenforceable.[49] To fit within the requirements of *Concepcion*, an arbitration agreement would have to incorporate various pro-plaintiff provisions that provided genuine access to reasonably priced dispute resolution system – as AT&T had in its own arbitration agreement.

In this way, the Court's decision in *Concepcion* did not run counter to the long-standing principle – embodied in § 2 of the FAA – that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[50] The Supreme Court had previously interpreted the second part of the sentence – the so-called "savings clause" – to allow "[s]tates [to] regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'"[51] The power of courts to use common law contract principles – including unconscionability – to invalidate arbitration agreements remained intact post-*Concepcion*.

By contrast, judicial application of the *Discover Bank* rule had taken to targeting arbitration agreements through failure to consider them in their entirety when applying unconscionability. In turn, the *Discover Bank* rule ran afoul of the general principle that arbitration agreements could not be singled out for worse treatment than any other contract. As the Court had previously noted, "[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent."[52]

Indeed, in a recent *en banc* decision, the Supreme Court of Missouri followed this approach in limiting the impact of *Concepcion*. After having its prior decision vacated and remanded by the Supreme Court in light of *Concepcion*,[53] the Missouri Supreme Court held that while "the presence and enforcement of [a] class arbitration waiver does not make the arbitration clause unconscionable," a court may still find an agreement with a class arbitration waiver unconscionable by "looking at the agreement as a whole to determine the conscionability of the arbitration provision."[54] Thus, the Missouri Supreme Court emphasized that "the majority opinion [in *Concepcion*] discusses in detail the many ways in which the arbitration provisions at issue in *Concepcion* are fair and reasonable and do not lead to an unconscionable result."[55] It

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[49] *See, e.g,* Ashby Jones, *After AT&T Ruling, Should We Say Goodbye to Consumer Class Actions?*, WALL ST. J. L. BLOG (Apr. 27, 2011, 12:36 PM), http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/.

[50] 9 U.S.C. § 2 (2006).

[51] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) (quoting 9 U.S.C. § 2).

[52] *Id.*

[53] Missouri Title Loans, Inc. v. Brewer, No. 10-1027, 2011 WL 531553 (U.S. May 2, 2011).

[54] Brewer v. Missouri Title Loans, No. SC 90647, 2012 WL 716878, at *1 (Mo. Mar. 6, 2012) (en banc).

[55] *Id.*

would therefore be a mistake to read *Concepcion*, argued the court, to conclude simply because "the *Discover Bank* rule was preempted by the [FAA] . . . that all state law unconscionability defenses are preempted by the [FAA] in all cases."[56] In this way, the Missouri Supreme Court's decision in *Brewer* serves as one of the first and clearest statements of *Concepcion*'s potential limitations, holding that the FAA "preemption analysis requires a case-specific assessment of the arbitration contract at issue."[57]

In sum, it seems fair to read the majority's decision as holding the *Discover Bank* rule preempted by the FAA because it was too broad and provided plaintiffs too much leeway to void otherwise valid arbitration agreements simply because they contained a class-action waiver – even without considering pro-consumer provisions in the same agreement. Going forward, courts may be reluctant to apply the Court's holding in *Concepcion* where a particular arbitration agreement satisfies the three requirements of the *Discover Bank* rule – that is, it is adhesive, involves small amounts of damages, and is accompanied by allegations of a scheme to cheat consumers – but fails to provide other pro-consumer provisions which could counter-balance the effect of the class-action waiver. As a result, *Concepcion* may be read to require lower courts to determine whether an arbitration agreement – taking all of its provisions into account – actually has the effect of, to use the dissent's phrasing, "depriving claimants of their claims."[58]

III. PRECEDENT

A more nuanced reading of the majority's opinion is not the only reason to think that *Concepcion* covers less than we might think. While five justices signed the majority opinion,[59] it is far from clear whether a majority of the Court agreed with the majority opinion's logic. Although Justice Thomas signed on to the majority opinion, he also filed a concurring opinion providing an alternative interpretation of the FAA.[60] In explaining why he had signed the majority opinion notwithstanding his alternative reading of the FAA, Justice Thomas stated that he joined the majority only "reluctantly" and had done so because "the Court's test will often lead to the same outcome as my textual interpretation."[61]

But Justice Thomas is unambiguous in his concurrence that his interpretation of the FAA is quite different than the interpretation expressed in the majority opinion. For Thomas, the scope of § 2's savings clause derives from a careful parsing of the text. On the one hand, § 2 of the FAA states clearly that arbitration agreements "shall be valid, irrevocable, and enforceable."[62] By contrast, when the FAA expresses the exceptions to the validity of arbitration awards, it simply states "save upon such grounds as exist at law or in equity for the *revocation* of any contract."[63] In the words of Justice Thomas, "[t]he use of only 'revocation' and the conspicuous omission of 'invalidation' and 'nonenforcement' suggest that the exception does not include all

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[56] *Id.*
[57] *Id.*
[58] *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting).
[59] *See id.* at 1743.
[60] *See id.* at 1753-56 (Thomas, J., concurring).
[61] *Id.* at 1754 (Thomas, J., concurring).
[62] *Id.* (quoting 9 U.S.C. § 2) (Thomas, J., concurring).
[63] *Id.* (Thomas, J., concurring)

defenses applicable to any contract but rather some subset of those defenses."[64] In this way, Justice Thomas argues that the only standard contract defenses applicable to arbitration agreements are those that "revoke" the arbitration agreement – as opposed to those defenses that challenge an arbitration agreement's validity or enforceability.[65]

Of course, the distinction between revocation on the one hand and validity and enforceability on the other hand is somewhat murky. To explain the distinction, Thomas looks to § 4 of the FAA, which states that "[w]hen a party seeks to enforce an arbitration agreement in federal court, § 4 requires that 'upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,' the court must order arbitration 'in accordance with the terms of the agreement.'"[66] The language of § 2, argues Thomas, should be read in light of the requirements in § 4; the grounds for "revocation" mentioned in § 2 must refer to the "making of the agreement" mentioned in § 4.[67] Thus, § 4 requires a federal court to make sure that none of the grounds for invalidating an arbitration award – as detailing § 2 – are present before sending the parties to arbitration.[68] Based on this interpretation, Thomas concludes that "[t]his [interpretation] would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake."[69] By contrast, "[c]ontract defenses unrelated to the making of the agreement – such as public policy – could not be the basis for declining to enforce an arbitration clause."[70]

This distinction makes all the difference for Thomas. As Thomas notes, the California Supreme Court applied the *Discover Bank* rule to hold that "class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory."[71] In fact, the California Supreme Court even analogized its concerns with class action waivers to circumstances where a contractual clause is contrary to public policy: "class action waivers [may be] substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy."[72] Indeed, Thomas highlights a number of instances where the California Supreme Court clearly conceptualized the *Discover Bank* rule as precluding the "enforce[ment]" of class action waivers because such waiver were "against the policy of law."[73] The California Supreme Court never described the *Discover Bank* rule as a problem of contract formation – it clearly understood the *Discover Bank* rule as providing a defense to contract enforcement.

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[64] *Concepcion*, 131 S. Ct. at 1754 (Thomas, J., concurring)

[65] *Id.* at 1754-55 (Thomas, J., concurring). This is not to endorse Justice Thomas's reading of § 2 of the FAA. In fact, there may be some good reason to be skeptical of Justice Thomas's textual interpretation. *See* David Horton, *Unconscionability Wars*, 106 NW. L. REV. COLLOQUY 13, 27-32 (2011) (criticizing Thomas's textual interpretation of § 2).

[66] *Id.* (quoting 9 U.S.C. § 4) (Thomas, J., concurring).

[67] *Id.* at 1754-55 (Thomas, J., concurring).

[68] *See id.*

[69] *Id.* at 1755.

[70] *Concepcion*, 131 S. Ct. at 1755.

[71] *Id.* (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1112 (Cal. 2005)).

[72] *Id.*

[73] *Id.*

Accordingly, Thomas concludes that "the Discover Bank rule does not concern the making of the arbitration agreement."[74] Instead, it is a rule aimed at preventing the enforcement of an otherwise valid arbitration agreement akin to the rule that contracts contrary to public policy are void. In turn, "the Discover Bank rule is not a 'groun[d] . . . for the revocation of any contract.'"[75] It therefore functions as a defense aiming to render an otherwise valid arbitration agreement unenforceable. Such defenses, on Thomas's account, are pre-empted by the FAA as only defenses speaking to contract formation remain viable under § 2.[76]

While both Thomas and the rest of the Court's majority agreed to strike down the *Discover Bank* rule, their divergent interpretations of the FAA would require different outcomes where, for example, an unconscionability claim rested on concerns regarding procedural unconscionability. Consider the facts of *Olvera v. El Pollo Loco*, a 2009 case before the California Court of Appeal.[77] As described by the court, El Pollo Loco – a fast food franchise – provided employees with written materials that included provisions addressing the method of resolving disputes between employees and the company.[78] In the explanatory section – written in both English and Spanish – the company stated that "If all attempts to resolve the problem are unsuccessful, the new policy requires that the employee and the company use a mediator to assist them in reaching a resolution. See your General Manager for additional details."[79] This section made no mention of arbitration.[80] By contrast, the material contained an arbitration provision – only provided in English and without a Spanish translation – that stated the parties "may agree" to arbitration but that "the sole means to resolve any dispute not resolved through other means was through arbitration."[81] Moreover, the un-translated arbitration provision was in smaller type and appeared at the end of the packet, while the mediation provision was front and center in the materials provided to the employees.[82] The arbitration provision also contained a class-action waiver.[83]

Not surprisingly, the court found the arbitration provision unconscionable.[84] In its analysis, the court focused on the "high" degree of procedural unconscionability; this was not merely a contract of adhesion, but the incorporation of the English-only arbitration provision – which contradicted the translated mediation provision – misled the employees as to the terms of the new dispute resolution policy.[85] The class-action waiver, according to the court, also rendered the arbitration provision substantively unconscionable although the court did not describe the

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[74] *Id.* at 1756.

[75] *Id.* (quoting 9 U.S.C. § 2).

[76] *See Concepcion*, 131 S. Ct. at 1754. It is also worth noting that to the extent state courts engage in "strategic judging" when interpreting arbitration doctrine, there is good reason to believe that Thomas's concurrence will be used to support more narrow application of *Concepcion*. *See infra* Part IV.

[77] *See* Olvera v. El Pollo Loco, Inc., 93 Cal. Rptr. 3d 65 (Ct. App. 2009). Many thanks to Steven Schultz for bringing this case to my attention.

[78] *See id.* at 68.

[79] *Id.*

[80] *See id.*

[81] *Id.*

[82] *See id.*

[83] *See Olvera*, 93 Cal. Rptr. 3d at 68.

[84] *See id.* at 74.

[85] *Id.* at 72-73.

degree of substantive unconscionability as high.[86] In this way, the court voided the arbitration provision by relying heavily on procedural unconscionability.[87]

El Pollo Loco serves as an example where the majority opinion and Thomas would likely diverge.[88] While the majority would likely reject a finding of unconscionability predicated on a class-action waiver, Thomas would presumably embrace such a finding so long as the unconscionability claim rested primarily on the procedural side; in that way, the claim of unconscionability – like the claim in *El Pollo Loco* – would speak to formation as opposed to enforcement. Thus, in contrast to the majority's opinion, Thomas's concurrence embraces a set of state law claims – claims related to the formation of the agreement – that can still undermine the viability of arbitration agreements.[89]

Of course, recognizing the impact of Thomas's concurrence is only half the story. This is because Thomas did sign on to the majority's opinion.[90] At first blush, there is good reason to believe that by signing on to the majority's opinion, Thomas rendered his concurrence irrelevant as a matter of precedent.

However, such a dismissal would be premature. In 1977, the Supreme Court somewhat famously adopted the "*Marks* Rule," which provided "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ."[91] While the *Marks* Rule, by its terms, would not appear to apply where – as in *Concepcion* – five justices have assented to a single opinion of the court, federal courts have, in some instances, deployed the rule in a wider range of circumstances.

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[86] *See id.* at 73-74.

[87] *See id.*

[88] To be sure, one might argue that even Thomas's concurrence would require enforcing the arbitration agreement because the claim rested on a claim of substantive unconscionability – a claim that might be described as speaking to enforcement as opposed to formation. However, there are two reasons to resist such a conclusion. First, in cases where the predominant factor in the unconscionability decision is procedural unconscionability, it would seem most accurate to describe the defense as speaking to the formation of the agreement. Second, and relatedly, substantive unconscionability may not speak to formation, but may best be thought of as further evidence of procedural unconscionability, thereby linking substantive unconscionability directly to a defense speaking to the formation of the agreement. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. d ("A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. *But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms. . . .*") (emphasis added).

[89] To be sure, Thomas's concurrence may at times provide more expansive grounds for eliminating defenses to the enforcement for arbitration agreements. Indeed, one might read the majority decision as holding that it is only when defenses are deployed to fundamentally change the nature of the arbitration process – like requiring certain claims to proceed on a class basis – that the FAA preempts the state law contract defense. By contrast, one might read Thomas's concurrence as interpreting the FAA to preempt state law contract defenses whenever they spoke to enforcement – even where they did not fundamentally change the nature of the arbitration process. Thus, Thomas's concurrence does not uniformly limit the preemptive effect of the FAA. That being said, his emphasis on the formation/enforcement distinction does provide some important protection against the enforcement of arbitration agreements where there is evidence of significant procedural unconscionability. (Many thanks to Christopher Drahozal for emphasizing this point to me.)

[90] *See Concepcion*, 131 S. Ct. at 1743.

[91] Marks v. United States, 430 U.S. 188, 193 (1977) (citation and internal quotation marks omitted).

For example, in *Branzburg v. Hayes*, the Court's majority held that the First Amendment provided no privilege for reporters called to testify before a grand jury regarding criminal charges.[92] Justice Powell signed the Court's majority opinion, serving as the ever-important fifth vote. However, Justice Powell also authored a concurring opinion, where he stated "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[93] In turn, "[t]he balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[94] In this way, Justice Powell's concurrence differed from the majority opinion, contending that the First Amendment could provide reporters with immunity from testifying before a grand jury depending on the circumstances.[95]

In applying *Branzburg*, lower courts have frequently considered Powell's concurrence as limiting the holding of the majority.[96] As some have noted, such analysis appears predicated on the fact that Powell provided the fifth and deciding vote and simultaneously Powell's concurrence limited the majority opinion's holding.[97] While courts continue to differ over the application of *Branzburg*, it seems clear that Powell was, to some extent, successful in hijacking the Court's majority opinion by providing a different – and conflicting – rationale in his concurrence.[98] Moreover, *Branzburg* may not be the only instance where a justice was able to limit the precedential impact of a Supreme Court decision by both signing the majority opinion and writing a conflicting concurrence.[99]

In this way, *Branzburg* and cases like it indicate that Thomas's concurrence may have significant impact in the application of *Concepcion* going forward. This is particularly true according to those who understand precedent not in terms of the best current understanding of the law, but in terms of predicting how courts – and most notably the Supreme Court – are likely to resolve future cases. Oliver Wendell Holmes famously expressed this "predictive" view of precedent: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[100] Thus, understanding precedent through the prism of a predictive model takes a "forward-looking view of the law" where "an inferior court discharges its duty to

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[92] *See* Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.").

[93] *Id.* at 710 (Powell, J., concurring).

[94] *Id.*

[95] *See, e.g.*, Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1951 (2006) (describing the different approaches expressed in the *Branzburg* Court's majority and Justice Powell's concurrence).

[96] *See, e.g.*, Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595-96 (1st Cir. 1980); United States v. Criden, 633 F.2d 346 (3d Cir. 1980); Riley v. City of Chester, 612 F.2d 708, 715-16 (3d Cir. 1979).

[97] Tristan C. Pelham-Webb, *Powelling for Precedent: "Binding" Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693, 700-04 (2009).

[98] *See id.*

[99] *See* Igor Kirman, Note, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2089-96 (1995).

[100] Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

say what the law is by applying the dispositional rule that the superior court enjoying revisory jurisdiction predictably would embrace."[101]

Along such lines, courts may very well limit the application of *Concepcion*, refraining from applying the Court's analysis to cases of unconscionability predicated on conduct that undermines the formation of the agreement. Indeed, Thomas's concurrence has already begun to creep into judicial opinions, providing further indication of its potential to limit the impact of *Concepcion*.[102] In this way, Thomas's concurrence provides another important reason for why *Concepcion* may not cover quite as much legal terrain as some have suggested.

IV. POLITICS

As noted above, both the majority and concurring opinions in *Concepcion* provide resources for limiting *Concepcion*'s precedential impact. On the one hand, the majority's opinion is susceptible to a more narrow reading where common law grounds for contract revocation might still render arbitration agreements unenforceable so long as they take the entirety of the agreement into account. On the other hand, Thomas's concurrence may be interpreted by lower courts to limit the precedential impact of *Concepcion*, with the Court's holding only applying to instances where the common law contract doctrine serves as grounds for revocation as opposed to a defense against contract formation.

But there is also another reason to wonder whether *Concepcion*'s impact will be more limited than some have anticipated. In considering *Concepcion*, it is hard not to be struck by the tenuous nature of the Court's five-vote majority. In the past, both Justice Thomas and Justice Scalia have expressly contested the Supreme Court's holding in *Southland Corp. v. Keating*,[103] which held that the FAA applies in state courts. Thus, Justice Scalia has stated that "[a]dhering to

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[101] Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 16 (1994); *see also* Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 231-35 (2008).

[102] The most notable example thus far has been the Supreme Court of Missouri's decision in *Brewer v. Missouri Title Loans*, No. SC 90647, 2012 WL 716878, at *1 (Mo. Mar. 6, 2012) (en banc). As part of its decision limiting the application of *Concepcion*, the court focused on Thomas's concurrence, arguing that Thomas's concurrence highlights two of the foundational claims in the majority's opinion: that the FAA "does not preempt state law contract defenses pertaining to the formation of a contract" and that the FAA "preemption analysis requires a case-specific assessment of the arbitration contract at issue." *Id.* at *5-6; *see also supra* notes 53-57 and accompanying text (discussing *Brewer*).

For other examples of courts employing Thomas's concurrence in their analysis, *see* NAACP of Camden County East v. Foulke Mgmt. Corp., 24 A.3d 777, 792 (N.J. Super. Ct. App. Div. 2011) ("This caveat was developed more explicitly in Justice Thomas's concurring opinion, which represented the pivotal fifth vote in the Court's five-to-four decision in AT&T Mobility. As Justice Thomas noted, 'the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress.'"). *See also* Cmty. State Bank v. Strong, 651 F.3d 1241, 1267 (11th Cir. 2011) ("The ability of such contractual defects to invalidate arbitration agreements is not affected by the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which preserved 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' so long as the defenses do not 'apply only to arbitration or . . . derive their meaning from the fact that an agreement to arbitrate is at issue.'" (quoting *Concepcion*, 131 S. Ct. at 1746)); Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1215 (11th Cir. 2011) ("In addition, like the plaintiffs in *Concepcion*, the Plaintiffs here do not allege any defects in the formation of the contract, aside from its generally adhesive nature, which alone is insufficient to invalidate a consumer contract.").

[103] 465 U.S. 1 (1984).

Southland entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes."[104] Similarly, Justice Thomas has described the Court's decision in *Southland* as simply "wrong," forcefully arguing that "[t]he statute that Congress enacted [i.e. the FAA] actually applies only in federal courts."[105] And while Justice Scalia has stated that he will "not in the future dissent from judgments that rest on *Southland*,"[106] Justice Thomas has made no such concession. To the contrary, Justice Thomas has been highly critical of the use of *stare decisis* to insulate *Southland*: "Rather than attempting to defend *Southland* on its merits, petitioners rely chiefly on the doctrine of *stare decisis* in urging us to adhere to our mistaken interpretation of the FAA. In my view, that doctrine is insufficient to save *Southland*."[107]

That Justice Thomas remains unwilling to join decisions resting on *Southland*'s premise that the FAA applies in state courts is crucial to predicting future lower court application of *Concepcion*. As Aaron Bruhl has argued, state courts engage in various forms of "strategic judging," by "choos[ing] the grounds for their decisions in ways that reach a desired result and simultaneously make it difficult for higher courts to review their decisions."[108] This has been particularly true in the context of arbitration as "some judges disagree with the Supreme Court's strongly pro-arbitration course, are willing to oppose it, and will take the survivability of their doctrinal choices into account when fashioning their arbitration rulings."[109]

This type of strategic judging has manifested itself in the increasing number of state courts deploying the doctrine of unconscionability to void otherwise valid arbitration agreements.[110] Unconscionability became the doctrine of choice for courts resistant to the increasing scope of enforceable arbitration agreements because it provided them with sufficient doctrinal cover to avoid reversal on appeal.[111] Indeed, the Supreme Court took critical notice of this trend in *Concepcion*,[112] a trend that undoubtedly factored into the Court striking down the *Discover Bank* rule.

At first blush, the Supreme Court's decision in *Concepcion* peeled back this doctrinal cover, arguing that judicial use of unconscionability had simply become a smokescreen for the widespread failure to put arbitration agreements on "equal footing" with all other contracts.[113] And by calling out state courts for this type of decision-making, *Concepcion* goes far in undermining this increasingly popular judicial tactic.

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[104] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 284-85 (1995) (Scalia, J. dissenting).

[105] *Id.* at 286 (Thomas, J., dissenting).

[106] *Id.* at 285 (Scalia, J., dissenting).

[107] *Id.* at 295 (Thomas, J., dissenting).

[108] Bruhl, *supra* note 18, at 1444.

[109] *Id.* at 1446.

[110] *See* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004) (tracing the resurgence of judicial use of the unconscionability doctrine to void arbitration agreements); *see also* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004) (examining how judicial use of the unconscionability doctrine has become an important counterweight to the Supreme Court's pro-arbitration jurisprudence).

[111] *See supra* notes 108 and 110; *see also supra* note 2.

[112] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011).

[113] *Id.* at 1745-46.

But given the penchant of courts to engage in strategic judging, *Concepcion* will only be as strong as its weakest link. And one has to imagine that state courts are fully aware of Justice Thomas's unrelenting criticism of *Southland*. Indeed, if *Concepcion* had made its way before the Supreme Court via California courts, the outcome of the case would likely have been the opposite with Justice Thomas unwilling to join a majority opinion resting on *Southland*'s premise that the FAA applies in state courts. Put more starkly, state courts must be fully aware that the Supreme Court – as currently constituted – will not reverse any of their decisions in which they continue to apply rules similar to those struck down in *Concepcion*.[114]

Already some courts have begun to cabin the Supreme Court's holding in *Concepcion* as "preempt[ing] California's unconscionability law regarding exemption of certain claims from arbitration, *at least for actions in federal court*."[115] This implied limitation of *Concepcion* has even become explicit in some recent state court decisions. On the one hand, a recent Massachusetts state court explicitly rejected this argument, concluding that "[c]ounting the votes of justices is always perilous."[116] On the other hand, and maybe not surprisingly, a California state court recently noted the possibility that Justice Thomas's continued unwillingness to join decisions resting on *Southland* might limit the applicability of Supreme Court decisions that include Justice Thomas in the majority;[117] the court, however, failed to reach the issue simply because the contentions of the parties enabled the court to avoid the question.[118]

To be sure, it is far from clear that as a doctrinal matter, Justice Thomas's continued dissent from *Southland* should impact the applicability of *Concepcion* to state courts. Indeed, there are some good reasons to think it should not.[119] But if we agree that state courts engage in strategic judging, there is also good reason to think that – at least on the margins – some state courts may exhibit an increasing willingness to limit the impact of decisions such as *Concepcion* that, as a public policy matter, they find objectionable.[120]

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[114] A prime example of this phenomenon is the Missouri Supreme Court's recent decision in *Brewer v. Missouri Title Loans*, No. 90647, 2012 WL 716878 (Mo. Mar. 6, 2012) (en banc). *See supra* notes 53-57and accompanying text (discussing *Brewer*'s narrow reading of *Concepcion*).

[115] Laguna v. Coverall N. Am., Inc., No. 09cv2131-JM, 2011 U.S. Dist. LEXIS 81105, at *6 (S.D. Cal. July 26, 2011) (emphasis added); *see also* Arellano v. T-Mobile USA, Inc., No. C 10-05663 WHA, 2011 U.S. Dist. LEXIS 52142, at *4-6 (N.D. Cal. May 16, 2011) ("Accordingly, despite public policy arguments thought to be persuasive in California, *Concepcion* has trumped these considerations, at least for cases in federal court."); In re DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig., 810 F. Supp. 2d 1060, 1072 (C.D. Cal. 2011) (citing *Arellano*).

[116] Feeney v. Dell, Inc., No. MICV 2003-01158, 2011 WL 5127806, at *7 n.10 (Mass. Super. Ct. Oct. 4, 2011).

[117] *See* Hartley v. Superior Court, 127 Cal. Rptr. 3d 174, 179 (Ct. App. 2011).

[118] *See id.* at 180.

[119] *See Feeney*, 2011 WL 5127806, at *7 n.10 ("In any event, I assume that, if the Supreme Court were to consider this case on an issue-by-issue basis, as is its practice, there would be a majority to hold that the FAA applies to state court proceedings . . . and a differently-constituted majority to hold that the FAA preempts Discover Bank rule."); Iskanian v. CLS Transp. Los Angeles, LLC, No. B235158, 2012 Cal. App. LEXIS 650, at *11-12 n.3 (Cal. App. 2d Dist. June 4, 2012) ("[Plaintiff] surmises that if the *Concepcion* case had reached the United States Supreme Court from state court, Justice Thomas (who provided the fifth vote) would not have found preemption. This is pure speculation, and it is belied by Justice Thomas's concurring opinion in *Concepcion*, which contains no indication that the holding should apply only in federal court.").

[120] *See* Bruhl, *supra* note 18, at 1446 ("The chosen basis for the decision can affect the likelihood of reversal by a higher court, even when holding the decision's bottom line constant. Lower court judges realize this, and so they can manipulate their grounds of decision both to advance their preferred outcomes and to make review of their decisions more costly. This is the essence of the strategic instruments approach.").

Consider the following example. In California, the Labor Code Private Attorneys General Act of 2004 ("PAGA"), allows "a civil action [to be] brought by an aggrieved employee on behalf of himself or herself and other current or former employees" to recover civil penalties for violations of the labor code.[121] However, employees attempting to bring such class actions under PAGA have often had to overcome employment agreements that contain both arbitration provisions and class action waivers. Prior to *Concepcion*, California courts had held that arbitration agreements with class action waivers function to prevent plaintiffs "from seeking civil penalties on behalf of other employees, contrary to the PAGA," and therefore such agreements were "as a whole . . . tainted with illegality and . . . unenforceable."[122]

In the wake of *Concepcion*, courts have been asked to consider whether or not this holding remains good law. In a recent decision, a federal district court for the Central District of California concluded that the Court's decision in *Concepcion* rendered PAGA preempted by the FAA.[123] Citing *Concepcion*, the district court noted that "the Supreme Court held that, under the FAA, states could not 'condition[] the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures.'"[124] Further summarizing *Concepcion*, the district court noted that "The [Supreme] Court concluded that requiring class arbitration when an arbitration agreement precluded it was 'inconsistent with the FAA' because class arbitration 'sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment' and because 'class arbitration greatly increases risks to defendants,' as '[t]he absence of multilayered review makes it more likely that errors will go uncorrected.'"[125]

The district court then analogized the Supreme Court's analysis of the *Discover Bank* rule to PAGA, holding that the plaintiff's claims pursuant to PAGA were arbitrable.[126] The analogy, according to the district court, was straightforward:

> For similar reasons, requiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA. A claim brought on behalf of others would, like class claims, make for a slower, more costly process. In addition, representative PAGA claims "increase[] risks to defendants" by aggregating the claims of many employees. . . . Defendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would "go uncorrected" given the "absence of multilayered review."[127]

Thus, "[j]ust as '[a]rbitration is poorly suited to the higher stakes of class litigation,' it is also poorly suited to the higher stakes of a collective PAGA action."[128] As a result, the district court interpreted *Concepcion* to prevent California's PAGA from rendering such claims non-

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[121] Cal. Lab. Code § 2699(a) (West 2004).
[122] Franco v. Athens Disposal Co., Inc., 90 Cal. Rptr. 3d 539, 559 (Ct. App. 2009).
[123] *See* Quevedo v. Macy's, Inc., 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011).
[124] *Id.* (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744, 1753 (2011)).
[125] *Id.* (quoting *Concepcion*, 131 S. Ct. at 1750-51, 1752).
[126] *See id.* at 1150.
[127] *Id*. at 1149.
[128] *Id*. (quoting *Concepcion*, 131 S. Ct. at 1752).

arbitrable: "*AT&T v. Concepcion* makes clear, however, that the state cannot impose such a requirement because it would be inconsistent with the FAA."[129]

The district court's analysis is quite persuasive. Like the *Discover Bank* rule, PAGA protected a set of claims by ensuring a plaintiff could bring a representative suit. In turn, plaintiffs have sought to deploy PAGA in order to avoid arbitration agreements that incorporate class action waivers. In this way, PAGA encapsulated a California state public policy, which served to void otherwise valid arbitration agreements; and, under *Concepcion*, such a state law would appear to be preempted by the FAA when applied to arbitration agreements.

But this argument, while persuasive in federal courts, has not been adopted in California state court. In reaching the opposite conclusion, the California Court of Appeal argued that PAGA claims are fundamentally different from typical class action claims. According to the court, "[t]he representative action authorized by the PAGA is an enforcement action, with one aggrieved employee acting as a private attorney general to collect penalties from employers who violate the Labor Code."[130] As expressed in prior California decisional law, "Such an action is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct. Restitution is not the primary object of a PAGA action, as it is in most class actions."[131] Indeed, "The [PAGA] attempted to remedy the understaffing of California's labor law enforcement agencies by granting employees the authority to bring civil actions against their employers for Labor Code violations."[132]

Prior California decisions had been unwilling to allow contractual provisions to undermine the objectives of PAGA: "efforts to 'nullify the PAGA and preclude [the plaintiff] from seeking civil penalties on behalf of other current and former employees, that is, from performing the core function of a private attorney general . . . impedes [the] goal of 'comprehensive[ly] enforc[ing]' a statutory scheme through the imposition of 'statutory sanctions' and 'fines.' . . . [And] the prohibition of private attorneys general is invalid."[133]

Based on this distinction, the California Court of Appeal determined that *Concepcion*'s holding did not render PAGA claims arbitrable. According to the court, *Concepcion* "concerns the preemption of unconscionability determinations for class action waivers in consumer cases" and thereby "specifically deals with the rule enunciated in Discover Bank . . ."[134] By contrast, *Concepcion* "does not purport to deal with the FAA's possible preemption of contractual efforts to eliminate representative private attorney general actions to enforce the Labor Code."[135] Under PAGA, the "aggrieved employee acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties."[136] In this way, "[t]he purpose of the

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[129] *Quevedo*, 798 F. Supp. 2d at 1149 (quoting *Concepcion*, 131 S. Ct. at 1753).

[130] Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854, 860 (Ct. App. 2011), *cert. denied*, No. 11-880, 2012 WL 136923 (U.S. Apr. 16, 2012).

[131] *Id*. (quoting *Franco*, 171 Cal. App. 4th at 1300).

[132] *Id*. (quoting *Franco*, 171 Cal. App. 4th at 1301).

[133] *Id.* (quoting *Franco*, 171 Cal. App. 4th at 1303).

[134] *Id.* at 500.

[135] *Brown*, 128 Cal. Rptr. 3d at 861.

[136] *Id*. (quoting Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court, 46 Cal. 4th 993, 1003 (2009)).

PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code."[137]

According to the court, "[t]his purpose contrasts with the private individual right of a consumer to pursue class action remedies in court or arbitration, which right, according to AT&T, may be waived by agreement so as not to frustrate the FAA—a law governing private arbitrations."[138] And in turn, *Concepcion* "does not provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law."[139] Thus the court concluded, "representative actions under the PAGA do not conflict with the purposes of the FAA. If the FAA preempted state law as to the unenforceability of the PAGA representative action waivers, the benefits of private attorney general actions to enforce state labor laws would, in large part, be nullified."[140]

It is somewhat hard to understand why this distinction should make a difference. While it may be true that the purpose of PAGA is different than the purpose of the *Discover Bank* rule, PAGA's authorizing representative actions on the part of aggrieved employees does conflict with arbitration agreements that incorporate class action waivers. In turn, if *Concepcion* held that the *Discover Bank* rule is preempted by the FAA because it undermines the enforceability of otherwise valid arbitration agreements, it is hard to see why the different purpose of PAGA should prevent the FAA from rendering it preempted.[141]

In its decision, the California Court of Appeal appeared to acknowledge the tenuousness of its arguments. Indeed, somewhat candidly, the court "recognize[d] that the United States Supreme Court has held that the FAA preempts certain California statutory dispute resolution mechanisms."[142] However, the court was unwilling to expand the logic of *Concepcion* – and other similar Supreme Court decisions – insisting that "United States Supreme Court authority does not address a statute such as the PAGA."[143] In a somewhat explicit show of judicial defiance, the court stated "Until the United States Supreme Court rules otherwise, we continue to follow what we believe to be California law."[144]

This refusal to expand *Concepcion* beyond its narrow circumstances captures much of the strategic judging dynamic. Aware that the Supreme Court is unlikely to reverse its decision, the California Court of Appeal was willing to push back against *Concepcion*'s logic and reassert the authority of the state to require judicial resolution of PAGA claims. It did so by highlighting a

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[137] *Id*. at 862.

[138] *Id*. at 861.

[139] *Id*.

[140] *Id*. at 863.

[141] Indeed, another recent California Court of Appeal reached the opposite conclusion. *Iskanian*, 2012 Cal. App. LEXIS 650, at *27 ("Respectfully, we disagree with the majority's holding in *Brown*. We recognize that the PAGA serves to benefit the public and that private attorney general laws may be severely undercut by application of the FAA. But we believe that United States Supreme Court has spoken on the issue, and we are required to follow its binding authority.").

[142] *Brown*, 128 Cal. Rptr. 3d at 863.

[143] *Id*.

[144] *Id*. It is also worth highlighting that the California Court of Appeal noted that the Supreme Court had granted certiorari in Greenwood v. CompuCredit Corp. 615 F.3d 1204 (9th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3627 (U.S. May 2, 2011) (No. 10-948) (in order to consider whether claims arising under the Credit Repair Organization Act must be arbitrated under valid arbitration agreements). *See id.* at 861 n.5. Such cases represent opportunities for the Supreme Court to address the preemptive effect of the FAA without implicating the division among the justices regarding the applicability of the FAA to federal courts.

distinction with little difference between the *Discover Bank* rule and PAGA, presumably aware that state court decisions are unlikely to receive significant scrutiny from the Supreme Court given the fractured nature of the Court's majority regarding the applicability of the FAA to state courts. In turn, the California Court of Appeal sticks to its doctrinal guns, daring the Supreme Court to "rule[] otherwise."[145] And until the Supreme Court does in fact rule otherwise, the California Court of Appeal has clearly stated who makes the law in state court: "we continue to follow what *we believe to be California law*."[146]

This is, of course, not to say that all California state courts – or all state courts generally – will uniformly resist the implications of *Concepcion*. Indeed, some court decisions might embrace *Concepcion* and apply the Supreme Court's holding more conventionally.[147] But bold responses to *Concepcion* – like the court's decision in *Brown* – may become increasingly typical for state courts that wish to resist the expansion of the FAA's preemptive scope. Such courts are undoubtedly aware of how tenuous the Supreme Court's majority is and are therefore likely dubious of the Supreme Court's ability to strike down state court decisions rejecting the expansive reading of the FAA embodied in *Concepcion*. While as a matter of technical doctrine such decisions may be flawed, state courts are likely to erect more hurdles to the Supreme Court's broad interpretation of the FAA's preemptive scope than their federal counterparts. And such willingness presumably draws, at least in part, from the inability of the Supreme Court to marshal a unified majority to quash state court decisions that reject the Supreme Court's pro-arbitration trajectory.[148] As a result, there is good reason to believe that *Concepcion* will have a more limited impact on state court decisions than we might otherwise think.

V. CONCLUSION

Concepcion was undoubtedly a landmark decision that will have broad impact on the ability of courts to deploy common law contract defenses to void arbitration agreements. Indeed, the decision, by its terms, limits the use of unconscionability as a doctrine of last resort – a doctrine that had become increasingly popular in recent judicial decisions.[149]

That being said, there are reasons to believe that *Concepcion*'s reach will not be quite as broad as some might think. First, the Court's decision may be read as simply rejecting the creation of overly-broad rules that apply common law doctrines to void arbitration agreements. On such an account, the *Discover Bank* rule undermined the purpose of the FAA by voiding to wide a swath of arbitration agreements – including arbitration agreements that incorporated pro-consumer terms to counterbalance the impact of class action waivers. Second, Justice Thomas's concurrence in *Concepcion* may be used by lower courts to limit the precedential value of the

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[145] *Brown*, 128 Cal. Rptr. 3d at 863.

[146] *Id.* (emphasis added).

[147] *See, e.g.*, *Iskanian*, 2012 Cal. App. LEXIS 650 at *30 (holding *Concepcion*'s preemption of various California state laws, including PAGA).

[148] Indeed, in light of this analysis, it is not surprising that the Supreme Court recently denied certiorari in Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854 (Ct. App. 2011), *cert. denied*, No. 11-880, 2012 WL 136923 (U.S. Apr. 16, 2012). While the decision clearly flies in the face of the Supreme Court's pro-arbitration trajectory, the Court cannot marshal a unified majority to reverse the decision because of continued division among the justices as to whether the FAA applies in state courts.

[149] *See supra* notes 108-111 and accompanying text.

Court's holding to instances where the implicated defense speaks to the revocation of an otherwise valid arbitration agreement – as opposed to instances where the implicated defense speaks to the formation of the agreement. And third, state courts may engage in strategic judging in light of the division within the five-justice *Concepcion* majority over the applicability of the FAA to state courts. In this way, while *Concepcion* may have changed the landscape of arbitration doctrine, resources remain for plaintiffs to resist the most recent manifestation of the Court's pro-arbitration jurisprudence.

THE FALLOUT FROM *AT&T MOBILITY V. CONCEPCION*: PARAMETERS ESTABLISHED BY THE INTERPRETATIONS OF LOWER COURTS

Terry F. Moritz*

I. INTRODUCTION

Last year, the United States Supreme Court rattled the arbitration world with its decision in *AT&T Mobility v. Concepcion.*[1] The Court's decision in *Concepcion* overturned the widely accepted *Discover Bank* rule[2] that had been handed down by the California Supreme Court in *Discover Bank v. Superior Court.*[3] *Discover Bank* had established a fairly rigid rule that class arbitration waivers were unconscionable and could not be enforced, thus permitting class actions even where the parties had agreed to only individual arbitrations.[4] In overturning *Discover Bank*, however, the Court held that the Federal Arbitration Act (FAA) preempted the *Discover Bank* rule and that the terms of an arbitration agreement could not be declared unconscionable simply because they contained a class action waiver.[5] Instead, the FAA dictates that arbitration agreements – even those in adhesive contracts – must be read at face value and strictly interpreted.[6]

In reaching its decision in *Concepcion*, the Court focused on § 2 of the FAA, acknowledging that this provision, often referred to as the "Savings Clause," "permits arbitration agreements to be declared 'unenforceable' upon such grounds as exist at law or in equity for the revocation of any contract" but that arbitration agreements can only be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability – not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.[7] Ruling that § 2 of the FAA preempts California's *Discover Bank* rule, the Court noted that:

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[1] AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

[2] *Id.* at 1753.

[3] *See generally* Discover Bank v. Superior Court, 113 P.3d 1100, 1103 (Cal. 2008).

[4] *Id. at* 1108.

[5] *AT&T Mobility,* 131 S. Ct. at 1753.

[6] *Id.* at 1752.

[7] *Id.* at 1746 (citing *Doctor's Assocs., Inc. v. Casarotto,* 517 U. S. 681, 687 (1996)).

> Class-wide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA.[8]

The Court also concluded that "[a]rbitration is poorly suited to the higher stakes of class litigation," and struck down the *Discover Bank* rule as hostile to the use of individual arbitration to resolve consumer disputes.[9] Although the Court noted the ways in which arbitration is "poorly suited to the higher stakes of class litigation" – ineffectiveness of judicial review of certification issues, informality of proceedings, inexperience of arbitrators, class certification issues, and increased risks to defendants – the Court's decision, nonetheless, seems to rest on a strict application of § 2 of the FAA, rather than any policy arguments in favor of or against classwide arbitration.[10]

Although the Court's logic in the *Concepcion* decision is frequently criticized, within the context of the Court's arbitration jurisprudence, it is sound. In the 2009-2010 Term, the Court in *Stolt-Nielsen S.A. v. AnimalFeeds International*[11] held that a party could not be compelled to engage in class-arbitration "unless there is a contractual basis for concluding that the party agreed to do so".[12] In any arbitration agreement that contains a class action waiver it seems beyond contest to fairly conclude that the parties have not agreed to class arbitration. The argument made by those critical of the *Concepcion* decision is that because *Discover Bank* reaches all waivers of class action, whether in the arbitration forum or in a court setting, the Court misapplied the Savings Clause in § 2 of the FAA. This argument misses the point. It is only in an arbitration setting where the agreement of the parties to arbitrate is an essential precondition. Put another way, no one gets to elect whether the law will bind them, but they can elect to submit a matter to an arbitration. Thus, to the extent the *Discover Bank* rule results in judicially compelled class arbitration contrary to the agreement of the parties, the rule is specifically targeted at arbitration only.

In the year since *Concepcion* was decided, lower courts throughout the country have had ample opportunity to interpret the scope of the *Concepcion* decision.[13] In fact, several hundred

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[8] *Id.* at 1750-51.

[9] *Id.* at 1752.

[10] *Id.*

[11] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

[12] *Id.* at 1775.

[13] Not only have myriad lower courts interpreted *Concepcion* in a variety of contexts, but the U.S. Supreme Court also recently issued an opinion in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), in which it relied on its adherence to the "liberal federal policy favoring arbitration agreements" set forth in *Concepcion* to hold that the statutory phrase "[y]ou have a right to sue a credit repair organization" in the Credit Repair Organizations Act (CROA) did not bar arbitration of disputes brought under the CROA. *Id.* at 673. The Court specifically stated, "We think it clear, however, that this mere 'contemplation' of suit in any competent court does not *guarantee* suit in all competent courts, disabling the parties from adopting a reasonable forum selection clause…Had Congress meant to prohibit these very common [arbitration] provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest…Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 671-73.

cases have cited to *Concepcion* in some capacity. Some courts have placed limitations on the scope of *Concepcion* by either holding that the specific arbitration agreement at issue was unenforceable for reasons aside from the inclusion of a class arbitration waiver, or by differentiating *Concepcion* for its application of state or federal statutory law, rather than common law or court-made law. On the other end of the spectrum, some courts have expanded on the *Concepcion* decision to strike down state laws that resembled the *Discover Bank* rule. Throughout the decisions, two conflicting policy arguments seem to come into play: (1) the inappropriateness of arbitration as a means of resolving class claims, on the one hand, and (2) the vindication of rights doctrine (*i.e.* the possibility that many small-dollar claims will go unresolved due to the costs associated with pursing individual claims), on the other. Yet, despite the many practical implications of the Court's decision in *Concepcion*, lower courts seem to base their reasoning on an application of the FAA and contract construction principles.[14]

II. THE BROAD RANGE OF LOWER COURTS' DECISIONS

A. Cases That Limit the Scope of *Concepcion* by Ultimately Finding the Arbitration Agreement at Issue to be Unenforceable on Other Grounds

Several courts continue to apply an unconscionability standard to arbitration agreements, with some courts skirting the holding of *Concepcion* by ultimately finding a particular arbitration agreement to be unenforceable for reasons aside from the inclusion of a class arbitration waiver.[15] In *Kanbar v. O'Melveny*, for example, the Northern District of California stated that "arbitration agreements are still subject to unconscionability analysis… [and] the doctrine of unconscionability can override the terms of an arbitration agreement and the parties' expectations in connection therewith."[16] The *Kanbar* court ultimately held that the arbitration agreement was both procedurally and substantively unconscionable based on its "take it or leave it" condition of employment, its strict notice requirements, and overly burdensome confidentiality provisions.[17]

Other courts focus on the fact that *Concepcion* did not disrupt a court's ability to declare an arbitration agreement unenforceable for reasons other than public policy or unconscionability, such as fraud, duress, or lack of mutual assent. Due to confusing and inconsistent provisions in the arbitration agreement, the court in *NAACP of Camden County East v. Foulke Management Corp.* ultimately held that the arbitration agreement was unenforceable due to lack of mutual assent.[18] Likewise, in *Sanchez v. Valencia Holding Co., LLC*, a California Court of Appeal for the Second District declared an arbitration agreement to be procedurally and substantively

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[14] Only dissenting opinions seem to pay more than mere lip service to the policy argument that arbitration is poorly suited for class litigation. *See e.g.*, Jock v. Sterling Jewelers, Inc., 646 F.3d 113, 131-32 (2d Cir. 2011) (Winter, J., dissenting).

[15] *See, e.g.*, Kanbar v. O'Melveny & Myers, No. C-11-0892 EMC, 2011 WL 2940690, at *1 (N.D. Cal. July 21, 2011); NAACP of Camden County E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404 (App. Div. 2011); Chavez v. Bank of Am., No. C 10-653 JCS, 2011 WL 4712204, at *1 (N.D. Cal. Oct. 7, 2011); Sanchez v. Valencia Holding Co., No. B228027, 2011 WL 5027488, at *1 (Cal. Ct. App. Oct. 24, 2011); Newton v. Clearwire Corp., No. 2:11-CV-00783-WBS-DAD, 2011 WL 4458971, at *1 (E.D. Cal. Sept 23, 2011).

[16] *Kanbar*, 2011 WL 2940690, at *6.

[17] *Id.* at *7.

[18] *NAACP of Camden County E.*, 421 N.J. Super. at 438.

unconscionable based on the cumulative effect of clauses regarding arbitration appeal procedures, the imposition of certain filing fees, and the exclusion of repossession issues from arbitration.[19]

Some courts choose to "pencil-out" an unconscionable provision, but uphold the remainder of the arbitration agreement. For instance, in *Chavez v. Bank of America*, the Northern District of California expunged substantively unconscionable forum selection clause from an otherwise enforceable arbitration agreement.[20]

Other courts continue to apply existing jurisdictional standards of unconscionability, provided that they do not disfavor arbitration *per se*. In *Bernal v. Burnett*, Judge Martinez for the United States District Court for the District of Colorado, tested an arbitration agreement with a class arbitration waiver under Colorado's unconscionability test, which is set forth in *Davis v. MLG Corp.*:

> Because Colorado's test for unconscionabilty on a contract provision does not explicitly disfavor arbitration (class or otherwise), the degree to which *Concepcion* changes the legal landscape in Colorado is unclear. There does not appear to be any reason why the *Davis* factors are not still good law. Thus, the court will consider the facts of this case under the structure, keeping in mind the Supreme Court's statements and observations in *Concepcion*.[21]

B. The Application of *Concepcion* to Federal or State Statutory Laws in Contrast to Common Law or Court-Made Law

Some lower courts have differentiated the implications and scope of *Concepcion* based on the application of a federal or state *statutory* law rather than an application of common law or court-made law.[22] For example, *Chen-Oster v. Goldman, Sachs & Co.* involved allegations of gender discrimination against female employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and New York City Human Rights Law, N.Y.C. Admin Code § 8-107 *et seq.*[23] A federal court in the Southern District of New York initially denied the defendant's motion to stay the action and compel arbitration based on an arbitration agreement ancillary to an employment contract. The defendant filed a motion for reconsideration following the Court's ruling in *Concepcion*.[24] The court again denied the motion, holding that *Concepcion* did not clearly reach rights secured under Title VII. The court specifically stated:

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[19] *Sanchez*, 2011 WL 5027488, at *10.

[20] *Chavez*, 2011 WL 4712204, at *11.

[21] Bernal v. Burnett, 793 F. Supp. 2d 1280, 1287 (2011) (citing Davis v. MLG Corp., 712 P.2d 985 (Colo. 1986)).

[22] *See, e.g.*, Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950(LBS)(JCF), 2011 WL 2671813, at *1 (S.D.N.Y. July 7, 2011); Brown v. Ralphs Grocery Co., 197 Cal. App. 4th 489 (2011).

[23] *Chen-Oster*, 2011 WL 2671813, at *1.

[24] *Id.*

> *Concepcion* involved the preemption of state contract law by a federal preference for arbitration embodied in a federal statute, the FAA…This case demands consideration of a separate issue: whether the FAA's objectives are also paramount when, as here, rights created by a competing federal statute are infringed by an agreement to arbitrate…In this case, as discussed in the April 28 Order, what is at issue is not a right to proceed, procedurally, as a class, but rather the right guaranteed by Title VII, to be free from discriminatory employment practices. *Chen-Oster*, 2011 WL 1795297, at *12. Because arbitrators will apply the same substantive law of Title VII as would be applied by a federal court, *see Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2d Cir.2000), and the substantive law of Title VII as applied by the federal courts prohibits individuals from bringing pattern or practice claims, *Chen-Oster*, 2011 WL 1795297, at *11, *12 n.6, this case implicates federal statutory (Congressionally-created) rights, not the 'judicially-created obstacle [ ] to the enforcement of agreements to arbitrate' that was at issue in *Concepcion.*[25]

In *Brown v. Ralphs Grocery Company*,[26] the Court of Appeals for the Second District of California considered complex allegations involving the California Private Attorney General Act of 2004 (PAGA) and California's Labor Code. The court proclaimed that "[t]he purpose of the PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code." Accordingly, because the claims were brought for the benefit of the general public, with the claimants acting as a proxy for the state to enforce labor laws, the applicable class waivers were unenforceable. The appellate court remanded the case to the trial court to decide whether to sever the waiver or to refuse to enforce the arbitration clause altogether.[27]

C. Cases that Expand the *Concepcion* Holding

At the other end of the spectrum are those cases in which a lower court has expanded on the *Concepcion* holding to overturn rulings similar to *Discover Bank*. In *Litman v. Cellco Partnership*, the Third Circuit refused to follow the New Jersey Supreme Court's holding in Muhammad v. County Bank of Rehoboth Beach, Delaware,[28] which prohibited class waivers in consumer contracts of adhesion that involved disputes involving small amounts of damages.[29] In overturning Muhammad and enforcing the particular arbitration agreement at issue, the Third Circuit noted:

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[25] *Id.* at *3.

[26] 128 Cal. Rptr. 3d 854, 856 (2011).

[27] *Id.* at 868. It is worth noting, however, that a court in the Northern District of California upheld an arbitration agreement subject to plaintiffs' Sherman Act allegations, stating that "it is well established in the Ninth Circuit that claims involving federal statutory rights, and in particular antitrust claims, are subject to arbitration." *In re Apple & AT&TM Antitrust Litigation*, 2011 WL 6018401 (N.D. Cal. Dec. 1, 2011).

[28] Litman v. Cellco P'ship, 655 F.3d 225, 231 (3d Cir. 2011).

[29] Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88, 100 (N.J. 2006).

> We understand the holding of *Concepcion* to be both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration 'is desirable for unrelated reasons.'[30]

Similarly, in *Wolf v. Nissan Motor Acceptance Corporation*, a New Jersey federal court rather reluctantly followed the direction of Concepcion and found that Muhammad was no longer good law.[31] Accordingly, the arbitration clause that contained a class action waiver was deemed not to be unconscionable.[32]

The Eleventh Circuit interpreted *Concepcion* broadly in applying it to the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) and held that "[i]nsofar as Florida law would invalidate [arbitration] agreements as contrary to public policy [ ], such a state law would 'stand[ ] as an obstacle to the accomplishment and execution' of the FAA."[33] In *Cruz v. Cingular Wireless*, the plaintiffs had argued that the remedial purpose of the FDUTPA would be hindered by enforcement of the arbitration agreement, since most claims brought under the FDUTPA would go unprosecuted unless brought as a class due to the fact that they involve small dollar amounts.[34] Because *Concepcion* had rejected this exact argument, the Eleventh Circuit held that "faithful adherence to *Concepcion*" required that the court enforce the arbitration agreement regardless of any public policy arguments to the contrary.[35]

III. THE CONTINUING UTILITY OF THE VINDICATION OF RIGHTS DOCTRINE IN LIGHT OF *CONCEPCION*

A. The American Express Trilogy

In *In re American Express Merchants' Litigation* ("*Amex I*"), plaintiffs, a putative class of low volume merchants, initiated a Sherman Act claim alleging violations of federal antitrust laws.[36]

In *Amex I*, the court considered the enforcement of a mandatory arbitration clause in a merchant's contract with American Express, which also contained a "class action waiver," a provision that prohibited any party to the contract from pursuing anything other than individual arbitration claims.[37] The Second Circuit found the class action waiver unenforceable, "because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs."[38] This concept that collective action in certain circumstances must be permitted because without such collective action, wrongful conduct would go

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[30] *Litman*, 655 F.3d at 231 (quoting *Concepcion*, 131 S. Ct. at 1753).

[31] Wolf v. Nissan Motor Acceptance Corp., No. 10-cv-3338 (NLH)(KMW), 2011 WL 2490939, at *6-7 (D. N.J. June 22, 2011).

[32] *Id.* at *6.

[33] Cruz v. Cingular Wireless, 648 F.3d 1205, 1207 (11th Cir. 2011) (quoting *Concepcion*, 131 S. Ct. at 1753).

[34] *Id*.

[35] *Id.* at 1214.

[36] *In re* Am. Express Merchs.' Litig. (*Amex I*), 554 F.3d 300 (2d Cir. 2009).

[37] *Id.* at 310-11.

[38] *Id.* at 304.

unchallenged, is known as the "vindication of rights doctrine." *In re American Express* is a textbook example of the doctrine and some of the issues it raises when it arises in an arbitration context.

Amex I made its way to the Supreme Court, where it was remanded for reconsideration in light of its decision in *Stolt-Nielsen*.[39] Upon reconsideration, the Second Circuit issued its decision in *In re American Express Merchants' Litigation* ("*Amex II*"),[40] holding that its original analysis was unaffected by *Stolt-Nielsen.*[41] Accordingly, it again reversed the district court's decision and remanded for further proceedings,[42] but placed a hold on its mandate in order for American Express to file a petition seeking a writ of certiorari to the Supreme Court. While the mandate was on hold, the Supreme Court issued its decision in *Concepcion*. The Second Circuit thereafter reviewed its prior decisions and concluded, in *In re American Express Merchants' Litigation* ("*Amex III*"), that "*Concepcion* does not alter our analysis, and we again reverse the district court's decision and remand for further proceedings."[43]

The plaintiffs in *Amex I* asserted a tying arrangement imposed on them by requiring them to honor all American Express cards.[44] In the district court, the plaintiff had submitted an affidavit from an economist establishing the fiscal impracticality of individual antitrust claims, and the Second Circuit had found such evidence to be compelling.[45]

In *Amex III*, the Second Circuit acknowledged that *Concepcion* and *Stolt-Nielsen*, taken together, stand for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agree to class action arbitration,[46] but the court went on to note:

> What *Stolt-Nielsen* and *Concepcion* do not do is require that all class-action waivers be deemed *per se* enforceable. That leaves open the question presented on this appeal: whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims. While we cannot rely on *Concepcion* or *Stolt-Nielsen* to answer the question before us, we continue to find useful guidance in other Supreme Court decisions addressing the issue of vindicating federal statutory rights via arbitration.[47]

In *Amex III*, the Second Circuit noted that longstanding Supreme Court precedent recognized that the class action device is the only economical alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action.

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[39] Am. Express Co.v. Italian Colors Rest., 130 S. Ct. 2401 (2010) (citing *Stolt-Nielsen*, 130 S. Ct. 1758).
[40] *In re* Am. Express Merchs.' Litig. (*Amex II*), 634 F.3d 187 (2d Cir. 2011).
[41] *Id.* at 189.
[42] *Id.* at 200.
[43] *In re* Am. Express Merchs.' Litig. (*Amex III*), 667 F.3d 204, 206 (2d Cir. 2012).
[44] *Amex I*, 554 F.3d at 308.
[45] *See, e.g.*, *Amex III*, 667 F.3d at 212.
[46] *Amex III*, 667 F.3d at 213.
[47] *Id*. at 214.

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.[48]

The court then looked to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*[49] and noted that in dicta, the *Mitsubishi* Court said that should clauses in a contract operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."[50]

Quoting its own opinion in *Amex I*, the court noted:

> While dicta, it is dicta based on a firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the Supreme Court stated that 'in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action,' an agreement which confers even 'a partial immunity from civil liability for future violations' of the antitrust laws is inconsistent with the public interest.[51]

The Second Circuit next looked to the Supreme Court's decision in *Green Tree Financial Corporation–Alabama v. Randolph*[52] and noted:

> We continue to find [Green Tree] 'controlling here to the extent that it holds that when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'[53]

Finding that American Express had brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonable be pursued as individual actions, whether in federal court or in arbitration, and that the enforcement of the class action waiver in the Card Acceptance Agreement "flatly ensures that no small merchant may challenge American Express ['s] tying arrangements under the federal antitrust laws,"[54] the Court concluded:

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[48] *Id.* (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)).
[49] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
[50] *Amex II*, 634 F.3d at 197 (citing *Mitsubishi*, 473 U.S. at 637 n.19).
[51] *Id.* (quoting Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 329 (1955).
[52] Green Tree Fin, Corp.–Ala. v. Randolph, 531 U.S. 79 (2000).
[53] *Amex II*, 634 F.3d at 197 (quoting *Green Tree*, 531 U.S. at 92).
[54] *Amex III*, 667 F.3d at 218 (quoting *Amex I*, 554 F.3d at 319).

> Since the plaintiffs cannot pursue these claims as class arbitration, either they can pursue them as judicial class action or not at all. If they are not permitted to proceed in a judicial class action, then, they will have been effectively deprived of the protection of the federal antitrust-law. The defendant will thus have immunized itself against all such antitrust liability by the expedient of including in its contracts of adhesion an arbitration clause that does not permit class arbitration, irrespective of whether or not the provision explicitly prohibits class arbitration.
>
> Therefore, in light of the fact that the arbitration provision at issue here does not allow for class arbitration, under *Stolt-Nielsen* and by its terms, if the provision were enforced it would strip the plaintiffs of rights accorded them by statute. We conclude that this arbitration clause is unenforceable. We remand to the district court with the instruction to deny the defendant's motion to compel arbitration.[55]

B. The Continuing Validity of the American Express Trilogy

Other courts have called into question the validity of the Second Circuit's analysis in the *American Express* cases. For example, *D'Antuono v. Service Road Corp*. calls into doubt the viability of the *American Express* reasoning following the Court's holding in *Concepcion*.[56] The plaintiffs in *D'Antuono* sued their employer alleging violations of both federal and state employment laws.[57] The *D'Antuono* court ultimately skirted the issue of whether *Concepcion* left *American Express* undisturbed, however, finding that the Connecticut Supreme Court has never been confronted with an arbitration agreement that included not only a class action waiver, but also a cost- and fee-shifting provision, such as the arbitration agreement in the case at hand.[58] The court did, however, call into doubt any attempts to thwart arbitration, noting:

> It is not necessary for the Court to consider whether the FAA would preempt Connecticut law to the extent that it required invalidation of an arbitration agreement like the one at issue in this case, since the Court has no reason whatsoever to believe that the Connecticut Supreme Court would invalidate such an agreement.[59]

In response to the plaintiffs' argument that *Concepcion* distinguished between the preemption of the FAA over state *substantive* unconscionability principles, but not over state *procedural* unconscionability principles, the Court stated: "To the contrary, this Court reads the *AT&T Mobility* decision as casting significant doubt on virtually any 'device or formula' which might be a vehicle for 'judicial hostility toward arbitration.'"[60]

Shortly after the Connecticut court delivered its decision in *D'Antuono*, the plaintiffs sought an interlocutory appeal. In granting the motion to file an interlocutory appeal, the district court stated that it was persuaded that the case involved conflicting controlling questions of law.[61]

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[55] *Amex III*, 667 F.3d at 219.
[56] D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308, 322 (D. Conn. 2011).
[57] *Id.* at 313.
[58] *Id.* at 331.
[59] *Id.* at 330.
[60] *Id.*
[61] D'Antuono v. Serv. Rd. Corp., No. 3:11CV33 (MRK), 2011 WL 2222313, at *1 (D. Conn. June 7, 2011).

The court indicated that it had rendered its decision based on *American Express* and other case law involving the federal common law of arbitrability, but that "there is a great deal of uncertainty surrounding the continuing validity of the federal common law of arbitrability doctrines on which Plaintiffs rely."[62]

In *Kaltwasser v. AT&T Mobility, LLC*, the plaintiff argued that *Concepcion* did not disturb the vindication of rights doctrine under federal common law.[63] The plaintiff contended that *Concepcion* left room for a court to conduct an "individualized case-by-case" analysis of whether binding the plaintiff to individual arbitration would prevent a vindication of rights, in which case the arbitration agreement should be unenforceable.[64] In support of this position, the plaintiff pointed to *American Express*, but the court found that because *American Express* involved litigation of federal claims, whereas *Kaltwasser* involved the litigation of state claims, *American Express* had no bearing on the case before it.[65]

Nonetheless, the *Kaltwasser* court stated that, even assuming that *American Express* and *Green Tree Financial Corporation – Alabama v. Randolph*,[66] (the Supreme Court case on which *American Express* was predicated) had involved state law claims, *Concepcion* still left no room for a case-by-case analysis of the cost and benefits at stake.[67] The court reasoned that *Concepcion* acknowledged that small-dollar claims might slip through the cracks due to the expenses incurred with litigating a claim (a fact that the *Concepcion* dissent found particularly troubling), but did not draw significant attention to this point in reaching its conclusion, which lead the *Kaltwasser* court to conclude that *Concepcion* does not allow the plaintiffs to avoid an arbitration agreement based on a case-by-case analysis of the costs and benefits at stake.[68] Moreover, even if the vindication of rights doctrine survives following *Concepcion*, the *Kaltwasser* court held that the application of the cost-benefit analysis is "confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims," and not the costs of pursuing the underlying cause of action.[69]

Accordingly, while some lower courts have clearly set specific parameters on the scope of *Concepcion*, lingering issues regarding the breadth of the *Concepcion* holding – particularly whether *Concepcion* applies to federal and state statutes and whether the vindication of rights doctrine is intact – remain. Given the conflicting holdings of lower courts and the high stakes involved with lawsuits of this type, it is likely that *American Express* will make its way to the Supreme Court. Several uncertainties remain following *Concepcion* and the interpretations of lower courts, including:

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[62] *Id.*
[63] Kaltwasser v. AT&T Mobility LLC, 812 F. Supp. 2d 1042, 1046 (N.D. Cal. 2011).
[64] *Id.* at 1047.
[65] *Id.* at 1048.
[66] Green Tree Financial Corporation – Alabama v. Randolph, 531 U.S. 79 (2000).
[67] *Kaltwasser*, 812 F. Supp. 2d at 1048-49.
[68] *Id.*
[69] *Id.* at 1050.

1. Will the vindication of rights doctrine as set out in *American Express* and similar cases be taken up by the Supreme Court?

2. Under the federal common law of arbitrability, as set forth in *American Express* and similar cases, and in light of *Concepcion*, are district courts permitted to inquire into general public policy concerns and the vindication of rights doctrine in determining whether a particular arbitration agreement is enforceable, or must they instead only look to the economic feasibility of arbitration under the circumstances?

3. How will the courts square differing congressional objectives of various federal statutory laws, such as the FAA, the Sherman Act, Title VII of the Civil Rights Act, and federal employment laws?

IV. CONCLUSION

In the one year since the U.S. Supreme Court handed down the *Concepcion* decision, the decision has continued to be as unsettling as it appeared to be when the decision was first handed down. Given the prevalence of arbitration in our legal system today, it is not surprising that the *Concepcion* decision has had far-reaching implications. What is surprising, however, is the broad range of interpretations that have been pronounced by the lower courts in the relatively short time since the decision was rendered. Some courts seem reluctant to follow *Concepcion* and find a way to hold fast to previous standards of unconsionability with respect to arbitration agreements. Other courts have made distinctions based on the application of state or federal statutory law, versus common law or court-made law, to the underlying claim. And other courts have explicitly acknowledged that *Concepcion* calls into doubt precedent that is central to the enforceability of arbitration agreements, such as the vindication of rights doctrine and a plaintiff's ability to avoid an arbitration agreement based on a cost-benefit analysis. One thing remains certain: we have not seen the end of *Concepcion*-driven issues. However, it is worth noting that the Supreme Court has not lost its commitment to sustaining arbitration agreements against competing state laws based on a state's policy preferences.

Most recently, the Supreme Court overturned a decision of the West Virginia Supreme Court holding that an agreement to arbitrate claims against a nursing home, including those involving personal injury or wrongful death, was unenforceable.[70] In *Marmet Health Care Center v. Brown*, the Supreme Court issued a *per curiam* opinion in which it found that the "West Virginia court's interpretation was both incorrect and inconsistent with clear instruction in the precedents of this Court [and that] the FAA provides no exception for personal-injury or wrongful-death claims. [Rather,] it 'requires courts to enforce the bargain of the parties to arbitrate.'"[71] The Court went on to find that the West Virginia Supreme Court's decision to except personal injury and wrongful death claims from agreements to arbitrate in the nursing

[70] Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012).
[71] *Id.* at 1203.

home area amounted to a categorical prohibition on the arbitration of a certain type of claim, which is contrary to the terms and coverage of the FAA.[72]

[72] *Id.* at 1203-04.

BOOK REVIEW

LUCY REED, JAN PAULSSON, AND NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION (2d ed., 2011).

Jack J. Coe, Jr.*

I. INTRODUCTION

In recent years, investor-State arbitration has inspired an impressive array of high-quality commentary in a range of forms and fora. The public domain is graced by numerous books,[1] dozens of journal articles,[2] and abundant offerings seeming to appear spontaneously in the digital realm. The topic has been pursued with distinction at the Hague Academy[3] and in other prominent lecture series.[4] Several empirical studies testing our assumptions have also emerged.[5] Judging, moreover, from the still-increasing number of theses devoted to investor-State topics, the sense that more remains to be said continues to thrive among academic supervisors and entry level scholars.[6] Certainly, the topic persistently features in a significant percentage of the many arbitration–related conferences regularly sponsored by learned and professional societies.

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[1] Among the many bound works and collections of essays are: ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS (Norbert Horn ed., 19th ed. 2004); INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Todd Weiler ed., 2005); NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS (Todd Weiler ed., 2004); CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2008); THE FUTURE OF INVESTMENT ARBITRATION (Catherine A. Rogers & Roger P. Alford eds., 2009).

[2] For a non-exhaustive bibliography comprising fourteen pages (limited to NAFTA Chapter Eleven subjects alone), *see* 1 Charles H. Brower II et al., NAFTA Chapter Eleven Reports, 683-99 (2006); *see also* ICSID, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDBibliographyRH&actionVal=ViewArticleAndBooks (last visited May 28, 2012).

[3] Concerning ICSID, essential reading is Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS (HAGUE ACADEMY OF INT'L L.) 330 (1972) (discussing the history of the ICSID Convention). More recently at the Academy, Professor Jose Alvarez examined the Investor-State field more broadly. *See* Jose E. Alavarez, *The Public International Law Regime Governing International Investment*, 344 RECUEIL DES COURS (HAGUE ACADEMY OF INT'L L.) 195 (2011).

[4] *See* James Crawford, Professor, Jesus College at Cambridge University, Address at the 22nd Freshfields Lecture on International Arbitration, in London (Nov. 29, 2007), http://www.lcil.cam.ac.uk/Media/lectures/pdf/Freshfields%20Lecture%202007.pdf.

[5] *See* Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007); Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 805–38 (2011); Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825 (2011) [hereinafter *ICSID Effect*].

[6] Such theses often result in excellent monographs. *See, e.g.*, IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT (2008) (resulting from doctoral research at the European University Institute in Florence).

The investor-State arbitration story is intimately linked in turn to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)[7] and the center it created—the International Centre for Settlement of Investment Disputes (ICSID or the Centre). The Convention, and hence the Centre, have been examined in at least one substantial treatise,[8] and in several shorter works. Among the latter is Reed, Paulsson and Blackaby, *Guide to ICSID Arbitration* (the *Guide*), first published in 2004, which has recently appeared in a second, thoroughly revised, edition.[9] As will be clear from a comparison of the first and second editions, much has transpired at ICSID in recent years. Although the *Guide* aims to be a concise, reliable desk reference rather than a policy oriented commentary of the academic sort, in succeeding at its task it manages to touch upon many of the compelling themes that surround investor–State arbitration and the substantial literature it has prompted. Some of these themes are surveyed below.

II. THE CONVENTION'S UNDERPINNING RATIONALE AND PREMISES

Unlike most other administering institutions, ICSID exists to serve development goals.[10] Its undergirding supposition is that private investment flows are more likely to occur if prospective investors know that such disputes as may arise with the host country can be referred to an effective disputes regime that both functions independently of the host State's local courts and has the imprimatur of the World Bank.[11] As part of this calculus, host States are in effect offered a bargain. Among other inducements, in exchange for participation in the ICSID Convention regime, host States are assured that once the ICSID Convention process has been initiated by the investor, the investor's home State will be greatly restrained

[7] International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

[8] A leading commentary on the ICSID Convention is CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009).

[9] LUCY REED ET AL., GUIDE TO ICSID ARBITRATION (2d ed. 2011) [hereinafter GUIDE]. This edition of the Guide contains 468 pages—more than twice as many pages as are found in the first edition. It remains compact and portable, however. Its dimensions are roughly 6 inches by 8 inches by 1 inch. The second edition also retains many of the structural features of the first edition. For example, the book's six chapters unfold under the original headings: 1) Introduction to ICSID; 2) Contractual ICSID Arbitration; 3) ICSID Investment Treaty Arbitration; 4) ICSID Arbitration Procedure; 5) The ICSID Review Regime; and 6) Recognition, Enforcement and Execution of ICSID Awards.

The book's primary materials have been updated. Among other features, the Second Edition's appendices contain well-chosen documents such as the ICSID Convention and current rules sets, NAFTA Chapter 11, the Energy Charter Treaty, and two BITs (the UK Model text, and the US-Argentina BIT). There is also a comprehensive list of cases, a selective bibliography, and an exceedingly useful series of tables dissecting issue-by-issue the ICSID docket to date (a feature introduced in the new edition). Its index is sensibly organized mainly around individual ICSID Rules and Convention Articles.

[10] *Id.* at 3-4.

[11] *See* Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, I ICSID REV.-FILJ 1 (1986); IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES 97 n.68 (1993) (ICSID sponsored by the World Bank to help increase investment flows by establishing disputes machinery detached from domestic courts); News Release, ICSID, Designations to the ICSID Panels of Conciliators and of Arbitrators by the Chairman of the ICSID Administrative Council (Sept. 15, 2011), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement95 (indicating that private capital flows remain ICSID' principal aim).

in its ability to exert diplomatic protection on behalf of its aggrieved national.[12] Investors, in turn, will also be limited in the extent to which they might seek local court remedies during the arbitration.[13]

III. CASELOAD[14]

ICSID's standing as the leading administering institution associated with investor-State arbitration can readily be substantiated by examining its case-load.[15] As of the beginning of 2012, the ICSID docket of concluded and pending cases comprised well over 360 arbitrations, involving claims totaling many billions of dollars. While its case-load is less impressive when viewed in light of the nearly five decades during which ICSID has been available to claimants, to amortize the docket in that way obscures the two extremes that punctuate ICSID's history: a long glacial period beginning with the Convention's coming into effect in late 1966 (a period characterized by a very modest caseload) disturbed rather abruptly by a sudden, but subsequently steady, stream of claims beginning in the late-1990s. Thus, ICSID's Annual Report for 1994 reported five pending cases,[16] whereas, as 2012 dawns, 140 cases are on-going. The number of concluded cases in turn has reached 229.[17]

Paralleling the burgeoning docket, and to a large extent explaining it, is the breathtaking increase in the number of Bilateral Investment Treaties (BITs) and analogous instruments that have come into force during the last fifteen years.[18] Their significance for ICSID is both jurisdictional and substantive. Most BITs extend a continuing host-State offer, conditionally made to qualifying investors, to arbitrate investment claims. Under the terms of that undertaking, investors seeking to pursue BIT arbitration commonly may resort to whichever of the two ICSID regimes[19]applies to the dispute in question.[20] By

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[12] GUIDE, *supra* note 9, at 190.

[13] *Id.* at 50. Under the Convention and associated procedural rules, a disputant may seek interim remedies from a domestic court only if both parties have agreed to permit such petitions. *Id*. at 147.

[14] *Id.* at 6-9.

[15] *See ICSID Effect*, *supra* note 5, at 839.

[16] INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES, ANNUAL REPORT 6 (1994).

[17] *Cf.* Roberto Danino, Secretary General, ICSID, Opening Remarks at the Conference: Making the Most of Investment Agreements: A Common Agenda (Dec. 12, 2005), *available at* http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/36053800.pdf, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded (by the end of 2005 there were 113 pending cases, representing "exponential growth").

[18] *See* GUIDE, *supra* note 9, at 57-58 (majority of cases now BIT cases); UNCTAD, *Bilateral Investment Treaties 1959–1999*, iii, U.N. Doc. UNCTAD/ITE/IIA/2 (2000), *available at* http://www.unctad.org/en/Docs/poiteiiad2.en.pdf (describing the "rapid increase" in BITs during the 1990s, amounting to a nearly a five-fold increase between the end of the 1980s and the end of the 1990s).

[19] ICSID Convention arbitration is not available unless both the host State and the investor's home State have become parties to the ICSID Convention (typically by ratification). GUIDE, *supra* note 9, at 24-25, 32-35. When one of the two States involved has ratified the Convention, ICSID Additional Facility Rules Arbitration may still be available. *Id*. at 17-19; Indeed, the Additional Facility has been pressed into service in recent years for NAFTA Chapter Eleven disputes. Of the three NAFTA States, only the United States has ratified the ICSID Convention, with the consequence that a claim involving only Mexico (as home or host State) and Canada (as home or host State), does not qualify for Additional Facility arbitration. *See generally* Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA*?, 19 J. INT'L ARB. 185 (2002) [hereinafter Coe, *Achilles Heel*]. A U.S. investor's choice under Chapter Eleven is thus between UNCITRAL Rules arbitration and Additional Facility Arbitration. The two regimes have in common a role for the courts of the seat of arbitration not present in ICSID Convention Arbitration. GUIDE, *supra* note 9, at 17-19. Global enforcement of Additional Facility and UNCITRAL Rules awards are similarly subject to the "refusal" grounds found in the fifth articles of the New York and Panama Conventions. *Id.*; Coe, *Achilles Heel*, *supra* at 194-96.

setting forth substantive treatment assurances, BITs also supply the governing standards by which the arbitrators will judge the Respondent State's conduct in the case at hand.[21]

Since a given State's BIT promise to arbitrate redounds to many potential claimants, and because a given State may have made dozens of such promises, regulatory acts by a State that generate sector-wide effects can give rise to dozens of claims. Argentina alone, for instance, has been named respondent in scores of claims involving several BITs, the majority of those claims arising out of the drastic economic measures implemented in an effort to stabilize Argentina's economy.[22] This multiplier effect explains much about the precipitous growth in ICSID's work-load in recent years, and about the disaffection that some States now hold for ICSID.[23]

The BIT-centric caseload of contemporary ICSID can in some senses be traced to Chapter Eleven of the North American Free Trade Agreement (NAFTA Chapter Eleven). The initial claimants to test treaty-based arbitral remedies were investors relying on NAFTA Chapter Eleven. They enjoyed success sufficient to signal to some—misleadingly—that NAFTA's BIT analogue offered somewhat predictable recompense for those prejudiced by government mistreatment.[24] As a longer view would demonstrate, however, the settlement in *Ethyl Corp*,[25] and the award in *Metalclad*[26] were unusual events in Chapter Eleven history.[27] Nevertheless, those early claimant successes and the growing availability of equivalent treaty remedies caught the attention of investors and of firms large and small.

IV. COMPETING REGIMES AND INSTITUTIONS

The reader hoping to find in the Guide an elaborate discussion of arbitration under the United Nations Commission on International Trade Law Rules (UNCITRAL Rules) will be disappointed (but presumably not surprised given the title of the book). Yet, in its modern BIT context, ICSID arbitration is pursued as an election, a choice ordinarily between two arbitral options.[28] As noted above, a typical

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[20] *See* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.-FILJ 232, 233 (1995) (discussing consensual basis upon which non-privity investors may pursue legal rights directly); Andrea K. Bjorklund, *Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 CHI. J. INT'L L. 183, 183 (2001) (examining NAFTA claims by investors who have no privity of contract with the government). By design, a State's ratification of the ICSID Convention is required but not sufficient to oblige it to arbitrate. *See* GUIDE, *supra* note 9, at 35. Rather, consent covering the particular dispute involved must also be established; in contemporary practice, BITs and similar treaties (now numbering approximately 3,000) supply that predicate. ICSID arbitrations in which consent derives from a contract have become the exception, and constitute a relatively small percentage of the total number of ICSID cases. *Id.* at 53.

[21] *See id.* at 58-106; KENNETH VANDEVELDE, UNITED STATES INVESTMENT TREATIES POLICY AND PRACTICE (2d ed. 2010).

[22] *See* Alvarez, *supra* note 3, at 368-434.

[23] *See infra* notes 50-54 accompanying text.

[24] *See* Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter Eleven in its Tenth Year, An Interim Sketch of Selected Themes, Issues and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1384-85 (2003) [hereinafter Coe, *Taking Stock*].

[25] *Ethyl v. Canada* ended in settlement after the tribunal's award on jurisdiction rejecting Canada's request for dismissal. Ethyl Corp. v. Canada, Award on Jurisdiction, June 24, 1998, 38 I.L.M.708 (1999). Reportedly, Ethyl Corp. received $13 million dollars to settle. *See* Todd Weiler, *The Ethyl Arbitration: First of Its Kind and Harbinger of Things to Come*, 11 AM. REV. INT'L ARB. 187, 198 (2000); Alan C. Swan, *INTERNATIONAL DECISION: Ethyl Corporation v. Canada, Award on Jurisdiction (Under NAFTA/UNCITRAL)* 94 AM. J. INT'L L. 159, 160 (2000).

[26] Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 2 J. WORLD INVEST. 685 (2001).

[27] *See* Coe, *Taking Stock*, *supra* note 24, at 1459 (table of outcomes through 2003).

[28] *See* Stephen Jagush & Jeffrey Sullivan, *A Comparison of ICSID and UNCITRAL Rules Arbitration: Areas of Divergence and Concern*, *in* THE BACKLASH AGAINST INVESTMENT: PERCEPTIONS AND REALITY (Michael Waibel et al, eds., 2010); Piero Bernardini, *ICSID Verses Non-ICSID Investment Treaty Arbitration* 2 (Sept. 15, 2009), http://www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf.

modern BIT gives investors standing to press claims through ICSID. Ordinarily, however, there is a second arbitral option. Often, that option is UNCITRAL Rules arbitration. When the available ICSID option is Additional Facility arbitration, the choice between it and the UNCITRAL Rules does not involve fundamentally different systems; both are "seat" oriented regimes that envision a central role for the New York Convention and that permit domestic courts to exercise various forms of supervision over the arbitration and the resulting award.[29]

When the two relevant States' have ratified the ICSID Convention, by contrast, the alternatives facing the investor are more divergent. An investor's designation of the ICSID option in such circumstances is an election to pursue a-national arbitration in which the seat of arbitration is of little significance and local courts have a subdued role.

Whichever ICSID option obtains, however, investors often prefer to proceed under the UNCITRAL Rules, although the reasons for doing so vary with each investor. Generally, the lack of an institutional structure and of a second tier of treaty provisions may appeal to claimants seeking flexibility, added confidentially and local court access. The UNCITRAL Rules, moreover (even before the recent revisions to them)[30] have proven serviceable over many years—perhaps most notably at the Iran-U.S Claims Tribunal where they have served for over three decades.[31] Relatedly, numerous commentaries explore the UNCITRAL Rules, thus providing considerable guidance.[32] Because several institutions are willing to administer UNCITRAL Rules arbitrations involving States, the parties need not necessarily forgo institutional support when the clamant elects the UNCITRAL Rules option.[33] In any event, the regularity with which the UNCITRAL Rules have governed BIT disputes suggests that ICSID arbitration, while accounting for the majority of investor-State proceedings, is by no means the whole story.[34]

V. FINALITY VERSUS QUALITY CONTROL

Consistent with ICSID's purposeful detachment from domestic legal systems, ICSID Convention awards are not subject to annulment proceedings in municipal courts; nor is enforcement of such awards subject to defensive arguments under grounds of the types specified in the New York and Panama Conventions. Rather, in place of domestic court control is an internal regime by which ICSID Convention awards are, at the request of a party, tested against enumerated grounds set forth in the Convention.[35] The task of ruling on an annulment request is given not to a domestic court but to an ad

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[30] *See* JAN PAULSSON & GEORGIOS PETROCHILOS**,** REVISION OF THE UNCITRAL ARBITRATION RULES, *available at* http://www.uncitral.org/pdf/english/news/arbrules_report.pdf (unofficial report).

[31] *See generally* Howard Holtzmann, *Drafting the Rules of the Tribunal*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 75 (David Caron & John Crook eds., 2000).

[32] Among these are: LEE CAPLAN & DAVID CARON, THE 2010 UNCITRAL ARBITRATION RULES: A COMMENTARY (2010); DAVID CARON & MATTI PELLONPAA, THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED 7-8 (1995); JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES 5 (1991).

[33] The Permanent Court of Arbitration (PCA) has attracted a number of investor-State arbitrations in the last ten years. The PCA website indicates that nearly four dozen proceedings in which a State or State entity is a party have been lodged with the Permanent Court. *See* http://www.pca-cpa.org/showpage.asp?pag_id=1029.

[34] Franck, *ICSID Effect*, *supra* note 5, at 840.

[35] *See* GUIDE, *supra* note 9, at 159-177; Andrea Giardina, *ICSID: A Self-Contained, Non-National Review System*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 199 (Richard B. Lillich & Charles N. Brower eds., 1994).

hoc committee constituted only for the particular award in question; it is the annulment rulings of such committees that have generated much debate.[36]

When annulment is granted the question naturally arises whether quality control and finality—both elements affecting systemic legitimacy—have been properly balanced. Even when not successful, annulment proceedings generally add many months to the arbitration in question; and when an award is annulled, the process often starts anew, with the second arbitration sometimes lasting longer than the first one.[37] In light of the exclusive and restrained annulment grounds found in Article 52 of the ICSID Convention, which do not contemplate merits review for errors of fact or law,[38] one might expect that annulments would be rare. In fact, they have not been so rare.[39]

As the *Guide* notes, ICSID annulment practice can be thought of as passing through distinctive periods.[40] Its early (some would say "notorious") period was characterized by annulment committees that attracted robust criticism for having too willingly second-guessed the arbitrators.[41] Then came a period of recalibration (typified by "more measured" ad hoc committee holdings)[42] followed by a third generation involving the first attacks against BIT-based awards.[43] The most recent instances of these BIT-related proceedings, it seems, have introduced a return to greater intervention by ad hoc committees, reminiscent – some would say – of the earliest, much criticized, annulment proceedings.[44]

Those that would favor robust scrutiny of ICSID awards can rightly stress that once an award clears the ICSID system–unlike the New York Convention regime with which it competes[45]–there is no secondary layer of control; States must enforce the pecuniary obligation contained in the award without reference even to their own rules of public policy.[46] In such circumstances, it might be argued that award-debtor States and enforcing States alike deserve awards that are tightly reasoned and that demonstrate jurisdictional self-restraint.[47] States, so goes the argument, are not merely commercial entities whose primary stakeholders are shareholders.

The insistence on lucid and coherent reasoning that often preoccupies ad hoc committees, in turn, promotes awards that give guidance to States and investors in the individual case and contributes to a more satisfactory and durable jurisprudence. These salutary goals are undercut, of course, to the extent that ad hoc committees diverge in the standards they apply,[48] and there no doubt comes a point at which

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[36] *See generally* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739 (1989) [hereinafter *Breakdown*].

[37] *See generally* Jack J. Coe, Jr., *Settlement of Investor-State Disputes through Mediation—Preliminary Remarks on Processes, Problems and Prospects*, *in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 73, 77-81 (R. Doak Bishop ed., 2009) [hereinafter *Prospects*].

[38] ICSID Convention, *supra* note 7, art. 52.

[39] *See* Guide, *supra* note 9, at 401-05 (tables).

[40] *Id.* at 162-74.

[41] *See* Reisman, *supra* note 36.

[42] *See* Guide, *supra* note 9, at 168.

[43] *Id*. at 169.

[44] *Id.* at 174.

[45] *See generally* Albert Jan van den Berg, *Refusals of Enforcement Under the New York Convention of 1958: The Unfortunate Few*, *in* ARBITRATION IN THE NEXT DECADE 75 (1999) (discussing grounds for refusal of enforcement of award).

[46] *See* GUIDE, *supra* note 9, at 162-66.

[47] *Cf.* Tai-Heng Chen, *What's Reasonable Depends Who's Asking*, 8 BALTIC Y.B. INT'L L. 389, 391-92 (2005) (reviewing THE REASONS REQUIREMENT IN INTERNATIONAL ARBITRATION: CRITICAL STUDIES (Guillermo A. Alvarez & W. Michael Reisman eds., 2008) and noting the suggestion that investor-State awards ought to be held to a higher standard of explicated reasoning).

[48] *See* GUIDE, *supra* note 9, at 174-75 (ICSID has repeatedly appointed certain individuals to ad hoc committees to promote coherent annulment jurisprudence). *But see* Franck, *ICSID Effect*, *supra* note 5, at 845 n.90 (describing complaints by counsel concerning ad hoc committee over reaching).

an assessment of reasoning quality, like a quest for excess of mandate,[49] masks unauthorized merits review.[50]

VI. THE PERSPECTIVES OF CIVIL SOCIETY

Reaching the proper calibration of ICSID's internal control machinery is a dilemma specific to ICSID Convention arbitration. It subsists, however, within a broader and more multifaceted debate to which investor-State arbitration has given rise, cabined under the "legitimacy" rubric. The notion that a private enterprise might directly achieve through arbitration a monetary remedy for host–State violations of BIT obligations has long been a central feature of BITs.[51] Claims filed in the mid-1990's under NAFTA Chapter Eleven, however, alerted new cadres of observers to an arbitral mechanism that had been in plain view for several decades, albeit without being regularly utilized. The resulting critiques spanned a wide spectrum, varying both in orientation and in levels of authoritativeness.[52] The associated legitimacy assessments, sometimes unaided by a good grasp of context or historical perspective,[53] questioned authority, process fairness and transparency in light of various societal interests and the perceived quality and impact of outcomes.[54] The system's capacity for circumnavigating democratic values and its vulnerability to being commandeered by wealthy multinationals were recurrent themes.[55] These critiques have become more subdued, one might speculate, because of the implementation of

[49] *See* ICSID Convention, *supra* note 7, art. 52(1)(b).

[50] *Cf.* GUIDE, *supra* note 9, at 168 (appellate style review might threaten to undercut finality and thus investor confidence in the dispute system).

[51] *See, e.g.*, Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L.J. 531 (2002) (tracing the history of mixed claims processes and concluding that Chapter 11 is not fully unprecedented); Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV. 287 (1997) (direct arbitral standing for investors a common feature).

[52] *See generally* Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO. INT'L ENVTL. L. REV. 51 (2004); Charles H. Brower, II, *Structure, Legitimacy, and NAFTA 's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2003); Naveen Gurudevan, *An Evaluation of Current Legitimacy-Based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process*, 6 SAN DIEGO INT'L L.J. 399 (2005); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

[53] S*ee* Thomas Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 827 (2002) ("Nothing was ever said - and, therefore, understood - about the larger operation and aspirations of NAFTA. The critics never bothered to communicate an understanding of the difficulty of international adjudication or of how instrumental a functional system of adjudication is to the pursuit of international trade."); *see id*. (certain characterizations of Chapter 11 have been so misleading as to amount to "misrepresentations pitched at a level of deceit").

[54] *See, e.g.*, Anthony De Palma, *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, at 1 (describing the investor-state arbitral process as a form of "secret government"); Editorial, *The Secret Trade Courts*, N.Y. TIMES, Sept. 27, 2004, at A1 (reform needed given "one-sided" arbitration process favoring wealthy corporations over poor States).

[55] *See generally Bill Moyers Reports: Trading Democracy* (PBS television broadcast), *available at* http://www.pbs.org/now/printable/transcript_tdfull_print.html (last visited May 29, 2012). The fact that arbitrators are not elected officials nor subject to appellate review, of course, must be viewed in light of a party's ability to challenge an arbitrator if significant conflicts of various types can be demonstrated. *See* GUIDE, *supra* note 9, at 133-37. Parties have regularly challenged arbitrators. The GUIDE's table on challenges lists thirty attempts leading to eight resignations. Some arbitrations have given rise to multiple challenges; *see also id*. at 406-09.

transparency-related reforms[56] and data that demonstrate that claimants face more of a gauntlet than might have seemed true based upon the earliest invocations of NAFTA Chapter Eleven.

VII. STATE "BACKLASH" AND RELATED MATTERS

ICSID's capacity for even-handedness is of course an important question. At least as to ICSID arbitration, concerns that anti-State bias has infected the system seem not to be supported by the data,[57] which suggest that choosing ICSID does not improve a claimant's chances of winning or of maximizing a recovery compared to other arbitral fora.[58] Similarly, in smaller samples generated by ten years of NAFTA Chapter Eleven arbitration (both under the UNCITRAL Rules and the Additional Facility) most claims were unsuccessful and those that succeeded resulted in recoveries much lower than the amounts sought.[59] There have been, however, enough large recoveries to cause several States to reassess their commitment to ICSID[60] and, relatedly, to BITs that offer investors a direct arbitral remedy tied to somewhat indeterminate standards of treatment. Although a macro view shows that ICSID membership continues to grow, a few States—principally in the Americas—have withdrawn or threatened to withdraw from the Convention.[61] It does not follow, of course, that those States will denounce the BITs into which they have entered, nor that they will refuse to comply with such ICSID awards as may have been rendered; those are separate questions.[62]

VIII. KEEPING UP WITH AMPLIFIED CASELOADS

Among the other concerns voiced by observers in recent years has been that ICSID's exploding docket had outstripped its institutional capacities.[63] In 2006, one well-informed observer of ICSID—an institution which he called "the best run, best staffed, with the best rules and the best treaty"—spoke

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[56] *See infra* notes 60-65 and accompanying text.

[57] Despite the arrestingly large recoveries often *sought* by investors through ICSID arbitration, and sometimes recovered, it is not true that choosing ICSID improved a claimant's likelihood of success or amount of recovery. *See* Franck, *ICSID Effect*, *supra* note 5, at 825; *Cf.* Coe, *supra* note 25, at 1459-60 (recovery tables as of 2003 comparing amount sought and amount recovered under NAFTA Chapter 11).

[58] Franck, *ICSID Effect*, *supra* note 5, at 857-59.

[59] *See* Coe, *supra* note 25, at 1459-60 (tables listing outcomes).

[60] *See, e.g.*, Campania de Aguas and Vivendi v. Argentina, ICSID Case No. ARB/97/3 Award of 20 August 2007 (awarding approximately $104 million USD in one of dozens of claims brought against Argentina). Argentina, however, has not denounced its ICSID treaty obligations.

[61] *See* Franck, *ICSID Effect*, *supra* note 5, at 845-47 (discussing Bolivia's withdrawal from ICSID and related reactions of States to liability exposure and perceived systemic unfairness); *Ecuador's Notification under Article 25(4) of the ICSID Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (Dec. 5, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement9; *but see* Benedict Mander; *Venezuela-ICSID: Leaving is Easier Said than Done*, FIN. TIMES (Jan. 17, 2012, 10:37 PM), http://blogs.ft.com/beyond-brics/2012/01/17/venezuela-icsid-leaving-is-easier-said-than-done/#axzz1p3CyBoNU (notice period for effective denunciation and need for investment complicate withdrawal decision).

[62] Significantly, States have tended to honor monetary obligations embodied in ICSID awards. Argentina is proving to be an outlier in this respect, however. GUIDE, *supra* note 9, at 17.

[63] *See* William Rowley, *ICSID at a Crossroads*, 1 GLOBAL ARBITRATION REV., no. 1, *available at* http://www.mcmillan.ca/Files/JWRowley_ICSID_AtCrossroads_0906.pdf.

nevertheless of an institution "under threat,"[64] an admonition apparently inspired by the budget priorities set by the World Bank.[65] Equally, users of ICSID might well have noticed with dismay the recent period in which ICSID's leadership changed with surprising frequency.[66] Such a revolving door effect could not have promoted forward looking agendas or stability, particularly while caseloads continued to enlarge apace.

IX. TRANSPARENCY

Among the legitimacy-related themes underscored by many observers was the need to introduce greater "transparency" into the system.[67] Prefigured by NAFTA policies, States have increasingly accepted that a measure of openness in the investor-State process is desirable, and perhaps inevitable.[68] With few obstacles enshrined in the ICSID Convention, the Centre was able to act in accordance with an obvious trend to accomplish enhanced access through ICSID Rules changes; those occurred in 2006.[69] The Rules amendments[70] embellish what had already been ICSID's policy of relative openness by

[64] V.V. Veeder, Queen's Counsel, Essex Court Chambers, Why Bother? And Why It Matters, Speech Before The Institute for Transnational Arbitration (Summer 2006) (transcript available in News & Notes from The Institute for Transnational Arbitration) (remarking, *inter alia*, that ICSID's then-new premises were "appalling, and by any standard unfit for their purpose").

[65] *Id*. at 5-6.

[66] *See generally* News Release, ICSID, Roberto Danino New Secretary-General of ICSID (Sept. 4, 2003), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement1; News Release, ICSID, Appointment of Acting Secretary-General (Feb. 1, 2006), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement28; *Ana Palacio Elected ICSID Secretary-General*, ICSID (Sept. 20, 2006) http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement1; News Release, ICSID, Ana Palacio Leaves ICSID (April 30, 2008), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement12; News Release, ICSID, Meg Kinnera Elected ICSID Secretary-General (Feb. 23, 2009), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement15.

[67] *See generally* Jeffrey Atik, *Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process*, *in* NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 135 (Todd Weiler ed., 2004); Martin Hunter and Alexei Barbuk, *Non-Disputing Party Interventions in Chapter 11 Arbitrations*, *in* NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 151 (Todd Weiler ed., 2004); V.V. Veeder, *The Transparency of International Arbitration: Process and Substance*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 88 (Loukas A. Mistelis and Julian D.M. Lew eds., 2006); Paul Freidland, *The Amicus Role in International Arbitration*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 321 (Loukas A. Mistelis and Julian D.M. Lew eds., 2006); Jack J. Coe, Jr., *Transparency in Investor State Arbitration–Adoption, Adaptation, and NAFTA Leadership*, 54 KANSAS L. REV. 1339 (2006) [hereinafter *NAFTA Leadership*]; J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681, 706–08 (2007).

[68] *See generally* Coe, *NAFTA Leadership*, *supra* note 67.

[69] *See* News Release, ICSID, Amendments to ICSID Rules and Regulations (Apr. 5, 2006), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement26.

[70] News Release, ICSID, Suggested Changes to the ICSID Rules and Regulations (May 12, 2005) (on file with ICSID).

authorizing tribunals to accept amicus filings, subject to certain conditions,[71] and to permit non-disputants to observe hearings, provided neither party objects.[72]

Amicus filings had been accepted even before the ICSID Rules changes, and several tribunals have been prepared since the revisions to allow such submissions.[73] Indeed, at least among some arbitrators, there has developed the view that to permit amicus submissions in appropriate circumstances "is an important element in the overall discharge of the Arbitral Tribunal's mandate, and in securing wider confidence in the arbitral process itself."[74]

X. JURISPRUDENTIAL COHERENCE IN THE MARKETPLACE OF IDEAS

ICSID's cardinal role in investor-State arbitration places it in the center of another legitimacy-related debate; that examining whether the investment and arbitral jurisprudence being produced is sufficiently principled and coherent to guide and treat fairly States and investors. An ordered system of precedent constraining tribunals does not formally operate in the investor-State realm. Even though tribunals are generally alerted by the parties to the reasoning of other tribunals, markedly divergent analyses have been applied to substantially similar BIT texts. Fully settled understandings therefore have not become associated with the oft-examined concepts of "fair and equitable treatment,"[75] "measures tantamount to expropriation," "full protection and security,"[76] "umbrella" clauses[77] and the "most favored nation" guarantee.[78]

The much discussed solution of instituting an appellate mechanism of some type,[79] though supported by many States and commentators,[80] has yet to be pursued in a concrete fashion. As a partial solution to the problem of "ad hockery," some arbitrators have announced that they will adopt established trends when they perceive them, rather than further splinter BIT jurisprudence by formulating *de novo* rules of decision in each case.[81]

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[71] *See* GUIDE, *supra* note 9, at 15, 141 (discussing revised Rule 37).

[72] ICSID Arbitration Rules, Rule 32; *see* GUIDE, *supra* note 9, at 15.

[73] *See* GUIDE, *supra* note 9, at 15, 141.

[74] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Procedural Order No. 5, para. 50 (November 27, 2006), http://italaw.com/documents/Biwater-PO5.pdf.

[75] *See also* J. Christopher Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID REV. 21 (2002); Kenneth Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT'L L. & POL. 43 (2010).

[76] *See* GUIDE, *supra* note 9, at 74-96.

[77] *Id.* at 92-96 (reviewing umbrella clause jurisprudence; additionally concluding that there is "no *jurisprudence constante*" on umbrella clauses).

[78] *Id*. at 82-87.

[79] *See generally* Barton Legum, *The Introduction of an Appellate Mechanism: The U.S. Trade Act of 2002*, *in* ANNULMENT OF ICSID AWARDS 289 (Emmanuel Gaillard and Yas Banifatemi eds., 2004); William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 533–34 (2000) (arguing that international commercial arbitration in general would benefit from elective appellate mechanisms).

[80] *See generally* Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA*?, 19 J. INT'L ARB. 185, 206-07 (2002) (discussing need for an appellate regime); William S. Dodge, *International Decision: Metalclad Corp. v. Mexico*, 95 AM. J. INT'L L. 910, 918 (2001) (appellate body could be given power to correct errors of law).

[81] *See* Alvarez, *supra* note 3, at 368-433.

XI. ADR—ON THE HORIZON?

As the *Guide* explains, the ICSID's Convention established a conciliation regime.[82] Conciliation, however, has not been used often.[83] A number of commentators from practice, government and academia nevertheless have suggested that the existing investor-State disputes mechanism could benefit from more routine use of mediation (conciliation).[84]

It is a fact that investor-State disputes often settle, and that mediation has enjoyed good success with respect to B-to-B disputes. It is plausible therefore that investor-State settlement rates might be increased by introducing a dynamic third-party process proven capable in other contexts of generating (sometimes very quickly) more satisfactory outcomes than bilateral negotiations alone. At present, those investor-State cases that settle often do so only after appreciable costs have been incurred. Those that do not settle, in turn, generally require each side to commit significant resources to the arbitration enterprise and to cope with considerable disruption in pursuit of an outcome that typically is uncertain.[85]

The ICSID Secretariat has expressed interest in exploring ADR of a more dynamic kind than that contemplated in the Convention. It will be complemented in its efforts by work at the United Nations Conference on Trade and Development (UNCTAD)[86] and the International Bar Association.[87]

XII. A WORTHY BOOK

Given the existing rich array of reference material touching upon investor-State disputes, one is entitled to ask whether another book on investor-State arbitration could be justified, even one merely updating an existing work. In its coverage, conciseness, reliability, compact format and step-saving attributes, the *Guide's* second edition should stand up well to scrutiny. Certainly in terms of the developments to have occurred since 2004, the second edition needs little justification: there have been revisions to the ICSID Arbitration Rules and considerable jurisprudence developed during the last few years, and although the book is not principally about substantive investor protection law, its synopses of common BIT protections as construed by tribunals are clear and surprisingly comprehensive.[88]

The book additionally has several features that make it unlikely to be ignored by counsel when briefing a client or preparing to launch an ICSID case. Particularly noteworthy are the *Guide's* tables. How often has an expropriation been established and in which cases? (*See* Table II F). Which cases have found breaches of umbrella clauses or of the promise of fair and equitable treatment? (*See* Table II, G and A). Which arbitrators have been willing to award costs and how regularly have costs been granted?

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[82] GUIDE, *supra* note 9, at 21-22.

[83] *Id*. at 22 (citing six attempts to conciliate producing only some verifiable success).

[84] *See generally* U.N. CONFERENCE ON TRADE & DEV., INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION (2010); Mark A. Clodfelter, *Why Aren't More Investor-State Treaty Disputes Settled Amicably?*, *in* INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION II (Susan D. Franck & Anna Joubin-Bret eds., 2011); Jeswald W. Salacuse, *Is There a Better Way: Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT'L L.J. 138, 143-147 (2007); Susan Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161 (2007); Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7 (2005).

[85] *See generally Prospects*, *supra* note 37, at 77-81.

[86] *See generally* UNCTAD, INVESTOR–STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION (2010).

[87] A sub-committee of the IBA's Mediation Section has produced a set of mediation rules specific to investor-state disputes (on file with the author).

[88] *See* GUIDE, *supra* note 9, at 74-96.

(*See* Table III D). How often have challenges to arbitrators been successful? (*See* Table III C). Those who have investigated these and similar questions by searching the available websites will readily appreciate the amount of work the authors have done for the reader.[89]

Given the foregoing, ICSID experts—both counsel and arbitrators—should find the reference a reliable traveling companion, while newcomers to the field ought to regard it as required reading. Certainly, my students have found the book an efficient vehicle by which to acquire quickly a solid understanding of the ICSID regime and BIT jurisprudence before digging in more deeply. This "market test" would seem to bode well for the book's utility in the hands of others. In short, the second edition of the *Guide* is both a wonderful research tool and a reliable reference that seems to have no counterpart in the market. It makes a distinctive contribution.

[89] If pressed to quibble, one might argue for a more comprehensive index, or a more exhaustive bibliography. These, of course, are minor and perhaps idiosyncratic complaints, and run counter to the authors' goal of producing a handy desk-reference rather than a treatise.

TRENDSETTERS: ASIA-PACIFIC JURISDICTIONS LEAD THE WAY IN DISPUTE RESOLUTION

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The tectonic plates are shifting in international dispute resolution. The growth of global trade has been encouraged and, in turn, has encouraged the worldwide development of effective and enforceable international arbitration and mediation processes. As a result, there have been palpable changes made not only in the manner in which the increased number of disputes are resolved, but also in the sites that are chosen for their resolution. One of the defining events in the development of international arbitration occurred in 1923 when the International Chamber of Commerce (ICC), International Court of Arbitration was established in Paris. From that point and continuing for over 80 years, the center of gravity for most international proceedings was the Euro-American area, with United States law firms leading the way.[1] Then, beginning in the 1990s,[2] a significant change in trading patterns occurred and an increasing number of international disputes were processed in the Asia-Pacific (A/P) region and resulted in a steady rise in the importance of the region as it relates to dispute resolution.

Hong Kong and Singapore have emerged as A/P jurisdictions that have experienced a consistent acceleration in their dispute resolution activities and have become focal points for the resolution of international disputes, while the People's Republic of China (PRC) and others have been making concerted efforts to establish their credentials as "Arbitration Friendly" states.

This article will first present a general overview of Alternative Dispute Resolution (ADR) activity in the A/P region and elsewhere with an emphasis on one of the major contributors to the A/P region's growth—long-term, hi-value construction and energy (C/E) projects which frequently are time and weather sensitive and tend to be claims prone.[3] This discussion will be followed by an analysis of several popular arbitration and mediation procedures used in the A/P region (and elsewhere) and will conclude with a summary of the efforts made by these states to develop dispute resolution practices that are both efficient and economical. All this being done in the context of the A/P's burgeoning economic, business and political importance, which prompted the boast that:

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[1] *See* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE (1998).

[2] One of the drivers for this change was that in 1979 China had opened up to the West, and by the 1990s was experiencing unprecedented economic growth.

[3] Many involved companies anticipate an increase in 2012 in disputes involving technology, engineering and healthcare. *See* FULBRIGHT & JAWORSKI L.L.P., FULBRIGHT'S 8TH ANNUAL LITIGATION TRENDS SURVEY REPORT 9 (2011) [hereinafter FULBRIGHT'S LITIG. TRENDS 8TH].

> If the 20th Century was the 'American Century'. . . then it is true that the 21st century belongs to the countries of the Asia-Pacific Region.[4]

I. DISPUTE RESOLUTION TRENDS

The major international arbitral institutions have set down firm ties in the A/P and together with the region's providers, have established a vibrant dispute resolution ambience and a healthy competition throughout the region.

A. UNCITRAL

Any discussion of international dispute resolution must include a brief reference to the work that has been accomplished in this volatile area by the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL is the core legal body of the United Nations in the field of international trade. One of its primary achievements has been the publication, among many other documents, of multiple Conventions, Model Laws and Rules dealing with the conduct of international commercial arbitration and conciliation.[5] The most significant of these is the Convention on the Recognition and Enforcement of Foreign Awards (1958), commonly known as the New York Convention, and recognized as the linchpin of international dispute resolution.[6] It has as its overarching objective the liberalization of procedures for enforcing foreign arbitral awards and doing so with a minimum of court intervention, tasks that it has performed admirably. Nearly 150 countries, from Afghanistan to Zimbabwe, are signatories to the New York Convention.[7]

B. General Findings

So, what is happening? The number of international arbitrations (including construction and energy (C/E) disputes) has grown steadily, with a recent increase of about 20 - 25% over previous years,[8] brought about by, among other things, the effects of the worldwide financial difficulties. In 2009, one in seven United States companies had at least one international arbitration and in the United Kingdom arbitrations increased by over 20%. In-house counsel in both countries indicated a strong preference for arbitration of international disputes as opposed to adjudication by national courts.[9] And, in 2010 the preference for arbitration increased in both the U.S. (to 40% from 34%) and in the U.K. (to 37% from 28%). Interestingly, there is a correlation between dispute resolution mode and company size; arbitration is more popular among mid-size than it is among large companies.[10]

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[4] Chakraborti and Chakraborty, *India and the Asia Pacific Region*, 1 ASIA-PACIFIC JOURNAL OF SOCIAL SCIENCES 1 (2010).

[5] Throughout this article, the terms "conciliation" and "mediation" are used interchangeably.

[6] *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 10 June 1958), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

[7] *See generally* Donald P. Arnavas, *Enforcing International Arbitration Awards Under the New York Convention: An Anniversary Report*, 4 INT'L GOV'T CONTRACTOR 84 (2007).

[8] For example, see the annual reports of the ICC, Paris, available on the ICC website.

[9] *See* FULBRIGHT & JAWORSKI L.L.P., FULBRIGHT'S 7TH ANNUAL LITIGATION TRENDS SURVEY REPORT 21 (2010).

[10] *See* FULBRIGHT'S LITIG. TRENDS 8TH, *supra* note 3.

The United Kingdom, Switzerland, France and the United States remain the four most popular destinations for international arbitrations and Paris, Geneva/Zurich, London and New York the most frequently selected cities for international proceedings.[11] In the A/P, Singapore and Hong Kong have now made several appearances on the list of leading sites and appear poised and ready to extend their enhanced popularity.

C. International Providers in the A/P Region.

One reliable gauge of the growing importance of the A/P region as a center for international dispute resolution is the fact that three of the world's leading international arbitration providers are actively open for business there.[12]

The ICC, the largest truly international arbitral body which in the recent past has averaged nearly 700 international arbitrations per year (and had actual totals of 817 and 793 in 2009 and 2010) as compared to a total case load that averaged 250 only 30 years ago.[13] The ICC maintains the first branch of its secretariat in Hong Kong and in 2010 opened a regional office in Singapore.

The London Court of International Arbitration (LCIA), in 2009, established its first independent office outside of London in New Delhi and introduced new arbitration rules—prepared expressly for use in India—which combine standard LCIA provisions with relevant Indian arbitral protocols. The LCIA had 270 new international cases filed in 2006/2007 (its totals are complied in two-year increments) and an increase to 552 new matters for 2009/2010.[14]

The American Arbitration Association's International Centre for Dispute Resolution (ICDR)—whose annual international arbitrations approximate 600—has opened an office in Singapore in conjunction with the Singapore International Arbitration Centre (SIAC).

D. Local Providers in the A/P Region

Some of the progress made by China must be attributed to the 1995 enactment of the Arbitration Act of the People's Republic of China--popularly known as the Chinese Arbitration Act or CAA. The CAA was the first arbitration statute in the history of the PRC. It replaced earlier arbitral practice where there was no uniform arbitration law to regulate arbitration activities; where no arbitration agreement was required in order to initiate arbitration proceedings and where domestic arbitration awards were not final. These early proceedings were considered arbitrations even though they were really no more than administrative proceedings used to settle economic disputes.[15] The CAA contains provisions that are expressly intended for use in international arbitrations and it codifies many of the more basic principles of modern arbitration law while, at the same time, underscoring the independence of China's existing arbitral commissions. Although, as mentioned

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[11] *See* Dr. Stephan Wilske, *The Global Competition for the "Best" Place for International Arbitrations*, 1 CONTEMP. ASIA ARB. J. 31, (2008).

[12] *See* FULBRIGHT & JAWORSKI L.L.P., FULBRIGHT'S 3RD ANNUAL LITIGATION TRENDS SURVEY REPORT 26 (2006). The ICC was preferred by 43% of respondents with 33% preferring the LCIA, 9% favoring *ad hoc* self administered proceedings and 6% choosing arbitration under the ICSID rules (discussed below).

[13] *See* ICC annual reports on ICC website, http://www.iccwbo.org/.

[14] *See* LONDON COURT OF INTERNATIONAL ARBITRATION, DIRECTOR'S GENERAL REPORT 1 (2011) for those years.

[15] *See* Hu Li, *An Introduction to Commercial Arbitration in China*, A.B.A. DISP. RESOL. J. (2003).

below, there is evidence of a willingness to permit more participation by non-Chinese lawyers,[16] the general rule in China continues to be that in order to file court papers or advise on the particulars of Chinese law, they must affiliate with a Chinese law firm.

In addition to the arbitral providers specifically discussed below, the PRC has over 180 local arbitral commissions engaged in the resolution of domestic community disputes.

The leading dispute resolution institution in the PRC, the China International Economic and Trade Commission (CIETAC), has its headquarters in Beijing, maintains sub-commissions in Shenzhen and Shanghai and operates branch offices in several additional cities.[17] CIETAC has taken steps aimed at changing the PRC's earlier image as a "no-go" international arbitral site and making its procedures easily accessible to all disputing parties, even though some negative perceptions persist.[18] Some years ago a Hong Kong court recognized CIETAC's good work by noting that it had enforced many CIETAC awards and praising the general fairness of CIETAC's arbitration proceedings.[19]

Since its inception, CIETAC has revised its arbitration rules seven times—the most recent revisions became effective as of March 1, 2012. Among other things, the rules permit, subject to confirmation by CIETAC's Chairman, arbitrators from outside the CIETAC list to serve on its panels, arbitrations to be conducted with the place of the proceeding outside China, and both foreign and Chinese parties to integrate other arbitration rules (e.g., the UNCITRAL Arbitration Rules) into their CIETAC proceedings—an alternative that is of particular interest to parties that consider CIETAC to be too inclined to interfere in the conduct of an arbitration.[20] In addition, in May, 2011, CIETAC issued a revised listing of arbitrators. The list names approximately 1000 arbitrators, 218 of whom are foreign. It is envisaged that this panel with its wider geographic distribution will further enhance CIETAC's international reputation as did its joint symposium with the ICC, held in Beijing in July 2011. On the negative side, one observer has noted concerns over the speed and quality of arbitrator appointments, and the involvement of the CIETAC secretariat in drafting arbitral awards and procedural orders.[21]

The China Maritime Arbitration Commission (CMAC)—whose caseload consists primarily of arbitrating contractual and non-contractual disputes arising from transportation, production and navigation at sea—is headquartered in Beijing, has a sub-commission office in Shanghai and liaison offices in four other cities.

The Beijing Arbitration Commission (BAC) was founded in 1995 and its homepage describes it as the "arbitration organization with the most rapid development in China." BAC provides both arbitration and mediation services and many of its cases involve construction disputes. By the end of 2008 BAC had, since its founding, accepted 2826 cases involving construction disputes (approximately 20% of its total caseload).

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[16] *See generally* Anna Stolley Persky, *The New World: Despite Globalization, Lawyers Find New Barriers to Practicing Abroad*, 97 A.B.A. J. 34 (Nov. 2011).

[17] All Chinese dispute resolution providers are referred to as "commissions."

[18] *See, e.g.*, Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration* (2010), http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf (whose survey respondents "have the most negative perception of Moscow and Mainland China as seats of arbitration.").

[19] Paklito Inv. Ltd. v. Klockner E. Asia Ltd., 2 H.K.L.R. 39 (1993).

[20] *See* Benjamin O. Kostrzewa, *China International Economic Trade Arbitration Commission in 2006: New Rules, Same Results?*, 15 PAC. RIM L. & POL'Y J. 519, 525-526 (2006) (noting that foreign parties typically receive favorable results in over half of CIETAC arbitrations).

[21] *See* F. Hess, *Arbitration Environment in China: Where we are and the Road Ahead*, 7 TRANSNAT'L DISP. MGMT. 1, 3 (2010).

BAC has established working arrangements with several universities in the United States and engages in regular conferences, meetings and training sessions with them. In 2008 it introduced new mediation rules which it described as "cutting edge mediation culture, methods, skills and experiences for commercial cases." The rules include a number of innovations for use in construction contract dispute mediations.[22] BAC's arbitration rules were also revised in 2008 and, among other things, permitted the appointment of arbitrators from outside BAC's panel to preside over foreign-related proceedings. Among the several conferences that BAC presided over in 2011 was the Asia Pacific Regional Arbitration Group Conference.

The Shanghai Arbitration Commission (SAC) was founded in 1995 and its arbitration rules were revised in 2005. It hears both domestic and international matters. In April of 2011, SAC entered into a cooperative agreement with the Shanghai Commercial Mediation Center (SCMC) intended to increase its capability to mediate as well as arbitrate commercial disputes.

In South Korea, the Korean Commercial Arbitration Board (KCAB) maintains offices in Seoul and Pusan. In addition to arbitration and mediation the KCAB offers the disputing parties conciliation services designed to provide a "last chance" to achieve closure before more formal arbitral proceedings are initiated. A recent decision of the Korean Supreme Court indicates that the judiciary will rarely disturb an arbitral award.[23]

On March 15, 2012, after several years of negotiations, the United States – Korea Free Trade Agreement (KORUS FTA) entered into force and added to Korea's standing as an international economy to be reckoned with. Although not directly associated with dispute resolution, the KORUS FTA contains several sections that deal with the Parties' alternatives when disputes concerning the FTA arise. The World Trade Organization (WTO) and its Agreement on Government Procurement (GPO) (discussed below) also figure prominently in the FTA's dispute resolution process.

In Singapore, SIAC has recently experienced an "astounding" growth in arbitrations cases—its 2009 caseload increased to 160 new matters, a 60% increase from the 2008 figures.[24] Some of this gain has been attributed to the introduction of new facilities at the Maxwell Chambers in January of 2009, which according to its Chief Executive now provide a major international arbitral setting with "best-of-class hearing facilities." SIAC issued the 4th Edition of its arbitration rules effective in July 2010.[25] The rules include provisions for emergency interim relief prior to formation of the arbitral panel and for expedited procedures.[26] Singapore's standing has been further enhanced by arbitration friendly court decisions involving SIAC proceedings. For example, the Singapore Court of Appeals recently affirmed that it was proper for SIAC to assume jurisdiction over a case that required it to apply a hybrid of SIAC and ICC procedural rules, noting that SIAC was quite capable of performing the required functions and that the concept of party autonomy permitted the parties to choose the arbitration rules that would govern their arbitration.[27] Singapore's international prestige has been further increased by its selection as the site for the 2012 International Council for

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[22] Included are Rules for Dispute Resolution Boards and Adjudication Boards which are discussed below.

[23] *See* Eun Young Park & Shinhong Byun, *Reconfirming Continued Support for the Autonomy of Arbitrations: Recent Developments in Korea*, ARB. NEWS (International Bar Association), March 2011, at 48.

[24] *See* Chris Crowe, *Asia's Arbitration Explosion*, INT'L BAR NEWS (International Bar Association), August 2011, at 1.

[25] *SIAC Rules 2010*, SINGAPORE INT'L ARBITRATION CTR (Jul. 1, 2010), http://www.siac.org.sg/index.php?option=com_content&view=article&id=210&Itemid=130.

[26] *Id*.

[27] Insigma Tech. Co. Ltd. v. Alston Tech. Ltd. [2009] SGCA 24.

Commercial Arbitration (ICCA) conference. Its inclusion positions the county among the ten nations that comprise the Trans-Pacific Partnership (TPP) which has achieved the broad outlines of "an ambitious, 21st century TPP Trade Agreement" which promise to enhance trade and investment among the TPP partner countries.[28]

The Hong Kong International Arbitration Centre (HKIAC) has also experienced a significant increase in it caseload—in 2009 746 new cases, including 429 arbitrations, were filed. There were 15% more arbitrations in 2009 than 2008. International cases increased by 79%, from 173 to 309.[29] Several factors have contributed to this increase. For one, the ongoing Closer Economic Partnership Arrangement (CEPA) between the PRC and Hong Kong has encouraged trans-border trade and has measurably increased Hong Kong's economic activity. Also, for 13 consecutive years, Hong Kong has been selected by Canada's Fraser Institute as the freest economy in the world and it has secured a first place ranking for freedom of international trade—significant contributions to its reputation for global business stability and for being arbitration friendly. In addition, in June 2011, Hong Kong's new Arbitration Ordnance—"in tune with the latest and best international practice," became effective. Among the Ordinance's provisions are ones which eliminate the distinction between domestic and international proceedings; codify the confidentiality obligations that apply to arbitrations; and clarify the availability of interim measures. One commentator noted that the new Ordinance adopted many of the salient features of the UNCITRAL Model Law with virtually no changes.[30] Meanwhile, HKIAC's International Arbitral Center has doubled its size with new hearing and office facilities.[31]

Some of the other states in the A/P regional have also taken steps to increase their arbitral activities.

1. Taiwan

Taiwan's major obstacle insofar as being accepted as a leader among the A/P's arbitral powers is the fact that it is not a signatory to the New York Convention. Despite this, at least one authority concluded that Taiwan seems prepared to meet international expectations such as offering internationally accepted dispute resolution mechanisms and noted that its Chinese Arbitration Association (CAA) is a well-established arbitral provider fully qualified to preside over international cases.[32] In the past decade over 6% of Taiwan's arbitration caseload involved foreign parties.[33] In addition to the CAA, two of Taiwan's other arbitral providers, the Taiwan Construction Arbitration Association and the Chinese Construction Industry Arbitration Association, each focus on different specialized areas of construction disputes.

Taiwan also points to the speed and cost-efficiency of its arbitrations and notes that under Article 21 of the Taiwan Arbitration Law, an Arbitral panel must render an award within 6

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[28] Statement from the Office of the United States Trade Representative, *available at* http://www.ustr.gov/about-us/press-office/press-releases/2011/november/trans-pacific-partnership-leaders-statement.

[29] *See* Hong Kong International Arbitration Centre's publication ASIAN DISPUTE REVIEW, *available at* http://www.asiandr.com/.

[30] Justin D'Agostino, *New Hong Kong Arbitration Ordinance Comes into Effect*, KLUWER ARB. BLOG, http://kluwerarbitrationblog.com/blog/2011/06/01/new-hong-kong-arbitration-ordinance-comes-into-effect/ (Last visited June 12, 2012).

[31] Press Release, Government of Hong Kong, Boost for HK's development as an international arbitration hub (June 1, 2011), http://www.info.gov.hk/gia/general/201106/01/P201106010222.htm.

[32] *See* Wilske, *supra* note 11, at 55.

[33] Shu-Wei Lo & Edward Liu, *Arbitration in Taiwan*, CHINA LAW & PRACTICE (June 2011), *available at* http://www.chinalawandpractice.com/Article/2839217/Channel/7576/Arbitration-in-Taiwan.html.

months of the commencement of the arbitration unless the panel requests and receives a 3 month extension.

2. Malaysia

Malaysia, after resolving a number of controversies involving its judiciary and acting through the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has, among other things, adopted UNCITRAL's revised Arbitration Rules (2010) and publicizes its capabilities as a forum for the settlement of disputes through arbitration "in trade, commerce and investment within the Asia-Pacific region." With its booming economy, some observers have occasionally referred to Malaysia the "Silicon Valley" of the A/P region.

3. India

India's recent association with the LCIA appears to signal its intention to become more involved in international arbitration. The governing Indian arbitration statute is the Arbitration and Conciliation Act, 1996, which is based upon UNCITRAL's Model Law of Commercial Arbitration. India's courts are notoriously slow in their adjudication of commercial disputes—a rather staggering total of nearly 30 million cases are now pending.[34] The Arbitration and Conciliation Act was intended to provide a workable alternative to court adjudication and its ensuing delays. It applies to both domestic and international disputes and goes beyond the UNCITRAL Model Law in minimizing judicial intervention. Despite the presence of several domestic arbitral providers (and, now, the LCIA) there is a marked tendency in India to utilize *ad hoc* procedures in arbitral proceedings a practice that would be inappropriate in most international matters.[35] Construction/infrastructure is one of the leaders of the Indian economy and a frequent source of disputes. Note finally, that, the construction Industry Development Council (CIDC) and SIAC have established an arbitration center known as the Construction Industry Arbitration Council (CIAC) to arbitrate construction disputes.[36]

4. Japan

Japan has rarely been selected as a site for international dispute resolution but has, nonetheless, displayed some positive arbitral stirrings. In 2005 the Japan Commercial Arbitration Association (JCAA) processed 10 international disputes. Its arbitration law was enacted in 2004 and in is based on the UNCITRAL Model Law. Japanese courts have shown some arbitration friendly tendencies. For example, foreign attorneys have, since 1996, been permitted to appear in

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[34] *See* Krishna Sarma, Momota Oinam & Angshuman Kaushik, *Development and Practice of Arbitration in India – Has it Evolved as an Effective Legal Institution* 1-3 (Ctr. On Democracy, Dev., and the Rule of Law, Working Paper No. 103, 2009), *available at* http://cddrl.stanford.edu/publications/development_and_practice_of_arbitration_in_india_has_it_evolved_as_an_effective_legal_institution.

[35] *See id.* at 6.

[36] *See id.* at 11.

international arbitral proceedings which are conducted in a manner compatible with international norms for modern arbitrations.[37]

5. Vietnam

Vietnam recently enacted a new arbitration law—the 2010 Law on Commercial Arbitration. Among other things, it allows foreign arbitrators to freely participate in arbitration proceeding—both domestic and international.

6. Australia

Australia's international dispute resolution fortunes are constantly engaged in a battle against the "tyranny of distance."[38] In July, 2010 the International Arbitration Amendment Act 2010 made several changes in Australia's arbitration statutes designed to re-affirm its credentials as an arbitration friendly jurisdiction that will uniformly enforce foreign awards under the provisions of the New York Convention. The Australian Centre for International Commercial Arbitration (ACICA) offers comprehensive hearing and office facilities and serves as the default authority for the appointment of arbitrators pursuant to Article 11 of the UNCITRAL Model Law.[39]

7. Summary

The total international arbitrations handled by the five leading A/P arbitral providers over the ten year period from 2000 through 2009 provides an good indication of their relative use among international disputants in the A/P region.[40]

CIETAC----------4862
HKIAC----------3866
KCAB----------645
SIAC----------488
BAC----------387

II. TRENDS IN THE USE OF ARBITRATION, MEDIATION AND THE INTERIM PROCESSES

Not only is the A/P region generating substantial numbers of disputes but it is also being introduced to additional dispute resolution procedures, such as adjudication, dispute boards, expert determination, and early neutral evaluation (the "interim processes"). Since they serve as a major economic impetus, these dispute resolution processes and techniques attain particular importance.

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[37] *See* Akihiro Hironaka & Hiroyuki Tezuka, *Japan*, THE ASIA-PACIFIC ARBITRATION REVIEW (2007), *available at* http://www.globalarbitrationreview.com/reviews/2/sections/4/chapters/24/japan/.

[38] Attributed to Professor Luke Nottage of the University of Sydney Law School.

[39] Australia and New Zealand have consistently projected themselves as active members of the A/P region.

[40] *See* Chong Yee Leong & Qin Zhiqian, *The Rise of Arbitral Institutes in Asia*, THE ASIA-PACIFIC ARBITRATION REVIEW (2011), *available at* http://www.globalarbitrationreview.com/reviews/31/sections/110/chapters/1189/the-rise-arbitral-institutes-asia/.

A. Arbitration and the Interim Processes

A former chairman of the ICC, delivered a rather pessimistic appraisal of arbitration's "value" as a litigation substitute when he stated that:

> The advantages of arbitration are becoming less and less obvious in the eyes of the parties to the dispute. The problem is not just that it often takes too long to resolve the dispute, but that the costs are no longer reasonable compared to what is at stake in the dispute.[41]

These sentiments are not especially new or novel. Indeed, arbitration's evolutionary trail is littered with attempts—some successful, some not—to devise a process that is simultaneously "a swift, inexpensive, and effective substitute for judicial dispute resolution."[42] The following discussion will examine some alternatives that have been developed to bring the ADR process closer to a dispute resolution model that will serve as a true alternative to litigation. We will then consider several of the interim processes that are gaining favor in the A/P and are aimed at achieving greater system efficiency regardless of the specific process being employed.

B. Arbitration—General Concepts

Arbitration is a "finally determinative" form of dispute resolution broadly similar to but generally less formal than litigation, the outcome of which is binding, and in respect of which it is extremely difficult to appeal. International contracts, especially those involving construction disputes, often specify that if other attempts at resolving a dispute do not achieve closure, the parties must resort to arbitration of their dispute. There is a powerful reason why arbitration, rather than litigation within a court system, is preferred in such circumstances. Frequently, where a contractor or consultant is performing services outside its own country, it will be reluctant to have disputes regarding the quality of its work dealt with by a local court. Arbitration, in large measure, avoids this problem while litigation confronts it head-on, sometimes with unfortunate results. In addition, because of the New York Convention, enforcement of an international arbitration award is normally a relatively routine matter which insures that virtually all international awards can be enforced more readily than international court judgments.

Mention should also be made of an additional source of international dispute resolution involving government contract procurement. The World Trade Organization (WTO) is a multilateral organization with approximately 150 members. The Agreement on Government Procurement (GPA) is a plurilateral agreement—first negotiated in 1981 and open to WTO members who are entitled, but not obligated to subscribe to its provisions. The GPA currently has 41 members including Hong Kong, Japan, Singapore, South Korea, Taiwan and the United States—China is currently in the process of negotiating accession. The GPA's latest revisions became effective on March 30, 2012. One of its primary goals has consistently been to open up international

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[41] Robert Briner, Address given in Sydney at the program on "The Changing Landscape of International Commercial Arbitration" of the 75th Anniversary Congress of the Union Internationale des Avocats 14 (Oct. 29, 2002), published in NEWS FROM ICSID (Winter 2002), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/09/01/000160016_20050901163656/Rendered/PDF/33321a10ICSID0news11912.pdf).

[42] Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 683 (7th Cir. 1983).

government contracting to maximum international competition. Together with the WTO, the GPA provides extensive dispute resolution procedures and its revisions, among other things, continue to encourage transparency and fairness in the international procurement process.[43]

C. The Interim Processes

Until relatively recently, arbitration, litigation, and (to a more minor extent) expert determination, were the most readily accessible forms of dispute resolution, and all were finally determinative. However, in recent years, new types of "temporarily determinative" forms of dispute resolution have become available, and these all function as "filters" to substantially reduce the number of disputes which must proceed to a finally determinative process. These Interim processes have become particularly attractive in the present distressed economic times, when in-house counsel are anxious to avoid the major costs associated with arbitration. The following outline illustrates some of the several interim processes (listed below) that are currently used in the A/P region.

Interim (Filters)	**Final**
-Mediation	-Arbitration
-Early Neutral Evaluation	-Court Litigation
-Dispute Boards	-Expert Determination
-Negotiation	-Adjudication

1. United Kingdom

A United Kingdom statute which came into force in the mid-90s, imposed an "adjudication" requirement on all construction contract disputes.[44] It required that all C/E disputes must be initially referred to an adjudicator whose decision is binding on the parties, unless—within a stipulated time—the matter is taken to arbitration. This procedure has proven quite efficient and the number of C/E disputes proceeding to arbitration has declined dramatically since its advent. Adjudication, which had its beginnings in the U.K., has been adopted in various Commonwealth countries as well as in several A/P jurisdictions (primarily Singapore, New Zealand and Australia). However, it has not altogether escaped criticism. For instance, one authority has commented that although the process is "facially attractive" and ofttimes results in prompt and informed dispute resolution while the evidence is fresh and the parties can most benefit from the opinion of an impartial expert, it, nonetheless, has shortcomings:

[43] *See generally* Anderson et al., *The WTO's Revised Government Procurement Agreement – An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets*, 54 THE GOVERNMENT CONTRACTOR 1, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984216.

[44] Housing Grants, Construction and Regeneration, 1996, ch. 53, § 108 (Eng.).

> It should work well for short, sharp, clear disputes. Experience shows, however, that short, sharp clear disputes do not often arise on construction projects or, if they do, they do not matter very much. Ugly, tough, complex disputes that matter a lot do not lend themselves to resolution by adjudication[45]

2. Dispute Boards

Dispute Boards (DBs) normally involve a procedure whereby a standing panel of engineers/lawyers is appointed at the outset of a project and normally serves though completion of the work.[46] The DB inspects the job site throughout the duration of the project and deals with any incipient disputes.[47] This generally prevents many disputes from crystallizing into arbitrations. An alternative model provides for an *ad hoc* DB to be appointed once a particular dispute has arisen. Under this system, the DB remains intact until the dispute is resolved and a recommendation or decision is made.

DBs have been used with good results in Europe for multiple projects including most prominently the daunting Channel Tunnel undertaking linking France and the United Kingdom (which used two DBs one composed of Engineers and the other of finance specialists). The A/P with its current emphasis on construction and infrastructure has employed DBs on numerous larger undertakings. For example, DBs (among other methods) were used during the construction of the Hong Kong Airport, a most challenging engineering project that took 6 years to complete. The airport's cost was in excess of $20 billion and involved 225 construction contracts. Four tiers of dispute resolution were used—the parties were first required to refer disagreements to a designated engineer for determination, if either party disagreed with the decision, a mandatory mediation was held, "adjudication took place if the mediation failed and arbitration was the final resort."[48]

DBs were also utilized on China's Ertam Hydroelectric Power Project which involved construction of a concrete arch dam and Asia's largest underground powerhouse. Total investment was $3.4 billion for the project which commenced in 1991 and took eight years to complete.

Hong Kong has developed a successful variant to the DB know as the Dispute Resolution Advisor (DRA) system. Under this procedure an independent third party advisor is active throughout the project, resolving disputes as they arise. Among other things, it has been found that DRA response time constraints, good faith negotiations and the early involvement of the dispute resolution advisor have all had a positive effect in preventing claims from escalating into full fledged disputes. DRA has been used *inter alia*, for the construction of the Hong Kong Convention and Exhibition Center. Its use is required by local government for all C/E projects above HK$200 million.

In Japan, three principle types of DBs are available: Dispute Review Boards (DRBs) which are also used widely in the United States, Dispute Adjudication Boards (DABs) which are the most

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[45] PAUL STARR, POSITION STATEMENT, ADJUDICATION-SHOULD IT BE ENCOURAGED? 4 n.12 (2008) (on file with author); *see also* Denise Bowes, *Practitioner's Perception of Adjudication in UK Construction* (September 2007), *available at* http://www.arcom.ac.uk/-docs/proceedings/ar2007-0117-0125_Bowes.pdf.

[46] Most DBs are comprised of 3 members. In larger projects, 5 to 7 members are sometimes used. *See generally* STARR, *supra* note 45.

[47] Although used principally in construction contracts, DBs have proven effective in other long term, hi-value scenarios.

[48] STARR, *supra* note 45, at 5 n.3.

common form of DB used in international construction contracts, and Combined Dispute Boards (CDBs), introduced in 2004 by the ICC and intended to combine the advantages of the other two basic types.[49]

DBs work well, that is, they deal with and finally dispose of most the disputes that come before them--over 90% of disputes referred to a DB will not go beyond that procedure into arbitration or litigation. Why are they so efficient? One theory has it that prior to a DB's site visit, the contractor and the owner (who tend to regard the DB as an intruder) will join forces and attempt to resolve whatever relatively minor incipient disputes there may be. Obviously, the DB's practice of confronting disputes at a very early stage, before the parties' have become entrenched in their positions is also a significant factor in their rapid resolution. The DB procedure amounts to serial adjudication. It may be expected to be used increasingly on larger projects throughout the A/P and the result is likely to be a reduction in the number of formal arbitrations. However, the process can be costly and as a result, it is sometimes the case that parties will not appoint DBs notwithstanding that the contract so requires. This is from a sense (usually misguided) that they are saving money by avoiding the costs of the panel. In fact, as the history of DBs demonstrates, the reverse is true, the appointment of a DB will quite frequently reduce the overall costs of dispute resolution on a project.

The American Arbitration Association (AAA), the LCIA, the ICC and the HKAIC all have formulated rules specifically designed to regulate the conduct of proceedings before DBs. The ICC rules contain a provision encouraging the parties to resolve the dispute amicably, and another that provides for an internal review of the DB's determination and findings before it is transmitted to the parties.

3. Expert Determination

Expert determination is a little used procedure in which the parties engage a third party, with expertise in a particular subject-matter, to give a binding determination upon a specific question.[50] It is generally used for a single or a group of associated issues, and rarely for more complex disputes. Expert determinations are not subject to court control and their decisions are normally subject to very narrow appeal grounds.

4. Early Neutral Evaluation

Early Neutral Evaluation bears some similarities to expert determinations—the key difference being that the opinion of the evaluator as to the merits of a party's position is not binding. It is a voluntary procedure that encourages direct communications between adversarial parties about possible claims. Once the parties mutually agree upon an evaluator, they exchange written statements which describe the substance of the dispute, as well as the parties' views of critical liability questions and any damages issues. At an informal meeting at which the evaluator presides, each party is given the opportunity to comment on the facts and law upon which its claims or defenses are based. The evaluator then renders a written report. Either party is free to reject the

[49] *See* Toshihiko Omoto, *Resolution and Avoidance of Disputes in Construction Contracts*, JCAA NEWSLETTER (Japan Commercial Arbitration Ass'n, Tokyo, Japan), Nov. 2009, at 2.

[50] Not to be confused with experts retained by the parties whose opinions and findings are not binding and may or may not be accepted by the arbitral panel.

evaluator's conclusions. However, if the parties mutually agree, they may proceed to settlement discussions or utilize the evaluator or another party as their mediator.

The AAA as well as several other arbitral institutions has early neutral evaluation plans and protocols available for parties that wish to use this procedure.

D. Bilateral Investment Treaties

When the parties to a dispute are private entities, no particular jurisdictional difficulties arise when they set out to resolve their differences through international arbitration. However, matters become more problematic if one of the parties is a sovereign state, since the general rule is that absent their consent, they are immune from suit.[51] A modern example of such consent is found in the dispute resolution provisions of Bilateral Investment Treaties (commonly known as "BITs") which offer a unique and important use of international arbitration in the case of private disputes that arise over investments made in a foreign jurisdiction.[52] The most distinctive characteristic of BITs is the ability of non-party nationals to engage in arbitration—without prior consent—with another state party. By offering this right, BITs protect investments in those countries where investor rights are not already protected through existing agreements. For instance, in June 2011, Phillip Morris Asia which is based in Hong Kong, initiated an action against Australia under the Hong Kong-Australia BIT, contending that its most recent restriction on the sale of cigarettes in Australia violated the BIT's expropriation provisions.[53]

By the end of 2009 there were approximately 2750 active BITs throughout the world, and several A/P countries have entered into multiple BIT agreements. For Example, the PRC has concluded 130 BITs, more than any other country except Germany;[54] South Korea has concluded approximately 70; Singapore has over 20 BITs and Hong Kong has entered into about 15.[55]

BIT dispute resolution provisions typically require that the parties initially seek resolution of their dispute through consultation and negotiation (essentially a "cooling off" period ranging from three months to a year). If the dispute remains unresolved the investor may then pursue the matter in the courts of the party involved in the dispute, or seek resolution through some previously agreed upon dispute resolution method, or proceed to binding arbitration before the International Centre for the Settlement of Investment Disputes (ICSID) tribunal or any other international forum including *ad hoc* proceedings. According to a Report issued by the United Nations Conference on Trade and Development (UNCTAD), as of 2009, there have been a total of 357 known investor-state dispute settlement cases filed under a variety of international investor agreements.[56] Of these, 225 were filed with ICSID, 91 were filed under the UNCITRAL arbitration rules and 19 with the Stockholm Chamber of Commerce. The remainder were administered by several organizations or on an *ad hoc*

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[51] In the United States, an example of such consent is found in the 1887 Tucker Act, 28 U.S.C.A. § 1346 (a)(2).

[52] *See generally* Donald Arnavas, *Bilateral Investment Treaties: Motivation and Protection for Individual Investors*, INT'L GOV'T CONTRACTOR (Thompson/West, Eagan, M.N.), Nov. 2006, at 1.

[53] *See* Matt Siegel, *Move Against Smoking in Australia has Companies Trying to Prevent a Precedent*, N.Y. TIMES, June 28, 2011, at B2.

[54] *See* Hess, *supra* note 22, at 7; although some of its recent BITs are written more broadly, many earlier Chinese BITs limited the scope of arbitration to the amount of compensation to be paid in the case of expropriations.

[55] *See* International Centre for Settlement of Investment Disputes (ICSID) Database of Bilateral Investment Treaties, *available at* http://icsid.worldbank.org/ICSID/FrontServlet (last visited June 26, 2012).

[56] *Latest Developments in Investor-State Dispute Settlement*, UNCTAD (2010), *available at* unctad.org/en/docs/webdiaeia20103_en.pdf.

basis. A total of 49 developing countries, 17 developed countries and 15 countries with economies in transition participated in these disputes.

ICSID is an autonomous organization with close links to the World Bank. It was founded in 1966 pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention). As of October, 2011, there are 157 signatories to the ICSID Convention. ICSID international arbitration proceedings may be conducted at the Washington, D.C. headquarters of ICSID or at whatever other New York Convention compliant venue to which the parties agree. As of June 2010, approximately 319 cases were being dealt with by the ICSID Arbitral Tribunal with about 30 new matters being docketed each year. Almost half of ICSID's docket relates to projects in the energy and public utilities sectors.[57]

E. Mediation—General Concepts

When applying the "interim filter" and "finally determinative" labels mentioned earlier, mediation takes on a sort of dual identity. That is, when used as a free standing dispute resolution mechanism, mediation, if closure is achieved, is finally determinative and the parties' settlement agreement is fully enforceable as any other contract and in international matters, can typically be enforced under the New York Convention. However, if, as is frequently the case, mediation is an initial step that is required to be undertaken prior to either arbitrating or litigating the matter in dispute, it acts as an interim filter although it will often dispose of the dispute altogether.

Mediation is a process conducted in a strictly confidential manner by an independent third party who lacks authority to impose a solution and where the objective is to assist the parties in resolving their dispute. It is not adversarial—the complaint and answer that signal the start of litigation and arbitration do not exist in mediation, rather the parties file concise—hopefully factual—position papers and essential documentation with the mediator. One of mediation's most important characteristics is its flexibility. Thus, the manner in which proceedings are conducted can be varied depending on what is considered the best method to foster a settlement between the parties. Most proceedings are more akin to business meetings than to trials and generally last from a few hours to one or two days duration, with only the parties, essential witnesses and the mediator present. A relatively few are more formal, driven by detailed agendas and continue for several days or weeks, with an array of witnesses, attorneys and experts in attendance**.** The subject matter of the dispute being mediated can further influence the format of the proceedings. For instance, in the mediation of construction disputes it might be appropriate to start with dual opening presentations by the project manager and an accountant, followed by a viewing of videos or photographs of the job site. In any case, two important characteristics of mediations are the ability of the parties to modify their approach (in midstream if necessary) and the fact that the parties play a role in recommending changes in the manner in which the mediation is being conducted. Articles 11 and 12 of the UNCITRAL Conciliation Rules underscore these concepts:

> Article 11
>
> The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests to submit written materials, provide evidence and attend meetings.

[57] ICSID Convention signatories are free to bring other non-BIT matters to the ICSID Arbitral Tribunals; however, BIT disputes dominate its docket.

Article 12

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for settlement of the dispute.

Most mediations have similar basic structures. They begin with the opening presentations mentioned above followed by a question and answer period. The parties then retire to "breakout rooms" where they are individually visited by the mediator. These *ex parte* caucuses form a critical aspect of the mediation process by providing each party with an opportunity to privately discuss the factual aspects of the dispute and possible settlement approaches in a forthright manner and in a confidential setting, while the mediator asks questions designed to encourage them to consider both the negative and positive aspects of their positions.[58] In these caucuses, mediators often act in a facilitative mode—not unlike "shuttle diplomacy" in which they assist in establishing position alternatives by persuasion, cajoling and encouragement without commenting on the merits of a position. As one authority put it:

> The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. . . .[59]

Less often, mediators will act in an evaluative mode—interjecting opinions and predictions regarding a party's case. Obviously, statements made in the *ex parte* setting are confidential if so designated by the party and will not be revealed to the other party without specific permission.[60] On some occasions, the two techniques will both be used during the proceedings.

The *ex parte* caucus process continues as long as the mediator and the parties believe that there is some benefit to be gained from doing so. General meetings may be interspersed if an impasse is encountered or to discuss the progress that has been made and the issues that are still to be resolved. After this procedure has run its course, the parties will either reach a settlement or terminate the mediation. If a settlement is reached, the parties jointly prepare and execute a settlement agreement. Even if less that a complete settlement has been achieved, issues are frequently narrowed or eliminated as the case may be. In international mediation settlements, it is quite common for the mediator to then "change hats" and briefly become an arbitrator for the limited purpose of recording the settlement agreement "in the form of an arbitral award on agreed terms" thus allowing the parties to take advantage of the New York Convention for enforcement purposes.[61]

The chances of arriving at a mutually satisfactory settlement through mediation are quite favorable, and leading construction/engineering mediators often achieve success rates of about 75-80%. In the United States the settlement figure in mediations of contract disputes between the federal government and its contractors is even higher—reaching well into the 90% range.

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[58] Known commonly as "reality testing."

[59] Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996).

[60] The use of the evaluative technique varies. In some jurisdictions, e.g., the United Kingdom, it is rarely used, whereas in the PRC, mediators will often point out flaws in a party's position. Nor is it uncommon for a Chinese mediator to suggest that the parties apologize for problems and difficulties that they may have caused.

[61] As suggested in the UNCITRAL explanatory notes to Articles 12 and 13 contained in its Model Law on International Commercial Conciliation; U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT AND USE at 50-54, U.N. Sales No. E.05.V.4 (2004).

A recent mediation proceeding illustrates another important benefit of the process. The mediation involved a dispute regarding a series of federal government contracts and the amount in controversy exceeded $2.5 billion. The mediation, held before co-mediators, consumed nearly one month and concluded in a settlement of over $250 million for the contractor, plus a multi year extension of a contract with a value of several billion dollars. The contract extension was a peripheral issue unrelated to the main dispute—an "innovative solution" that became part of the parties' settlement because of mediation's flexibility and its ability to consider side issues so long as the parties agree to do so. Such a comprehensive result would not have been possible in either arbitration or litigation.

F. Mediation Activity in the A/P Region

How much mediation is there? In Europe, the principle mediator appointing body is the United Kingdom based Centre for Effective Dispute Resolution (CEDR) whose total English mediation market for 2010 was estimated at 6000 mediation proceedings—double the number in 2007.[62] If only mainstream commercial cases are considered, there has been a 30% increase in CEDR's caseload since 2007.

In the A/P, Chinese culture has long favored the use of compromise rather than coercion in resolving disagreements and has traditionally taught that litigation is a "last resort" that necessarily involves a loss of face and is very often understood to mark the end of a business relationship. The China Council for the Promotion of International Trade (CCPIT) and the China Chamber of International Commerce Conciliation Center (CCOIC) have, since 1987, maintained a mediation system which includes conciliation centers in a number of cities throughout China. These centers are oriented toward the resolution of local disputes. Most mediators speak only Chinese and are drawn from the local community—which would obviously limit the value of the process insofar as international matters are concerned.[63] In addition, mediation in the PRC is most often thought of in the context of the Med-Arb practice which is frequently criticized (discussed below). In addition to its regional centers, CCPIT/CCOIC has established the business oriented Beijing Conciliation Centre in Beijing and the Hamburg Conciliation Centre in Germany opening up the possibility of conducting international conciliation proceedings on a secure institutional basis.[64] It has also entered into partnerships and cooperative agreements with several institutional providers. Among these is the US China Business Mediation Center, a joint undertaking between CCPIT/CCOIC and the International Institute for Conflict Prevention and Resolution (CPR). Established in 2004, the Business Mediation Center does not maintain an office in a specific city, but administers projects by dispatching mediators to wherever commercial disputes arise. The parties normally choose their mediator. However, if they wish, CPR will assist in the selection of two neutrals—one American, one Chinese—to preside on a joint basis.

As mentioned earlier, BAC, effective in April 2008, established separate mediation rules with a view toward offering parties a viable alternative to arbitration. BAC prides itself on the

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[62] *See* CENTRE FOR EFFECTIVE DISPUTE RESOLUTION, THE FOURTH MEDIATION AUDIT 4 (2010).

[63] *See* Tim Hill, Hogan Lovelis, The Growth of International Mediation in the Region, Remarks at the CIArb Asia Pacific Conference (May 27, 2011).

[64] *See* Hamburg Chamber of Commerce's Beijing-Hamburg Conciliation Centre Hamburg, *available at* http://www.hk24.de/en/fairplay/conciliation/347726/hamburg.html.

dispatch with which it is able to conclude construction disputes through conciliation—the average is a 48-day duration from the acceptance of the conciliation.

Hong Kong's development as a mediation center was given an impetus by the success of the process in resolving with dispatch many of the disputes associated with the construction of its Airport. As one authority noted:

> Following the success of mediation in avoiding more formal disputes on this project, it became a tool of choice for the resolution of disputes in the Hong Kong construction industry although the take up of mediation in other areas was slower.[65]

The Hong Kong judiciary recognized the potential of mediation as a possible alternative to arbitration in the resolution of business disputes when in 2010 it permitted courts to take into account any unreasonable refusal to mediate when assessing costs at the conclusion of a case.[66]

G. The Med-Arb Alternative

CIETAC's experience is that between 20 – 30% of the arbitral disputes brought to it are ultimately settled by mediation through a process of 'Med-Arb'.[67] This procedure, whereby the arbitral tribunal may turn itself into a mediator (and, if necessary, back into an arbitrator) could just as easily be termed Arb-Med, but regardless of its title it has certain inherent drawbacks that make its frequent use in the dispute resolution process somewhat problematic. Rule 40 of CIETAC's arbitration rules deals with a "blending the process of arbitration and mediation."[68] In summary, rule 40 provides that:

> (a) With the consent of both parties, the arbitral panel may attempt to conciliate the matter during the course of the arbitration proceedings . . .
>
> (b) The arbitral tribunal may terminate the conciliation and continue the arbitration proceeding if one of the parties so requests . . . .
>
> (c) If conciliation fails, the arbitral tribunal shall proceed with the arbitration and render an arbitral award provided that any opinion, view, statement or proposal . . . made in the process of conciliation shall not be invoked in the subsequent arbitration proceedings . . . or any other proceeding.

The process has the advantage of being simple and convenient but some practitioners believe assumes too much of the participants and does not address the probability that parties will be less than forthcoming if they fear that statements that they make during a mediation and especially

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[65] Hill, *supra* note 63.

[66] *See id.*

[67] *See generally* Alison Ross, *Navigating Chinese Arbitration Law*, GLOBAL ARB. REV., May 5, 2011, http://www.globalarbitrationreview.com/news/article/29437/navigating-chinese-arbitration-law/.

[68] TANYA KROZAK, INTERNATIONAL COMMERCIAL ARBITRATION/MEDIATION AT CIETAC 1 (1998) (citing Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 ARB. INT'L 164 (1998)), *available at* http://cfcj-fcjc.org/clearinghouse/hosted/17451-international_commercial_arb.pdf.

during its *ex parte* caucuses, could be used (consciously or subconsciously) to their detriment if the arbitration is resumed.

Nor would the situation be assisted by a regulation similar to the Hong Kong ordinance which requires an arbitrator who has participated in an unsuccessful mediation to disclose to the other parties as much of the confidential information obtained during the mediation as the arbitrator considers material to the arbitral proceedings.[69] The possibilities that this provision provides for abuse of the system are obvious. Indeed, the only circumstances where a transition from mediation to arbitration appears to be "safe", would involve a complete change of neutrals, and this would mean an increased expenditure of time and money in bringing the new neutrals up to date on the facts in the case. Another "solution" would be to conduct the mediation without the use of any *ex parte* caucuses which, while reducing the potential for unfair disclosure of confidential information, would also severely diminish the effectiveness of the mediation proceeding.

The potential for missteps presented by Med-Arb is demonstrated by a recent case decided by a Hong Kong Court.[70] In that case an arbitral dispute in the PRC had moved from arbitration to mediation and, when that failed, back to arbitration and an award. The award was challenged on the grounds of public policy, since it was alleged that it was tainted by actual or apparent bias. The arbitral tribunal had formed a mediation panel consisting of the arbitrator appointed by the applicant, the secretary general of the arbitral commission and a third individual—a business executive who was believed to have influence over the respondents (who had never agreed to his appoint to the panel) The executive was directed to present the respondents with a settlement proposal and to "work on them" to accept it. The respondents eventually declined the settlement proposal and the arbitral tribunal found that the parties' original agreement was invalid. The court concluded that all of this contributed to an appearance of bias that rendered the award unenforceable.

III. TIME AND COST SAVING DEVICES

While time and cost savings can be realized in the arbitration hearing itself, they are also potentially available during the proceeding's *alpha* and *omega* periods—that is, before and after the hearing. For one thing, since scheduling an arbitration is not dependent on gridlocked court dockets and since the typical preliminary sparring by counsel—through discovery, motions and the like—commonplace in litigation, are not nearly as prevalent in arbitration—time and cost savings can be realized before the hearing commences. Similarly, post-hearing delays are usually minimized because of the finality that attaches to most arbitral awards and because of the relative ease of the award enforcement process.

A. "Chess-Clocking", "Hot-Tubbing" and Other Innovations

There are a number of practices that can assist in achieving an economical and efficient hearing.[71] And, a well organized case management conference presided over by an arbitrator who

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[69] Hill, *supra* note 63.

[70] *Gao Haiyan v. Keeneye Holdings Ltd.*, [2011] 3 H.K.C. 157 (C.F.I.).

[71] *See generally* Gabrielle Kaufmann-Kohler, *Online Dispute Resolution and its Significance for International Commercial Arbitration*, GLOBAL REFLECTIONS ON INT'L LAW, COM. AND DISP. RESOL., Nov. 2005, http://www.lk-k.com/data/document/online-dispute-resolution-and-its-significance-for-international-commercial-arbitration-global.pdf.

has strong case-management skills and attended by all participants, either in person or by telephone, teleconferencing etc., is a necessary early step.[72] It is good practice for the arbitrator to initially inquire if the parties have any desire to engage in settlement discussions or whether there is a possibility that an award can be rendered without a hearing on the basis of written documentation. Assuming that neither of these alternatives is chosen, standard procedural matters constitute agenda items that should be addressed in detail at the meeting—for example, the estimated length of the hearing, the issues that will be considered, the number of witnesses for each side, the method to be used for examining witnesses, the treatment of documentary evidence and the like. The understandings and tentative time durations attributed to these matters will, where appropriate, become benchmarks that the arbitrator can later refer to if chess-clock timing (discussed below) is used to monitor the fair allocation of time available to the parties.[73]

The following is a representative sampling of some of the methods used in the A/P (and elsewhere) to assist in the conduct of an efficient hearing:

- The Hong Kong Arbitration Ordinance (mentioned earlier) offers a good example of the enhanced ability of the arbitrator to exercise control over the proceeding. Even though the Ordinance relies heavily on the terms of the UNCITRAL Model Law it makes some modifications. Article 18 of the UNCITRAL Model Law, for example, gives the parties a "full" opportunity to present their cases. However, Section 46 of the Ordinance modifies this right by providing that the parties shall have a "reasonable" opportunity to do so, thus providing added discretion to the arbitrator in ruling on an issue that is regularly raised during the course of arbitral proceedings. Without this language, some arbitrators, out of an abundance of caution, may be more readily inclined to grant a party's request for extra time or some other concession in order to avoid the possibility of later criticism.

- The A/P region is generally familiar with and well disposed towards the time-saving technique of 'chess-clock' timing (each party has, say, 50% of the total time available, so that the hearing is concluded within its allotted period) although the arbitrator may allow added time under some circumstances.[74] Chess-clocking gives the parties an incentive for adhering to agreed upon schedules and provides the arbitrator with an objective method for controlling abuses.

- Submissions "on the record" refer to proceedings that are conducted entirely on the basis of the written record (sometimes supplemented by oral arguments). A modified on the record presentation is confined largely or entirely to written submissions, but permits witnesses to be orally examined with respect to their written submissions. Both of these processes are regularly used in A/P arbitrations.

- Witnesses "add to the costs, both when a witness statement is prepared and considered and when the witness attends to give oral evidence" Thus, suggests the ICC guide, limit witnesses to those "whose evidence is required on key issues."[75] Good advice, but sometimes difficult to enforce since most counsel would be inclined to contend that each witness that they offer is to some extent

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[72] *See* COMM'N ON ARBITRATION, INT'L CHAMBER OF COMMERCE, TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION (2007), and UNCITRAL, *Notes on Organizing Arbitration Proceedings*, 1996, U.N. Doc A/51/17; GAOR 29th Session for assistance in the planning phase of the proceeding.

[73] *See* Kaufmann-Kohler, *supra* note 71, at ¶ ¶ 31-34.

[74] A variant allocates time to discrete portions of the parties' presentations (e.g., cross examination of witnesses) so identified at the case-management conference, for more detailed chess-clocking.

[75] TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION, *supra* note 72 at ¶ 63.

vital to their case. These issues should be discussed and, if possible, resolved at the case-management conference. Joint stipulations of uncontested items are also an excellent method of shortening a witness list.

- "Hot-Tubbing" refers to expert witnesses being examined concurrently. This technique is employed regularly in international arbitrations in Hong Kong, Singapore, Korea, Malaysia and elsewhere in the A/P region. It is common for A/P tribunals to take a pro-active approach to expert evidence, particularly as it relates to C/E disputes. For example, there will often be a disagreement about what delay was caused to an infrastructure project, and by whom, and with what consequences. Delay experts are usually able to choose from a range of different analytical techniques. Thus, one party's expert may select a particular methodology, while the other may consider that a different technique is more suitable. If the arbitral panel simply issues an order for experts to meet, produce reports and be cross-examined, the tribunal is likely to find itself faced at the hearing with 'ships passing in the night'—two different procedures being advanced and little engagement between the two experts. However, arbitrators, particularly in Hong Kong and Singapore, now specifically require the experts to disclose at the case-management conference, which methodology they intend to use, and, if there are two different techniques being employed, to require each expert to use both techniques so that "like may be compared with like." In similar fashion, the experts will be requested to identify, in advance, the various assumptions they propose to build into their analyses so that as much common ground as possible can be achieved. Under these circumstances the Hot-Tubbing procedure permits simultaneous and meaningful examination of the experts so that ambiguities and other queries are resolved with reasonable dispatch.

A variant of Hot-Tubbing used in many United States C/E arbitrations as well as (though less commonly) in the A/P is having several party representatives with detailed knowledge of different aspects of a particular claim testify and be subject to cross examination as a group. Thus, for example, a subcontractor's field representative, its heavy equipment operator and its cost estimator, might present themselves simultaneously rather than seriatim with a resultant savings in time and an increase in efficiency.

Finally, the ICC guide states that it is helpful "to start with a presumption that expert evidence will not be required."[76] Hot-Tubbing is an effective way of insuring that only the essentials of expert opinions are submitted and considered by the arbitral panel.

IV. CONCLUSION

Judge Posner comments in his *Leatherby* opinion that, "[n]o one would dream of having a judicial panel composed of one part-time judge and two representatives of the parties,"[77] but in many arbitrations, especially international ones, this is a system that is time tested and reliable. And when, as Judge Posner also observes,[78] the subject matter expertise of the arbitral tribunal is added to the mix, the odds of the proceeding reaching a "swift, inexpensive and effective result" are significantly enhanced.[79] With this solid foundation and the willingness of the A/P states to incorporate the latest innovations and procedures into their proceedings the future of international arbitration and mediation in this dynamic area appears secure.

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[76] *Id.* at ¶ 65.

[77] *See Leatherby*, 714 F.2d at 680.

[78] *Id.* (noting "The professional competence of the arbitrator is attractive to the businessman because a commercial dispute usually possesses its own folkways, mores and technology").

[79] Goals that the *Leatherby* arbitration, which lasted three years and produced a hearing transcript of 16,000 pages, unfortunately did not attain.

I AGREED TO WHAT?: PROTECTING CONSUMERS FROM UNFAIR PRACTICES IN BINDING CONSUMER ARBITRATION

Laura Magnotta*

I. INTRODUCTION

On July 1, 2011 Maryland House Bill 442 was enacted into law.[1] The Act, entitled Consumer Protection –Transparency in Consumer Arbitrations Act, is aimed at protecting consumers who become parties to binding consumer arbitration, particularly through adhesion.[2] The Act requires that specified arbitration organizations collect, publish and make available information relating to binding consumer arbitration.[3] Additionally, the Act lays out specific guidelines for how and when the information is to be published.[4] Failure to comply with the requirements of the Act can result in the arbitration agreement being deemed unconscionable or unenforceable, but may not be "the sole reason to refuse to enforce an award made in consumer arbitration."[5] A prior attempt at similarly protecting consumers' interest in binding arbitration was introduced in the Maryland House of Delegates in 2010, was passed out of the House, but died in the Senate coming up one vote shy of passage in the Senate Finance Committee.[6] This article will discuss specific aspects of the new law, place the law within the context of other attempts to protect consumers in binding arbitration, and discuss the practical implications of the law.

II. CONSUMER PROTECTION – TRANSPARENCY IN CONSUMER ARBITRATIONS ACT

The Consumer Protection –Transparency in Consumer Arbitration Act applies "to an arbitration organization that performs an arbitration activity related to 50 or more consumer arbitrations during a five-year period."[7] As defined by the Act, "arbitration activity" includes participation in any one or more aspects of arbitration including "initiation, conduct, sponsorship, or administration of, or the appointment of an arbitrator."[8] Additionally, consumer arbitration is defined as "binding arbitration conducted in accordance with a consumer arbitration agreement."[9]

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[1] *See* H.B. 442, 428th Leg., Reg. Sess. (Md. 2011) (enacted) (codified at MD. CODE ANN., COM. LAW §§ 14-3901-3905 (West 2011)). H.B. 442 was crossfiled with S.B. 309 (*See* S.B. 309, 428th Leg., Reg. Sess. (Md. 2011) (enacted) (codified at MD. CODE ANN., COM. LAW §§ 14-3901 to -3905 (West 2011))).

[2] *See* Consumer Protection—Transparency in Consumer Arbitration Act, MD. CODE ANN., COM. LAW §§ 14-3901-3905 (West 2011).

[3] See i*d*.

[4] *See id*.

[5] *See* MD. CODE ANN., COM. LAW § 14-3905(b)(1)-(2) (West 2011).

[6] *See* H.B. 379, 427th Leg., Reg. Sess. (Md. 2010).

[7] MD. CODE ANN., COM. LAW § 14-3902 (West 2011).

[8] *Id.* § 14-3901(b).

[9] *Id.* § 14-3901(e)(1).

This does not include binding arbitration resulting from an agreement for property insurance, casualty insurance or surety insurance; arbitration according to "arbitration rules adopted by a securities self-regulatory organization and approved by the United States Securities and Exchange Commission"; or consumer arbitration involving an institution licensed by the Department of Health and Mental Hygiene if the agreement to arbitrate is not a mandated condition for admission into the institution.[10]

A. Required Information

Arbitration organizations that are subject to the Act are required to "collect, publish, and make available to the public…information regarding each consumer arbitration for which it performed an arbitration activity during the preceding five-year period."[11] The information required to be published includes: the name of the non-consumer party; whether the dispute involved goods, services, real property or credit; the type of claim or cause of action; which party prevailed; "the number of times during reporting period that the non-consumer party has been a party in a consumer arbitration for which the arbitration organization performed an arbitration activity"; the name of the attorney representing the consumer party; "the date the arbitration organization received the demand for the consumer arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or arbitration organization"; the type of disposition of the dispute; the amount of the claim, award or any other relief granted; the name of the arbitrator, their fee and the percentage of the arbitrator's fee allocated to each party; and the address of where the consumer arbitration was conducted.[12]

B. Publication Method

The required information is to "be reported beginning on the first day of the month following the month an arbitration organization becomes subject to this [Act]" and "shall be updated at least quarterly thereafter."[13] More specifically, to be made sufficiently available to the public, the required information shall be published in a "computer-searchable format that is accessible at the Internet Web site of the arbitration organization and may be downloaded without a fee."[14] The information shall also be made available in writing on request "at a fee that does not exceed the actual cost to the arbitration organization of copying the information."[15]

C. Uses for Information/Failure to Comply

The requirement for arbitration organizations to collect information regarding consumer arbitration can affect organizations in two main ways. First, the information provided by the arbitration organization as required by the Act "may be considered in determining whether a

[10] *See id*. § 14-3901(e)(2)(i)-(iii).
[11] *Id*. § 14-3903(a).
[12] *See id*. § 14-3903(a)(1)-(11).
[13] *Id*. § 14-3903(b)(1).
[14] *Id*. § 14-3903(c).
[15] *Id.*

consumer arbitration agreement is unconscionable or otherwise unenforceable under the law."[16] Second, while an arbitration organization's failure to comply with the provisions of the Act "may not be the sole reason to refuse to enforce an award made in a consumer arbitration," it "may be considered as a factor in determining whether a consumer arbitration agreement is unconscionable or otherwise unenforceable under the law."[17]

An arbitration organization's failure to comply with the Act allows "a consumer or the Attorney General [to] seek an injunction to prohibit an arbitration organization that has engaged in or is engaging in a violation of §14-3903…from continuing or engaging in the violation."[18] If the court issues an injunction or the arbitration organization voluntarily complies with §14-3903 after the action is filed, the organization is liable to the person bringing the action for an injunction for the person's reasonable attorney's fees and costs.[19]

D. Liability for Reporting

To encourage reporting of required information, the Act includes a provision that shields arbitration organizations from liability for reporting the information.[20] Under the Act, "[a]n arbitration organization is not liable for collecting, publishing, or distributing the information required under [the Act]."[21] This provision precludes a party whose information was published as required by the Act from suing the publishing arbitration organization.

III. ANALYSIS

The need to protect consumers in binding arbitration is not a new concept. Several cases and specific situations throughout the United States have highlighted the need for consumer protection in binding consumer arbitration particularly where the arbitration agreement is adhesionary. Issues arise as a result of how consumers, who are often forced into arbitrating their claims, are treated during the process. Without transparency in the consumer arbitration process, consumers are typically faced with a foreign process against an entity that has participated in the process numerous times and has the benefit of familiarity with the process, familiarity with the arbitrator(s) or arbitration organization, and institutional memory and resources.

The basis for issues arising out of binding consumer arbitration concerns the adhesionary nature of the arbitration agreements where consumers can either agree to the arbitration agreement or forego the transaction altogether. The fact that the contract is adhesionary does not make it *per se* unconscionable or unenforceable. The Supreme Court in *AT&T Mobility v. Concepcion* mentioned that adhesionary contracts remain enforceable because of the proliferation of their use.[22] The problems with these types of adhesionary arbitration agreements arise when

[16] *Id*. § 14-3904.
[17] *Id*. § 14-3905(b).
[18] *Id*. § 14-3905(c)(1).
[19] *See id*. § 14-3905(c)(2).
[20] *See id*. § 14-3905(a).
[21] *Id.*
[22] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011) ("[T]he times in which consumer contracts were anything other than adhesive are long past.").

either the consumer does not know that they have entered into an agreement to arbitrate their disputes, or, if they are aware of the agreement to arbitrate, they either 1) do not expect to need it, 2) do not fully understand the ramifications, or 3) value the benefits of the product or service over the costs of arbitration. This lack of knowledge on the part of the consumer allows non-consumers to navigate a system with which they are familiar in a way that is potentially harmful and unfair to the consumer.

This issue was more specifically addressed in *Engalla v. Permanente Medical Group, Inc.* In his concurring opinion, Justice Kennard noted the potential for unfairness in binding consumer arbitration where contracts are adhesionary.[23] This unfairness arises when businesses and/or arbitrators in binding consumer arbitration become repeat players in the arbitration system causing "arbitrators [to] consciously or unconsciously bias their decisions in favor of an organization or industry that hires them regularly as an arbitrator."[24] While the majority of the court in *Engalla* did not find that Permanente Medical Group's method of selecting arbitrations made the contract to arbitrate unconscionable, they did find that Permanente's practices were contrary to those of reputable neutral, third party arbitration organizations.[25] Subsequently, the California Supreme Court affirmed the need for neutral arbitrators in *Armendariz v. Foundation Health Psychcare Services, Inc.*[26]

To prevent the possibility of non-consumer parties taking advantage of the binding consumer arbitration process at the cost of the consumer, it is essential that consumer arbitration is made fair through the use of neutral and impartial arbitrators. Arbitration institutions have taken affirmative steps towards ensuring fairness and transparency in consumer arbitration by implementing protocols and other regulations requiring arbitrator neutrality.[27] In 1997, the National Consumer Disputes Advisory Committee promulgated recommendations for ensuring fairness in consumer arbitration entitled *Due Process Protocol for the Mediation and Arbitration of Consumer Disputes*, which were later adopted by the American Arbitration Association.[28] Principle three of the protocol addresses "Independent and Impartial Neutrals and; Independent Administration." The principle entitles all parties to arbitration procedures administered by an independent ADR institution and overseen by an independent and impartial

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[23] *See* Engalla v. Permanente Med. Grp., Inc., 938 P.2d 903, 926-927, 15 Cal. 4th 951, 987-988 (Cal. 1997) (Kennard, J., concurring) ("Finally, it is worth noting that new possibilities for unfairness arise as arbitration ventures beyond the world of merchant-to-merchant disputes in which it was conceived into the world of consumer transactions….").

[24] *Id*. at 927.

[25] *See id*. at 925 (majority opinion).

[26] *See* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 682 (Cal. 2000) (citing Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997)) (A mandatory employment arbitration agreement (similar to the mandatory consumer arbitration contract here) is lawful if it "(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum. Thus, an employee who is made to use arbitration as a condition of employment effectively may vindicate his or her statutory cause of action in the arbitral forum.").

[27] *See generally* AMERICAN ARBITRATION ASSOCIATION, CONSUMER DUE PROCESS PROTOCOL (1998) (a series of principles aimed at ensuring a fair process in consumer dispute resolution).

[28] *See id*., *Introduction: Genesis of the Advisory Committee.*

neutral.[29] Additionally, the principle also requires equality between consumer and non-consumer in selecting a neutral and that the chosen neutral discloses "any circumstance likely to affect impartiality…"[30]

Specific instances of conflicts of interest between arbitration organizations and non-consumer parties to consumer arbitration influenced the Maryland legislature's decision to enact a law aimed at protecting the consumer.[31] For example, in 2009, the Minnesota Attorney General sued the National Arbitration Forum (Forum) alleging that the Forum generated revenue by convincing creditors to include mandatory arbitration clauses and appoint the Forum as the arbitrator.[32] The Attorney General also alleged that the Forum, the country's largest provider of debt collection arbitration, financially affiliated itself with Mann Bracken, one of the country's largest debt collectors.[33] The Mann Bracken law firm, based in Maryland before its collapse in 2010, employed a debt-collection process that was inherently biased against consumers.[34] Mann Bracken took cases to the Forum which was "connected to Mann Bracken through a common ownership structure," where the arbitrators would almost always find in Mann Bracken's favor.[35] These actions, it was alleged, hid from consumers the fraudulent nature of these associations and the bias of their arbitrators.[36] The issue was settled with an agreement that the Forum cease to arbitrate credit card debt and other consumer collection disputes.[37]

The Maryland legislature was also influenced by a July 2010 Federal Trade Commission Report titled *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*.[38] To prevent bias and unfairness in binding arbitration, the Federal Trade Commission (FTC) recommended measures to increase transparency and fairness in the arbitration process. The measures included drafting contracts so consumers are aware of their choice to arbitrate, eliminating bias in the arbitration process and conducting arbitration so that consumers will be more likely to participate.[39] The FTC recommended that these measures be adopted by Congress to create a nationwide system requiring that debt collection arbitration decisions be reported and made public. Congress has yet to follow through and pass such legislation, leaving the states to protect their citizens. In addition to Maryland, California and the District of Columbia have enacted arbitration disclosure laws similar to those recommended by the FTC.[40]

In an attempt to protect consumers who are not participating in arbitration with an arbitration organization such as AAA and JAMS who have consumer protection safeguards in

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[29] *See id., Principle 3*.

[30] *See id., Principle 3.5*. Circumstances that might affect impartiality include: any bias or financial or personal interest which might affect the result of the ADR proceeding; or any past or present relationship or experience with the parties or their representatives, including past ADR experiences.

[31] *See S.B. 309 Fiscal and Policy Note: Consumer Protection - Transparency in Consumer Arbitrations Act*, Dept. Legis. Servs., 428th Leg., Reg. Sess. (Md. 2011).

[32] *See* Complaint at 2, Minnesota v. Nat'l Arb. Forum, No. 27CV0918550 (Minn. Dist. Ct. 2009) (settled out of court) [hereinafter "Complaint"].

[33] *See id*.

[34] *See* Jamie Smith Hopkins & Andrea K. Walker, *After the Fall: Collapse of Mann Bracken, One of the Largest-Debt Collector Law Firms, Lifts the Veil of an 'Oppressive' Industry*, BALTIMORE SUN, Mar. 21, 2010, at 1C.

[35] *See id.*

[36] *See* Complaint, *supra* note 32.

[37] *See Firm Agrees to End Role in Arbitrating Card Debt*, N.Y. TIMES, July 19, 2009, at B8.

[38] *See* S.*B. 309 Fiscal and Policy Note*, *supra* note 31.

[39] *See* S.*B. 309 Fiscal and Policy Note*, *supra* note 31.

[40] *See* S.*B. 309 Fiscal and Policy Note*, *supra* note 31.

place, the Maryland General Assembly enacted the Consumer Protection –Transparency in Consumer Arbitrations Act in an attempt to ensure fairness in binding consumer arbitration in all consumer arbitrations taking place in Maryland. As introduced by Delegate Samuel Rosenberg in the Maryland House of Delegates, House Bill 442 was aimed at equipping consumers with the tools to determine whether or not the arbitrator(s) hearing their case are neutral and to allow consumers to make an informed decision when choosing arbitrators.[41] Proponents of the bill commented that, unlike in court, there is no way to discover information about arbitrators and their decisions because that information is kept secret.[42] The Act solves this problem by requiring that information about arbitrators and their decisions are published, thereby uncovering information about arbitration organizations and increasing transparency.

Opponents of the bill argued that the bill could have negative effects on the consumers it is intended to protect. First, by requiring publication of arbitration decisions, the arbitration process becomes more like a typical courtroom legal proceeding, which is what the parties had contracted to avoid.[43] Second, publication of awards could invite burdensome and complicated discovery requests in subsequent disputes that could significantly increase the cost and time for arbitration, which is adverse to the central purpose of choosing arbitration.[44] Specific industries also had concerns with the need for confidentially in highly regulated industries such as healthcare.[45]

Practically speaking, the Act will allow consumers who become involved in consumer arbitration to examine information about arbitrators and their past decisions before choosing the arbitrator that will hear their case. Theoretically, this requirement should keep the arbitrators honest because arbitrators and arbitration organizations who want to maintain business and revenue will come to decisions in a fair and transparent way to make themselves more appealing to the parties for whom they wish to act as arbitrators. Moreover, the requirement opens the doors of the arbitration process to the consumers who are unfamiliar with how it works. Not only will this allow consumers to choose arbitrators who have a history of fair decision-making, it will also give them insight into how the process works.

The requirements may also benefit the state of Maryland by revealing details of arbitration organizations' decisions, thereby allowing the state to take action against arbitration organizations that are biased in favor of non-consumers. As in the case brought against the Forum by the Attorney General of Minnesota, Maryland may be able to take action against arbitration organizations who habitually decide in favor of repeat players in an attempt to bolster their business. This could prevent issues of bias and unfairness from ever reaching the consumer. The required disclosures may also give the Maryland General Assembly greater insight into the consumer arbitration industry, allowing them to enact further regulations if necessary.

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[41] *See Hearing on H.B. 442 Before the H. Comm. on Economic Matters*, 428th Leg. (Md. 2011) (oral statement of Delegate Samuel Rosenberg, Sponsor of H.B. 442, at 1:16:30, *available at* http://mgahouse.maryland.gov/House/Viewer/?peid=790f93a2b9174df299e187ad54255d751d (noting that the purpose of the bill was to prevent someone who ruled against consumers in an overwhelming number of cases from being the required arbitrator in mandatory consumer arbitration).

[42] *See id*. (oral statement of Paul Bland at 1:19:00).

[43] *See id.* (oral statement of Robin Schavitz, Representative of Health Facilities Association of Maryland, at 1:36:40).

[44] *See id.* (oral statement of Susan O'Brien, Vice President with Health Facilities Association of Maryland at 1:34:00).

[45] *See id.* (oral statement of Robin Schavitz, Representative of Health Facilities Association of Maryland at 1:35:50) (noting the secretive nature of healthcare decisions and recommending that the provisions of the Act not apply to long term care facilities).

The Act is also designed to insulate the reporting arbitration organizations from being sued by parties whose information is revealed pursuant to the Act. By relieving the arbitration organization from liability for disclosing information about the parties to arbitration, the Act protects arbitration organizations from the financial and reputational effects that revealing private information about the parties for whom they arbitrate may create.[46] This provision may work to encourage arbitration organizations to disclose the required information rather than risk not reporting to protect their reputations and prevent lawsuits for breaching confidentiality. However, issues may arise in implementing this provision where consumer arbitration contracts include a confidentiality clause that prohibits disclosure of the same information required by the Act. Where the Act and the language of the contract contradict one another, the courts will likely need to determine which prevails. Inviting the courts into the arbitration process defeats the purpose of choosing to enter into arbitration as opposed to bringing the issue before the court. Once the courts get involved in determining whether the requirements of the Act overcome the provisions of the contract, issues regarding the parties' freedom of contract arise. Section 2 of the Federal Arbitration Act (FAA) declares that a written agreement to arbitrate in any contract involving interstate commerce or a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[47] Additionally, section 4 of the FAA allows a party to such an arbitration agreement to "petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."[48] If the courts respect the parties' freedom of contract as called for in the FAA, all non-consumers will likely include non-disclosure or confidentiality provisions in their adhesionary arbitration contracts to ensure that their information is not disclosed under the Act. This would, in effect, destroy any protections the Act was enacted to create.

The act may also negatively affect arbitration organizations' willingness to participate in consumer arbitration. If the organizations find that reporting requirements are too burdensome or may uncover unsavory details about the organization, they may choose not to participate in consumer arbitration or purposely fail to disclose the required information and risk the penalties to protect their reputations. Similarly, arbitration organizations may fear implicating themselves or revealing too much to the public to such an extent that they leave the business altogether, reducing competition among arbitration organizations and increasing the price of arbitration. In addition, the new reporting requirements may also increase the cost of arbitration due to the increased requirements placed on the organization. While these risks may be a concern to the arbitration organizations, the benefits that the consumers will experience in the form of increased transparency, fairness and accountability in binding consumer arbitration outweigh the potential risks.

IV. CONCLUSION

With binding and often adhesionary consumer arbitration provisions becoming the norm in consumer agreements, consumers are often forced to participate in an adjudicatory process with which they are unfamiliar. As a result, the businesses against whom they are forced to

[46] *See* MD. CODE ANN., COM. LAW, § 14-3905(a).
[47] *See* Federal Arbitration Act, 9 U.S.C. § 2 (1925).
[48] *Id*. § 4.

arbitrate are often more advantageously situated because, as repeat players in consumer arbitration, they are in the position to compel arbitration organizations to find in their favor in exchange for continued business and revenue. Consumers are left to fend for themselves in a system that is essentially set up for them to fail. As a result, consumer arbitration has the potential to become highly unfair to the consumer who has no choice but to participate or forego the business transaction altogether.

The Consumer Protection –Transparency in Consumer Arbitrations Act was enacted to prevent these fraudulent and often secretive relationships between the non-consumers and the arbitration organizations by requiring that the organizations disclose and publish information about how they decide consumer arbitration cases. This allows consumers to make informed decisions regarding the appointment of the arbitrator to their cause and ensures neutrality and fairness in the consumer arbitration process. While the regulations place a greater burden on the arbitration organization by requiring them to publish information in the specified manner, the benefits to the consumer and the protection of the reputation of the arbitration process as a whole can be seen to outweigh the costs to the arbitration organizations.

AN ARBITRATION BODY FOR THE INTERNATIONAL SEOUL: KCAB'S NEW RULES

Alexander Wiker*

I. INTRODUCTION: ARBITRATION IN THE REPUBLIC OF KOREA

On September 1, 2011, the Korean Commercial Arbitration Board's (KCAB) new domestic[1] and international[2] arbitration rules came into effect.[3] This article outlines key provisions in the revised International Arbitration Rules (International Rules) and changes from the previous to the current regime.

A. Modern Korean International Arbitration Law

Beginning in the 1960s, South Korea's international arbitration law has undergone considerable development. To date, Korea is a party to most major international arbitration treaties, including the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the Washington Convention)[4] and the New York Convention.[5] Domestically, modern Korean commercial arbitration regulation began in 1966, with the enactment of the Korean Arbitration Act.[6] This Act was extensively revised in 1999 to incorporate the UNCITRAL Model Law, thereby making Korea among the first East Asian nations to enact the Model Law.[7] In 1970, the Ministry of Industry and Commerce (currently Ministry of Commerce, Industry, and Energy) formed the KCAB – the only officially recognized arbitral institution in Korea.[8] The KCAB was established by and administers arbitration in accordance with the Korean Arbitration Act[9] and Korean Supreme Court-approved rules governing arbitral proceedings. The KCAB (formerly the Korean Commercial Arbitration Association, KCAA) first promulgated a combined set of rules for domestic and international

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[1] *See generally*, KOREAN COMMERCIAL ARBITRATION BOARD (KCAB), DOM. ARB. R. (2011) (S. Kor.).

[2] *See generally*, KCAB, INT'L ARB. R. (2011) (S. Kor.).

[3] *See id.*

[4] *See* ICSID, Second Annual Report 1967/1968, at 7, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/01/17/000011823_20060117164452/Rendered/PDF/34727.pdf. Korea signed the Washington Convention (or ICSID Convention) on Apr. 18, 1966, which came into force on Mar. 23, 1967.

[5] *See* UNCITRAL, *Status: 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. In 1973, Korea acceded to the New York Convention, which entered into force in Korea the same year.

[6] Arbitration Act, Act No. 6083, Dec. 31, 1999 (S. Kor.) (promulgated by Act No. 1767 on Mar. 16, 1966 and amended on Dec. 31, 1999 to largely adopt the UNCITRAL Model Rules).

[7] *See* Thomas Moxham, *International Arbitration in Korea*, INFOMAG (2011) (unpublished manuscript) (on file with author).

[8] *See id.*

[9] Arbitration Act (1999), arts. 40-41, add. 3.

arbitration in 1966 (Arbitration Rules).[10] In 2007, the KCAB substantially revised its arbitration rules and enacted separate rules for governing domestic (Domestic Rules) and international arbitration proceedings (International Rules) in order to encourage foreign parties to arbitrate disputes in Korea.[11] Failing to attract international arbitration, the Korean Supreme Court amended both the domestic and international arbitration rules on June 29, 2011, which became effective on and from September 1, 2011.

From 1967 to 2010, the KCAB handled a total of 4,317 arbitration matters.[12] Of the 316 arbitrations registered with the KCAB in 2010, seventy-three (23%) involved non-Korean parties.[13] In spite of the relatively large number of international cases, only two cases have ever been submitted under the previous international arbitration rules.[14]

B. Impetus Behind the New Rules

The primary reason parties seldom utilized the initial International Rules is that the original domestic KCAB Arbitration Rules remained the default rules for all arbitrations under the KCAB, regardless of whether the underlying disputes involved domestic or international parties.[15] Previously, the International Rules applied only if the parties had specifically designated the KCAB's International Rules in the arbitration agreement or another written agreement between the parties.[16] The Domestic Rules were not designed with international parties in mind. As a result, foreign parties agreeing to KCAB arbitrations have been forced to arbitrate under less than hospitable conditions designed to govern domestic disputes. For instance, Korean was the default language, arbitrators were chosen explicitly from the KCAB roster, and time lines were stricter than under the International Rules.[17]

In 2011, along with Korea's entrance into a revolutionary free trade agreement with the European Union, Korea has endeavored to improve international arbitration procedures. In revising the Domestic and International Rules, the key motivation was to create "a clear demarcation between the domestic and international rules so as to promote international arbitration."[18] Additionally, the KCAB has amended the old International Rules with the goals of improving reliability, efficiency, and cost-effectiveness of international arbitration services.[19]

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[10] *See* Moxham, *supra* note 7.

[11] *See* Tom Moxham, *An Introduction to International Commercial Arbitration in Korea*, Global Law & Society Forum, Kangwon University (Sept. 29, 2011).

[12] *See id*.

[13] *See id*. The USA, Germany, and Japan have brought the highest number of international arbitration cases in Korea, respectively. Most international cases involve claims of relatively low dollar amounts between USD 10,000 and 500,000. *Id*.

[14] *See* Clemmie Jepson-Turner, *KCAB Unveils International Rules*, GLOBAL ARB. REV. (Oct. 27, 2011), http://www.globalarbitrationreview.com/news/article/29914/.

[15] *See* Benjamin Hughes & Beomsu Kim, *The Asia-Pacific Arbitration Review 2012: Country Chapters: South Korea*, GLOBAL ARB. REV. (2011), http://www.globalarbitrationreview.com/reviews/38/sections/135/chapters/1417/south-korea/.

[16] *See id*.

[17] *See id*.

[18] *See* Jepson-Turner, *supra* note 14 (quoting Tom Moxham).

[19] *See* Hughes and Kim, *supra* note 15.

II. NEW RULES

A. Reliability

1. Refined Scope

The revised International Arbitration Rules came into effect on September 1, 2011. Accordingly, the International Rules automatically apply to all arbitration agreements made after that date.[20] For arbitration agreements made on or prior to September 1, 2011, unless the parties agree to apply the new International Rules, the former rules will apply even when the request for arbitration is submitted after September 1, 2011.[21] An agreement to apply the revised International Rules after September 1, 2011 will not affect the validity of prior arbitration proceedings.[22]

The revised International Rules apply in two situations: where the parties have agreed in writing to refer their disputes to arbitration under the revised International Rules, and where the parties have agreed in writing to refer their disputes to arbitration before the KCAB and the arbitration is an "International Arbitration."[23] "International Arbitration" refers to an arbitration where either at least one of the parties at the time of conclusion of the arbitration agreement has its place of business in any State other than Korea, or the place of arbitration is any State other than Korea.[24] In comparison, the 2007 International Rules applied only "where the parties ha[d] agreed in writing to refer their disputes to international arbitration under the KCAB International Arbitration Rules."[25] Similarly, the revised Domestic Arbitration Rules (Domestic Rules) have been modified to reflect the new conditions for default application of the revised International Rules. Now, the Domestic Rules only apply by default to either arbitrations where parties have expressly agreed to apply the Domestic Rules or "domestic arbitrations."[26] Reflecting the new clear demarcation between domestic and international rules, the name of the Domestic Rules has been changed from "Arbitration Rules" to "Domestic Arbitration Rules."

2. Arbitration Committee

The revised International Rules extend the function of the International Arbitration Committee, which is composed of local and international arbitrators and plays a consultative role to the Secretariat.[27] As in the prior International Rules, the KCAB must consult the Committee regarding the challenge, replacement, or removal of arbitrators.[28] New to the revised

[20] INT'L ARB. R. (2011), art. 3, supp. prov.
[21] *Id*.
[22] *Id*.
[23] *Id*. art. 3.
[24] *Id*. art. 2.
[25] KCAB, INT'L ARB. R. (2007), art. 3 (S. Kor.).
[26] *See* DOM. ARB. R. (2011), arts. 2-3. The KCAB defines "domestic arbitrations" as arbitrations between parties having their principal offices or permanent residences in the Republic of Korea.
[27] INT'L ARB. R. (2011), art. 1(3).
[28] *Id*. arts. 1(3), 13, 14.

International Rules, the KCAB may now consult the Committee during the appointment of arbitrators.[29]

B. Efficiency: Expedited Procedures

The revised International Rules now provide for expedited procedures, an option previously available only under the Domestic Rules.[30] The expedited procedures apply automatically where the parties agree or where the claim amount does not exceed 200 million Korean won (approximately USD 175,000).[31] However, if a claim is increased to exceed 200 million won or a counterclaim exceeds 200 million won, then the expedited procedures will not be used, unless the parties agree otherwise.[32]

The expedited procedures establish three timesaving provisions. One, such disputes are settled by a sole arbitrator, appointed by the KCAB Secretariat from its roster.[33] If the dispute is under 200 million won and the arbitration agreement calls for three arbitrators, the Secretariat may "encourage" the parties to agree to refer the case to a sole arbitrator.[34] Two, disputes are to be settled by documents only or, upon party request or panel discretion, through recourse to a single hearing. For disputes under 20 million won, the dispute will proceed by default without a hearing.[35] Where the Arbitral Tribunal deems necessary, it may hold subsequent hearings, or require further submission of documents after the hearing.[36] Three, the award must be rendered, in summary form, within three months from the date of constitution of the tribunal, subject to extension only at the Secretariat's discretion.[37]

C. Cost-Effectiveness

Administrative fees under the revised International Rules are identical to the Domestic Rules, with a cap at 150 million won (approximately USD 32,000).[38] In contrast, arbitrator fees have been increased from the prior International Rules. Under the previous International Rules, arbitrator fees were relatively low, ranging from USD 250 to USD 500 per hour.[39] Now, fees are determined by the Secretariat based on the amount in dispute and considering the nature of the dispute, time spent by an arbitrator(s), arbitrator experience and other relevant factors.[40] The fees now are approaching that of established international arbitration institutions. For instance,

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[29] *Id*. arts. 1(3), 12.

[30] *See id*. arts. 38-44; DOM. ARB. R. arts. 56-60.

[31] INT'L ARB. R. (2011), art. 38.

[32] *Id*. art. 39.

[33] *Id*. art 40.

[34] *Id*. art 42.

[35] *Id*.

[36] *Id*. arts. 41-42.

[37] *Id*. art. 43.

[38] *See* DOM. ARB. R., sched. fees; INT'L ARB. R. (2011), app. 1 art. 2.

[39] *See* Sidley Austin LLP, *Promising New International Arbitration Rules in Korea*, INT'L ARB. UPDATE FOCUS ON ASIA (May 2007), *available at* http://www.sidley.com/files/News/f8a224dd-c1ce-428f-a0ab-04a50384903b/Presentation/NewsAttachment/73efc124-bdbf-4611-b82b-04dcf22f78e8/IntlArbMay0307v2.pdf. The 2007 International Rules heralded the first substantial increase in international arbitrator fees. Under the 2000 Rules, arbitrators could only receive from KRW 800,000 to KRW 3.9 million (approx. USD 800 to USD 4,000). *Id*.

[40] INT'L ARB. R. (2011), app. 2 art. 1.

arbitrator fees for disputes between one and five billion won range between USD 6,000 and USD 62,000.[41] Additionally, the revised International Rules do not place a ceiling on arbitrator fees.

D. Other Important Provisions

1. Language

Provisions on determining the language of the award and arbitration have not changed from previous versions of the rules. For arbitrations under the revised International Rules, the tribunal determines the language(s) of the arbitration, unless parties agree otherwise.[42] Comparatively, under the Domestic Rules, Korean remains the default language, unless agreed otherwise by the parties.[43] If one of the parties is non-Korean, both Korean and English languages "may" be used during the proceeding and for the award.[44]

2. Clarification of Arbitral Awards

Under the International Rules, the tribunal must render its award within forty-five days from the date final submissions are made or the hearings are closed, whichever comes later.[45] Within thirty days of the rendering of an award, the tribunal may, upon its own initiative or by party request, correct a clerical, computational, typographical, or similar error contained in the award.[46] In contrast, under the Domestic Rules, the tribunal has discretion to correct an award at any time after the award is rendered (although parties have only thirty days to request a correction).[47] Furthermore, under the Domestic Rules, parties may request the tribunal to make an additional award as to claims presented in the arbitration proceedings but omitted from the award.[48]

III. AN OVERALL IMPROVEMENT

On the one hand, the revised International Rules are certainly a progressive step for South Korean international arbitration law. Most importantly, demarcating the revised International Rules as default for non-Korean parties will certainly ensure increased arbitration under the revised International Rules in the future. Under the revised International Rules, foreign parties

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[41] *See id*. Compare this to Hong Kong, where Hong Kong International Arbitration Centre (HKIAC) arbitrator fees for disputes of similar dollar amounts range from USD 10,750 to USD 100,000. *See* HKIAC ADMINISTERED ARBITRATION RULES, sched. fees (2005), *available at* http://www.hkiac.org/index.php/en/aribtration-rules-a-guidelines/hkiac-administered-arbitration-rules/46-hong-kong-international-arbitration-centre-administered-arbitration-rules-2#3.1.

[42] INT'L ARB. R. (2011), art. 24.

[43] DOM. ARB. R., art. 50.

[44] *Id*.

[45] INT'L ARB. R. (2011), art. 33. In contrast, domestic awards must be rendered within thirty days of the closing of hearings. DOM. ARB. R., art. 48.

[46] INT'L ARB. R. (2011), art. 36.

[47] DOM. ARB. R., art. 54(1).

[48] *Id*. art. 54(3).

benefit from a system designed for their specific needs. The amended scope of application and arbitrator fee schedule bring the KCAB's rules closer in line with other established international arbitration administrative agencies.[49] While KCAB overall fees remain relatively low, increased arbitrator fees may attract higher quality arbitrators. Overall, the new expedited procedures are clearly a positive development, fulfilling a procedural necessity.

On the other hand, the revised International Rules have been criticized on several grounds.[50] In particular, the expedited procedures create a number of problems. The expedited procedures apply by default to disputes less than 200 million won.[51] Not only does this preempt party choice of proceedings, but also the expedited procedure can be easily – and definitively – thwarted by a party simply amending a claim or counterclaim to exceed 200 million won. Notwithstanding the ease of avoiding expedited procedures altogether, parties may also be less than willing to agree to a compelled expedited ruling under rules that have only been used in two disputes ever. Furthermore, disputes under 20 million won are to be settled without a hearing by default.[52] Abrogating party choice to have a hearing without express consent could cause problems for the award's enforceability. Also problematic is the KCAB's feeble ability to "encourage" parties to refer the case to a sole arbitrator, as requisite under the expedited procedures if parties have explicitly agreed upon a tripartite tribunal.[53] Where the purpose is to increase judicial efficiency, merely "encouraging" adversarial parties to agree opens the door to considerable delay.

IV. CONCLUSION

South Korea has made great strides in becoming a competitive forum for international arbitration. In a recent review of eighty-seven countries comparing regulation of foreign direct investment, the World Bank ranked South Korea highly by both regional and global indexes.[54] Additionally, Korean Supreme Court decisions have been invariably pro-arbitration, a fact that bodes well for enforcing arbitral awards in Korea.[55] Still, Korean legal infrastructure remains lacking in many areas necessary to attract international arbitration.[56] The KCAB's revised International Arbitration Rules aim to improve reliability, efficiency, and cost-effectiveness of international arbitrations in Korea in order to attract increased foreign arbitrations. Overall, the rules are a step in the right direction but remain short of perfection.

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[49] For instance, in Japan the Japan Commercial Arbitration Association (JCAA) sets arbitrator fees between JPY 30,000 and JPY 80,000 per hour (approx. USD 400 to USD 1,000 per hour). *See* JCAA REGULATIONS FOR ARBITRATORS REMUNERATION, art. 3 (2008).

[50] *See* Hughes & Kim, *supra* note 15.

[51] *See* INT'L ARB. R. (2011), art. 38.

[52] *Id*. art. 42.

[53] *See id*. art. 40(2).

[54] World Bank Group, *Investing Across Borders, 2010*, at 122, *available at* http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf.

[55] *See* Moxhan, *supra* note 7.

[56] For instance, under the Attorney-at-Law Act, a foreign attorney who is not qualified to practice law in Korea may not represent parties in arbitration proceedings, and may face criminal sanctions if he or she does so. Also, online arbitration is not available in Korea, although the KCAB is considering it. Moreover, on average, it takes around twenty-five weeks to enforce an arbitration award rendered in Korea, from filing an application to a writ of execution attaching assets (assuming there is no appeal), and 23 weeks for a foreign award. Finally, the KCAB's English website is in serious need of improvement: wrought with missing and dead links, unfinished pages, and unresponsive or nonexistent contacts. *See id*.

THE NEW FRENCH ARBITRATION LAW: ONE STEP FORWARD, TWO STEPS BACK?

Jesse Baez *

I. INTRODUCTION

France is home to the International Chamber of Commerce, and is viewed around the world as a major center for international arbitration. Due to its importance to international arbitration, any changes made to French arbitration law are of great interest to legal practitioners around the world. In January 2011 the French government issued Decree No.2011-48 of 13 January 2011 concerning changes to French arbitration law. The goal of the Decree is to reform French domestic and international arbitration.[1]

The arbitration reform is embodied in Articles 1442 through 1525 of the French Code of Civil Procedure. [2] Title I deals with changes to domestic arbitration,[3] while Title II addresses international arbitration.[4] The additions to the law incorporate three developments into the French Civil Code: case law principles that have developed since the last major arbitration reforms of 1980-1981, provisions targeted at making arbitration more efficient, and imported features from other legal systems. [5]

One of the more important changes in French arbitration law concerns "the judge acting in support of arbitration." This "*Juge'd'appui*" feature of the Decree is a codification of the principles developed in French case law. [6] This role falls to the President of the relevant *Tribunal de Grande Instance* in domestic arbitration and to the President of the *Tribunal de Grande Instance* of Paris in international arbitration.[7] There are other important codifications derived from French case law principles such as the recognition of arbitration "by reference" to a document in which it is contained, the autonomy of the arbitration clause, and the recognition of the *kompetenz-kompetenz* principle.[8] Other provisions aim at increasing the efficiency of the arbitration process, including prohibiting appeal of an award in domestic arbitration unless the parties agree to do so, granting the arbitrator authority to enjoin the parties to produce evidence or order provisional measures if necessary, allowing international arbitration agreements to not have any requirements as to their forms, eliminating the provision that an application to set aside an

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[1] JEAN-PIERRE ANCEL, *Introduction* to THE JANUARY 2011 DECREE ON THE NEW FRENCH ARBITRATION LAW 9 (Emmanuel Gaillard et al. trans., 2011).

[2] Décret n° 2011-48, arts. 1442-1527 du 13 janvier 2011 portant réforme de l'arbitrage [Decree No. 2011-48, arts. 1442-1527 of January 13, 2011 on the new French arbitration law], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] n° 0011, Jan. 14, 2011, p. 777-780 [hereafter "Decree No. 2011-48"].

[3] *Id.* arts. 1442-1503.

[4] *Id.* arts. 1504-27.

[5] *See* ANCEL, *supra* note 1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

award or appeal against an enforcement order suspends the enforcement of that award, and adopting the concept of estoppel. [9]

While some of the new provisions do increase the efficiency and autonomy of French domestic and international arbitration, others in fact impede arbitration's efficiency and autonomy in a significant way. Thus, the reforms are an improvement in some respects, and a digression in others.

II. DECREE NO. 2011-48 OF 13 JANUARY 2011 ON THE NEW FRENCH LAW ON ARBITRATION

A. Title I: Domestic Arbitration

1. The Arbitration Agreement

Title I, which encompasses Articles 1442 to 1503 describes the domestic component of the new arbitration law. Arbitration can be in the form of a clause or a submission agreement. Arbitration is defined as "an agreement by which the parties to one or more contracts undertake to submit to arbitration disputes which may arise in relation to such contracts,"[10] and a submission agreement is defined as "an agreement by which the parties to a dispute submit such dispute to arbitration."[11] Arbitration agreements must be in writing, and can be a written communication between the parties, or a document referred to in the main agreement.[12] An arbitration agreement is required to designate the arbitrator or arbitrators, or provide a procedure for their appointment.[13] Parties may also choose to use the procedures described in Articles 1451 to 1454.[14] In addition, parties in international and domestic arbitration may submit disputes to arbitration even if proceedings are pending before a court.[15] Article 1447 codifies the separability doctrine which applies to domestic and international arbitration. The French separability doctrine states that domestic and international arbitral agreements are independent of the contracts they relate to, and will not be affected if the contract is void.[16] Moreover, a court must decline jurisdiction when a dispute subject to either a domestic or international arbitration agreement is brought before it, except when the arbitration agreement is manifestly void or not applicable.[17] Parties also have the right to provisional measures when an arbitral tribunal has not been constituted. In this type of situation a party has the right to apply to a court for provisional or conservatory measures, as well as for measures regarding the taking of evidence. Any application for provisional or conservatory measures is to be made to the president of the *Tribunal de Grande Instance* or the *Tribunal de Commerce*.[18]

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[9] *Id.* at 9-10.
[10] Decree No. 2011-48, art. 1444.
[11] *Id.*
[12] *Id.* art. 1443.
[13] *Id.* art. 1444.
[14] *Id.*
[15] *Id.* art. 1446.
[16] Decree No. 2011-48, 1447.
[17] *Id.* art. 1448.
[18] *Id.* art. 1449.

2. The Arbitral Tribunal

The selection and removal of the arbitral tribunal and is described in Articles 1450 through 1477. The majority of this Chapter, from Articles 1452 through 1460 applies to both international and domestic arbitrations. Only a natural person with full capacity to exercise his or her rights may act as an arbitrator, and when an arbitration agreement designates a legal person, only this person will have the power to conduct the arbitration.[19] An arbitral tribunal must be composed of either a sole arbitrator or an odd number of arbitrators. Furthermore, if the agreement provides for an even number of arbitrators, an additional one will be appointed by the party; otherwise the additional arbitrator will be appointed by the other arbitrators or, failing this, by the judge acting in support of arbitration.[20] The reforms also provide a mechanism for the appointment of arbitrators if the parties fail to agree on the procedure for appointing the arbitrators. If there is a sole arbitrator and the parties disagree on the arbitrator, the person administering the arbitration or the judge acting in support of the arbitration makes the appointment. In addition, when there are three arbitrators each party will appoint an arbitrator, and these two arbitrators in turn will appoint a third arbitrator. If appointment by the two arbitrators fails, the person responsible for administering the arbitration or the judge acting in support of the arbitration will appoint the third arbitrator,[21] if there are more than two parties subject to the dispute and all parties involved fail to agree on the procedure for appointing the arbitrators, either the person responsible for administering the arbitration or the judge acting in support of arbitration must appoint the arbitrators.[22] Any other dispute involving the composition of the arbitral tribunal is again resolved by either the person administering the arbitration or the judge acting in support of arbitration. [23] The judge acting in support of the arbitration also has the power to declare that no arbitrator appointment is necessary if an international or domestic arbitration agreement is either manifestly void or inapplicable.[24]

Articles 1456 to 1459 define the scope of the arbitrator's mandate. These provisions state that once the arbitral tribunal is composed, the arbitrators' have accepted their mandate. Prior to this, however, arbitrators are mandated to disclose any circumstance that impacts their impartiality or independence. If the arbitrator's removal is not agreed upon by the parties, his or her removal is decided by the person responsible for administering the arbitration or the supporting judge.[25] Arbitrators must carry out their mandate until it is complete, unless they become legally incapacitated or there is a legitimate reason for their refusal to act or resignation.[26] Finally, arbitrators can only be removed through the unanimous consent of the parties.[27]

Article 1459 explains that "the judge acting in support of arbitration", is the President of the relevant *Tribunal de Grande Instance*. The provision defines the supporting judge's jurisdiction: he or she may rule on applications made on the basis of Articles 1451 to 1454, and may apply Article 1455 if necessary. The arbitration agreement determines which court has

[19] *Id.* art. 1450.
[20] *Id.* art. 1451.
[21] *Id.* art. 1452.
[22] Decree No. 2011-48, art. 1453.
[23] *Id.* art. 1454.
[24] *Id.* art. 1455.
[25] *Id.* art. 1456.
[26] *Id.* art. 1457.
[27] *Id.* art. 1458.

jurisdiction, and if it does not do so then jurisdiction lies with the court where the seat of the arbitral tribunal is set or if the agreement is silent on this, where the party resisting the application resides.[28] Parties to international and domestic arbitration, as well as the arbitral tribunal itself, have a right to apply to the judge supporting arbitration to have a decision made as an expedited proceeding. Moreover, any decision made by the judge supporting arbitration cannot be appealed. However, an Article 1455 decision by a supporting judge may be appealed.[29] The last Article of this Chapter, 1461, states that any provision that contradicts the rules in Chapter II will be considered invalid. [30]

3. Arbitral Proceedings

A dispute can be submitted to arbitration by either of the parties or jointly.[31] Moreover, if the arbitration agreement lacks a time limit, the tribunal's mandate is limited to six months. However, in either domestic or international arbitration this time limit may be extended either by agreement by the parties or by the judge acting in support of arbitration.[32] The arbitral tribunal defines the procedure for the arbitration, however fundamental principles of French court proceedings will apply to domestic arbitration proceedings. [33] Moreover, in both domestic and international arbitration parties and arbitrators will act diligently and in good faith in the conduct of proceedings. In addition, arbitral proceedings are confidential unless otherwise agreed to by the parties. [34]

Articles 1465 to Articles 1472 apply to domestic and international arbitration, and contain the most important provisions of this Chapter. First, Article 1465 recognizes the *kompetenz-kompetenz* principle, which means that domestic and international arbitral tribunals have exclusive jurisdiction to rule on objections to their jurisdiction.[35] Second, if a party, without good cause, fails to object to any irregularity in the arbitral tribunal in a timely fashion, they waive their right to object to the irregularity. [36] Third, arbitral tribunals have the power to take necessary provisional or conservatory measures, and attach penalties to these orders. Furthermore, a tribunal may amend any provisional or conservatory measure it has ordered. However, courts reserve the power to order conservatory attachments and judicial security. [37] Fourth, if evidence is under the control of a third party, parties subject to the arbitration agreement may, with leave from the arbitral tribunal, have the third party summoned before the *President of the Tribunal de Grand Instance* to obtain the evidence. The President has the power to order production of the evidence and attach penalties if necessary. This order may be appealed within fifteen days of service of the order.[38] Fifth, the arbitral tribunal has the power to rule on a

[28] Decree No. 2011-48, art. 1459.
[29] *Id.* art. 1460.
[30] *Id.* art. 1461.
[31] *Id.* art. 1462.
[32] *Id.* art. 1463.
[33] *Id.* art. 1464.
[34] *Id.*
[35] Decree No. 2011-48, art. 1465.
[36] *Id.* art. 1466.
[37] *Id.* art. 1467-1468.
[38] *Id.* art. 1469.

claim of forgery or request for verification of handwriting.[39] Finally, the tribunal also has the power to stay the proceedings.

4. The Arbitral Award

For domestic arbitration, the arbitral tribunal must decide the dispute in accordance with the law unless empowered to rule as *amiable compositeur*.[40] In addition, in both the international and domestic arenas, the arbitral tribunal's deliberations must be confidential. [41] For both international and domestic arbitration, the award must state the names of the parties and their domicile or headquarters, the names of the counsel who represented the parties, the names of the arbitrators, the date on which the award was made and the place where it was made. [42] Both domestic and international arbitral awards must set forth the claims and arguments of the parties, and the award must state the reasoning behind it.[43] Article 1484 has important estoppel significance for international and domestic arbitration. The provision states that an arbitral award will be res judicata with regard to the claims adjudicated, and that the award may be declared provisionally enforceable.[44] A domestic or international arbitral tribunal is no longer vested with power to rule on the claims adjudicated in that award once an award is made. Furthermore, upon application of a party an arbitral tribunal can correct clerical errors or omissions, interpret the award, or make an additional award where it failed to rule on a claim. If the international or domestic tribunal can no longer be reconvened, and if the parties can't agree on a new tribunal, the above powers are vested in the court that would have had jurisdiction if there was no arbitration.[45] Moreover, any appeal made under Article 1485 and any decision amending the award must be made within three months of application to the arbitral tribunal, although this may be extended by agreement between the parties.[46]

5. Enforcement

An award can only be enforced with an enforcement order issued by the *Tribunal de Grande Instance* of the place where the award was made.[47] Furthermore, enforcement proceedings will not be adversarial. In addition, an enforcement order will not be granted where an arbitral award is contrary to public policy. Any order denying enforcement must state why the award was denied. [48]

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[39] *Id.*
[40] *Id.* art. 1478.
[41] Decree No. 2011-48, art. 1479.
[42] *Id.* art. 1481.
[43] *Id.* art. 1482.
[44] *Id.* art. 1484.
[45] *Id.* art. 1485.
[46] *Id.* art. 1486.
[47] Decree No. 2011-48, art. 1487.
[48] *Id.* art. 1488.

6. Recourse

According to the new law, an arbitral award is not subject to appeal unless the parties come to an agreement to allow appeals.[49] Furthermore, actions to set aside an award are prohibited except where parties have agreed that the award can be appealed.[50] The basis of setting aside an arbitral award includes situations where the arbitral tribunal declined jurisdiction or wrongly upheld it, the tribunal was not properly constituted, the tribunal exceeded the authority of its mandate, due process was violated, the award was contrary to public policy, and where the award does not state the reasons on which it is based or fails to state the date, names, and signature of the arbitrators making the award.[51] Any actions to set aside an award are to be brought before the Court of Appeals of the place where the award was made. This must be done within one month of the notification of the award.[52] A decision that denies an appeal or application to set aside an award is considered an enforcement order of the award.[53] No recourse can be had against a judicial order that enforces an award. [54] Furthermore, an order that denies enforcement can be appealed within one month.[55] Additionally, third parties have the ability to challenge an arbitral award by petitioning the court that would have had jurisdiction had there been no arbitration. [56] In both international and domestic arbitration, parties may apply for revision of an arbitral award in circumstances provided in articles 595, 594, 596, 597 and 601 to 603.[57]

B. International Arbitration

The provisions covering international arbitration are shorter than those pertaining to domestic arbitration, due to the fact that many of the provisions in Title I cover both domestic and international arbitration. The supporting judge mentioned in Title I also has a role in international arbitration when: the arbitration occurs in France, the parties have chosen French law to govern the arbitration, the parties have granted jurisdiction to French courts over disputes relating to the arbitral procedure or one of the parties is at risk of a denial of justice.[58] The provisions in Title I that apply to both domestic and international arbitration shall apply unless the parties agree otherwise. [59] Title II further provides that the arbitral agreement may define the procedure that will be used by the arbitral tribunal,[60] as well as the choice of law the dispute will be governed by.[61] However, the arbitrators must ensure that parties are treated equally and due process is upheld.[62] Title II also states that an arbitral award will be recognized and enforced in France as

[49] *Id.* art. 1489.
[50] *Id.* art. 1491.
[51] *Id.* art. 1492.
[52] *Id.* art. 1494.
[53] Decree No. 2011-48, art. 1498.
[54] *Id.* art. 1499.
[55] *Id.* art. 1500.
[56] *Id.* art. 1501.
[57] *Id.* art. 1502.
[58] *Id.* art. 1505.
[59] Decree No. 2011-48, art. 1506.
[60] *Id.* art. 1509.
[61] *Id.* art. 1510.
[62] *Id.* art. 1511.

long as the award's existence can be proven, and it is not "manifestly contrary to public policy."[63] The award can only be enforced with an enforcement order that is issued by the *Tribunal de Grand Instance* of the place where the award was rendered or by the *Tribunal de Grande Instance* of Paris.[64] Furthermore, the only means of recourse for an international arbitration award made in France is an action to set aside.[65] There are several reasons why an award would be set aside, including when an arbitral tribunal wrongly upheld or declined jurisdiction, when the arbitral tribunal was improperly constituted, where the arbitrators exceeded their mandate, where there was a violation of due process, and when recognition and enforcement of the award would be contrary to international public policy.[66] While the parties may waive their right to bring an action to set aside, both parties retain the right to appeal an enforcement order on one of the grounds set forth in article 1520.[67] In addition, similar to Title I, an order denying recognition or enforcement of an award made in France or abroad can be appealed.[68]

III. ANALYSIS

In several important aspects the new law enhances the efficiency and autonomy of arbitration. First, perhaps one of the most important and positive features is the inclusion of the separabiltiy doctrine in domestic and international arbitration. Separability helps to ensure the survival and autonomy of arbitration agreement even if the main contract is found to be invalid. Second, the memorialization of *kompetenz-kompetenz* enhances arbitration's autonomy by clearly defining that it is the arbitrator themselves, and not the judiciary that will determine whether the arbitral tribunal has jurisdiction. However, this must be qualified by the fact that in all likelihood arbitrators will rarely strike down their own jurisdiction due to their financial incentive in sitting on the arbitral tribunal.

The estoppel and *res judicata* effect granted by the new law adds to the legitimacy of the arbitration process by giving arbitral awards a nearly equivalent status with judicial rulings. Also, estoppel and *res judicata* grant finality to the arbitration process, and also prevents parties from turning to the judicial process to re-litigate the same issues. In addition, the lack of appeal in domestic and international arbitration also adds to the finality, efficiency and credibility of arbitration as an institution.

Furthermore, the new laws also pave a path to a fair and just decision by the arbitrators by giving the arbitrators the power to order conservatory or provisional measures, a powerful tool that allows the arbitrators full access to the information they need to make a fair decision.[69] The Decree's provision requiring the arbitrator's to disclose any information that may impact their partiality guarantees that the arbitral tribunal will be conducted in a fair manner, and also helps to protect the parties' due process rights.

However, the new laws also damage arbitration's autonomy and efficiency in several crucial respects. The "supporting judge" is one of the main culprits in this regard. Arbitration is a technique to resolve legal disputes *outside* the court system, yet the addition of a supporting judge

[63] *Id.* art. 1513.
[64] *Id.* art. 1516.
[65] Decree No. 2011-48, art. 1519.
[66] *Id.* art. 1520.
[67] *Id.* art. 1522.
[68] *Id.* arts. 1523, 1525.
[69] *Id.* art. 1468.

in domestic and international arbitration makes the court a permanent player within the arbitration process itself. Moreover, because the supporting judge is endowed with the power to declare that no arbitral appointment be made if he or she feels that the agreement is void and not applicable,[70] the judge can effectively negate the *kompetenz-kompetenz* principle. The power of the supporting judge makes arbitration seem less like an alternative dispute resolution mechanism and more like a branch of the judiciary.

Another way the new laws damage arbitration's autonomy is the potential the laws create for conflicting jurisdiction between the courts and the arbitral tribunal. While a court must decline jurisdiction if a dispute subject to an arbitration is brought before it,[71] the parties can submit the dispute to arbitration even if their dispute is already before a court.[72] What happens if the latter instance occurs? What if the arbitral tribunal and the court come to different conclusions? Is the arbitrator's determination simply ignored? This provides for uncertainty in the arbitration process.

Further hampering the efficiency and economy of arbitration are several articles which allow for a *de facto* appeal of the arbitrator's decision, thereby damaging the efficiency of arbitration. The provision mandating that arbitral awards must state the reasons why it was awarded, combined with the requirement that the arbitral tribunal may interpret the award upon application and make additional awards,[73] allows for appeal within the arbitral process. This prolonging of arbitration reduces the savings in time and resources that would occur if the arbitral award was final.

Finally, several provisions allow for judicial interference after the tribunal has rendered the award. While it is understandable that an award may be vacated for an arbitrator exceeding their mandate or for violation of due process, awards may also be vacated for violating public policy in both domestic and international arbitration.[74] "Public policy" reasons are not defined within the Decree, and can provide a pretext for an activist court to vacate an award based on an amorphous reason. Future amendments should explicitly define on what international and domestic public policy grounds a court may vacate an award.

IV. CONCLUSION

The French reform of arbitration has its positives and negatives. The memorialization of several important arbitration principles stand alongside a detrimental internal appeal process within the arbitral tribunal, and numerous ways for the courts to get involved. To improve the recently enacted laws, the supporting judge's role should be minimized if not eliminated entirely, simultaneous proceedings in arbitration and the courts should be prohibited, the arbitrator's ability to render new awards should be limited so as to prevent *de facto* appeal, and public policy grounds for *vacatur* of an award should be clearly defined. If these changes were made to the new laws, arbitration in France would take more than one step forward.

[70] *Id.* art. 1479.
[71] Decree No. 2011-48, art. 1448.
[72] *Id.* art. 1446.
[73] *Id.* art. 1485.
[74] *Id.* art. 1491, 1520.

THE UNIFORM COLLABORATIVE LAW ACT: STATUTORY FRAMEWORK AND THE STRUGGLE FOR APPROVAL BY THE AMERICAN BAR ASSOCIATION

Andrew J. Meyer*

I. INTRODUCTION

Modern divorce, alimony, marital property, child custody, and support laws were created by legislators and focus on the rights and responsibilities of parties.[1] The authority to break marital bonds is vested solely with the courts through an adversarial process that "most experts believe is ill-equipped to resolve the inter-disciplinary issues presented in a divorce case."[2] The universal acceptance of no-fault divorce by the states has limited the adversarial nature of divorces, but financial awards of alimony, marital property, and child custody are often determined using a "fault-coupled-with-rights" approach.[3] The results of divorce and other family law matters handled through the traditional litigation are rarely tailored to the unique problems of each case.[4]

Alternative Dispute Resolution (ADR) has played an important role in resolving family law cases for several decades and has been touted by experts as "limiting the negative impact that the animosity of litigation has on children and parents."[5] The most popular form of ADR for family law cases is mediation.[6] In general, mediation is a non-adversarial, confidential resolution process facilitated by a neutral third party.[7] Family law mediators "assist communication, encourage understanding, and focus participants on their individual and common interests."[8] Confidentiality is a key feature of mediation, because it enables parties to freely discuss alternatives without fear of information later being used in litigation.[9] In divorce and other family law cases, mediation shifts the focus from rights to the interests of the parties, increasing the likelihood of a "win-win" outcome.[10] Additionally, mediation gives parties more control over the outcome and reduces both monetary and emotional costs.[11] The success of

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[1] Elena B. Langan, *"We Can Work It Out" Using Cooperative Mediation – A Blend of Collaborative Law and Traditional Mediation – to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 246 (2011) (stating that the assignment of rights and responsibilities through divorce is a vestige from when marriage was commonly seen as a property transaction).

[2] *Id*. at 246–47.

[3] *Id*. at 251. The approach taken by each individual state varies based on their divorce statutes.

[4] *See id*. at 247.

[5] *Id*. at 255 (noting that although ADR does not necessarily give the parties the same feelings of voice, procedural justice, vindication, validation, impact, and safety they would receive through traditional litigation).

[6] *See id*. at 258 (stating that mediation was initially used exclusively for family law cases).

[7] *Id*. at 259.

[8] *Id*. at 260.

[9] *Id*. at 262.

[10] *See id*. at 260.

[11] *See id*. at 262-63.

mediation in family law cases has led many courts to order a mediation before a divorce case goes to trial.[12]

Like any system of dispute resolution, mediation is not perfect, and there are several drawbacks to using it to resolve family law issues. Participants in mediation are generally not allowed to have counsel present, and mediators are usually prohibited from explaining or giving their opinion on the law.[13] This can leave parties ill-informed about their legal rights and obligations and may be particularly unfair if the parties are unequal in bargaining power.[14]

In 1990, Stuart Webb, a Minnesota family lawyer, created the collaborative law process as an alternative to both litigation and mediation.[15] Like mediation, collaborative law is an out of court, non-adversarial process that helps parties achieve settlement in significantly less time and at a much lower cost than litigation.[16] In collaborative law, each party is represented by counsel, negotiations are based on the parties' interests, there is no neutral third party facilitator, and the process is fully voluntary.[17] The key feature of collaborative law is that each party and their attorney are required to enter into a "four-way" agreement which requires both attorneys to disqualify themselves if a settlement cannot be reached. [18] This agreement prevents either party from threatening to go to litigation and increases the likelihood of a fair settlement.[19] Collaborative lawyers might become aware of confidential information from the opposing party during the process. Allowing the attorneys to continue to represent their client in litigation could create an unfair advantage for a party.[20] The collaborative law process encourages cooperation and removes any economic incentive for attorneys to litigate a matter. Currently, there are approximately 22,000 attorneys trained in collaborative law techniques.[21]

The collaborative law process is guided by the following principles:

1) Define the interests, concerns, and goals of each party
2) Gather information necessary to allow the parties to make an informed decision
3) Develop options for resolution
4) Eliminate options that are unrealistic or detrimental
5) Negotiate a resolution on the basis that it is mutually beneficial to both parties[22]

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[12] *See id*. at 258.

[13] *See id*. at 266-72.

[14] *See id*. at 258, 272 (stating that without adequate information, resolving a matter through mediation may be seen as a denial of procedural justice).

[15] Norman Solovay & Lawrence R. Maxwell, Jr., *Why a Uniform Collaborative Law Act?*, N.Y. DISP. RESOL. LAW., Spring 2009, at 36, 36 (initially collaborative law was only used for family law dispute, but has since expanded to other civil matters, including trusts and estates, intellectual property, employment, personal injury, and real estate).

[16] *See* Langan, *supra* note 1, at 277 (in family law, collaborative law also helps protect the interest of non-client children).

[17] *See* Solovay, *supra* note 15, at 36 (courts cannot order parties to settle a matter through collaborative law).

[18] *See* Solovay, *supra* note 15, at 36 (in the agreement parties must also state their intention to resolve the matter without the intervention of an adjudicatory body, define the nature and the scope of the collaborative process, and identify each party's collaborative lawyer).

[19] *See* Langan, *supra* note 1, at 277 (both parties attorneys are disqualified if a settlement is not reached).

[20] Solvovay, *supra* note 15, at 37 (disqualification also gives the parties an incentive to reach a settlement to avoid the increased time and expenses required to hire a new counsel).

[21] N.Y. STATE BAR ASS'N: DISPUTE RESOLUTION SECTION., REPORT ON THE UNIFORM COLLABORATIVE LAW ACT, 2, (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Section_Reports_and_White_Papers&ContentID=52540&template=/CM/ContentDisplay.cfm [hereinafter *NYSBA Report*].

[22] *NYSBA Report*, *supra* note 21, at 2.

Collaborative law is designed to encourage parties to engage in problem solving, rather than positional negotiations, and find creative solutions that maximize benefits to all sides.[23]

II. THE UNIFORM COLLABORATIVE LAW ACT (UCLA)

Most collaborative law processes begin with parties entering into a collaborative law participation agreement.[24] In general, a collaborative law participation agreement states the parties' intention to resolve the matter without an adjudicatory body, defines the nature and scope of the collaborative law process, and identifies each party's collaborative lawyers.[25] Lawyers must fully inform their clients about the potential advantages and disadvantages of collaborative law before obtaining their consent.[26] There are currently no widely accepted standards for collaborative law, and participation agreements may vary greatly in their depth and detail.[27] Currently, only five states have adopted statutes or court rules setting minimum standards for collaborative law practice.[28]

In light of the expanding use of collaborative law, in February 2007 the Uniform Law Commission (ULC) began drafting a model law to regulate collaborative law practice and establish minimum standards.[29] The ULC designed the Uniform Collaborative Law Act (UCLA) to establish expectations for both attorneys and clients about the collaborative process, give clear definitions, and reduce the costs of interstate disputes.[30] In July 2009, the ULC approved a draft of the UCLA, which was later revised, amended, and approved in October 2010.[31] The UCLA is largely procedural in scope; it sets guidelines for the contents of collaborative law participation agreements and minimum standards of attorney conduct during the collaborative process.

The preface to the UCLA makes it clear that collaborative law must be voluntary, parties must agree to disclose all relevant information, and the standards of professional responsibility

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[23] Andrew Shepard & David Hoffman, *Regulating Collaborative Law: The Uniform Collaborative Law Act Takes Shape*, DISP. RESOL. MAG., Fall 2010, at 26 (a respectful dialogue throughout negotiations is necessary to ensure win-win outcomes).

[24] *Id*. at 27 (the collaborative law participation agreement serves as an enforcement mechanism to ensure both lawyers will withdraw if the matter does not settle, both parties and their attorneys must sign the agreement).

[25] Solovay, *supra* note 15, at 36.

[26] Solvoy, *supra* note 15, at 36.

[27] *NYSB Report*, *supra* note 21, at 5.

[28] *See* UNIF. LAW COMM'N, COLLABORATIVE LAW ACT SUMMARY (2010), *available at* http://www.nccusl.org/ ActSummary.aspx?title=Collaborative%20Law%20Act (Texas, Utah and Nevada have adopted the UCLA, Alabama, the District of Columbia, Hawaii, and Massachusetts are considering adopting the UCLA, California and North Carolina have their own collaborative law statutes); *see* 2011 Tex. Sess. Law Serv. Ch. 1048 (West) (Texas recently enacted the UCLA which became effective on September 1, 2011); *see* UTAH CODE ANN. §§ 78B-19-101–116 (West 2010) (Utah adopted the UCLA in May 2010); *see* 2011 Nev. Legis. Serv. Ch. 43 (West) (Nevada adopted the UCLA in May 2011, it will go into effect on January 1, 2013); *see* N.C. GEN. STAT. ANN. §§ 50-70–79 (West 2003) (North Carolina adopted its own collaborative law act which applies only to divorce and separations proceedings); *see* CAL. FAM. CODE §§ 2010–2013 (West 2011) (California adopted its own collaborative law statute in January 2011, it applies only to family law disputes).

[29] Lawrence Maxwell, *An Update Uniform Collaborative Law Act Uniform Collaborative Law Rules Texas Uniform Collaborative Law Act*, ALTERNATIVE RESOL., Winter 2011, at 3, 4. (the Uniform Law Commission was formerly known as The National Conference of Commissioners on Uniform State Laws).

[30] *See* UNIF. LAW COMM'N., COLLABORATIVE LAW ACT SUMMARY (2010), *available at* http://www.nccusl.org/ ActSummary.aspx?title=Collaborative%20Law%20Act.

[31] Maxwell, *supra* note 29, at 4-5.

still apply to attorneys involved.[32] Section 2 of the UCLA gives definitions for important collaborative law terms. A "collaborative matter" is defined as any dispute, transaction, claim, problem, or issue for resolution.[33] However, the ULC introduced an alternative definition for states that want to limit the scope of collaborative law to family law matters.[34]

A collaborative law agreement must be in writing, signed by both parties, state the scope and nature of the dispute, name both parties' collaborative lawyers, and state their intention to resolve the matter though collaborative law.[35] The collaborative law process begins when the parties sign the collaborative law participation agreement.[36] The collaborative law process may conclude when one party voluntary decides to terminate the process with or without cause or when a party initiates litigation.[37] In general, parties must notify a tribunal before entering into a collaborative law agreement, and the tribunal can issue a stay on any pending proceedings until the collaborative law process has concluded.[38]

During the collaborative law process, both parties must make timely, full, candid, and informal disclosures of all information relevant to the dispute and regularly update any information that has materially changed.[39] In general, communications made are confidential and privileged to facilitate open discussion between the parties.[40] However, a collaborative lawyer is required to screen clients to determine if there has been any violent or coercive behavior.[41] If the attorneys discover that a violent or coercive relationship exists, they must still follow the rules of professional conduct and report the matter to the appropriate authorities.[42]

The UCLA codifies a key provision of collaborative law practice: collaborative attorneys and the law firms they work for must disqualify themselves from representing their clients if a settlement is not reached.[43] This ensures that attorneys have no incentive to litigate and have a strong inclination to reach a fair settlement. The disqualification provision does not apply to low income parties who receive representation in the collaborative process through a legal services office or a government agency, since they may not be able to afford a second attorney if the matter goes to litigation.[44] There is always a risk that a settlement will not be reached through

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[32] UNIF. COLLABORATIVE LAW ACT Refs & Annos, U.L.A (2010).

[33] UNIF. COLLABORATIVE LAW ACT §2.

[34] UNIF. COLLABORATIVE LAW ACT §2 (the family law matters include marriage, divorce, dissolution, annulment, property distribution, child custody, visitation, parenting time, alimony, maintenance, child support, adoption, parentage, premarital, marital, and post-marital agreements).

[35] UNIF. COLLABORATIVE LAW ACT §4 (these are the minimum conditions to enter into a collaborative law participation agreement, parties may supplement these requirements as they see fit this is to ensure that parties "opt-in" to collaborative law, rather than participate in it inadvertently).

[36] UNIF. COLLABORATIVE LAW ACT §5.

[37] UNIF. COLLABORATIVE LAW ACT §5 (the process can also be terminated if a party's attorney withdraws, but it can be re-initiated if a new attorney is appointed, in general the collaborative process can be terminated at any time by either party).

[38] UNIF. COLLABORATIVE LAW ACT §6.

[39] UNIF. COLLABORATIVE LAW ACT §12.

[40] UNIF. COLLABORATIVE LAW ACT §§ 16, 17 (communications made during the collaborative process are not discoverable during litigation).

[41] UNIF. COLLABORATIVE LAW ACT §15 (collaborative law will not work for parties that have a violent or coercive relationship, because they will not be able to effectively reach a mutual settlement).

[42] UNIF COLLABORATIVE LAW ACT §13.

[43] UNIF. COLLABORATIVE LAW ACT §9 (the law firm that the collaborative lawyer is associated with is also disqualified from representing the client in litigation).

[44] UNIF. COLLABORATIVE LAW ACT §§ 10, 11 (the lawyer that represents the client is still disqualified from representing the client, but another attorney from the legal services office or government agency can represent the client in litigation).

collaborative law and the client will have to hire a new attorney for litigation. Therefore, an attorney must obtain the client's informed consent before choosing collaborative law. Section 14 of the UCLA requires that the attorney discuss the advantages and disadvantages of the collaborative process and alternatives available with clients before signing a collaborative law participation agreement.[45]

The UCLA provides a general framework for the procedural practice of collaborative law that can be adopted by states as either statutes or court rules. As collaborative law becomes more common it is likely that a greater number of states will adopt the UCLA.

III. ARGUMENTS FOR AND AGAINST THE UCLA

The ULC traditionally submits their uniform acts to the American Bar Association (ABA) for approval. This approval is not required, but uniform acts are not widely adopted by states until the ABA has given its official endorsement. The ULC approved the UCLA in July 2009, and it was later submitted to the ABA House of Delegates in February 2010.[46] The UCLA was later withdrawn after objections were raised by several ABA committees.[47] The UCLA was amended and reapproved by the ULC in October 2010. The revised UCLA was submitted to the ABA House of Delegates in August 2011. Similar objections were raised and the UCLA was not approved by the ABA by a vote of 298 to 154.[48]

There are several reasons why the ABA claims that the UCLA is an inappropriate law. Opponents argue that the disqualification provision allows one side to "fire" an opposing party's attorney at a critical point in negotiations.[49] A party can disqualify the other side's attorney simply be terminating the collaborative process or initiating litigation. This can be particularly burdensome for a party that is unable to afford the time and cost of hiring a new attorney for litigation. There is also a potential ethical issue, because an attorney's continued representation is reliant upon the actions of a third party.[50] The disqualification provision may violate an attorney's ethical obligation to represent a client throughout a dispute.[51] Collaborative law may also coerce attorneys to continue the process, even if negotiations have stalled, making clients feel as if they have lost control over the dispute.[52] Collaborative law may not be appropriate for parties that wish to maintain privileged communications with their attorneys.[53] Finally, opponents of the UCLA argue that it is inappropriate for state legislatures to enact laws which

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[45] UNIF. COLLABORATIVE LAW ACT §14 (the lawyer must inform the client that collaborative law is fully voluntary, if litigation is initiated the collaborative law process terminates, and the lawyer cannot represent the client in subsequent litigation).

[46] Maxwell, *supra* note 29, at 4.

[47] Shepard, *supra* note 23, at 27 (the litigation section, judicial division, and young lawyers section of the ABA opposed the UCLA as it was written).

[48] Rachel M. Zahorsky, *ABA Rejects Proposed Measure for Collaborative Law Guidelines*, ABA JOURNAL, Aug. 9, 2011, http://www.abajournal.com/news/article/the_aba_house_of_delegates _rejected_ resolution_ 110b/.

[49] Langan, *supra* note 1, at 282 (parties are required to negotiate in good faith, but either party can terminate the collaborative process at any time with or without cause).

[50] Langan, *supra* note 1, at 283 (the disqualification provision potentially violates Model Rule 1.7(a)(2) which states that there is a conflict of interest if there is a significant risk that representation will be limited by a lawyer's responsibility to a third party).

[51] Langan, *supra* note 1, at 281-82.

[52] Langan, *supra* note 1, at 285.

[53] Langan, *supra* note 1, at 288 (collaborative law requires full and voluntary disclosure by both parties).

regulate the practice of law.[54] Parties could enter into their own collaborative law agreements without any assistance by state laws or court rules.

The ULC made several amendments to the UCLA to address the concerns initially raised by the ABA. The revised version of the UCLA can be adopted as a statute or as court rules, which addresses the concern about legislatures regulating the practice of law.[55] States can also choose to limit the applicability of the UCLA to family law or allow it to apply to all civil disputes.[56]

The ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion stating that the UCLA does not violate any of the ethics provisions of the Model Rules on Professional Responsibility.[57] Rule 1.2(c) allows attorneys to limit the scope of their representation, so long as it is reasonable under the circumstance and the client's informed consent is obtained.[58] The UCLA requires attorneys to fully inform their clients about the advantages and disadvantages of collaborative law, discuss available alternatives, and inform clients that if a settlement is not reached the attorney must withdraw. The Committee determined that the UCLA is sufficiently in compliance with Rule 1.2(c).[59] The Committee also determined that there is no issue under Rule 1.7(a)(2) regarding a collaborative attorneys only offering limited representation.[60] Rule 1.7(a)(2) states that an attorney's loyalty and independent judgment are essential to their relation with a client.[61] A potential conflict cannot limit an attorney's responsibility or interest and foreclose alternatives for clients.[62] The disqualification provision in a collaborative law participation agreement does not materially limit a lawyer's ability to represent a client, nor does it foreclose all alternatives available to client. Going forward as collaborative law practice becomes more common, an increasing number of states may find it necessary to adopt the UCLA scheme to set minimum standards in order to protect clients' interests.

IV. CONCLUSION

The UCLA provides workable minimum standards for the practice of collaborative law. The Act ensures that clients receive fair representation and that parties will work together to reach creative settlements for their disputes. The UCLA also gives participants in collaborative law incentive to avoid costly adversarial litigation. Despite the ABA rejecting the current version of the UCLA, more states will likely adopt the model act as collaborative law becomes an increasingly common form of ADR.

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[54] Langan, *supra* note 1, at 282 (noting how most states consider the regulation of the practice of law the exclusive jurisdiction of the courts).

[55] Maxwell, *supra* note 29, at 5 (the ULC recommends that several provisions of the UCLA are adopted as court rules).

[56] Maxwell, *supra* note 29, at 5 (this relates to the definition of "collaborative matter" in section 2 of the UCLA).

[57] ABA COMM. ON ETHICS & PROF'L RESPONSIBLITY, FORMAL OP. 07-447 (2007).

[58] *Id*. at 3.

[59] *Id*. at 3.

[60] *Id*. at 4.

[61] *Id*. at 4.

[62] *Id*. at 4.

THE PCA'S OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES: BRINGING ARBITRATION TO INFINITY AND BEYOND

Jesse Baez*

I. INTRODUCTION

Arbitration and alternative dispute resolution do not have an established presence in disputes that reach above Earth's atmosphere. Traditionally, outer space was the purview of nation-states.[1] The foundation of space law consisted of international treaties, as well as domestic laws issued by various countries. [2] As a result, disputes that occurred in outer space were resolved by government agencies and diplomats while legal dispute resolution mechanisms were eschewed.[3] There were some efforts to provide an alternative dispute mechanism for space related disputes; the Liability Convention of 1972 offered one such mechanism with its Claims Commission.[4] The Commission was intended to fall under the United Nations' jurisdiction, but it has never been used to resolve a dispute.[5] With private commercial interests expanding their activities into outer space, the need for an alternative legal dispute resolution mechanism outside of the traditional government and diplomatic channels has increased.[6]

The International Bureau of the Permanent Court of Arbitration (PCA), based in the Netherlands, responded to the need for non-governmental legal dispute resolution mechanisms in outer space disputes by issuing its Optional Rules for the Arbitration of Disputes Relating to Outer Space Activities in December 2011 (The Rules). The Rules use the 2010 UNCITRAL Arbitration rules as their basis with significant changes that reflect the reality of outer space disputes.[7] These changes reflect that disputes may involve states, international organizations and private entities. The Rules include public international law elements that are relevant to outer space disputes. In addition, the Rules utilize the Secretary-General and the PCA at the Hague, provide freedom for the parties to have their arbitral tribunal consist of one, three or five persons, offer specialized lists of arbitrators and experts in science and technical fields, and the Rules also suggest procedures to protect confidentiality.[8] Moreover, the Rules are not mandatory and emphasize flexibility and party autonomy.[9] The Rules, as well as the services of the PCA and

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[1] Michael Listner, *A new paradigm for arbitrating disputes in outer space*, SPACE REVIEW (January 9, 2012), *available at* http://www.thespacereview.com/article/2002/1.

[2] *Id*.

[3] *Id*.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES INTRODUCTION (Permanent Court of Arbitration 2011).

[8] *Id.*

[9] *Id.*

the Secretary- General, are made available to all types of entities, including states, international organizations and private entities.[10]

The PCA's Optional Rules for the Arbitration of Disputes Relating to Outer Space activities are an important step in providing a legal framework for entities that engage in operations above Earth's atmosphere. While the effectiveness of the Rules is still untested, the Rules have the potential to serve as an impetus for the commercialization of outer space. International arbitration brings economy, cost effectiveness, speed and solves thorny issues of jurisdiction. The existence of space arbitration will make it more attractive and less expensive for a company to invest in operations that extend beyond the atmosphere of our planet.

II. DIFFERENCES BETWEEN THE PERMANENT COURT OF ARBITRATION OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES AND THE 2010 UNCITRAL ARBITRATION RULES

A. Scope of Application

Parties may agree to adopt the Rules as they stand, or modify them by party agreement.[11] The dispute does not have to be characterized as relating to outer space in order for the arbitral tribunal to have jurisdiction under the Rules.[12] If a party agrees to arbitrate under the Rules, this agreement constitutes a waiver of any right of immunity from jurisdiction to which the party might otherwise be entitled.[13] If there is a waiver of immunity that relates to the execution of an arbitral award, it must be explicitly stated in the arbitration agreement. [14] In addition, the International Bureau of the Permanent Court of Arbitration serves as a registry for the arbitral proceedings and a provider of secretariat services.[15]

The first major difference between the UNCITRAL and the PCA Rules can be found in the first article regarding the scope of application. Unlike the PCA Rules, adopting the UNCITRAL rules does not constitute an automatic waiver of any right of immunity from jurisdiction, nor do the UNCITRAL rules have any mention of waiver of immunity relating to the execution of arbitral awards.[16] Also, the UNCITRAL rules lack the designation of a body that serves as a registry for the proceeding and provides secretariat services.[17] Another important difference that should be noted is the conflict of laws provision found in the UNCITRAL rules but not in the PCA Rules. The UNCITRAL rules state that if the rules "conflict with a provision

[10] *Id.*

[11] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 1 (Permanent Court of Arbitration 2011).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Compare* UNCITRAL ARBITRATION RULES ART. 1 (UNCITRAL, 2010), *with* OPTIONAL. RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 1(Permanent Court of Arbitration 2011).

[17] *Compare* UNCITRAL ARBITRATION RULES ART. 1 (UNCITRAL, 2010), *with* OPTIONAL. RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 1(Permanent Court of Arbitration 2011).

of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."[18] In contrast, the PCA Rules do not contain a similar provision as to what happens if the Rules clash with the law applicable to the arbitration. From this lack of a conflict of laws provision, taken with the waiver of jurisdictional immunity, it can be inferred that in an arbitration under the PCA Rules the arbitrator would have the final say as to which rules would prevail in any conflict.

B. Appointing Authority

The Secretary-General of the Permanent Court of Arbitration serves as the appointing authority for arbitrators.[19] The Secretary-General can require from either the parties or the arbitrators any information it requires, and the Secretary-General must also give the parties and arbitrators an opportunity to present their views.[20] Any communication with the appointing authority must also be shared with all other parties by the sender. [21]

The two sets of rules also differ as to who the appointing authority will be for the arbitration. UNCITRAL allows for party selection of the appointing authority, and mentions the Secretary-General of the PCA as a possible choice.[22] In contrast, the PCA Rules state that Secretary-General "shall serve as appointing authority", which indicates that there is no choice in appointing authority.[23] Furthermore**,** there are no provisions for the removal of the appointing authority in the PCA Rules as there are in the UNCITRAL rules. The PCA Rules are also silent as to what will occur if the Secretary-General fails to appoint an arbitrator within a reasonable time period. [24]

C. The support role of the Secretary General and the International Bureau

Unlike the UNCITRAL rules, the PCA Rules support arbitration with specialized lists of personnel that are familiar with legal and technical aspects of outer space disputes. For instance, the Secretary-General gives the parties a list of arbitrators that have expertise in matters that are relevant to outer space disputes.[25] In addition, if the arbitrators need to appoint independent experts on technical or scientific matters, the Secretary-General will provide a list of experts that the arbitrators can choose from.[26] The support given by the PCA Rules is due to the highly technical nature of outer space disputes, and helps facilitate the arbitration process.

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[18] UNCITRAL ARBITRATION RULES ART. 1 (UNCITRAL, 2010).

[19] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 6 (Permanent Court of Arbitration 2011).

[20] *Id.*

[21] *Id.*

[22] UNCITRAL ARBITRATION RULES ART. 6 (UNICTRAL 2010).

[23] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 6 (Permanent Court of Arbitration 2011).

[24] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 12 (Permanent Court of Arbitration 2011).

[25] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 10 (Permanent Court of Arbitration 2011).

[26] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 2, 29 (Permanent Court of Arbitration 2011).

D. Arbitrator disclosure and challenges

In the event an arbitrator on a three or five person tribunal can no longer participate in the arbitration, the other arbitrators may continue the arbitration and render a decision, ruling, and award, or decide not to continue the arbitration and have a substitute arbitrator appointed.[27] This substitute arbitrator will be appointed either by the list-procedure, other arbitrators, or, in exceptional circumstances the appointing authority may appoint the substitute arbitrator.[28] Unless the arbitral tribunal decides otherwise, upon replacement of an arbitrator, the proceedings resume at the stage where the replaced arbitrator ceased to perform his function.[29]

The PCA Rules give the arbitrators more power to decide what happens in the event that an arbitrator can no longer serve than the UNCITRAL rules. Under the PCA Rules, in a three or five person panel, the arbitrators can either decide to continue the proceedings without the arbitrator, or halt the proceedings and appoint another arbitrator, unlike the UNCITRAL rules where the arbitrators are not empowered to make this decision.[30] Rather, under the UNCITRAL rules the arbitrator must be replaced with a substitute arbitrator, or, subject to the discretion of the appointing authority, the arbitration will continue without the missing arbitrator.[31]

E. Confidentiality

A party can invoke the confidentiality of any information it submits to the arbitration by making an application to render the information classified as confidential.[32] The notice of confidentiality must contain the reasons why the information should be considered confidential, and this notice must be communicated to opposing parties and the International Bureau.[33] After receipt of notice, the arbitral tribunal will determine whether the information will be classified as confidential, and will determine under what conditions and to whom the confidential information may be disclosed, and will require persons to whom the confidential information is to be disclosed to sign a non-disclosure agreement.[34] The tribunal's decision about the confidentiality of the information must be communicated to both the parties and the International Bureau.[35] Furthermore, the tribunal can also appoint a confidentiality adviser as an expert in order to advise the tribunal without disclosure of the confidential information to either the parties or the arbitral tribunal. [36]

A significant difference between the rules is the difference in invoking confidentiality. The PCA Rules contain a mechanism that allows for a party to invoke confidentiality over certain documents, subject to the tribunal's approval.[37] In addition, the PCA Rules also allow for the

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[27] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 13 (Permanent Court of Arbitration 2011).

[28] *Id.*

[29] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 15 (Permanent Court of Arbitration 2011).

[30] UNCITRAL ARBITRATION RULES ART. 12 (UNCITRAL 2010).

[31] UNCITRAL ARBITRATION RULES ART. 14 (UNCITRAL 2010).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 17

appointment of a confidentiality expert to review the confidential documents without disclosure of the documents to either the tribunal or the parties.[38] In comparison, the UNCITRAL rules lack any kind of confidentiality protection.

F. Costs and Deposit of Costs

Under the PCA Rules, costs are defined as fees of the arbitral tribunal, travel costs and other expenses incurred by the arbitrators, cost of expert advice and other assistance required by the tribunal, the costs of travel and expenses of witnesses subject to tribunal approval, legal and other costs incurred by the parties that are related to the arbitration, and the fees and expenses of the International Bureau which include the fees of the appointing authority.[39]

The International Bureau may request the parties to deposit an equal amount as an advance for costs.[40] Amounts deposited by the parties are collected by the International Bureau and are dispersed for arbitrators' fees, fees for the appointing authority, and fees for the International Bureau.[41] A security deposit is required for interim measures, which is to be directed to the International Bureau and dispersed to the arbitral tribunal upon the Bureau's order.[42] Also, during the arbitration a supplementary deposit may be required by the International Bureau.[43] If a party does not pay in full within sixty days after a request, the Bureau will inform the party they must make the required payments, or the tribunal may order the suspension or termination of the proceedings.[44] After a final award has been rendered or a termination order has been issued, the Bureau will give the parties an accounting of the deposits received and return any unspent balance to the parties.[45]

The major difference between the two types of rules in regards to deposit of costs is who collects the deposit of costs. The PCA Rules empower the International Bureau to collect any deposit of costs, while the arbitral tribunal is responsible for the collection of deposits under the UNCITRAL rules.[46] Finally, an important difference in the PCA rules is that the fees of the International Bureau are included along with the costs of the appointing authority and the tribunal.[47] The additional fees are due to the Bureau's role in providing secretariat services for the arbitration.

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[38] *Id*.

[39] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 40 (Permanent Court of Arbitration 2011).

[40] OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 43 (Permanent Court of Arbitration 2011).

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Compare* UNCITRAL ARBITRATION RULES ART. 43, *with* OPT. RULES FOR ARB. OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 43

[47] *Compare* UNCITRAL ARBITRATION RULES ART. 43, *with* OPT. RULES FOR ARB. OF DISPUTES RELATING TO OUTER SPACE ACTIVITES ART. 43

III. ANALYSIS

When it comes to a topic as complex as outer space law, the support that the PCA Rules provide can help to facilitate the arbitration process. The presence of specialized lists saves the parties from having to conduct a search for arbitrators with experience relevant to outer space disputes, which would add to the time and cost of the arbitration process. Similarly, having a list of relevant experts available to the arbitrators is also likely to decrease the cost and time of the arbitration by saving the arbitrators from having to conduct a search for qualified experts. Thus the supporting role played by the International Bureau and the Secretary-General of the PCA could be a significant draw for parties to choose to arbitrate under the PCA Rules. However, one caveat is warranted. Legal practitioner Gerry Oberst observes that the lists of specialized personnel provided by the PCA may lose their value if they are not updated regularly.[48] As he states, "in practice, it is easy to put someone's name down on a list but difficult to take it off."[49] The PCA will have to ensure that these lists are updated on a regular basis, or arbitrating under the PCA Rules may lose some of its appeal.

While the rules do not leave much in the way of party choice when it comes to designating the appointing authority, Oberst states that this lack of choice comes with an advantage. Having the PCA as the sole appointing authority makes the arbitration more efficient than it otherwise would be; parties will not have to search for an appointing authority.[50] In addition, Oberst also notes that the arbitrators' power to continue the arbitration even if one arbitrator can no longer participate is an effective tool against undue delay.[51] However, the lack of choice in designating an appointing authority may be a double edged sword. If the Permanent Court of Arbitration were to fail or unreasonably delay the appointment of arbitrators, parties could be left without any alternative appointing authority, and have to accept the delay in resolving their claim. This lack of alternative could be remedied through party modification of the PCA Rules. Practitioners should take note of the lack of alternatives in the appointing authority and modify their arbitration clauses accordingly.

As the arbitration community has noted, the rules reflect the fact that entities other than corporations are involved in outer space transactions.[52] Sending satellites into orbit involves companies, states, and international organizations working together.[53] The waiver of jurisdiction and lack of a conflict of laws provision found in the PCA Rules reflect this reality and are crucial to a space related arbitration process. In court litigation of a space-based dispute, a claim of immunity from jurisdiction by a governmental entity would throw a huge wrench in the legal proceeding and would possibly preclude the litigation from moving forward. Likewise, the drafters of the PCA Rules were wise not to include the conflict of laws provision contained in the UNCITRAL rules. Giving the arbitrators discretion to decide which rules apply when the PCA Rules and the law governing the arbitration conflict gives the arbitrators flexibility in an already complex arbitration process.

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[48] Gerry Oberst, *Regulating the Final Frontier*, THE LAWYER (January 16, 2012), *available at* http://www.thelawyer.com/regulating-the-final-frontier/1010913.article.

[49] *Id.*

[50] Gerry Oberst, *New Arbitration Rules to Resolve Satellite Disputes*, SATELLITE TODAY (February 1, 2012), *available at* http://www.satellitetoday.com/via/globalreg/New-Arbitration-Rules-to-Resolve-Satellite-Disputes_38178.html.

[51] *Id.*

[52] *Id.*

[53] *Id.*

The confidentiality provisions will also prove to be significant to parties who may encounter a space based dispute. Sending anything into space, be it a person or satellite, is expensive, and involves sensitive, technical details that a company would not want disclosed to a competitor. Having a confidentiality procedure in place helps assure parties that important trade details will not be disclosed to either the tribunal or opposing parties.

Finally, an important point that should be taken into consideration by parties and legal practitioners is the cost of arbitrating under the PCA Rules. Parties will have to pay not only for the Secretary-General's services as appointing authority and the tribunal, but also for the International Bureau's registry and secretariat services. Since an outer space based dispute is bound to be expensive even before the claim goes to arbitration, the costs involved in arbitrating under the PCA Rules should not be taken lightly.

IV. CONCLUSION

Overall, the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities seem to be an effective set of rules that reflect the reality and complexity of disputes in outer space. The rules have been adapted to the reality that space disputes often involve different players such as states, governmental entities and corporations. In addition, the PCA Rules also recognize the need for confidentiality in technical matters, as well as the need for experts and arbitrators who are well versed in space law matters. Above all, the rules incorporate flexibility and party autonomy that can be important in an outer space dispute. While the rules are untested, they could prove to be an important mechanism for resolving disputes not only between private corporations, but also between nations and governmental entities. If certainty and continuity as to how the legal process will function in outer space disputes can be established, private entities will be more likely to take a bold step and decide to operate above Earth's atmosphere.

THE COMMERCIAL ARBITRATION ACT 2011: AUSTRALIA'S ATTEMPT AT ARBITRATION EMINENCE

Laura Magnotta*

I. INTRODUCTION

On November 17, 2011, the Commercial Arbitration Act 2011 (CAA) was enacted in Victoria, Australia to become the State of Victoria's guiding law on domestic arbitration.[1] The Act, based on the United Nations Commission on International Trade Law (UNCITRL) Model Law on International Commercial Arbitration (Model Law) and supplemented to more accurately apply to domestic commercial arbitration, was enacted to replace the existing Commercial Arbitration Act 1984 (1984 Act).[2] The goal of the Standing Committee of Attorneys-General in encouraging the passage of the new law was to align domestic arbitration laws with international arbitration laws to make Australia the center of commercial arbitration in the Asia-Pacific region.[3] The CAA was also created to make Victoria's commercial arbitration laws consistent with similar laws previously passed in New South Wales and Tasmania furthering the national trend towards creating a unified domestic arbitration scheme.[4] This article discusses how the CAA has amended the prior Australian domestic arbitration law to align with current best practices, the path the Act took towards enactment, and how the changes to Australian domestic arbitration law will affect how lawyers represent their clients.

II. COMMERCIAL ARBITRATION ACT 2011

Like most other arbitration legislation, the Commercial Arbitration Act 2011 was enacted "to facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense."[5] The CAA repeals and replaces the 1984 Act, which was seen as limiting the recourse to arbitration by making the process similar to court proceedings and

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[1] *See* Doug Jones, *Commercial Arbitration Act: What Are the Key Reforms and What Will This Mean for Your Clients?*, THE NEW COMMERCIAL ARBITRATION ACT 2011 SEMINAR, 1, Nov. 30, 2011, *available at* http://www.justice.vic.gov.au/resources/b/6/b69b730048feeb88b4c4fcf1556a9148/professordougjonespapercommercialarbitrationactseminar30november2011.pdf.

[2] *See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibly*, Parliament of Victoria, 15 September 2011 Council, at 3205, *available at* http://www.justice.vic.gov.au/home/the+justice+system/justice+-+commercial+arbitration+act+2011+second+reading+speech+and+statement+of+compatibility+-+%28weblink%29.

[3] *See* Albert Monichino, *Arbitration Law in Victoria Comes of Age*, VICTORIAN DEPARTMENT OF JUSTICE "THE NEW COMMERCIAL ARBITRATION ACT 2011" SEMINAR, Nov. 30, 2011, at 1, *available at* http://www.justice.vic.gov.au/resources/c/7/c7e47f8048feeb88b4c6fcf1556a9148/monichino2011commercialarbitrationact.pdf.

[4] *See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.

[5] *See Explanatory Memoranda*, Commercial Arbitration Bill 2011, at 1, *available at* www.legislation.qld.gov.au/Bills/53PDF/2011/CommArbitB11Exp.pdf.

effectively failing to make arbitration a more efficient and cost effective method of dispute resolution.[6] The intent was that the CAA would "minimise [sic] judicial intervention in the arbitral process and … affirm and promote party autonomy with regard to the arbitral procedures."[7]

The CAA is based on the UNCITRAL Model Law on Commercial International Arbitration, which was adopted in 1985 and amended in 2006.[8] While the drafters of the CAA included supplements to the Model Law to bring it more in line with domestic arbitration needs, the original format and numbering of the Model Law was maintained to assist those who are familiar with the Model Law to be able to navigate the new Victorian law. The Model Law was created, among other reasons, to bring uniformity to the law of arbitration and address "the specific needs of international commercial arbitration practice."[9] The creators of the Model Law, understanding that national arbitration laws were often inappropriate for international cases, drafted the laws to take into account the needs of international arbitration.[10] Additionally, the drafters wanted to create a set of laws that could be adopted by various countries allowing parties from one country or jurisdiction to easily adjust to the laws of another country because of their similarities to the Model Law.[11]

In enacting the CAA, Victorian legislators changed a number of key areas that were deemed to be lacking in the 1984 Act. These include "changes to the power of an arbitral tribunal to order interim measures of protection, the obligation of confidentiality in arbitral proceedings, procedural requirements for the conduct of arbitrations, and also the grounds for challenging the appointment of an arbitrator or an award."[12]

The CAA codified a requirement that both the parties and the arbitral tribunal must not disclose confidential information regarding the proceedings.[13] Under the CAA, the parties may mutually decide to opt out of this provision and disregard the confidentiality requirement.[14] This provision on confidentiality clarifies an issue that was left unanswered by the 1984 Act.[15] Before the CAA, parties were left to look to common law solutions when questions of confidentiality arose.[16]

In the 1984 Act, there were no clear powers granted that allowed arbitrators to issue procedural orders.[17] Even if arbitrators issued such orders, there were no provisions to enforce them.[18] Seeking to remedy this deficiency, the CAA includes provisions that expressly grant

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[6] *See* Monichino, *supra* note 3, at 1.

[7] *See* Monichino, *supra* note 3, at 5.

[8] *See generally* 40/72, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, G.A. Res 40/72, U.N. Doc.A/RES/40/72 (2006).

[9] *See* 40/72, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, G.A. Res 40/72, U.N. Doc.A/RES/40/72, ix (2006).

[10] *See Explanatory Memoranda*, *supra* at note 5, at 2.

[11] *See Explanatory Memoranda*, *supra* at note 5, at 4.

[12] *See* Jones, *supra* at note 1, at 1.

[13] *See Commercial Arbitration Act 2011* (Vic.) pt 4A (Austl.).

[14] *See id.* at pt 4A div 1(17)(1).

[15] *See* Jones, *supra* at note 1, at 3.

[16] *See Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 (Austl.) (parties must expressly agree to confidentiality provisions since so such confidentiality obligations are implied by law or fact of creation of the arbitration agreement).

[17] *See* Jones, *supra* at note 1, at 7.

[18] *See* Jones, *supra* at note 1, at 7.

jurisdiction to both arbitrators and the courts to order interim measures.[19] The result is that parties no longer need to resort to the courts to request an order—they can do so through the arbitrators. In this scenario, the courts take action only where "the tribunal is unable or unwilling to act".[20]

The CAA also made amendments to the 1984 Act's grounds for challenging an arbitrator. Before the CAA, the three possible grounds for challenging an arbitrator were: misconduct, the exercise of undue influence by the arbitrator, or if the arbitrator was proven to be incompetent or unsuitable.[21] In particular, the misconduct ground raises problems because of its broadness.[22] To remedy these issues, the CAA restricts the grounds for challenging an arbitrator to those instances where "circumstances give doubt as to the arbitrator's impartiality or independence or where the arbitrator does not possess the qualifications agreed to by the parties."[23]

Issues with misconduct as a tool for judging the arbitrators' actions also arise when a party challenges an award. Under the 1984 Act, parties could challenge an arbitration award for an error of law or for misconduct by the arbitrator.[24] Using misconduct—a vague standard—as a ground for vacating an arbitral award, "jeopardizes the finality of arbitral decisions by supplying a very broad scope for parties to challenge an arbitral award."[25] The CAA removed the vague standard by allowing for arbitral awards to be set aside only for specific and narrowly defined procedural defects.

III. DISCUSSION

Legislators and politicians in Australia wanted to amend the domestic arbitration laws primarily to align the country's domestic and international arbitration law in an attempt to make Australia a "hub for dispute resolution in the Asia-Pacific Region".[26] To do so, they had to overcome two perceived problems with existing domestic arbitration laws in Australia. The first was the similarity between domestic arbitration proceedings and court proceedings. This was counterintuitive to the widely understood purpose of arbitration – a cost effective and efficient alternative to courtroom trial processes.[27] The second was the lack of finality of arbitral decisions as a result of broad grounds for review of arbitral awards and challenges to arbitrators.[28] These two problems invited the courts into a process that was created to achieve the opposite result. By preventing unnecessary judicial intervention into the arbitration process, the finality and authority of the arbitrators' decisions will be strengthened and the parties will have a more limited recourse to the courts during and after the arbitral proceedings.[29]

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[19] *See Commercial Arbitration Act 2011* (Vic.) pt 4A, divs 1(17)(1) & (3) (Austl.).

[20] *See* Jones, *supra* at note 1, at 3.

[21] *See Commercial Arbitration Act 1984* (Vic.) s 44 (Austl.).

[22] *See* Jones, *supra* at note 1, at 10 (courts had difficulty determining the limits of misconduct because it included not only "issues of moral turpitude," but also technical misconduct and breach of procedure issues as well).

[23] *See Commercial Arbitration Act 2011* (Vic.) pt 3(11) (Austl.).

[24] *See Commercial Arbitration Act 1984* (Vic.) s 42 (Austl.).

[25] *See* Jones, *supra* at note 1, at 10.

[26] *See* Monichino, *supra* note 3, at 1.

[27] *See* Monichino, *supra* note 3, at 2.

[28] *See* Monichino, *supra* note 3, at 2.

[29] *See See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205 (statement by Hon. G.K. Rich-Phillips).

To fulfill these goals and remedy these problems, the federal Attorney General called for a review of the International Arbitration Act of 1974.[30] The review would begin the process of aligning domestic commercial arbitration with the International Arbitration Act of 1974.[31] Such an alignment was crucial because the domestic commercial arbitration laws at the time still reflected outdated English arbitration acts.[32] The changes from the 1984 Act discussed above are intended to update the domestic arbitration laws and make them comparable with more recent legislation.

In support of the attempt at aligning domestic and international arbitration, chief justices of the various states and territories of Australia released a statement noting "any attempt to hold out Australia as a centre for international arbitration will not succeed if the domestic arbitration system does not operate consistently with the international arbitration regime."[33]

The adoption of the UNCITRAL Model Laws was proposed by then Chief Justice Speigelman as a way to "send a clear message to the international commercial arbitration community that Australia is serious about a role as a centre for international arbitration".[34] With this recommendation in mind, the Standing Committee of Attorneys-General decided to draft new laws for commercial arbitration in Australia based on the Model Law.[35] The Parliament of Victoria cited several reasons for adopting the Model Law. Primarily, the Parliament relied upon the fact that the Model Law had provided "an effective framework for the conduct of international arbitrations in many jurisdictions, including Australia, for over 25 years".[36] In addition, the Model Law had a widely understood framework to deal with common arbitration issues that could be easily adapted to the domestic arbitration scheme and would provide consistency between domestic and international law.[37] Because the model law would create consistency with other jurisdictions, case law from other Australian states and abroad could assist in interpreting and applying the Model Laws provisions.[38]

The Parliament agreed that the Model Act would need to include supplementary provisions to adjust the international nature of the Model Law to reflect the needs of domestic arbitration proceedings.[39] The main change was the addition of a "paramount objective clause," the absence of which was seen as a weakness by those stakeholders who reviewed the proposed law.[40] A draft of the proposed law, including the supplementary language, was circulated and met little opposition.[41] The Commercial Arbitration Act 2011 of Victoria, Australia was enacted and became law on November 17, 2011.[42]

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[30] *See* Monichino, *supra* note 3.
[31] *See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.
[32] *See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.
[33] *See* Monichino, *supra* note 3 at 3.
[34] *See* Monichino, *supra* note 3 at 3.
[35] *See* Monichino, *supra* note 3 at 3-4.
[36] *See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.
[37] *See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.
[38] *See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.
[39] *See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3206.
[40] *See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3206.
[41] *See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3206.
[42] *See Commercial Arbitration Act 2011* (Vic.) pt 4A (Austl.).

IV. CONCLUSION

In an attempt to modernize Victoria, Australia's domestic arbitration law and bring it into alignment with the country's international arbitration laws, the Commercial Arbitration Act 2011 was enacted. The CAA, which repealed the 1984 arbitration act, was based on the UNCITRAL Model Law and supplemented to adjust for domestic arbitration needs. The drafters of the CAA hope that by aligning both domestic and international arbitration laws creating a strong arbitration regime in Australia, the country can become the arbitration hub of the Asia-Pacific region.

THE BATTLE OVER CLASS ACTION: SECOND CIRCUIT HOLDS THAT CLASS ACTION WAIVER FOR ANTITRUST ACTIONS UNENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT

Dustin Morgan*

I. INTRODUCTION

In *In re American Express Merchants Litigation*, the Second Circuit held that the class action waiver clause within the arbitration agreement between American Express and corporations found in both New York and California made the agreement unenforceable because recourse to class action was essential to protecting the corporations' statutory rights under the federal antitrust statues.[1] The court also decided that under the Supreme Court's decision in *Stolt-Nielsen S. A. v. AnimalFeeds International Corp.*, the court, not the arbitrator, continued to be responsible for determining the validity of a class action waiver in an agreement to arbitrate.[2] The court reasoned that the class action waiver in the arbitration agreement would disincentivize plaintiffs from bringing individual suit under the federal antitrust statutes because of the high costs associated with antitrust litigation and the marginal recovery that each individual plaintiff would receive if successful.[3] Because the court viewed the private enforcement of the antitrust laws as essential to the underlying congressional intent, any attempt to limit this intent would go against public policy, and would be void as such.[4] By disincentivizing private enforcement, the class action waiver in the arbitration provision prevented plaintiffs from enforcing their rights under federal antitrust statutes, voiding the agreement as against public policy.[5]

II. BACKGROUND

The named Plaintiffs in this litigation, California and New York corporations that operate businesses who have accounts with American Express and the National Supermarkets Association, Inc. ("Plaintiffs"), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets,"[6] sought to represent a class of litigants against American Express, challenging the terms and conditions they were forced to accept by opening a charge account with the Defendant financing company as a violation of the federal antitrust statutes.[7] The class the Plaintiffs sought to certify was defined as: "[A]ll merchants that have accepted American Express charge cards (including the American Express corporate card),

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[1] *In re* Am. Express Merchs. Litig., 634 F.3d 187, 199 (2d Cir. 2011), *aff'd on reconsideration by* 667 F.3d 204 (2d Cir. 2012).

[2] *Id.* at 191.

[3] *Id*. at 198.

[4] *Id.* at 199.

[5] *Id*.

[6] *Id.* at 189.

[7] *Id*.

and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations . . . throughout the United States . . ..”[8]

In order to receive a charge or debit card from American Express, the parties had to agree to a standard form agreement supplied by American Express.[9] Impliedly, the plaintiffs agreed to these terms by opening an account with American Express. The standard form contract contained provisions allowing either party to terminate the agreement and reserving with American Express the right to change the agreement upon written notice to the contracting parties.[10] The contracting parties were advised of their right to terminate the agreement within the provision allowing for modification of the standard form.[11] In 1999, American Express exercised its right of modification and inserted an arbitration agreement which stated:

> For the purpose of this Agreement, Claim means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement. Claim includes claims of every kind and nature including, but not limited to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, intentional tort, statutes, regulations, common law and equity. We shall not elect to use arbitration under this arbitration provision for any individual Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is pending only in that court.[12]

The arbitration agreement also contained the following provision which forbade both American Express and the contracting parties from participating, either in a representative or participatory fashion, in class action lawsuits.[13] The provision specifically stated:

> IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.[14]

In the district court proceeding, American Express moved to compel arbitration pursuant to the standard for agreement signed by the Plaintiffs.[15] The district court granted American

[8] *Id.* (omissions in the original).
[9] *Id.* at 190.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id.* (omission in the original).
[15] *Id.* at 191.

Express' motion.[16] In so doing, the district court held that "the agreement was 'a paradigmatically broad clause' which was certainly applicable to the dispute between the parties."[17] The district court, justifying its ultimate conclusion, also held that "[t]he enforceability of the of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability has been established."[18] Given these findings, the district court decided that the Plaintiffs' antitrust claims and the enforceability of the class action waiver were to be settled in arbitration; the district court dismissed the Plaintiffs' claims.[19]

The Second Circuit received the case for the first time after the Plaintiffs filed an appeal.[20] The court decided that the validity of the class action waiver was a question for the court, and not the arbitrator, to decide.[21] The court reasoned that *Green Tree Financial Corp. v. Randolph* controlled their analysis regarding the enforceability of the class action waiver.[22] The Supreme Court in *Green Tree* found that "where . . . a party seeks to invalidate an arbitration agreement on the grounds that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."[23] Applying this principle, the Second Circuit found that the district court erred in ruling the Plaintiffs failed to carry this burden because they "ignore[d] the statutory protections provided by the Clayton Act."[24] The Second Circuit found that the record supported a finding that the Plaintiffs would incur prohibitive costs if they were compelled to arbitrate under the agreement.[25] Given these findings, the court held that the class action waiver invalidated the arbitration agreement.[26] Their decision was grounded in Section 2 of the Federal Arbitration Act ("FAA"), allowing for non-enforcement of arbitration agreements where a ground for invalidation of a contract exists at common law; since the court believed such a ground existed here, non-enforcement was proper.[27] American Express filed a petition for certiorari, which was granted by the Supreme Court.[28] The Supreme Court granted the petition, vacated the Second Circuit's decision, and remanded the decision for proceedings consistent with its recent decision in *Stolt-Nielsen S. A. v. AnimalFeeds International Corp.*[29]

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[16] *Id*.

[17] *Id.* (citing *In re* Am. Express Merchs. Litig., No. 03 CV 9592 (GBD) 2006 U.S. Dist. LEXIS 11742, at *4 (S.D.N.Y. Mar. 16, 2006)).

[18] *Id.* (citing *In re* Am. Express Merchs. Litig., 2006 U.S. Dist. LEXIS 11742, at *6).

[19] *Id.* (citing *In re* Am. Express Merchs. Litig., 2006 U.S. Dist. LEXIS 11742, at *10).

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id.* (citing Green Tree Fin. Corp.-Alabama. v. Randolph, 531 U.S. 79, 92 (2000)).

[24] *Id.* (citing *In re* Am. Express Merchs. Litig., 2006 U.S. Dist. LEXIS 11742, at *5).

[25] *Id.* (citing *In re* Am. Express Merchs. Litig, 554 F.3d 300, 315-16 (2d Cir. 2009).

[26] *Id.* at 192.

[27] *Id.* (citing *In re Am. Express*, 554 F.3d at 320).

[28] *Id*.

[29] *Id*.

III. COURT'S ANALYSIS

A. The Effects of Stolt-Nielsen on the Class Action Waiver

The Second Circuit first discussed the effects that *Stolt-Nielsen* had on the case, as was required by the Supreme Court when it remanded the case. The court concluded that the Supreme Court's holding in *Stolt-Nielsen* was that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[30] American Express urged that the Supreme Court's decision required the court to "faithfully enforce the parties' arbitration agreement."[31] The Second Circuit distinguished the question here as one of whether a class action waiver is enforceable when it would "effectively strip the plaintiffs of their ability to prosecute alleged antitrust violations."[32] As such, the question was not one of giving intent to the parties' agreements; instead, the Second Circuit viewed the issue as whether Section 2 of the FAA allowed for non-enforcement through common law contract grounds.[33] In doing so, the court would examine the enforceability of class action waivers under the federal substantive arbitration law.[34]

The court's analysis of the federal arbitration law governing this issue was influenced by the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp*.[35] In *Gilmer*, the Supreme Court held that "'[i]t is by now clear that statutory claims may be the subject of an arbitration agreement,'" the arbitration clause was enforceable "'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'"[36] The Second Circuit, referencing *Gilmer*, framed the relevant inquiry as "whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex in either an individual or collective capacity."[37]

The court also examined the Supreme Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph* in framing its analysis.[38] In *Green Tree* the Supreme Court held that "when 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'"[39] This decision, along with the one articulated by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., holding that "public policy concerns might bar an agreement to arbitrate,"[40] would allow for the Second Circuit to invalidate the agreement to arbitrate if the class action waiver would force parties to participate in an arbitral procedure that was prohibitive expensive or would violate public policy.[41]

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[30] *Id.* at 193 (citing Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010)) (emphasis in the original).

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id.* at 194.

[36] *Id.* at 195 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).

[37] *Id.* at 196.

[38] *Id*.

[39] *Id.* at 197 (citing Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 92 (2000)).

[40] *Id.* at 197 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[41] *Id*.

B. The Court's Analysis of the Particular Agreement Between American Express and the Plaintiffs

The Second Circuit began its analysis of the validity of American Express' arbitration clause by noting "an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy."[42] The second of the factors articulated by the Second Circuit was met; the class action waiver was in violation of public policy. The court next turned to the issue of whether the arbitration agreement would inflict prohibitive costs upon the Plaintiffs, effectively robbing them of their ability to protect their rights under the federal antitrust statutes.[43]

The court here found that there was ample evidence in the record to support a finding that arbitrating their disputes would effectively act as a bar to the Plaintiffs asserting their statutory rights under the federal antitrust statutes.[44] The court based their assertion on expert testimony submitted by the Plaintiffs at the district court level.[45] The Plaintiffs' expert asserted that the Plaintiffs expected awards would be notably less than the expected costs they would incur if forced to individually arbitrate their antitrust claims.[46] The court viewed the expert's testimony as demonstrative that "the only economically feasible means for enforcing their [the Plaintiffs'] statutory rights is via class action."[47] Even with the trebling of damages and the shifting of attorney's fees, which must include an assessment of likelihood on the merits, the Plaintiffs would not be able to recover more than the costs associated with the experts and would be discouraged from bringing suit.[48]

The court concluded that the private enforcement of the antitrust statutes was essential to protecting the statutory rights protected by the antitrust statutes.[49] Strong private incentives were included within the statutes to encourage private enforcement; the prohibitive costs associated with individual arbitration cut inapposite to these incentives and could not stand when taking into account this congressional intent.[50] Because the class action waiver was found to be both in violation of public policy and a strong congressional intent favoring private enforcement, the class action waiver provision was ruled to be void.[51] The court refused to articulate a per se rule forbidding the inclusion of a class action in an agreement to arbitrate; instead the ruling court must rule on the enforceability of the waiver on a case-by-case basis, considering the merits.[52] Finally, the court did not view the Supreme Court's decision in *Stolt-Nielsen* as prohibiting this result; it noted that this decision merely prevented the court from ordering class-wide arbitration.[53] Because the court did not do this, it was clearly within the scope of its powers in

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[42] *Id.*; *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) (reasoning that a waiver of the right to litigate under the federal antitrust statutes could be found to be against public policy).

[43] *Id.* at 197–98.

[44] *Id*.

[45] *Id.* at 198.

[46] *Id*.

[47] *Id*.

[48] *Id.* at 198–99.

[49] *Id.* at 199.

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] *Id.* at 200.

making its ruling. The court remanded the decision to the district court for proceedings consistent with their decision here.[54]

C. The Court's Analysis in Light of AT&T Mobility – Amex III

The Supreme Court severely called the Second Circuits analysis when it rendered its decision in *AT&T Mobility LLC v. Concepcion*.[55] The Second Circuit addressed this concern in the third iteration of *In re American Express Merchants Litigation* ("*Amex III*").[56] The court found that neither *AT&T Mobility*, nor *Stolt-Nielsen* affected its previous analysis.[57] It argued that neither decision addressed the narrow issue presented by the Plaintiffs: "whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights."[58] The court reasoned that class action lawsuits are an effective mechanism for the vindication of statutory rights.[59] Arbitration can also provide an effective mechanism for litigants to litigate their rights, but this vindication can only come where the agreement to arbitrate does not act as a de facto waiver of the statutory right; the litigant must be able to effectively protect their rights in the arbitral forum.[60] The court found that the Plaintiffs had proven that arbitrating their antitrust claims would be prohibitively expensive and effectively prevent them from vindicating their rights under the federal antitrust statutes.[61] The court relied heavily on expert testimony opining that seeking individual lawsuits would lead to a negative value outcome; this testimony was seen as essential proof that any individual suit would be prohibitively expensive.[62] The court continued to warn that they were not expressing the opinion that class action waivers are per se unenforceable, instead the court ruled that "each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA 'is a congressional declaration of a liberal federal policy favoring arbitration agreements.'"[63] The Second Circuit remanded the case to the district court with instructions to deny the Defendant's motion to compel arbitration under the FAA.[64]

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[54] *Id*.

[55] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (holding that California's *Discover Bank* rule invalidating arbitral clauses containing class action waivers as unconscionable is incompatible with the FAA and therefore preempted).

[56] *See In re* Am. Express Merchs. Litig., 667 F.3d 204 (2d Cir. 2012) ("*Amex III*").

[57] *Id*. at 212.

[58] *Id*.; *see also* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (holding that California's *Discover Bank* rule invalidating arbitral clauses containing class action waivers as unconscionable is incompatible with the FAA and therefore preempted); Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1782 (2010) (finding that parties may not submit their claims to class arbitration unless the arbitral agreement explicitly references this procedural device).

[59] *Amex III*, 667 F.3d at 214.

[60] *Id*.

[61] *Id*. at 215–17; *see also* Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 92 (2000) ("when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs").

[62] *Amex III*, 667 F.3d at 217-18.

[63] *Id*. at 219 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

[64] *Id*. at 219–20.

IV. SIGNIFICANCE

In re American Express Merchants Litigation is one of the rare cases that significantly impacts numerous aspects of arbitration law. The Second Circuit's decision not only affects the status of class action waiver clauses within arbitral agreements, it also touches on arbitrator autonomy and the arbitrability of antitrust suits. Each of these issues have arguably been settled by the Supreme Court, but the Second Circuit's decision here strongly calls into question this assertion. While the Second Circuit agrees with the Supreme Court regarding arbitrator autonomy, its ruling regarding the arbitrability of antitrust suits is seemingly in direct opposition with the Supreme Court's ruling in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[65] The court's ultimate holding, that the class action waiver included by American Express voids the agreement to arbitrate, is also now called into question by the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion.*[66] All three of these issues present interesting questions concerning the continued validity of the Second Circuit's decision in *In re American Express Merchants Litigation*, and how courts in this jurisdiction, and maybe even the Supreme Court, resolve these questions will determine the ultimate impact of the Second Circuit's decision here.

The Supreme Court effectively limited arbitrator autonomy in *Stolt-Nielsen S. A. v. AnimalFeeds International Corp.* Here, the Supreme Court held that the question of whether class arbitration was appropriate was a question for the court, not the arbitrator, to decide.[67] By overruling the arbitrator's decision, the Court implicitly reserved the right to determine the nature of class action provisions within an arbitral agreement.[68] *In re American Express Merchants Litigation* reinforces this idea. In fact, both parties in the litigation agreed that this matter was a non-issue; neither party challenged the Second Circuit's assertion that they were the proper body to determine the enforceability of the class action waiver in light of *Stolt-Nielsen.*[69] This decision is the least contentious matter decided by the Second Circuit, but it is nonetheless significant. It signals that this jurisdiction has effectively moved with the Supreme Court from a regime that recognizes a high degree of arbitrator autonomy, evidenced in *Green Tree Financial Corp. v. Bazzle*, to one that restricts the arbitrator autonomy, at least within the context of decided questions regarding class action, as advanced in *Stolt-Nielsen.*[70] It now falls squarely within the authority of the court to decide issues regarding class action within the arbitration context; the Second Circuit directly recognizes this proposition here.

The Second Circuit advances several policy justifications for holding the class action waiver clause unenforceable; among these the court reasons that the class action waiver provision places a burden upon individual litigants preventing the kind of private enforcement envisioned in

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[65] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635-37 (reasoning that international arbitration provides an effective mechanism through which American antitrust statutes can be enforced).

[66] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (holding that California's *Discover Bank* rule invalidating arbitral clauses containing class action waivers as unconscionable is incompatible with the FAA and therefore preempted).

[67] Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010).

[68] *See id.* at 1774-76 (citing Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 479 (1989)) ("It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.").

[69] *In re* Am. Express Merchs. Litig., 634 F.3d 187, 191 (2d Cir. 2011), *aff'd on reconsideration by In re* Am. Express Merchs. Litig., 667 F.3d 204 (2d Cir. 2012).

[70] *Compare* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452-453 (2003) (holding whether parties agreed to class arbitration was a question of contract interpretation properly settled by the arbitrator), *with* Stolt-Nielsen 130 S. Ct. at 174 (citing *Volt*, 489 U.S. at 479).

and fundamental to the antitrust statutes.[71] These findings seem to call into question the arbitrability of antitrust claims, an issue that was effectively decided by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[72] The Second Circuit here employs reasoning that has been explicitly forbidden by the Supreme Court; questions of antitrust arbitrability have been settled, and the controversies are to be sent to arbitration where the parties have agreed as such. Even though the court cites *Mitsubishi* to show agreement with their ultimate conclusions, it seems to misunderstand the proper application of the precedent; it must be viewed in terms of its ultimate conclusion that antitrust suits are, at their core, arbitrable. The divergence from Supreme Court precedent severely calls into question any long-term impact that this decision will have, making any significant impact, at the very least, questionable.

Finally, the Second Circuit's decision to invalidate the class action waiver presents interesting questions in light of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*. In *AT&T Mobility* the Supreme Court decided that states may not enact class action waiver laws that stand as an obstacle to the enforcement of arbitration agreements governed by the FAA.[73] This pronouncement is arguably applicable to the federal courts. The Supreme Court, in *AT&T Mobility*, made broad statements in the decision, describing class action waivers as interfering with the FAA's mandate requiring arbitration where an underlying agreement is found.[74] This broad language hints that application will be applied broadly and call into focus all federal decisions concerning agreements to arbitrate; class action waivers will likely be viewed as part of the underlying agreement to submit disputes to arbitration. If this analysis holds true, the Second Circuit's decision here will likely be viewed as directly conflicting with Supreme Court precedent. The Second Circuit's decision here seems to be inapposite to the "liberal policy favoring arbitration" described by the Supreme Court in *AT&T Mobility*.[75] Because of this the Second Circuit's holding's continued significance and validity is significantly called into question. The court's best hope lies in its decision to not adopt a per se rule prohibiting class action waivers, instead adopting a case-by-case analysis.[76] Whether this decision will ultimately stand will depend on the course this litigation takes after remand. It is legitimate to wonder whether the Second Circuit will stand by its decision if given the chance to reverse in light of *AT&T Mobility*, or if the court will decide that it was correct and give the Supreme Court another

[71] *Am. Express*, 634 F.3d at 199; *see also* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) ("In enacting these laws [the antitrust statutes], Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as private attorneys general."). This notion of the private attorney general seems to be central to the Second Circuit's argument. A strong argument can be made that this line of decisions will likely stand because of the unique nature of the antitrust statutes and accompanying litigation.

[72] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 636-37 (1985) ("Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim.").

[73] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

[74] *Id.* at 1750.

[75] *Id.* at 1745.

[76] *Am. Express*, 634 F.3d at 199.

chance to rule on the applicability of class action waivers in arbitral clauses.[77] This decision will determine the ultimate significance of *In re American Express Merchants Litigation*.

V. CONCLUSION

The Second Circuit's decision in *In re American Express Merchants Litigation* can be viewed in one of two ways: either as an attempt to expand protection to consumers trying to avoid recourse to arbitration, or as a direct challenge to the Supreme Court's authority to shape arbitration law in the United States. Either way, the decision is unlikely to stand given the recent decision in *AT&T Mobility*. Here, the Supreme Court rejected the courts' role as protector of consumer rights. The Court stated "the times in which consumer contracts were anything other than adhesive are long past."[78] This pronouncement is an implicit pronouncement that should no longer serve as consumer protection agencies. The realities facing the consumer market dictate that businesses deal in terms of adhesion. Consumers must face this reality and not look to courts to invalidate deals they accepted as part of doing business.

The Supreme Court also showed a willingness in *AT&T Mobility* to overrule the circuit courts on issues it feels were decided wrongly. *AT&T Mobility* was decided on appeal from the Ninth Circuit; the Supreme Court showed no hesitation to overrule the Ninth Circuit when they felt the circuit decided the class action waiver issue wrongly.[79] If the Second Circuit is challenging the Supreme Court in holding the class action waiver enforceable, it should expect its decision to be overruled. If the Second Circuit gets a second chance to rule on the issue after remand to the district court it should rule in accordance with Supreme Court precedent and declare the class action waiver enforceable if it wants its decision to stand. This conflict, and the discrepancy between the Second Circuit's reasoning regarding the inarbitrability and the Supreme Court's decision in *Mitsubishi*, will need to be remedied before *In re American Express Merchants Litigation* can have any lasting effect. Inconsistency and failure to abide by precedent will only frustrate the development of arbitration law by necessitating needless appeal and clouding issues that once considered to be clear.

[77] This continues to be a question after *Amex III*. It is unclear whether the case-by-case basis test will continue to stand, or whether a doctrine will be developed that is more in line with the Supreme Court's strong presumption of favoring the recourse to individual arbitration. *Amex III* and its predecessors are unique because they involve a question of antitrust litigation; an area of law where individual litigants are unlikely to proceed with nominal claims without prohibitive costs. This is still an issue that, if pressed on it, the Supreme Court could decide that arbitration effectively vindicates statutory rights—especially if the issues arises in another area of substantive law.

[78] *AT&T Mobility*, 131 S. Ct. at 1750.

[79] *Id.* at 1745, 1753.

THE NINTH CIRCUIT GRAPPLES WITH THE ARBITRABILITY AND UNCONSCIONABILITY OF MMWA CLAIMS

Amanda Miller*

I. INTRODUCTION

In the Federal Arbitration Act (FAA), Section two states that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[1] Despite this clear statutory mandate requiring the enforcement of arbitration agreements, parties constantly resist the arbitral process. Often, parties endeavor to use state contract law in attempts to prevent the court from compelling arbitration as required by FAA § 2. To preclude arbitration, parties frequently argue that they are not bound by the agreement because the underlying claims lack substantive arbitrability. While arbitrability challenges are slowly becoming more futile,[2] the former route has flourished. By applying unconscionability doctrine, parties often persuade the court that the terms of the arbitration agreement shock the conscience and are unenforceable.[3]

In *Kolev v. Euromotors*, the Plaintiffs sought to defeat a motion to compel arbitration and presented the Ninth Circuit court with unconscionability and substantive inarbitrability defenses.[4] The Ninth Circuit ruled that Magnuson Moss Warrant Act (MMWA) warranty claims are not arbitrable and ignored the unconscionability claim.[5] In *Sanchez v. Valencia Holding Co.*, a similar case involving state statutes, the California Court of Appeal held that the arbitration clause was unconscionable.[6] In response to the California Supreme Court granting review in *Sanchez*, the Ninth Circuit issued a *sua sponte* withdrawal of the *Kolev* opinion and will issue a new opinion light of the California Supreme Court decision in *Sanchez*, which will likely address unconscionability, as opposed to substantive inarbitrability. While unconscionability challenges

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[1] Federal Arbitration Act, 9 U.S.C. § 2 (2006).

[2] *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012); *see also* 14 Penn Plaza v. Pyett, 129 S. Ct. 1456 (2009).

[3] *See* Kloss v. Edward D. Jones & Co., 54 P.3d 1 (Mont. 2002) (setting out factors for unconscionability in arbitration agreements); *see also* Gutierrez v. Autowest, Inc., 114 Cal. Rptr. 3d. 267 (Cal. Ct. App. 2003) (holding that the arbitration clause was procedurally unconscionable); *see also* Bruni v. Didion, 73 Cal. Rptr. 3d 395 (Cal. Ct. App. 2008) (holding that a home purchasers' warranty agreement had adhesive arbitration provisions that involved surprise, violated the purchasers' reasonable expectations and could not be severed); *see also* Rent-A-Center, West, Inc. v. Jackson 130 S. Ct. 2772 (2010) (holding that unconscionability/enforceability was a decision for the arbitrator); *see also* In re Checking Account Overdraft Litigation 2011 U.S. Dist. Lexis 118462, at *46, 2011 WL 4454913, at *4 (S.D. Fla. 2011) ("*Concepcion* did not completely do away with unconscionability as a defense to the enforcement of arbitration agreements under the FAA.").

[4] Kolev v. Euromotors West/The Auto Gallery, 658 F.3d 1024 (9th Cir. 2011), *withdrawn and vacated by* 2012 WL 1194177, ___F.3d___ (9th Cir. Apr. 11, 2012).

[5] *Id.*

[6] Sanchez v. Valencia Holding Co., LLC, 132 Cal. Rptr. 3d 517 (Cal. Ct. App. 2011), *vacated and review granted by* 135 Cal. Rptr. 3d. 19 (Cal. 2012).

have survived and seem to thrive post-*AT&T Mobility*,[7] it is clear that challenging motions to compel on arbitrability grounds is fruitless.

II. BACKGROUND

The courts have established a liberal policy favoring arbitration agreements and require enforcement of agreements to arbitrate according to their terms.[8] Despite this policy of favoring the arbitral, the courts were originally hesitant to arbitrate certain statutory claims.[9]

In *Mitsubishi Motors v. Soler*, the Court held that international arbitrators have authority to rule upon statutory claims that arose in the performance of an international contract.[10] When initially rendered, the holding was limited to international commercial arbitration matters. The courts later began to ignore the international specificity of the holding and integrated the policy of arbitrating statutory claims into domestic law. Precedent prohibiting domestic recourse to arbitration of certain statutory claims was reversed.[11]

The Supreme Court has also promulgated a policy of enforcing agreements to arbitrate even when the claims at issue are federal statutory claims, unless the FAA's mandate has been "overridden by a contrary congressional command."[12] In *Kolev*, the Ninth Circuit court held that Congress delegated MMWA rule-making authority to the FTC, who interpreted the statute's intent to preclude mandatory and binding pre-dispute arbitration clauses.[13] This decision was controversial, as the Fifth and Eleventh Circuit Courts have both held that the MMWA does not preclude arbitration of MMWA warranty claims.[14] The opinion of the Ninth Circuit Court was vacated, and a new opinion will be rendered after the California State Supreme Court issues an opinion in *Sanchez*, which addresses unconscionability of arbitration clauses.

While arbitration contracts are binding, Courts may sometimes hold that these agreements are unenforceable when the arbitration clause is unduly oppressive and unconscionable.[15] In *Gutierrez v. Autowest, Inc*., the court held that oppression may exist and an arbitration provision in a sales contract can be procedurally unconscionable when "[the buyer]

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[7] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (holding that California state contract law deeming class-action waivers in arbitration agreements unenforceable, is preempted by the Federal Arbitration Act).

[8] *See* Moses H Cone v. Mercury, 461 U.S. 1, 24 (1983) (holding that courts should resolve any doubts about arbitrability in favor of arbitration); *see also* Dean Witter v. Byrd, 470 U.S. 213, 221 (1985); *see also* Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1774-75 (2010).

[9] *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 233 (1987) ("[T]he mistrust of arbitration that formed the basis for the *Wilko* [*v. Swan*, 346 U.S. 427 (1953),] … is difficult to square with the assessment of arbitration that has prevailed since that time.").

[10] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985) (holding that international arbitrators have authority to rule on statutory claims in international contracts).

[11] *See Shearson*, 482 U.S. at 242; *see also* 14 Penn Plaza v. Pyett, 129 S. Ct. 1456 (2009) (holding that there is no subject matter inarbitrability of civil rights claims as long as the agreement clearly submits disputes to arbitration); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

[12] CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012) (holding that federal statutory claims are arbitrable unless express congressional command says otherwise).

[13] Kolev v. Euromotors West/The Auto Gallery, 658 F.3d 1024, 1025 (9th Cir. 2011).

[14] *See* Walton v. Rose Mobile Homes L.L.C., 298 F.3d 470 (5th Cir. 2002); *see also* Davis v. S. Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002).

[15] *See* Kloss v. Edward D. Jones & Co., 54 P.3d 1 (Mont. 2002) (setting out factors for unconscionability in arbitration agreements).

asserts the Contract was presented to him on a 'take-it-or-leave-it' basis, ... and he did not have an opportunity for meaningful negotiation…No one pointed out the Arbitration Clause or discussed it with [the buyer] at any time …."[16] In *Sanchez*, the California Court of Appeal held that the arbitration clause was unconscionable because the provision was adhesive, involved oppression and surprise, and contained one-sided terms that favored the car dealer to the detriment of the buyer.[17] While the *Kolev* court chose not to address the unconscionability claims in their first opinion, they may discuss the Plaintiffs unconscionability claims once the California Supreme Court renders an opinion in *Sanchez*.[18]

III. COURT'S ANALYSIS

In *Kolev v. Euromotors West*, Diana Kolev brought suit against Euromotors West/The Auto Gallery, Motorcars West LLC ("the Dealership") and Porsche Cars North America ("Porsche"), when the pre-owned automobile she bought from the Dealership developed serious mechanical issues during the warranty period.[19] The Dealership refused to honor her warranty claim and Kolev alleged breach of implied and express warranties under the MMWA, breach of contract, and contract unconscionability.[20]

The sales contract contained a mandatory arbitration clause, which the District Court enforced when the Dealership made a motion to compel arbitration.[21] The arbitration resulted in an arbitral award favoring the Dealership.[22] Kolev appealed, arguing that the MMWA barred binding arbitration of her warranty claims. Kolev maintained that while the MMWA did not specifically address arbitration, Congress delegated MMWA rulemaking authority to the Federal Trade Commission ("FTC").[23] Kolev claimed that the FTC construed the MMWA to bar pre-dispute mandatory binding arbitration clauses in warranty agreements, and as prohibiting enforcement of arbitration clauses in claims brought under the MMWA.[24]

The Ninth Circuit originally held that MMWA warranty claims were not subject to compulsory arbitration.[25] While the courts in the Fifth and Eleventh Circuits have both held that the MMWA does not preclude arbitration of warranty claims,[26] the Ninth Circuit disagreed, finding that Congress delegated MMWA rule-making authority to the FTC, who interpreted the statute's intent to preclude mandatory and binding pre-dispute arbitration clauses.[27] Because they

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[16] Gutierrez v. Autowest, Inc., 114 Cal. Rptr. 3d. 267 (Cal. Ct. App. 2003) (holding that the arbitration clause was procedurally unconscionable).

[17] Sanchez v. Valencia Holding Co., LLC, 135 Cal. Rptr. 3d. 19, 22-23 (Cal. Ct. App. 2011).

[18] Kolev v. Euromotors W./The Auto Gallery, 2012 WL 1194177 (9th Cir. Apr. 11, 2012).

[19] Kolev v. Euromotors W./The Auto Gallery, 658 F.3d 1024, 1025 (9th Cir. 2011).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *See* Walton v. Rose Mobile Homes L.L.C., 298 F.3d 470 (5th Cir. 2002); *see also* Davis v. Southern Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002), *cert denied*, 538 U.S. 945 (2003) (holding that MMWA warranty disputes are not precluded from arbitration).

[27] *Kolev*, 658 F.3d at 1030.

found warranty issues under the MMWA statutorily inarbitrable, the court decided it was unnecessary to address the unconscionability claims.[28] The Ninth Circuit recently withdrew their opinion for *Kolev*, and vacated the submission of the case, pending the issuance of a decision by the California Supreme Court in *Sanchez*.[29]

In *Sanchez*, a consumer filed a class action claim against a car dealership, alleging violations of the Consumers Legal Remedies Act (CLRA),[30] the Automobile Sales Finance Act (ASFA),[31] the Unfair Competition Law (UCL),[32] the Song–Beverly Consumer Warranty Act (Song–Beverly Act),[33] and the California Tire Recycling Act (Tire Recycling Act).[34] The dealership then filed a motion to compel arbitration.[35] The California Court of Appeal held that the arbitration clause in a car dealership contract was both procedurally and substantively unconscionable, and the trial court was correct in denying the defendant's motion to compel arbitration.[36] The Supreme Court of California granted the Defendant's petition for review. This comment will focus on the issues decided in both the Federal and the State courts, and the effect the California Supreme Court decision will have on *Kolev*.[37]

A. In Kolev, the Ninth Circuit held that Congressional Intent Precluded Binding Arbitration Clauses in MMWA Warranty Agreements

The court stated that traditional tools of statutory construction were used to determine whether Congress expressed clear intent on the issue of arbitration clauses in the MMWA.[38] The court found that while the MMWA did not specifically address binding arbitration agreements, Congress expressly delegated authority to the FTC to make rules regarding informal dispute settlement procedures for warranty agreements.[39] The FTC stated in Rule 703 that, "[d]ecisions of [any] Mechanism shall not be legally binding on any person."[40] Rule 703 also stated that if a consumer is dissatisfied with a Mechanism's holding or a warrantor's actions, then legal remedies may be pursued.[41] The FTC concluded that any written warranty containing binding, non-judicial remedies was prohibited.[42]

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[28] *Id.* at 1031.

[29] Kolev v. Euromotors West/The Auto Gallery, 2012 WL 1194177 (9th Cir. Apr. 11, 2012).

[30] CIV.CODE, §§ 1750–1784.

[31] CIV.CODE, §§ 2981–2984.6.

[32] BUS. & PROF.CODE, §§ 17200–17210.

[33] CIV.CODE, §§ 1790–1795.8.

[34] CA PUB RES D. 30, Pt. 3, Ch. 17 §§ 42860–95; Sanchez v. Valencia Holding Co., LLC, 135 Cal. Rptr. 3d 19, 22 (Cal. Ct. App. 2011).

[35] *Id.*

[36] *Id*. at 22–23.

[37] Sanchez v. Valencia Holding Co., LLC, 2012 WL 1159303 (Cal. 2012).

[38] *Id.* at 2.

[39] *Id.*

[40] *See* 16 C.F.R. § 703.5(j); *see also Kolev*, 658 F.3d at 1025.

[41] *See* 16 C.F.R. § 703.5 (g).

[42] *Kolev*, 658 F.3d at 1026.

1. The Court Interpreted Rule 703 to Preclude Arbitration Clause in Warranty Agreements.

The court provided three reasons why the interpretation precluding pre-dispute mandatory binding arbitration was a reasonable interpretation of the MMWA.[43] First, the court stated that Rule 703 implemented congressional intent, evidenced by a House Subcommittee Staff Report that stated "[c]ongressional intent was that the decisions of Section 110 Mechanisms not be legally binding."[44] Second, the court stated that the FTC's interpretation of the MMWA, barring pre-dispute mandatory binding arbitration, advanced the statute's purpose of protecting consumers from adhesive involuntary agreements.[45] Third, the court stated that FTC regulations represented a longstanding and consistent interpretation of the statute; therefore it should have been accorded deference.[46]

The court referenced the FTC's 1999 statement as evidence that the Commission deemed the ability of warrantors to require consumers to submit to binding arbitration as contrary to Congress's intent.[47] The court interpreted that statement as implying that a mechanism could not be legally binding, as it would bar later court action.[48]

2. The Ninth Circuit Reasoning of How the Federal Policy Favoring Arbitration did not Render the FTC's Interpretation of the MMWA Unreasonable.

a. Congressional intent was clear and the MMWA rebutted the Federal policy of enforcing arbitration agreements.

The Ninth Circuit cited *Shearson/Am. Express Inc. v. McMahon*, stating that the FAA mandate to enforce arbitration agreements may be overridden by congressional command.[49] The court pointed out that the FAA was enacted fifty-one years prior to the enactment of the MMWA and later-enacted statutes, which are more specific, should be given greater deference than older, more general statutes.[50]

The court expressly disagreed with holdings of the Fifth and Eleventh Circuits, which found that the MMWA did not overcome the FAA's presumption to enforce arbitration agreements.[51] The court stated that the FTC has reaffirmed its interpretation of the MMWA

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[43] *Id.* at 1027–28.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 1028–29.

[48] *Id.*

[49] *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (holding that claims under § 10(b) of the Securities Exchange Act were arbitrable under pre-dispute arbitration agreements, and customers could effectively vindicate their RICO claim against broker in arbitral forum).

[50] *Kolev*, 658 F.3d at 1029.

[51] *Id.* at 1030.

prohibiting binding, non-judicial arbitration, even after *McMahon* established a policy favoring the enforcement of arbitration agreements.[52]

b. The MMWA was different from every other federal statute that the Supreme Court has found unable to rebut the FAA's pro-arbitration presumption.

In the past, the Supreme Court has found no statute to meet the standard for rebutting the FAA's policy of enforcing arbitration agreements.[53] The court stated that the MMWA is unlike all the previously examined statutes in four ways. First, none of the other statutes had an authorized agency that interpreted the statute to prohibit pre-dispute mandatory binding arbitration.[54] Second, in the past, Congress has never discussed informal, non-judicial remedies and barred binding procedures such as mandatory arbitration, as it did with the MMWA.[55] Third, only in the MMWA has Congress explicitly preserved the consumer's right to pursue claims in civil court.[56] Finally, the MMWA is the only statute with the stated purpose of protecting consumers by prohibiting vendors from imposing binding, non-judicial remedies.[57] The court pointed out that this differed from the FAA's policy of expediting disputes without regard to the interests of consumers and referenced *AT&T Mobility v. Concepcion.*[58]

c. The Dissenting Opinion Finding how the MMWA did not Prevent Parties from Agreeing to Binding Arbitration as a Remedy to Warranty Disputes.

Judge Smith began his dissent by pointing out that the majority mistakenly confused "Informal Dispute Settlement Procedures,"(IDSM) or "Mechanisms" which were discussed under the MMWA, with alternative dispute resolution remedies adopted in private contracts.[59] Judge Smith stated that arbitration was not a Mechanism, and the FTC acknowledged that private parties were free to agree to some alternative to Mechanisms, if they deemed it more appropriate.[60] Judge Smith further argued that "Mechanism" is a narrowly defined legal term, which refers to only IDSMs authorized by the MMWA.[61] A binding arbitration remedy is not an IDSM because it is an alternative to litigation as opposed to a "pre-requisite" to litigation.[62] As

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[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 1031; *see also* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (holding that class action waivers were acceptable in arbitration agreements, as efficiency is goal of arbitration, and contracts of adhesion are permissible).

[59] *Id.* at 1032.

[60] *Id.*at 1033.

[61] *Id.*

[62] *Id.*

binding arbitration clauses are not included in the category of IDSMs, the FTC lacks authority to regulate them.

The dissent further found that the majority's holding banning binding arbitration in all warranty disputes was unsupported by the language of the statute, administrative rules, FTC opinions and judicial authority.[63]

In addition, Judge Smith argued that the FAA established a federal policy that favored the enforcement of arbitration contracts; therefore, any FTC regulations that prohibited binding arbitration by warranty dispute resolution procedure would be unreasonable.[64] Judge Smith stated that the FAA's mandate could only be overridden by contrary congressional command.[65] The party opposing arbitration carries the burden of proving that Congress intended to create an exception to the FAA.[66] Judge Smith concluded his dissent by stating, "[t]he FTC's ban on arbitration cannot reasonably be read to apply to anything other than a MMWA 'Mechanism'. Even if it could, this view would be incompatible with the clear federal policy favoring arbitration under the Arbitration Act."[67]

B. In Sanchez, the California Court of Appeal held that the Sales Contract Signed was unconscionable, and the Trial Court Correctly Refused to Compel Arbitration

In *Sanchez*, the Plaintiff filed this class action against a car dealer, alleging violations of several state statutes, including the CLRA, ASFA, UCL, Song–Beverly Act, and the Tire Recycling Act.[68] The Dealer filed a motion to compel arbitration pursuant to a provision in the sales contract, which also contained a class action waiver.[69] The arbitration provision in the sales contract stated that if the class action waiver was declared unenforceable, "the entire arbitration provision was not to be enforced. Pursuant to this 'poison pill' clause, the Trial Court denied the petition to compel arbitration."[70]

The Dealer appealed. The California Court of Appeal held that the arbitration provision was unconscionable because it was adhesive (involving oppression and surprise), and contained harsh one-sided terms that favor the Dealer.[71] Because the provision was permeated by unconscionability, the court determined it was unenforceable regardless of the validity of the class action waiver.[72]

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[63] *Id.*
[64] *Id.* at 1036.
[65] *Id.*
[66] *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987).
[67] *Kolev*, 658 F.3d at 1036.
[68] Sanchez v. Valencia Holding Co., LLC, 135 Cal. Rptr. 3d 19, 22 (Cal. Ct. App. 2011).
[69] *Id.*
[70] *Id.*
[71] *Id.* at 24.
[72] *Id.* at 22–23.

1. AT&T Mobility v. Concepcion found to be inapplicable

The California Court of Appeal stated that *Concepcion*, "does not preclude the application of the unconscionability doctrine to determine whether an arbitration provision is unenforceable."[73] *Concepcion* overruled *Discover Bank*, which stated that: class-action waivers in adhesive arbitration agreements are unconscionable under California law and should not be enforced.[74] The court in *Concepcion* held that "[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[75]

The FAA permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[76] This savings clause permits agreements to arbitrate to be invalidated by typical contract defenses, such unconscionability, but not by defenses that apply solely to arbitration.[77] In *Rent–A–Center v. Jackson*, the Court held that the arbitrator should decide whether the agreement was unconscionable and therefore unenforceable.[78] The *Sanchez* court held that *Concepcion* is inapplicable because the parties are addressing unconscionability claims and not the enforceability of a class action waiver that is inconsistent with the FAA.[79]

2. The arbitration provision satisfied both elements of procedural unconscionability: oppression and surprise

The procedural element of unconscionability focuses on two factors: oppression and surprise.[80] "Oppression" occurs when there is an inequality of bargaining power, and no real negotiation occurs.[81] When the supposedly-agreed-upon terms of the contract are hidden by the party seeking to enforce the disputed terms, "surprise" exists.[82]

In *Gutierrez v. Autowest, Inc.*, the court found the arbitration provision to be oppressive.[83] The facts in *Sanchez* are similar to those in *Gutierrez* in that the buyer asserted the contract was presented on a "take it or leave it" basis, there was no opportunity for meaningful negotiation, the buyer had no opportunity to read the contract prior to signing it, and no one

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[73] *Id.* at 28.

[74] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (holding that class action waivers were acceptable in arbitration agreements, and not necessarily unconscionable).

[75] *Id.*

[76] 9 U.S.C § 2.

[77] *Sanchez* at 29; *see also Concepcion* at 1746; *see also In re* Checking Account Overdraft Litigation (S.D. Fla. 2011) 2011 U.S. Dist. Lexis 118462, at *46, 2011 WL 4454913, at *4 ("*Concepcion* did not completely do away with unconscionability as a defense to the enforcement of arbitration agreements under the FAA.").

[78] Rent-A-Center, West, Inc. v. Jackson 130 S. Ct. 2772 (2010) (holding that unconscionability/enforceability was a decision for the arbitrator).

[79] *Sanchez*, 135 Cal. Rptr. 3d at 29.

[80] *Id.* at 30; *see also* Bruni v. Didion, 73 Cal. Rptr. 3d 395 (Cal. Ct. App. 2008) (holding that a home purchasers' warranty agreement had adhesive arbitration provisions that involved surprise, violated the purchasers' reasonable expectations and could not be severed).

[81] *Id.*

[82] *Id.*

[83] Gutierrez v. Autowest, Inc., 7 Cal. Rptr. 3d 267, 585 (Cal. Ct. App. 2003) (holding that a similar arbitration clause was procedurally unconscionable).

pointed out the Arbitration Clause or discussed it with the buyer.[84] Additionally, surprise exists when the Arbitration Clause was hidden in the lengthy form contract.[85] In *Sanchez*, the arbitration clause was found at the end of the contract, after the last signature, making it unnoticeable to the buyer who was not given time to read the contract.[86]

The court held that as the Plaintiff demonstrated surprise in addition to oppression, the arbitration clause was procedurally unconscionable.[87] While Valencia argued that the clause lacked procedural unconscionability because Sanchez had the opportunity to buy a car elsewhere, the court cites *Gatton v. T-Mobile USA*, stating "courts are not obligated to enforce highly unfair provisions that undermine important public policies simply because there is some degree of consumer choice in the market."[88] Additionally, the California Court of Appeal has held that the availability in the marketplace of a substitute alone is unable defeat a claim of procedural unconscionability.[89]

3. The arbitration clause was substantively unconscionable

Enforcement of an arbitration clause may only be denied if it is also substantively unreasonable.[90] Substantive unconscionability exists when the provision is overly harsh or one-sided, falls outside reasonable expectations, or is unduly oppressive.[91] The court held that four clauses in the arbitration provision were substantively unconscionable:

> First, a party who loses before the single arbitrator may appeal to a panel of three arbitrators if the award exceeds $100,000. Second, an appeal is permitted if the award includes injunctive relief. Third, the appealing party must pay, in advance, "the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs." Fourth, the provision exempts repossession from arbitration while requiring that a request for injunctive relief be submitted to arbitration.[92]

The court stated that while these provisions may appear neutral on their face, they have the effect of placing an unduly oppressive burden on the buyer.[93]

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[84] *Id.*; *see also Sanchez*, 135 Cal. Rptr. 3d at 30.

[85] *Sanchez*, 135 Cal. Rptr. 3d at 31.

[86] *Id.*

[87] *Id.*

[88] *Id.*; *see also* Gatton v. T–Mobile USA, Inc. 585, 61 Cal. Rptr. 3d 344 (Cal. Ct. App. 2007) (holding that the adhesive nature of the agreement created a minimal degree of procedural unconscionability, and when combined with a high degree of substantive unconscionability, as existed with the class-wide arbitration waiver, was sufficient to rule the provision unenforceable).

[89] *Sanchez*, 135 Cal. Rptr. 3d at 31; *see also* Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1283 (9th Cir. 2006) (en banc) (stating that other opportunities, alone, is insufficient to defeat a procedural unconscionability claim).

[90] *Sanchez*, 135 Cal. Rptr. 3d at 32.

[91] *Id.*

[92] *Sanchez*, 135 Cal. Rptr. 3d at 33.

[93] *Id.*

4. The court has authority to void the entire arbitration provision, as it is permeated by unconscionability that cannot be removed through severance restriction

The trial court has discretion to refuse enforcement an entire agreement or clause if it is 'permeated' by unconscionability.[94] An arbitration clause may be considered permeated by unconscionability if it contains more than one unlawful provision.[95] Courts should also consider whether the interests of justice would be furthered by severance of the unconscionable provisions.[96]

The California Court of Appeal cites *Armendariz*, stating that Courts lack the authority to reform contracts.[97] When severance or restriction is inadequate, and reformation of an arbitral clause is needed to remove the unconscionable taint from the provision, it must void the entire arbitration clause.[98]

The court in *Sanchez* held that the arbitration provision was procedurally and substantively unconscionable.[99] Because the provision was permeated by unconscionability that cannot be removed through severance or restriction, the trial court properly denied the motion to compel arbitration.[100]

C. The California Supreme Court Granted Review of Sanchez, the Ninth Circuit's Opinion in Kolev was withdrawn, and submission of the case is vacated Pending the issuance of a Decision in Sanchez

The California Supreme Court granted Valencia's petition for review.[101] In response to this, the Ninth Circuit withdrew their opinion for *Kolev*, stating that it may not be cited as precedent.[102] The Ninth Circuit stated that submission of the *Kolev* is vacated pending the issuance of a decision by the California Supreme Court in *Sanchez.*[103]

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[94] CIV.CODE, § 1670.5(a).

[95] *Sanchez*, 135 Cal. Rptr. 3d at 40; *see also* Lhotka v. Geographic Expeditions, Inc., 104 Cal. Rptr. 3d 844 (Cal. Ct. App. 2010) (holding that when an agreement is so permeated by unconscionability, severances is improper).

[96] *Id.*

[97] *Sanchez*, 135 Cal. Rptr. 3d at 41; *see also* Armendariz v. Found. Health Psychcare Serv., Inc., 6 P.3d 669 (Cal. 2000) (stating that Civil Code § 1670.5 and arbitration statutes do not authorize reformation of arbitration clauses by augmentation, and Code of Civil Procedure § 1281.2 authorizes the court to refuse arbitration if grounds for revocation exist, not to reform the agreement to make it lawful).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] Sanchez v. Valencia Holding Co., LLC, 2012 WL 1159303 (Cal. Mar. 21, 2012).

[102] Kolev v. Euromotors West/The Auto Gallery, 2012 WL 1194177 (9th Cir. Apr. 11, 2012); (citing Carver v. Lehman, 558 F.3d 869, 878–79 (9th Cir. 2009) (holding a panel may withdraw an opinion *sua sponte* before the mandate issues)).

[103] Kolev v. Euromotors West/The Auto Gallery, 2012 WL 1194177 (9th Cir. Apr. 11, 2012).

IV. SIGNIFICANCE

The Ninth Circuit's decision to withdraw its opinion for *Kolev* is significant, especially considering the fact that they are withholding a replacement opinion until the California Supreme Court reaches a decision in *Sanchez.* At first glance, these two cases appear to be about completely different issues. While *Kolev* addresses statutory inarbitrability, *Sanchez* involves voidance of arbitration clauses due to rampant unconscionability.

While the Plaintiffs in *Kolev* did bring an unconscionability challenge, the Ninth Circuit chose not to address this, and instead rendered a controversial opinion regarding the arbitrability of all MMWA warranty claims. This opinion was significant because it contradicted statutory inarbitrability trends,[104] and the court held that the MMWA prohibited the enforcement of mandatory pre-dispute arbitration clauses.[105] This decision directly contrasted with holdings from the Fifth and Eleventh Circuit Courts,[106] and could have decreased the adjudicatory efficiency of arbitration as a whole.

In addition, the original holding in *Kolev* undermined FAA Section two. FAA Section two creates a federal right to arbitration, maintaining that arbitration agreements are "valid, irrevocable, and enforceable."[107] By finding statutory inarbitrability in MMWA warranty disputes, the court eliminated the simplicity of the arbitral process, and transformed it into a litigious and unworkable system, which could lead to its deterioration as an efficient alternative to the court system.[108]

Because the Ninth Circuit's opinion in *Kolev* was so controversial, its withdrawal could be motivated by pressures to conform to the established policy favoring arbitration.[109] While statutory inarbitrability grounds have no successful precedence in attacking motions to compel arbitration, the courts are more willing to entertain the theory of unconscionability. If the California Supreme Court affirms the California Court of Appeal's decision that *Concepcion* was inapplicable, and the Trial Court was correct in voiding the arbitration clause in *Sanchez*, the Ninth Circuit may release a new opinion addressing *Kolev's* previously ignored unconscionability claims and exclude any holding regarding the arbitrability of MMWA warranty disputes.

V. CONCLUSION

The Supreme Court has established a strong policy favoring the enforcement of arbitration agreements.[110] The Ninth Circuit Court's holding in *Kolev* proved to be contradictory

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[104] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (holding that international arbitrators have authority to rule on statutory claims in international contracts).

[105] Kolev v. Euromotors West/The Auto Gallery, 658 F.3d 1024, 1031 (9th Cir. 2011).

[106] *Id.*; *see also* Walton v. Rose Mobile Homes L.L.C., 298 F.3d 470, 479 (5th Cir. 2002) (holding that arbitration of the MMWA was not inconsistent with the statutory purposes of the MMWA and compelling arbitration of MMWA claims was consistent with FAA Section two's policy of favoring arbitration); *see also* Davis v. Southern Energy Homes, Inc., 305 F.3d 1268, 1274 (11th Cir. 2002) (finding that the Supreme Court had consistently upheld arbitration in consumer protection claims, and the FAA did not conflict with the legislative purpose of the MMWA).

[107] *See* 9 U.S.C. § 2.

[108] *See Kolev*, 658 F.3d at 1031.

[109] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (stating that courts should resolve any doubts about arbitrability in favor of arbitration).

[110] *Id.*

to extensive precedence, as the Courts have found no statute that exhibited congressional intent clearly and unambiguously enough to preclude arbitration.

In addition to contravening the federal policy favoring arbitration,[111] this court's holding directly contradicts Fifth and Eleventh Circuit Court holdings.[112] The Fifth and Eleventh Circuits both found that the arbitration of warranty claims was consistent with the statutory purpose of the MMWA, and followed the federal policy of favoring arbitration.[113] These courts also held that arbitration of MMWA claims was a fair remedy for consumers, and as the Supreme Court had consistently upheld arbitration in consumer protection claims, the FAA did not conflict with the legislative purpose of the MMWA.[114]

Despite this glaring precedence, the Ninth Circuit is clearly resisting arbitration. The withdrawal of the *Kolev* opinion should not be looked at as a change of heart on behalf of the Ninth Circuit, but instead an attempt to find a savvier means of avoiding arbitration. While attacking motions to compel arbitration on substantive inarbitrability grounds is not viable, unconscionability attacks pose a more amorphous standard. The courts are more willing to void arbitration clauses due to unconscionability, as it is a standard contract defense. This poses a potential issue for arbitration. If the Ninth Circuit continues to seek creative ways to bypass federal policy, precedence, and the FAA, holding against arbitration, it would decrease the efficiency of the entire arbitral system.

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[111] *Id.*

[112] *See* Walton v. Rose Mobile Homes L.L.C., 298 F.3d 470, 479 (5th Cir. 2002); *see also* Davis v. S. Energy Homes, Inc., 305 F.3d 1268, 1280 (11th Cir. 2002) (holding that MMWA warranty disputes are not precluded from arbitration).

[113] *Id.*

[114] *Id.*

ARE ARBITRATORS RIGHT EVEN WHEN THEY ARE WRONG?: SECOND CIRCUIT UPHOLDS ARBITRAL RULING ALLOWING IMPLICIT REFERENCE TO CLASS ARBITRATION

Dustin Morgan*

I. INTRODUCTION

In *Jock v. Sterling Jewelers Inc.*, the Second Circuit reversed a district court decision vacating an arbitral award that determined the arbitrator could properly rule on a class certification motion that would allow Jock ("Plaintiff") and similarly situated plaintiffs to arbitrate discrimination claims against Sterling Jewelers ("Defendant").[1] The Second Circuit reasoned that the district court improperly applied the Federal Arbitration Act's ("FAA") Section 10(a)(4) grounds for vacatur; the district court ruled that the arbitrator improperly interpreted the law rather than undertaking the proper inquiry, which was whether the arbitrator had authority to rule under both the arbitral agreement and governing law.[2] The court reasoned that the Supreme Court's ruling in *Stolt-Nielsen v. AnimalFeeds Int'l Corp*. did not prohibit arbitrators from finding an implicit agreement allowing for class arbitration.[3] The court stated that FAA section 10—notably section 10(a)(4)—should be interpreted narrowly in order to promote the recourse to arbitration and the enforcement of arbitral awards.[4] Challenges to arbitral awards brought under Section 10(a)(4) should only be upheld where the arbitrator "consider[s] issues beyond those the parties have submitted for her consideration, or reach[s] issues clearly prohibited by law or by the terms of the parties' agreement."[5] Reviewing courts should not engage in a review that asks whether the arbitrator correctly interpreted the law or reached the right result.[6] Finally, the court held that the Defendant's interpretation of *Stolt-Nielsen* as requiring the explicit reference to class arbitration was unpersuasive.[7] The court interpreted *Stolt-Nielsen* to prohibit class arbitration only where the parties have agreed that the arbitral agreement is silent on the class arbitration issue.[8] The dissent would have required a more express reference to class arbitration to allow the arbitrator to rule on class certification.[9] This decision may settle the proper inquiry when considering motions for vacatur under FAA Section 10. But this clarity may come at the price of confusion regarding the ability of arbitrators to consider motions for class arbitration.

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[1] *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 115 (2d Cir. 2011).

[2] *Id*.

[3] *Id*. at 121.

[4] *Id*. at 121–22.

[5] *Id*. at 122.

[6] *Id*. at 124.

[7] *Id*. at 125.

[8] *Id*.

[9] *Id*. at 129.

II. BACKGROUND

Plaintiff filed a discrimination charge against her employer, Sterling Jewelers with the Equal Employment Opportunity Commission ("EEOC") in May 2005.[10] Plaintiff alleged that Sterling violated Title VII of the Civil Rights Act of 1964 and the Equal Pay Act by paying female employees less than their male counterparts.[11] Eighteen other female plaintiffs also filed charges against Sterling with the EEOC.[12] Jock and the other employees initiated the dispute resolution mechanism mandated by their employment contracts.[13] The mechanism, referred to as RESOLVE, outlined a three-step resolution process.[14] The process first allowed Sterling to make an initial determination after viewing the employee's complaint.[15] If the employee was dissatisfied with Sterling's determination they could then refer their complaint to a mediator or panel of employees appointed by Sterling.[16] Finally, employees could refer the dispute to arbitration in accordance with the rules of the American Arbitration Association ("AAA").[17] Employment with Sterling was conditioned upon acceptance of the RESOLVE dispute resolution system.[18]

In January 2008, the EEOC issued a letter outlining its findings; it found that Sterling had violated both Title VII and the Equal Pay Act through discriminatory compensation and promotion policies.[19] After learning of the EEOC's findings, Jock and the other Plaintiffs filed a class action lawsuit in United States District Court for the Southern District of New York, alleging violations of Title VII and the Equal Pay Act.[20] Shortly after, Plaintiffs filed a demand for class arbitration with the AAA advancing similar claims.[21] Plaintiffs then moved to stay the litigation in district court pending the outcome of arbitration.[22]

In June 2008, the district court granted the Plaintiffs' motion to stay litigation pending arbitration.[23] The parties submitted to the arbitrator the question of whether the RESOLVE mechanism permitted resolution by class arbitration.[24] The arbitrator issued an interim award finding that class arbitration was not prohibited by the RESOLVE mechanism and agreeing to hear a future class certification motion.[25] In so ruling the arbitrator relied on the RESOVE mechanism's language, which provided:

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[10] *Id*. at 115.
[11] *Id*.; 42 U.S.C. § 2000e (2006); 29 U.S.C. § 206(d) (2006).
[12] *Jock*, 646 F.3d at 115.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 116.
[17] *Id*.; AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *available at* http://www.adr.org/aaa/faces/rules/.
[18] *Jock*, 646 F.3d at 116.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.

> I hereby utilize the Sterling RESOLVE program to pursue any dispute, claim, or controversy ("claim") against Sterling . . . regarding any alleged unlawful act regarding my employment or termination of my employment which could have otherwise been brought before an appropriate government or administrative agency or in a [sic] appropriate court, including but not limited to, claims under . . . Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991, . . . the Fair Labor Standards Act. . . . I understand that by signing this Agreement I am waiving my right to obtain legal or equitable relief (e.g. monetary, injunctive or reinstatement) through any government agency or court, and I am also waiving my right to commence any court action. I may, however, seek and be awarded equal remedy through the RESOLVE program. The Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law.[26]

The arbitrator, using Ohio law as mandated by the RESOLVE clause, determined that because Sterling had the ability to prevent recourse to class arbitration but failed to do so, the Plaintiffs must be allowed to pursue this procedural device.[27] The arbitrator also allowed both parties to seek either confirmation or vacatur of this interim award.[28]

In June 2009 Sterling moved to vacate the arbitrator's interim award in district court.[29] The district court ruled that the arbitrator did not exceed her powers or rule in manifest disregard of the law, and in effect, confirmed the award.[30] The court relied heavily on the Second Circuit's determination in *Stolt-Nielsen* and declined to stay the action pending the Supreme Court's resolution of the impending appeal.[31] In January 2010 Sterling appealed the district court's decision.[32] Before the Second Circuit ruled on the appeal the Supreme Court rendered its decision in *Stolt-Nielsen*.[33] Consequently, Sterling moved the district court to reconsider its original judgment pursuant to Federal Rules of Civil Procedure 62.1 and 60(b); the Second Circuit held the appeal in abeyance pending the decision by the district court on Sterling's motion.[34]

In July 2010 the district court issued an opinion stating that if jurisdiction were restored "it would reconsider its [previous] order and vacate the arbitrator's award that permitted the plaintiffs to pursue class certification."[35] The district court concluded that "in light of the

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[26] *Id*. at 116–17.

[27] *Id*. at 117; *see also* Montgomery v. Bd. of Educ., 131 N.E. 497, 498 (Ohio 1921) ("The law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract.").

[28] *Jock*, 646 F.3d at 117.

[29] *Id*.

[30] *Id*. at 117–18; Jock v. Sterling Jewelers, Inc., 564 F. Supp. 2d 307, 312–13 (S.D.N.Y. 2008).

[31] *Jock*, 646 F.3d at 118; *see also* Stolt-Nielsen v. AnimalFeeds Int'l Corp., 548 F.3d 85, 99 (2d Cir. 2008) (finding that the arbitrators did not exceed their powers by allowing class arbitration where the arbitral clause was silent on the class arbitration issue).

[32] *Jock*, 646 F.3d at 118.

[33] *Id*.; *see also* Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (holding determination of whether class arbitration is appropriate is for the court, not the arbitrator, to decide and that there must be a clear intent to allow class arbitration in the arbitral clause for the procedural device to be appropriate).

[34] *Jock*, 646 F.3d at 118.

[35] *Id*. (citing Jock v. Sterling Jewelers, Inc., 725 F. Supp. 2d 444, 450 (S.D.N.Y. 2010)).

Supreme Court's decision in [*Stolt-Nielsen*] 'the arbitrator's construction of the RESOLVE agreements as permitting class certification was in excess of her powers and therefore cannot be upheld.'"[36] The district court ruled that its prior analysis, asking whether there was intent to preclude class arbitration, was inconsistent with *Stolt-Nielsen* and found that there was insufficient evidence in the arbitral clause necessary to find the requisite intent required to allow class arbitration.[37] In August 2010, the Second Circuit restored jurisdiction in accordance with Sterling's petition and the district court subsequently granted Sterling's motion for vacatur of the arbitrator's interim award.[38]

III. COURT'S ANALYSIS

A. Effect of Stolt-Nielsen on the Implied References to Class Arbitration

In considering the issue of whether the arbitrator properly allowed the Plaintiffs to submit a motion for class certification, in their arbitration against Sterling, the Second Circuit first examined the effects *Stolt-Nielsen* would have on the dispute.[39] The court first recognized that the Supreme Court's decision in *Stolt-Nielsen* allows courts to grant vacatur under FAA Section 10 where the arbitrator refuses to rely on the arbitral agreement and instead makes a public policy determination.[40] The court quickly limited this broad pronouncement by noting that the facts of *Stolt-Nielsen* were unique. Here, the parties conceded that the arbitral clause was silent on the class arbitration issue; because the arbitrator went beyond the language of the contract, the decision to allow class arbitration amounted to a policy decision beyond the language of the contract.[41]

The Second Circuit viewed the silence in *Stolt-Nielsen* as a factor that distinguished that dispute from the present case.[42] The stipulation in *Stolt-Nielsen* indicated that the parties were in complete agreement both about the inclusion of class arbitration within the contract and the intent to allow class arbitration.[43] Despite this stipulation, the arbitrator allowed class arbitration and the Court was forced to articulate a rule that allows for recourse to class arbitration where "there is a contractual basis for concluding that the party *agreed* to do so."[44] The Court refused to hold that there must be an express contractual provision allowing for class arbitration, leaving open the possibility that the courts could find an implied agreement.[45] This implicit agreement, however,

[36] *Jock*, 646 F.3d at 118 (citing Jock v. Sterling Jewelers, Inc., 725 F. Supp. 2d 444, 448 (S.D.N.Y. 2010)).

[37] *Id*.

[38] *Id*.

[39] *Id*. at 119.

[40] *Id*.; *see Stolt-Nielsen*, 130 S. Ct. at 1767-68; *see also* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011).

[41] *Jock*, 646 F.3d at 119; *see also Stolt-Nielsen*, 130 S. Ct. at 1768, 1774–75.

[42] *Jock*, 646 F.3d at 120.

[43] *Id*.; *see also Stolt-Nielsen*, 130 S. Ct. at 1770, 1781.

[44] *Jock*, 646 F.3d at 121 (citing *Stolt-Nielsen*, 130 S. Ct. at 1775).

[45] *Id*.

may not be "infer[red] solely from the fact of the parties' agreement to arbitrate."[46] Silence on the issue of class arbitration alone cannot give rise to a finding of an implied agreement.[47]

B. Authority to Vacate Under FAA Section 10

The Second Circuit recognized that the four grounds for vacatur articulated in FAA Section 10, as well as the common law ground of manifest disregard, must be interpreted narrowly so as to promote the enforcement of arbitral awards.[48] This narrow interpretation requires that courts only vacate awards where one of the enumerated grounds is "affirmatively shown to exist."[49] Accordingly, Section 10(a)(4) has been interpreted narrowly so as to allow vacatur only where the arbitrator has ruled on a question not submitted or reached a conclusion on an issue prohibited either by the arbitral clause or law.[50] The inquiry under Section 10(a)(4) is limited to whether the arbitrator had the power to rule on a particular issue, not whether the arbitrator made the correct determination; review for legal error is impermissible.[51] Emphasizing the high hurdle required of a movant in order to prevail under 10(a)(4), the Court in *Stolt-Nielsen* articulated the circumstances in which an arbitrator "exceeds his powers":

> It is not enough . . . to show that the panel committed an error—or even a serious error. It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable.[52]

It is from this narrow standard that the Second Circuit was tasked with determining whether the district court's decision to vacate the arbitrator's interim award was proper.

The Second Circuit reasoned that the district court's inquiry should have been limited to whether "the parties had submitted to the arbitrator the question of whether their arbitration agreement permitted class arbitration and . . . whether the agreement or the law categorically prohibited the arbitrator from reaching that issue."[53] Instead of engaging in this narrow inquiry, the district court focused on whether the arbitrator correctly interpreted the arbitral agreement.[54]

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[46] *Id*. (citing *Stolt-Nielsen*, 130 S. Ct. at 1775).

[47] *Id*.; *Stolt-Nielsen*, 130 S. Ct. at 1776 ("[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."). Several other cases have adopted or expanded on the nature of class arbitration. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750-51 (2011) (finding the change from bilateral to class arbitration is a fundamental one that drastically changes the underlying nature of the dispute).

[48] *Jock*, 646 F.3d at 121.

[49] *Id*. (citing Wall Street Assocs., L.P. v. Becker Paribas Inc., 27 F.3d 845, 849 (2d Cir. 1994)).

[50] *Id.*; *see also* ReliaStar Life Ins. Co. of New York v. EMC Nat'l Life Co., 564 F.3d 81, 85 (2d Cir. 2009); Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 220 (2d Cir. 2002); *accord* Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277 (9th Cir. 2009) (reasoning that arbitral awards may be vacated under the manifest disregard standard); *but see* Citigroup Global Mkts. Inc. v. Bacon, 562 F.3d 349, 350 (5th Cir. 2009) ("[M]anifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA.").

[51] *Jock*, 646 F.3d at 122; *see also Westerbeke*, 304 F.3d at 220 ("Section 10(a)(4) does not permit vacatur for legal errors.").

[52] *Jock*, 646 F.3d at 122 (citing *Stolt-Nielsen*, 130 S. Ct. at 1767) (internal quotation marks and citations omitted).

[53] *Id*. at 123.

[54] *Id*.

Applying this standard, the Second Circuit found the lower court to err based on a subtle distinction between facts found in the case at hand with the facts in *Stolt-Nielson.* Here, the Plaintiffs' conceded that there was no *explicit* reference to class arbitration in the arbitral clause. But even if there is no *explicit* agreement, such a finding does not necessarily confer the same "silent" status bestowed upon the agreement examined in *Stolt-Nielson.*[55] To the contrary, the question of whether the agreement *implicitly* permitted class arbitration was still squarely in dispute and was thus properly before the arbitrator.[56] And with the issue not rendered moot by the Plaintiffs' concession, the arbitrator could not exceed her authority under the arbitration agreement by entertaining the question of whether class proceedings would be proper.[57] This finding, coupled with the Second Circuit's interpretation of the holding in *Stolt-Nielsen*—that there is no bright-line rule that would prevent finding an implicit agreement to undergo class arbitration—formed the basis as to why the district court erred in vacating the award under Section 10(a)(4).[58]

C. Dismissal of Sterling's Interpretation of Stolt-Nielsen

In distinguishing the district court's determination from *Stolt-Nielsen*, the Second Circuit relied on a narrow reading of the term "silence" within the opinion.[59] Sterling argued that because the arbitrator found that the arbitral agreement merely did not prohibit class arbitration, rather than making the express finding that the agreement allowed arbitration, the arbitrator exceeded her authority.[60] The court dismissed this argument because it assumed a legal standard that had not been introduced at the time of the decision; *Stolt-Nielsen* had yet to be decided, and in the court's opinion, the district court also incorrectly interpreted the case law.[61] *Stolt-Nielsen* does not require that the intent to allow class arbitration be expressly stated; the decision merely limits that arbitrator's authority to rely on public policy and go beyond the agreement when making a determination.[62] Since the arbitrator relied on the agreement in allowing class arbitration, the reliance on *Stolt-Nielsen* to support vacatur was unfounded.[63]

In support of its determination, the Second Circuit affirmed that under *Stolt-Nielsen* the FAA defines federal arbitration law[64], but it refused to hold that state law is irrelevant in making determinations about the parties' intent.[65] The court stated that "a primary concern for the Court in *Stolt-Nielsen* was that the arbitration panel based its holding on public policy grounds, rather than looking to the FAA, maritime, or state law."[66] *Stolt-Nielsen* implicitly allows for reliance on state law where the parties intent regarding class arbitration cannot be readily determined.[67]

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[55] *Id*.
[56] *Id*. at 124.
[57] *Id*.
[58] *Id*.
[59] *Id*. at 125.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 125–26; *see also Stolt-Nielsen*, 130 S. Ct. at 1776 n.10.
[63] *Jock*, 646 F.3d at 126.
[64] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (arguing that the FAA creates federal substantive arbitration law).
[65] *Jock*, 646 F.3d at 126.
[66] *Id*. (citing *Stolt-Nielsen*, 130 S. Ct. at 1768–69).
[67] *Id*.

Therefore, the arbitrator's reliance on Ohio law in determining that the RESOLVE program allows class arbitration does not stand in opposition to Supreme Court precedent.[68]

D. Dissent's Interpretation of Stolt-Nielsen

The dissent in *Jock* read *Stolt-Nielsen* as creating a bright-line test for determining whether an arbitrator can impose class arbitration on contracting parties; the arbitrator can impose class arbitration only where the arbitral clause expressly allows for this procedural measure.[69] The dissent refused to distinguish *Stolt-Nielsen* and rejected the arguments presented by the majority opinion for doing so.[70] The dissent expressly rejected the idea that *Stolt-Nielsen* supports the finding of implied agreements to arbitrate on a class-wide basis and argued that the FAA, not state law, presents the uniform national law governing the interpretation of arbitral agreements.[71] The dissent would create a bright-line rule whereby parties would have to explicitly state that class arbitration is allowed for recourse to the procedural device to be appropriate.[72]

IV. SIGNIFICANCE

Jock v. Sterling highlights a struggle between important ideals within the arbitration system. The Second Circuit was faced with a choice between confirming an arbitral award and enforcing an arbitral contract as written. The Supreme Court has stressed the ideals of freedom of contract and the enforcement of arbitral awards over the past half-century.[73] By overturning the district court's decision to vacate the arbitrator's interim award, the Second Circuit implicitly reiterated the ideal that enforcement of arbitral awards still serve as vital to maintaining the viability of arbitration. *Jock*'s ruling can thus serve as clear guidance for district courts struggling to understand the extent to which a court is to defer to an arbitrator's decision.

But while *Jock* may promote uniformity and efficiency within the judicial confirmation process, it may come at the cost of clarity regarding the more precise capability of arbitrators to mandate class arbitration. Both *AT&T Mobility LLC v. Concepcion* and *Stolt-Nielsen* seem to clearly establish the Supreme Court's opinion about class arbitration: the procedure fundamentally alters the nature of the arbitral adjudication and thus may be proper only when found as consistent with the contracting parties' intent when originally agreeing to submit disputes to "arbitration."[74] The Supreme Court's views on the matter thus seem incompatible with the Second Circuit's ruling in *Jock*, which may very well be read as an attempt to rationalize how the arbitrator could have found class proceedings consistent with the parties' intent as embodied in their arbitral clause. *Stolt-Nielson*'s holding is now cloudier in the Second Circuit, as district

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[68] *Id*. at 127.

[69] *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 128 (2d Cir. 2011) (Winter, C.J., dissenting).

[70] *Id*.

[71] *Id*. at 130–31.

[72] *Id*. at 132–33.

[73] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (arguing arbitration is a matter of consent and agreements to arbitrate can be freely structured by parties); Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (finding freedom of contract principles require parties to be clear in their intent to allow class arbitration); Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468 (1989) (ruling that freedom of contract principles dictate that parties should be allowed to structure arbitral agreements as they see fit).

[74] *AT&T Mobility*, 131 S. Ct. at 1750-52; *Stolt-Nielsen*, 130 S. Ct. at 1775–76.

courts are left to consider the effect of any distinguishable fact when deciding upon a motion to vacate the arbitrators interim award that calls for class proceedings.

V. CONCLUSION

The Supreme Court has been relatively consistent within its series of arbitration decisions. The Court has articulated a doctrine that is friendly to arbitration, and cases have articulated bright-line rules that favor the recourse to arbitration, freedom to decide method of dispute resolution, and confirmation of awards. In recent years the Court has also articulated a doctrine that has been hostile to class action and class arbitration.[75] In both *AT&T Mobility* and *Stolt-Nielsen* the Court seemed to be resoundingly clear; the decision of whether class arbitration is proper is left to the court, this mechanism changes the arbitral process, and class arbitration is proper only where the intent to resort to this procedural mechanism can be clearly established from the arbitral clause.[76] Whether these decisions were rightly decided or not is still a matter of debate, but these decisions did seem to provide a level of clarity to a highly contentious area of arbitration law in the United States.

The Second Circuit in *Jock* may have done irreparable harm to this clarity. The court, by allowing intent to resort to class arbitration to be implicitly determined, may have opened up new questions within a seemingly settled area of arbitration law. Courts within the jurisdiction will now have to determine what type of language constitutes an implicit reference to class arbitration, how far the parties must go before the procedural mechanism will be allowed, and whether the courts or arbitrator will have the final word regarding whether class arbitration is appropriate in an individual matter. These questions can only be answered in a case-by-case manner, costing both the court system and individual litigants money. While the Second Circuit may justify this decision by citing a preference to the confirmation of arbitral awards, this doctrine was justified to promote cost-effectiveness and efficiency that the court may have eroded by implicitly overturning Supreme Court precedents that provided clarity to a complicated and highly-contentious issue.

[75] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

[76] *See AT&T Mobility*, 131 S. Ct. at 1750–52; *Stolt-Nielsen*, 130 S. Ct. at 1775–76.

TENTH CIRCUIT AFFIRMS THE DISTRICT COURT'S ORIGINAL DECISION TO COMPEL ARBITRATION IN AN APPEAL MADE BY THE APPELLANT AFTER LOSING IN ARBITRATION

Skipper Dean[*]

I. INTRODUCTION

In *Kepas v. eBay*,[1] the Tenth Circuit considered an appeal from the Plaintiff-Appellant arguing the district court erred in its decision to compel arbitration over disputes arising out of the employment arbitration agreement.[2] Before compelling arbitration, the district court modified the arbitration agreement, eliminating the clause which would allow an arbitrator to impose the costs of arbitration on the employee and also included Salt Lake County as an alternative location in the forum-selection clause.[3] It was only after the Appellant pursued his claim through arbitration and lost, and after the district court confirmed the arbitrator's decision, that the Appellant appealed the original motion to compel arbitration with the appellate court.[4] Applying California law as required by the contract's choice of law provision, the court used the standard dictated in *Armendariz v. Fountain Health Psychare Services, Inc*.,[5] to determine whether the district court had erred in determining the arbitration agreement was enforceable after making two modifications.[6]

II. BACKGROUND

In July of 2003, eBay hired Emmanuel Kepas to manage its Draper, Utah facility, but was first subject to a probationary period.[7] At the end of the probation period, eBay offered Appellant continued employment on the condition Kepas sign an arbitration agreement recognizing this condition.[8] The agreement stated that the parties agreed to arbitrate any dispute arising from the employment relationship—specifically listing each claim that would later be alleged by Kepas.[9] But the agreement excluded claims made by either party that arose out of the "Employee Proprietary Information and Inventions Agreement."[10] The agreement included a forum selection clause, which designated Santa Clara County, California as the designated forum.[11] Additionally,

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[1] *Kepas v. eBay*, 412 F. App'x 40 (10th Cir. 2010).

[2] *Id*. at 41.

[3] *Id*. at 43.

[4] *Id*.

[5] Armendariz v. Fountain Health Psychare Servs., Inc., 6 P.3d 669 (Cal. 2000).

[6] *Kepas*, 412 F. App'x at 43–44.

[7] *Id*. at 41.

[8] *Id*. at 41–42.

[9] *Id*. at 42.

[10] *Id*.

[11] *Id*.

the agreement provided that the American Arbitration Association ("AAA") rules would apply and the choice of law provision within the agreement stated the proceedings would be governed by the laws of the State of California.[12] The agreement provided that the employer would pay the arbitrator's fee for the proceeding, as well as other AAA charges.[13] This provision also granted the arbitrator authority to award any type of legal or equitable relief available to a court, including attorney's fees, punitive damages, and the costs of arbitration, which under the AAA rules, included all the arbitrator and AAA expenses.[14]

Kepas filed his complaint alleging civil rights[15] and age discrimination claims,[16] as well as well as breach of contract and breach of good faith and fair dealing.[17] eBay responded with a motion to compel arbitration.[18] In granting the motion, the court required that the arbitrator shall not award eBay with arbitrator fees and could only award eBay costs that would similarly be awarded under the Federal Rules of Civil Procedure.[19] The court also modified the agreement to enable Kepas to pursue the arbitration in Utah.[20] Although securing his choice of forum, Kepas' were all dismissed by the arbitrator on summary judgment. The district court subsequently confirmed the arbitration award.[21] Kepas then appealed the *initial* district court decision to compel arbitration, arguing that the arbitration agreement was unenforceable on grounds of unconscionability.[22]

III. ANALYSIS

Kepas argued that the arbitration agreement failed to satisfy the minimum requirements established in *Armendariz v. Fountain Health Psychare Services, Inc*.,[23] rendering the agreement unconscionable.[24] He further argued those defects rendered the entire arbitration agreement unenforceable.[25] The *Armendariz* standard applies to employer mandated arbitration agreements that force employees to waive their statutory rights, requiring that arbitration agreements provide employees with the ability to secure (1) neutral arbitrators, (2) more than minimal discovery, (3) an arbitral decision in writing, (4) all relief that would otherwise be available in court, and (4) assurance from employers that they will not require employees to pay unreasonable costs, arbitrator fees, or expenses as a condition to arbitrate.[26] The court determined that California law

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[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] 42 U.S.C. § 1981 (2006).
[16] 29 U.S.C. §§ 621–34 (2006).
[17] *Kepas*, 412 F. App'x at 41–42.
[18] *Id*.
[19] *Id*. at 42–43.
[20] *Id*. at 43.
[21] *Id*.
[22] *Id*.
[23] Armendariz v. Fountain Health Psychare Servs., Inc., 6 P.3d 669 (Cal. 2000).
[24] *Kepas*, 412 F. App'x at 43.
[25] *Id*.
[26] *Id*. at 43–44 (citing *Armendariz*, 6 P.3d at 682).

governed the dispute, as this was listed as the choice-of-law within the arbitration agreement.[27] *Armendariz* was thus the legal standard applicable between Kepas and eBay.[28]

Kepas argued the arbitration agreement failed under *Armendariz* because the employee could be forced to pay the arbitrator fees and AAA costs through the arbitral award. [29] The court stated the agreement allowed for an arbitrator to award any legal or equitable remedy available in a court proceeding, including the costs of arbitration.[30] Following the parties' choice of law provision, the court looked to the AAA meaning of "costs of arbitration", which defined the term as "all expenses of the arbitrator...and any AAA expenses." The court determined that under this meaning the arbitration agreement failed the minimum requirements because it imposed a significant risk on the employee to pay the arbitration costs.[31] The court rejected eBay's argument that a provision provided for the employer to pay the arbitrator fees and other AAA costs, emphasizing that the provision only suggested that eBay would bear these costs initially, but created the possibility of the arbitrator later enforcing these costs on the employee.[32] Since the agreement gave the arbitrator authority to impose the costs of arbitration as part of the award, creating a significant risk that employees could be required to bear arbitration costs, the award provision was contrary to public policy.[33]

Before determining the result of this defect, the court addressed Kepas's second argument that the forum-selection provision failed *Armendariz* because employees could be required to incur unreasonable travel costs for employee witnesses who were forced to travel from Utah to a distant arbitration proceeding in California.[34] The court found this argument unpersuasive because witness travel costs are not unique to arbitration and did not violate the *Armendariz* requirements.[35]

Kepas also argued that the scope of the arbitration agreement and the forum-selection clause were unconscionable.[36] To be found unconscionable under California state law, agreements are required to be both procedurally and substantively unconscionable, although it is not required that each element be equally unconscionable.[37] In determining the procedural element, the court considered whether the arbitration agreement was a contract of adhesion, whether oppression played a role in the process, and whether a party was surprised by hidden terms.[38] The court determined that this was an adhesive contract because it was a standard contract, drafted and imposed by the stronger party, and left the employee only with the option of accepting or rejecting the terms as written.[39] The court next determined the agreement was oppressive because, as an employee, Kepas was not in a position to bargain for alternative contract terms.[40] Last, the court determined that the agreement lacked the remaining element of

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[27] *Id*. at 42–43.
[28] *Id*. at 44.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id*. at 44–45.
[34] *Id*. at 45.
[35] *Id*.
[36] *Id*.
[37] *Id*. (citing Armendariz v. Fountain Health Psychare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000).
[38] *Id*. (citing Parada v. Superior Court, 98 Cal. Rptr. 3d 743, 756–57 (Cal. Ct. App. 2009).
[39] *Id*. at 46.
[40] *Id*.

surprise because the agreement was typewritten on two pages, and the terms, such as the forum clause selecting the state of the employer's headquarters as the location, were not beyond Kepas's reasonable expectations.[41] Therefore, while there was procedural unconscionability under the first two elements, the level was reduced due to the lack of surprise.[42]

Substantive unconscionability exists when an arbitration agreement lacks mutuality.[43] This occurs when the agreement compels arbitration for the claims most likely to be brought by the weaker party, but exempts those most likely to be brought by the stronger party,[44] or when employees are required to arbitrate claims that arise out of the same transaction that the employer can litigate.[45] Kepas argued the arbitration agreement lacked mutuality because it excluded from arbitration the claims of either party that "arise out of the Employee Proprietary Information and Inventions Agreement", and Kepas contended that eBay was the party more likely to bring these types of claims.[46]

In determining that the agreement was sufficiently bilateral, the court rejected this argument because Kepas could not identify the types of claims which would be excluded and had not satisfied his burden to support his claim.[47] The court found that both cases Kepas used as precedents, *Mercuro v. Superior Court*[48] and *Fitz v. NCR Corp.*,[49] did not apply because they were distinguishable.[50] The court distinguished *Mercuro* because the language in the agreement excluded claims for injunctive or equitable relief, and lacked mutuality because employers would generally seek injunctive relief, not employees.[51] By contrast, the exclusion in eBay's agreement excluded claims arising out of the "Employee Propriety Information and Inventions Agreement," which applied to both employer and employee claims regardless of the relief sought.[52]

In *Fitz*, the agreement excluded claims arising from "intellectual property rights," and the court held the agreement lacked mutuality because the exclusion would most likely be used by the employers and not employees.[53] While the court stated *Fitz* was more analogous to the arbitration agreement at issue here, the court emphasized the key distinction was that many eBay employees develop their own inventions, and this unique industry made it likely that both employees and eBay could bring the type of claims excluded from the arbitration agreement, and, therefore, *Fitz* did not apply.[54] Since the claims excluded from arbitration were likely to be brought by either party, the court determined the arbitration agreement did not lack mutuality.[55]

Substantive unconscionability similarly exists when an arbitration agreement is harsh or oppressive, and Kepas argued the forum-selection clause was unreasonably oppressive because it

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[41] *Id*.
[42] *Id*.
[43] *Id*. at 47.
[44] *Id*. (citing Armendariz v. Fountain Health Psychare Servs., Inc., 6 P.3d 669, 692 (Cal. 2000)).
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Mercuro v. Superior Court*,116 Cal. Rptr. 2d 671 (Cal. Ct. App. 2002).
[49] *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88 (Cal. Ct. App. 2004).
[50] *Kepas*, 412 F. App'x at 47.
[51] *Mercuro*, 116 Cal. Rptr. 2d at 677.
[52] *Kepas*, 412 F. App'x at 47–48.
[53] *Fitz*, 13 Cal. Rptr. 3d at 104–05.
[54] *Kepas*, 412 F. App'x at 48, 50–51 (Lucero, J., dissenting) (noting that the majority held in distinguishing *Fitz*, which dealt with a technology company, and where the court rejected almost the identical argument eBay used.).
[55] *Id*. at 48.

imposed additional expenses and impaired his ability to secure witnesses.[56] The court emphasized that Kepas was required to prove that enforcement would be unfair or unreasonable, that the forum would be so overly difficult and inconvenient that it essentially deprives the employee of his day in court, or show there is no rational basis for the forum choice.[57] The court determined that Kepas had not shown that the forum would effectively preclude him from bringing his dispute, and the hardship in securing witnesses was diminished because Kepas could obtain their testimony through a deposition in Utah.[58] In addition, since eBay's principal place of business is California, the court noted that there was a reasonable connection between the cause of action and the forum selected.[59] Therefore, although the district court originally modified the forum-selection provision in its decision to compel arbitration, the court determined that the original forum-selection provision was not substantively unconscionable, because it did not preclude Kepas from asserting his claims and the forum was rationally related to the cause of action.[60]

The court concluded that the potential for the arbitrator to impose the "costs of arbitration" on the employee was the sole defect in the arbitration agreement and determined that the objectionable term could be severed, allowing for the enforcement of the remainder of the arbitration agreement.[61] An arbitration agreement that fails the conscionability standard can still be enforceable if the offending term can be severed,[62] the main inquiry being whether the severance would further "the interests of justice."[63] The court noted several factors used by California courts to determine severability: whether the illegality is collateral to the main purpose, whether the agreement contains more than one objectionable term, and whether striking the single provision would remove the illegality from the agreement.[64] The court determined the objectionable provision was severable because the provision allowing the costs of arbitration as an award was collateral to the central purpose, the award provision was the only objectionable provision, and the deficiency of the arbitration agreement could be easily reconciled by removing the offending term.[65] The court agreed with the district court's determination that the remainder of the arbitration agreement was enforceable and affirmed the district court's decision to compel arbitration in the original proceedings.[66]

IV. SIGNIFICANCE

Kepas is significant because it allows for judicial review of an original court decision after the party has already completed the arbitration proceedings and lost. After the district court modified the arbitration agreement and compelled arbitration, Kepas decided to comply with the

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[56] *Id*. at 46–48.

[57] *Id*. at 48–49 (citing Furda v. Superior Court, 207 Cal. Rptr. 646 (Cal. Ct. App. 1984); Aral v. Earthlink, Inc., 36 Cal. Rptr. 3d 229 (Cal Ct. App. 2005); Intershop Commc'ns v. Superior Court, 127 Cal. Rptr. 2d 847 (Cal. Ct. App. 2002)).

[58] *Id*. at 49.

[59] *Id*.

[60] *Id*.

[61] *Id*.

[62] *Id*. (citing Abramson v. Juniper Networks, Inc., 9 Cal. Rptr. 3d 422, 437 (Cal. Ct. App. 2004)).

[63] *Id*. (citing Armendariz v. Fountain Health Psycare Servs., Inc., 6 P.3d 669, 696 (Cal. 2000)).

[64] *Id*. at 50 (citing *Abramson*, 9 Cal. Rptr. 3d at 438–39.

[65] *Id*.

[66] *Id*.

decision and pursue his claims through the arbitration process.[67] It was only after the arbitrator ruled in favor of eBay that Kepas appealed to have the original motion to compel arbitration reversed. This expands the scope of judicial review beyond the narrow means mandated in Section 10 of the Federal Arbitration Act ("FAA").[68]

Kepas also illustrates that the Tenth Circuit will employ the choice-of-law provision as written by the parties, even when the designated law is from another jurisdiction. Here, the court used California law to review the dispute based on the choice-of-law provision agreed upon by the parties within the arbitration agreement.[69] This gives guidance to practitioners when drafting arbitration agreements in knowing that the Tenth Circuit will honor the agreement and analyze the dispute under the designated choice-of-law agreed upon by the drafting parties.

V. CONCLUSION

While it is not uncommon for courts to sever or modify offending provisions in otherwise valid and enforceable arbitration agreements, the district court's decision to insert Salt Lake County as an additional arbitral forum requires some analysis. While the opinion does not contain the district court's reasoning in making the modification, it is interesting to note that the appellate court determined that the original forum-selection clause did not fail the *Armendariz* standard, and was not substantively unconscionable.[70] The court ultimately determined that the district court properly restricted the arbitration agreement in regards to the arbitral award provision, and was correct in compelling arbitration.[71] Yet it would seem that if the original forum-selection clause was valid and enforceable, the district court overstepped its authority in modifying this. It is unclear why the appellate court does not address this.

In addition, the most alarming and confusing aspect of this opinion is that the appellate court granted the appeal of the original motion to compel arbitration after the Kepas had completed the arbitration proceedings and lost.[72] It should appear that if the Kepas disagreed with the district court's ruling, the proper time to appeal would be immediately after the district court decision, not after the Kepas failed to achieve a favorable result in arbitration. This creates the impression of a losing party attempting to get another bite at the apple after an unfavorable ruling in arbitration. Entertaining this claim questions the binding nature and finality of the arbitrator's decision established under section two of the FAA.[73] It is unclear as to the court's reasoning for this, because it says nothing in regards to the timing of the appeal. And the effect remains to be seen in the Tenth Circuit.

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[67] *Id*. at 43.
[68] Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).
[69] *Kepas*, 412 F. App'x at 42–43.
[70] *Id*. at 45–49.
[71] *Id*. at 50.
[72] *Id*. at 43.
[73] 9 U.S.C. § 2.

SEVENTH CIRCUIT COMES TO ARBITRATOR'S DEFENSE IN CLARIFYING NARROW SCOPE OF ARBITRATOR 'EVIDENT PARTIALITY' UNDER SECTION 10 OF THE FEDERAL ARBITRATION ACT

Mallary Willatt [*]

I. INTRODUCTION

In *Trustmark Insurance Co. v. John Hancock Life Insurance Co.*, the United States Court of Appeals for the Seventh Circuit considered an appeal seeking review of an injunction barring the parties from further arbitration proceedings so long as a certain arbitrator remained a member of the arbitration panel.[1] The Plaintiff-Appellee argued, and the United States District Court for the Northern District of Illinois, Eastern Division agreed, that having previously arbitrated a dispute between the two parties over essentially the same issue, the arbitrator could no longer be considered disinterested in the proceedings.[2] The Plaintiff-Appellee argued this partiality was due to the arbitrator's preexisting knowledge of the previous arbitration and the dispute.[3] The Seventh Circuit Court of Appeals reversed, clarifying that under §10 of the Federal Arbitration Act ("FAA"), "partiality" means only having a personal or financial stake in the outcome of the arbitration, and that mere knowledge of previous events or arbitrations or interest in reemployment by the parties is not enough to establish partiality.[4]

II. BACKGROUND

Appellant John Hancock Life Insurance Company ("Hancock") and Appellee Trustmark Insurance Company ("Trustmark") entered into an agreement under which Trustmark would reinsure risks underwritten by Hancock.[5] The two insurance companies later disagreed over the meaning of "London Market Retrocessional Excess of Loss Business" and submitted their dispute to arbitration under the terms of the contract.[6] A three-member panel consisting of one party-chosen arbitrator appointed by each side and a neutral umpire found in favor of Hancock in March 2004, and a district court later affirmed the award.[7] In October 2004, Hancock

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[1] Trustmark Ins. Co. v. John Hancock Life Ins. Co., 631 F.3d 869 (7th Cir. 2011).

[2] *Id.* at 871.

[3] *Id*.

[4] *Id.* at 873.

[5] *Id.* at 870.

[6] *Id.* at 871.

[7] *Id.*

commenced another arbitration action after Trustmark refused to pay any of the bills Hancock had sent, claiming that the arbitral award alone governed all its dealings with Hancock.[8]

Once the second arbitration was commenced, Trustmark argued that Hancock had only secured its award by fraud because it failed to disclose four documents during discovery.[9] When picking the arbitrators for the second panel, Hancock chose Mark S. Gurevitz, ("Gurevitz") whom Hancock had chosen in the initial arbitration as well.[10] Trustmark chose an arbitrator who had been uninvolved in the prior proceeding.[11] Once the arbitrators were selected, it was necessary to determine what weight to give the previous arbitral decision. Hancock argued the results were dispositive, but Trustmark contended that the proceedings should be started from scratch, and that the confidentiality agreement the parties had signed during the first arbitration prevented any disclosure of the first arbitration.[12] Gurevitz and the neutral umpire agreed with Hancock, and concluded that they, as arbitrators, were entitled to know the evidence and results of the first arbitration.[13]

Trustmark filed suit to vacate the initial court decision confirming the award, but having been filed in 2009, the suit was held to be untimely.[14] Trustmark then sought an injunction to prevent further arbitration so long as Gurevitz remained on the panel, arguing his knowledge of the previous arbitration proceedings prevented him from being a disinterested party and rendered him partial in the outcome of the dispute.[15] Under FAA §10(a) an arbitral award may be vacated "where there was evident partiality or corruption in the arbitrators" or "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[16] Moreover, both the contract between Trustmark and Hancock and general principles of arbitration require that the arbitrators to a dispute be disinterested and impartial, such that the arbitrator have no financial or other personal stake in the outcome.[17] Trustmark used this and the requirement of arbitrator impartiality and disinterest to argue that because of his knowledge of the first arbitration, Gurevitz was rendered partial and should be excluded from the proceeding because any decision he rendered would be open to vacatur by a district court.[18]

The district court that heard Trustmark's request for an injunction agreed, and held that Gurevitz was not disinterested because of his knowledge of the first arbitration.[19] In addition, the court found that the second panel was not entitled to consider the decision made by the first, effectively halting the arbitration.[20] Hancock then appealed the district court's decision.[21]

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[8] *Id.* at 871.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 871.
[15] *Id.*
[16] Federal Arbitration Act, 9 U.S.C. §10 (2006).
[17] *Trustmark*, 631 F.3d at 871. (citing Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009)).
[18] *Id.* at 871.
[19] *Id.*
[20] *Id.*
[21] *Id.*

III. ANALYSIS

The main issue for the circuit court's review was whether the injunction was properly granted by the district court. An injunction, because it is a form of equitable relief, requires a showing of irreparable harm – a showing that Trustmark failed to meet, according to the court.[22]. The court concluded that the district court erred in finding that Trustmark had not agreed to arbitrate the reinsurance of certain risks, it also held that there would be no irreparable harm done to Trustmark by proceeding to arbitration.[23] The only conceivable injury would be that of time and cost.[24] Even if Gurevitz were later found to have been partial, Trustmark would not be deprived of its ability to seek vacatur of the award in court under FAA section 10, and thus would not have been caused any irreparable harm if the injunction was not granted.[25]

The Seventh Circuit, in addition to finding a lack of the irreparable harm necessary for injunctive relief, also took unusual and considerable steps to clarify the meaning of "disinterested arbitrator."[26] "Disinterested" adjudicators, according to the Supreme Court, are merely required to be "lacking a financial or other personal stake in the outcome."[27] The court then held that Gurevitz's knowledge of the previous arbitration did not constitute either financial or personal stake, but merely the same reputational stake any arbitrator has in the proceedings he or she is tasked with overseeing.[28] Next, the court made sure to clarify that unless an arbitrator has such personal or financial stake in the outcome of the proceedings, he will not be disqualified from adjudicating on grounds of partiality or interest.[29] Despite the assumption that he would rule in favor of the party appointing him, Gurevitz was no different than any other arbitrator, or even any other judge.[30] Adjudicators often have knowledge of the parties or disputes, and such knowledge is not sufficient to disqualify them.[31] In fact, as the court pointed out, the district court judge who issued the injunction was the very same judge who issued the order enforcing the 2004 arbitration award.[32] Such knowledge is insufficient to disqualify either a judge or an arbitrator, as "knowledge acquired in a judicial [or here, arbitral] capacity does not require disqualification."[33]

The court then went on to clarify the higher burden set for disqualifying arbitrators from adjudicating disputes.[34] While the parties involved in a suit cannot handpick judges, the rules of arbitration allow parties to pick their arbitrators. Additionally, under FAA §10 only "evident partiality", as opposed to the risk or appearance of such partiality, is sufficient to disqualify an arbitrator or result in the vacatur of an arbitral award.[35] The court then reasoned that where a

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[22] *Id.* at 872.

[23] *Id.* at 872.

[24] *Id.*; Petroleum Exploration, Inc. v. Public Serv. Comm'n, 304 U.S. 209, 222 (1938); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974); FTC v. Standard Oil Co., 449 U.S. 232 (1980).

[25] *Trustmark,* 631 F.3d at 872. (citing 9 U.S.C. §10 (2006)).

[26] *Id.*

[27] *Id.* (citing Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009)).

[28] *Id.* at 873.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 873.

[32] *Id.*

[33] *Id.* (citing Liteky v. United States, 510 U.S. 540 (1994)).

[34] *Id.*

[35] *Id.* (citing Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 621 (7th Cir. 2002)).

valid bargained-for contract allows the parties to choose their arbitrator, a court should not interfere with their ability to do so, provided all contractual requirements are followed and there is no other reason to disqualify the arbitrator.[36] In concluding that Gurevitz's prior knowledge of the first arbitration between Trustmark and Hancock was not enough to show the evident partiality necessary for arbitrator disqualification, the Seventh Circuit made clear the requirements for a showing of such evident partiality and made explicit the need for either personal or financial interest sufficient to render the arbitrator incapable of hearing the dispute with disinterest.[37] The court concluded that barring a showing of such evident partiality by Gurevitz, no irreparable injury would befall Trustmark should an injunction not be granted and the parties are allowed to proceed to arbitration.[38]

IV. SIGNIFICANCE

Trustmark is significant because the court makes explicit the requirements for arbitrator disqualification due to evident partiality. The Seventh Circuit signals its reluctance to divert from anything other than the narrowest view of what constitutes evident partiality and refuses to find it other than where there is a showing of personal or financial interests in the parties or disputes.[39] The court in *Trustmark* makes clear its deference towards arbitration and its unwillingness to interfere with bargained-for arbitration agreements unless a party can prove that an arbitrator's disinterest would be impossible.[40] In essence, the decision in *Trustmark* makes clear to parties engaged in arbitration in the Seventh Circuit that not only will it take a significant conflict to disqualify an arbitrator, but that the disputing sides can select an arbitrator with intimate knowledge of the parties' businesses or previous arbitration proceedings without fear of disqualification of the arbitrator or vacatur of the eventual award.[41] The court also makes certain that in the future all parties to arbitration will be aware of the Seventh Circuit's reluctance to interfere with arbitration proceedings. The decision establishes unless there is a clear case of abuse of discretion or arbitrator evident partiality, the Seventh Circuit will respect the arbitration agreement and not intrude on the bargained-for proceedings.

V. CONCLUSION

While the majority of the court's decision is a fairly simple matter of determining whether any irreparable harm would befall Trustmark should the parties proceed to arbitration, the court's decision to go further and address the question of arbitrator partiality is a significant step, as it was not an issue that needed to be addressed by the court.[42] The court could have

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[36] *Id.* at 874.
[37] *Id.*
[38] *Id.* at 874.
[39] *Id.* at 872–73.
[40] *Id.* at 873.
[41] *Id.*
[42] *Id.* at 872.

merely concluded that Trustmark would receive no irreparable injury should a stay of arbitration not be granted, and left the parties to their own devices.[43] Instead, the court chose to devote a good portion of its decision to the accusations made by Trustmark that Gurevitz was a partial arbitrator and should have been disqualified. The court, in forceful language, makes clear that it will not take the opportunity to expand the definition of arbitrator partiality and will only step in to disqualify an arbitrator where there is a clear case of evident partiality.[44] Moreover, the court refuses to expand its understanding of such evident partiality, reinforcing the idea of arbitration as a bargained-for contract, meaning that if the parties were silent on an issue, the court should not be the one to step in and interpret that silence.

In coming to defend Gurevitz's honor, the court also continues to make clear the stark differences between arbitration and traditional judicial proceedings. The Seventh Circuit unequivocally rejects any instance where a party would seek to narrow that difference, and to either make arbitrators no different than judges, or to limit the amount of knowledge either could have about a dispute. In its decision here, the Seventh Circuit Court of Appeals hews closely to previous arbitration cases that staunchly defend the right of parties to choose arbitration, as well as parties' rights to contract for exactly what they get in the resulting decision. The court here, instead of merely deciding the issue of whether the injunction was properly granted, takes the extra step in chastising a party that it thinks launched a baseless and defamatory attack against one of the arbitrators and makes clear its disinclination to involve the courts in arbitration where there is not a clear and previously established statutory or judicial reason to do so. In addition, the court warns other potential litigants that it will not allow attacks on arbitrator credibility to derail arbitration proceedings unless the litigating party can prove one of the already established indicators of evident partiality; that is, either personal or financial stakes that would make the arbitrator interested in the outcome of the proceedings and unable to impartially decide the outcome of the dispute.

[43] *Id.*
[44] *Id.* at 873.

WHEN A WAIVER ISN'T REALLY A WAIVER: ELEVENTH CIRCUIT ESTABLISHES NEW STANDARD FOR WAIVER OF RIGHT TO ARBITRATE AFTER FILING OF AMENDED COMPLAINT

Dustin Morgan*

I. INTRODUCTION

In *Krinsk v. SunTrust Bank, Inc.*, the Eleventh Circuit held, in a matter of first impression for the court, that by amending her complaint to include a much broader class of litigants than envisioned in the original complaint, Krinsk had materially altered the litigation.[1] As a result, SunTrust Bank ("SunTrust") must be allowed to rescind its previous waiver of the right to arbitrate under the agreement between the two parties.[2] The court reasoned that while the filing of an amended complaint does not ordinarily revive all defenses or objections previously waived by the answering party, "the defendant will be allowed to plead anew in response to an amended complaint, as if it were the initial complaint, when 'the amended complaint . . . changes the theory or scope of the case.'"[3] Analogizing this principle, the court established that a defendant's waiver of the right to arbitrate will not automatically be rescinded upon the filing of an amended complaint.[4] A defendant will be allowed to rescind this waiver only when "it is shown that the amended complaint unexpectedly changes the scope or theory of the plaintiff's claims."[5] According to the court, by amending her complaint to redefine the class of litigants in a way that would open the suit to a much broader range of parties in her suit against SunTrust, Krinsk had materially altered the scope of the litigation so as to allow SunTrust to rescind its previous waiver of its right to arbitrate under the agreement between the two parties.[6] In so ruling, the Eleventh Circuit fundamentally changed the way in which waivers of the right to arbitrate will be enforced throughout the jurisdiction in future litigation.

II. BACKGROUND

The dispute between Sara Krinsk and SunTrust stemmed from a conflict concerning a home-equity loan that Krinsk received from SunTrust.[7] Krinsk applied for and received a $500,000 line of credit listing Krinsk's Florida home as collateral.[8] In applying for and receiving the loan, Krinsk agreed to SunTrust's standard-form loan agreement; among the terms in the agreement was an arbitration clause that required disputes between the parties to be submitted to

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[1] Krinsk v. SunTrust Banks, Inc., 654 F.3d 1194, 1203-04 (11th Cir. 2011).

[2] *Id*.

[3] *Id*. at 1202 (citing Brown v. E.F. Hutton & Co., 610 F. Supp. 76, 78 (S.D. Fla. 1985)) (omission in the original).

[4] *Id*.

[5] *Id*.

[6] *Id*. at 1203.

[7] *Id*. at 1196.

[8] *Id*.

an arbitrator if either party elected to pursue arbitration.[9] The arbitration clause contained a class action waiver that stated:

> [I]f you or we elect to arbitrate a claim, neither you nor we will have the right: (a) to participate in a class action in court or in arbitration, either as a class representative, class member or class opponent; or (b) to join or consolidate [c]laims with claims of any person other than you. No arbitrator shall have authority to conduct any arbitration in violation of this provision.[10]

In October 2008, SunTrust made the decision to suspend Krinsk's right to access $400,000 of her previously approved home-equity line of credit ("HELOC").[11] SunTrust made this decision after requesting and receiving financial information from Krinsk that it claimed provided reasonable concern that Krinsk would be unable to fulfill her financial obligations under the agreement.[12] Krinsk alleged that SunTrust's reasons for suspending her account were pretextual and served as part of a greater scheme to remove high-risk HELOC accounts from its portfolio.[13] Krinsk further alleged that the most vulnerable targets of SunTrust's alleged scheme were the elderly, an age group from whom SunTrust expected little resistance.[14]

Relying on these allegations, Krinsk filed a class-action complaint on May 15, 2009 against SunTrust, SunTrust's corporate parent ("SBI"), and SBI's Chief Executive Officer ("CEO").[15] The original complaint stated claims for: "financial elder abuse under Florida's Adult Protective Services Act . . . (2) breach of contract; (3) deceit; (4) negligent misrepresentation; (5) breach of fiduciary duty; (6) violation of . . . the Truth in Lending Act . . . and (7) breach of implied covenant of good faith and fair dealing."[16] The original complaint defined the proposed class as:

> [A]ll Florida permanent or part-time residents that entered into an agreement with SunTrust entitled "Access 3 Equity Line Account Agreement and Disclosure" and who, after attaining the age of sixty-five (65), received a letter from SunTrust between July 1, 2008 and October 16, 2008, requesting updated financial information . . . and who were subsequently informed their collateralized credit line had been suspended or reduced during the draw period for purportedly failing to provide the information requested by SunTrust.[17]

Krinsk estimated that the class would encompass hundreds of members in her later motion for class certification.[18]

SunTrust responded to the complaint on July 6, 2009 by filing a motion to dismiss challenging the sufficiency of each of Krinsk's causes of action.[19] SBI and its CEO filed a joint

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[9] *Id*. at 1197.
[10] *Id*. at 1197 n.1.
[11] *Id*. at 1197.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*. at 1197–98.
[16] *Id*. at 1198.
[17] *Id*. (omission in the original).
[18] *Id*.

motion to dismiss immediately after.[20] SunTrust did not mention the loan agreement's arbitration clause at this time.[21] The district court did not rule on the motion to dismiss for sixth months, during which time the litigation proceeded.[22] SunTrust and Krinsk jointly filed a Case Management Report that outlined discovery plans and a discovery deadline and SunTrust levied a defense against Krinsk's motion to certify the class outlined in the original complaint.[23] As the litigation progressed through these stages SunTrust did not assert its right to compel arbitration under the loan agreement.[24]

The district court ruled on the motions to dismiss on January 8, 2010, "granting SunTrust's motion to dismiss in part and dismissing all of Krinsk's claims against SBI [and its CEO]."[25] The court also granted Krinsk twenty days to amend her original complaint in light of the motion to dismiss.[26] Krinsk's amended complaint asserted similar claims against SunTrust and offered a new definition for the proposed class of plaintiffs.[27] The class would now be defined as:

> All Florida residents who entered into one or more agreements for a … [HELOC] with SunTrust Bank pursuant to its "Access 3 Equity Line Account Agreement and Disclosure" that was collateralized by real estate located in Florida, and who had the available balance of their HELOC suspended or reduced anytime between January 1, 2007 to the date of class certification.[28]

This newly defined class would greatly increase the amount of litigants that were envisioned in the original complaint; the number of class members was now expected to be in the thousands.[29]

SunTrust answered Krinsk's amended complaint on February 10, 2010. In its answer, SunTrust raised its right to arbitrate its claims against Krinsk for the first time.[30] SunTrust also filed motions to compel arbitration under section four of the Federal Arbitration Act ("FAA"), to stay the litigation pending arbitration under FAA section three, and to prohibit the certification of Krinsk's supposed class pursuant to the class action waiver in the arbitral agreement.[31] Krinsk opposed these motions, arguing that SunTrust had waived its right to compel arbitration by participating in the litigation.[32]

The district court denied SunTrust's motions, agreeing with Krinsk's argument that SunTrust had waived its right to compel arbitration under the agreement.[33] In denying SunTrust's motions, the district court applied a two-part test examining whether "'under the totality of the

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[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*. at 1199.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id.*
[30] *Id*.
[31] *Id*.
[32] *Id*. at 1200.
[33] *Id*.

circumstances,' the party 'has acted inconsistently with the arbitration right,' and second, [they] looked to see whether, by doing so, that party 'has in some way prejudiced the other party.'"[34] The district court found both parts of the two-pronged test satisfied.[35]

First, the court found that SunTrust had acted inconsistently with its right to arbitrate by participating in the litigation up to the filing of the amended complaint.[36] The court ruled that "'[a] party that substantially invokes the litigation machinery prior to demanding arbitration may waive its right to arbitrate' if that conduct manifests the party's intent to waive arbitration."[37] SunTrust's participation in case management and motion practice in opposition to class certification represented a substantial invocation of the litigation machinery, according to the court.[38] Second, the district court found that Krinsk would be prejudiced if SunTrust was allowed to assert its right to arbitrate under the agreement.[39] Prejudice was apparent from both SunTrust's delay in asserting its right to arbitrate and the costs and time that Krinsk had expended in discovery and motion practice throughout the litigation.[40] Finding both prongs of the test satisfied, the district court denied SunTrust's motions to compel arbitration and stay the proceedings.[41]

III. COURT'S ANALYSIS

A. Effect of Amended Complaint on Defendant's Answer and Affirmative Defenses

SunTrust asked the Eleventh Circuit to consider an issue that had yet to be decided by the court: what effect does an amended complaint have on a previous waiver of the right to arbitrate?[42] Before considering this issue particularly, the court had to determine what effect an amended complaint generally has on a defendant's answer and the defendant's assertion of affirmative defenses.[43] The court reasoned that the "filing of an amended complaint does not automatically revive all defenses or objections that the defendant may have waived in response to the initial complaint."[44] The defendant will be allowed to plead anew where the "amended complaint . . . changes the theory or scope of the case."[45] According to the court, where the theory or scope of the case is fundamentally changed it would be unfair to allow the defendant a renewed chance to answer the complaint and offer affirmative defenses.[46]

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[34] *Id*. (citing Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1315 (11th Cir. 2002)).
[35] *Id*.
[36] *Id*. at 1200–01.
[37] *Id*. at 1201 (S & H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990)).
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*. at 1201–02.
[43] *Id.* at 1202.
[44] *Id*.
[45] *Id*. (citing Brown v. E.F. Hutton & Co., 610 F. Supp. 76, 78 (S.D. Fla. 1985)).
[46] *Id*.

B. Effect of Amended Complaint on Defendant's Right to Arbitrate

The effect of an amended complaint on a waiver of the right to arbitrate was a matter of first impression for the Eleventh Circuit.[47] The court recognized that other circuits had considered this issue and held that "in limited circumstances, fairness dictates that a waiver of arbitration be nullified by the filing of an amended complaint."[48] These limited circumstances were determined by analogizing the court's general principles regarding amended complaints. As with general answers and affirmative defenses, " a defendant's waiver of the right to compel arbitration is not automatically nullified by the plaintiff's filing of an amended complaint."[49] Courts will allow defendants to rescind their earlier waiver of the right to compel arbitration where "it is shown that the amended complaint unexpectedly changes the scope or theory of the plaintiff's claims."[50]

Ordinarily the invocation and participation in the judicial process will constitute a waiver of the right to compel arbitration.[51] The court reasoned that "when a plaintiff files an amended complaint that unexpectedly changes the shape of the case, the case may be 'so alter[ed] . . . that the [defendant] should be relieved from its waiver.'"[52] When such a case presents itself, the strong federal policy supporting arbitration dictates that the defendant's renewed motion compelling arbitration should be granted absent further imposition of or renewed waiver by the defendant.[53] Where the scope of the litigation is not dramatically altered in scope or theory, however the defendant's prior waiver should not be nullified and the defendant's motion to compel arbitration should be denied.[54]

The court did not view the changes in the amended complaint as immaterial, and concluded that SunTrust should have been allowed to rescind its waiver of the right to arbitration and its motion to compel arbitration should have been granted.[55] The significance of the amended complaint lay within the expanded class definition; where SunTrust would originally have litigated against hundreds of litigants, the new class definition would expose SunTrust to liability against thousands of parties.[56] Because this change was unforeseen at the time of SunTrust's waiver, and this expansion of the plaintiff class so altered the scope of the litigation, even despite SunTrust's expansive participation in the judicial process, SunTrust should have been allowed to rescind its waiver of its right to arbitrate.[57]

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[47] *Id*. at 1201–02.

[48] *Id*. at 1202.

[49] *Id*.; *see also* Gilmore v. Shearson/Am. Express Inc., 811 F.2d 108, 112 (2d Cir. 1987) ("A motion to compel arbitration of a claim involves the core issue of a party's willingness to submit a dispute to judicial resolution and, if waived, is not automatically revived by the submission of an amended complaint."), *overruled on other grounds by* McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co., 849 F.2d 761 (2d Cir. 1988)).

[50] *Krinsk*, 654 F.3d at 1202 (citing *Gilmore*, 811 F.2d at 113).

[51] *Id*. at 1203.

[52] *Id*. (citing *Gilmore*, 811 F.2d at 113).

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *Id*. at 1204.

IV. SIGNIFICANCE

This case is significant because it is a strong reaffirmation of the federal policy favoring arbitration.[58] By allowing a defendant to rescind a previous waiver of the right to arbitrate, the Eleventh Circuit ensures that parties who bargain for arbitration will be able to settle disputes through their chosen dispute resolution mechanism. This holding fits within FAA Section 2, which states that agreements to arbitrate shall be "valid, irrevocable, and enforceable."[59] By allowing parties to rescind a previous waiver of the right to arbitrate, the Eleventh Circuit helps further all three of these goals. Agreements will continue to be seen as valid because the recourse to arbitration will eventually be honored, irrevocability will be strengthened even in the face of party waiver where the circumstances of the litigation change, and enforceability will become more prevalent because waivers will become less enforceable in light of this opinion.

The significance of this case is especially evident in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. These cases fundamentally changed the way in which federal courts deal with motions to dismiss filed after the plaintiff submits a complaint.[60] Plaintiffs, after these cases, are required to advance enough facts in their complaint to show a plausible basis for relief in order to survive a motion to dismiss under Rule 12 of the Federal Rule of Civil Procedure.[61] These cases add significance because it seems motions to dismiss under Rule 12 will now be granted with higher frequency; as a result, amended complaints will also become more common. The Federal Rules of Civil Procedure provide judges with a large amount of discretion in granting parties permission to file amended complaints.[62] As a result, these types of waiver problems may become more frequent; the Eleventh Circuit has preemptively dealt with issues regarding waiver of the right to arbitrate and amended complaints.

V. CONCLUSION

Any analysis of this case must take into consideration that the arbitration at issue takes place in the consumer context. Krinsk accepted the arbitral provision as part of a standard form agreement.[63] The arbitration agreement was likely adhesive in nature and imposed as a condition to taking out a loan. As a result, fairness becomes a relevant concern. Should parties who assert their position and impose arbitral clauses be allowed to assert a right to arbitrate after participating in litigation? Both the FAA and the realities of contemporary litigation seem to suggest that the Eleventh Circuit took the proper approach in answering this question.

Whenever addressing a novel question concerning arbitration, a court must always be cognizant of the strong federal policy favoring arbitration.[64] The Supreme Court's case law and

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[58] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).

[59] 9 U.S.C. § 2 (2006).

[60] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[61] *Iqbal*, 129 S. Ct. at 1946; *Twombly*, 550 U.S. at 557; *see also* FED. R. CIV. P. 12(b)(6) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . failure to state a claim upon which relief can be granted.").

[62] FED. R. CIV. P. 15 (In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.).

[63] *Krinsk*, 654 F.3d at 1196–97.

[64] *See AT&T Mobility*, 131 S. Ct. at 1745.

the FAA impose a strong presumption in favor of the enforcement of agreements to arbitrate.[65] The Eleventh Circuit furthers this strong policy in its decision in *Krinsk*. By allowing parties to rescind their waiver of the right to arbitrate and compel arbitration after a fundamental change in litigation, the court allows the parties' underlying agreement to arbitrate to be honored. This decision is consistent with the development of both the FAA and the caselaw interpreting the Federal Rules of Civil Procedure. As a result, the decision is likely to be recognized and encompassed into case law of other federal circuits.

[65] *See id.*; 9 U.S.C. § 2.

BETTING AGAINST THE HOUSE: CALIFORNIA AND NEVADA'S STAND AGAINST ARBITRATION CLAUSES IN HOME CONSTRUCTION CONTRACTS

Devin Ryan[*]

I. INTRODUCTION

"The fellow that owns his own home is always just coming out of a hardware store."[1] In reality, sometimes a trip to a hardware store will not nearly be enough to repair a home, such as when the repairs needed can be incredibly immense or numerous. When those situations arise, homeowners must pursue other options. For homeowners like Alon Frumer and Michelle Berliner Frumer, that option is mandatory arbitration.[2] In *Frumer v. National Home Insurance Co.*, the Superior Court of New Jersey, Appellate Division held an arbitration clause as valid when it was included in a home warranty agreement mandating arbitration as the exclusive remedy for resolving major structural defects claims.[3] Other states do not share New Jersey's recent support of arbitration clauses in new home construction contracts and warranties.

In California and Nevada, courts and lawmakers are taking a stand against these arbitration clauses. Nevertheless, builders in these states continue to include mandatory arbitration clauses in sales contracts or warranty related documents. As a result, arbitrators are resolving homebuyers' claims of structural defects and related actions. While the effect of this may seem minor at first, the fallout of the 1990s and early 2000s home building boom has produced a score of homebuyers' defects claims. Therefore, a great deal of litigation has stayed off court dockets and been resolved privately through arbitration.

The increase in defects claims can be best described as follows:

> The furious pace of home building from the late 1990s through the first half of the 2000s contributed to a surge in defects, experts say. It caused shortages of both skilled construction works and quality materials. Many municipalities also fell behind inspecting and certifying new homes . . . At the height of the boom in 2005, more than two million house were built in the U.S., according to the National Association of Home Builders, a trade group. Criterium Engineers, a national building-inspection firm, estimates that 17% of newly constructed houses built in 2006 had at least two significant defects, up from 15% in 2003.[4]

Many of the homebuyers in California and Nevada are now filing suit alleging structural defects, as these two states, in particular, have "experienced a surge in construction-

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[1] Nathalie Montreuil, EVERY DAY QUOTES, 138 (2010) (quoting American humorist Kin Hubbard).

[2] *See* Frumer v. Nat'l Home Ins. Co., 18 A.3d 225, 229 (N.J. Super. Ct. App. Div. 2011) (holding a mandatory arbitration clause that covered major structural defects in a home warranty agreement was valid).

[3] *Id*. at 229.

[4] M.P. McQueen, *Cracked Houses: What the Boom Built*, THE WALL STREET JOURNAL, July 13, 2009, http://online.wsj.com/.

defect claims in recent years.[5] What these homebuyers are encountering, however, is that their claims are governed by mandatory arbitration clauses, preventing them from bringing suit in court. Homebuilders, either through the sales contract or warranty related documents, have been including these clauses more often than in years past. This has left some homeowners feeling "hamstrung" by the clauses.[6] In response, California and Nevada have attempted to curb the enforceability and applicability of mandatory arbitration clauses.[7]

Outside of California and Nevada, however, states embrace mandatory arbitration clauses as a speedy and less expensive remedy that will clear out the courts' dockets and provide final adjudication.[8] Despite homebuyers' general hostility to arbitration clauses, these states view the clauses as extremely beneficial to judicial economy and, in many cases, in the interest of both parties. Unsurprisingly, the National Association of Home Builders, a non-profit trade association, shares this view.[9]

But critics allege that the public policy favoring consumer protection outweighs any gains in judicial efficiency. They cite the need for legal protection because of the unequal bargaining power between homebuilders and homebuyers. Furthermore, they acknowledge the substantial monetary and life investment the buyers make in the transaction. Nevertheless, as this article will illustrate, California and Nevada law provide that mandatory arbitration in home construction contracts can be enforced so long as the homebuilders follow appropriate procedures.

This article will address California and Nevada's approach to mandatory arbitration clauses, the future implications of these clauses, and the necessary measures homebuilders and warranty providers should take to have the clauses enforced.

II. MANDATORY ARBITRATION CLAUSES IN HOME CONSTRUCTION CONTRACTS

A. Mandatory Arbitration Clauses in Home Construction Contracts in California

In California, California Civil Procedure Code section 1281 follows the Federal Arbitration Act ("FAA") and provides that arbitration agreements are "valid, enforceable and

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[5] *Id*.

[6] *Id*.

[7] In *Grafton Partners L.P. v. Superior Court*, 116 P.3d 479, 487-88 (Cal. 2005), the Supreme Court of California observed that the legislature provided for two devices to waive the right to a jury trial prior to a dispute: arbitration agreements and judicial reference provisions.

[8] *See, e.g.*, Harrington v. Pulte Home Corp., 119 P.3d 1044 (Ariz. Ct. App. 2005) (upholding mandatory arbitration clause in home purchase contracts and compelling homebuyers to arbitrate their claims that homebuilders did not disclose that a pilot training aerobatic box and jet engine test facility were nearby); *In re* U.S. Home Corp., 236 S.W.3d 761 (Tex. 2007) (holding that an arbitration clause in a warranty book, which provided that a party "may request" arbitration, made arbitration binding once the homebuilder requested it); Zeleny v. Thompson Homes at Centreville, Inc., 2006 WL 2382829 (Del. Super. Ct. July 10, 2006) (holding arbitration clause in housing contract warranty required binding arbitration of plaintiffs' claims of leaks and other defects).

[9] *Washington Update*, NATIONAL ASSOCIATION OF HOME BUILDERS (Mar. 26, 2010), http://nahbenews.com/nahbwash/issues/2010-03-26.html ("NAHB strongly supports the use of alternative dispute resolution, including binding arbitration, as the most rapid and cost-effective means of resolving disputes. Invalidating binding arbitration provisions in contracts would undermine decades of jurisprudence strongly favoring arbitration of disputes where the parties have agreed to use the arbitration process. NAHB opposes any attempt to prohibit the use of pre-dispute arbitration in contracts.").

irrevocable, save upon such grounds as exist for the revocation of any contract."[10] In this respect, California courts will invalidate mandatory arbitration clauses in home construction contracts on the basis of unconscionability, as it is a ground that "exist[s] for the revocation of any contract."[11] California's broad application of unconscionability differs heavily from that of other state courts.

1. Federal Preemption of Section 1298.7 of the California Code

Despite the great latitude California courts afford unconscionability, California lawmakers identified a need for further protection of homebuyers attempting to bring certain claims against homebuilders. The result was California Civil Procedure Code § 1298.7, which provided that an arbitration provision "shall not preclude or limit any right of action for bodily injury or wrongful death, or any right of action to which Section 337.1 or 337.15 is applicable."[12] This was read to mean that despite language to the contrary in a home construction contract's arbitration clause, a homebuyer could still bring defects claims in court. The court later found that the FAA, however, preempted this limitation on arbitration.[13]

In *Shepard v. Edward Mackay Enterprises*, the plaintiffs brought suit alleging construction defects caused by plumbing pipes installed by defendants and damaged further by the defendants' subcontractor.[14] The pipes leaked and "water damaged interior finishes, carpeting, cabinets and drywall."[15] The plaintiff alleged that the water damage created toxic mold, and that he suffered personal injury from exposure to that mold. The real estate purchase agreement, however, contained an arbitration provision, which stated that all disputes arising out of the contract must be resolved by binding arbitration.[16] The defendant filed a motion to compel arbitration, but the plaintiff opposed the motion, stating that Section 1298.7 prohibited the court from granting the motion. The trial court denied the motion to compel because it found that the defendants "failed to demonstrate the transaction involved interstate commerce."[17] The defendants appealed and argued that the FAA preempted Section 1298.7. The appellate court held that construction of the plaintiff's substantially affected interstate commerce because five materials suppliers provided supplies that originated outside of California to the defendant for use in constructing the house; therefore, "the FAA preempt[ed] contrary state law [Section 1298.7] in this case.[18]

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[10] CAL. CIV. PRO. CODE § 1281; *accord* Federal Arbitration Act, 9 U.S.C. § 2 (2006).

[11] CAL. CIV. PRO. CODE § 1281.

[12] CAL. CIV. PRO. CODE §§ 337.1, 337.15 govern the statute of limitations for claims relating to construction or improvement of real property. Section 337.1 states that actions for damages "from persons performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction of an improvement to real property more than four years after the substantial completion of such improvement." Section 337.15 states that an action to obtain damages "from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property" cannot be brought "more than 10 years after the substantial completion of the development or improvement."

[13] *See* Shepard v. Edward Mackay Enters., 56 Cal. Rptr. 3d 326, 333 (Cal. Ct. App. 2007).

[14] *Id*.

[15] *Id*. at 327.

[16] *Id*. at 327–28.

[17] *Id*. at 328.

[18] *Id*. at 328, 333.

This was consistent with the appellate court's ruling in *Basura v. U.S. Home Corp*.[19] In *Basura*, sixty homebuyers brought suit against the defendant alleging design and construction defects after a variety of problems arose, including "cracked foundation slabs."[20] The sales agreements contained arbitration clauses that covered any disputes arising out of the agreement. In twenty-eight of the contracts, however, the defendant did not initial the arbitration clause.[21] The defendant filed a motion to compel arbitration, but the plaintiffs argued that Section 1298.7 allowed their suit to go forward. The court held that Section 2 of the FAA preempted Section 1298.7 of the California Code because "the California statute is a state law applicable only to arbitration agreements, allowing a purchaser to pursue a construction and design defect action against a developer in court, despite having signed an agreement to convey real property containing an arbitration clause."[22] The court's ruling aligned with *Doctor's Associates, Inc. v. Casarotto*, where the Court held that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."[23]

2. California Courts Turn to Unconscionability

After the federal preemption of Section 1298.7, the courts turned to unconscionability to limit the impact of mandatory arbitration agreements in home construction contracts. A series of cases followed which addressed the issue of whether mandatory arbitration clauses' in home construction warranties were unconscionable: *Baker v. Osborne Development Corp.*;[24] *Bruni v. Didion*;[25] and *Adajar v. RWR Homes, Inc*.[26]

First, in *Baker v. Osborne Development Corp.*, homeowners sued the homebuilder, Osborne, arguing that several houses were defective.[27] Problems with the houses included "soil movement; foundation deficiencies; plumbing leaks; stucco, window, and roof problems; finish problems relating to cabinets, floor tiles, and countertops; and problems with the framing and electrical, heating, plumbing, and ventilation systems."[28] Osborne filed a motion to compel arbitration and argued that an arbitration agreement in the warranty booklet mandated arbitration of the claims. In addition, the Builder Application signed by both parties and sent to Home Buyers Warranty Corporation stated that the parties consented to the terms and the binding

[19] Basura v. U.S. Home Corp., 120 Cal. Rptr. 2d 328 (Cal. App. Ct. 2002).

[20] *Id*. at 330.

[21] *Id*.

[22] *Id*. at 333; *cf*. Woolls v. Superior Ct., 25 Cal. Rptr. 3d 426, 438-39 (Cal. Ct. App. 2005) (holding that the state law mandatory notice provision was not preempted the FAA and the arbitration agreements were unenforceable because "[t]he instant case, involving the renovation of a single family residence, lies at the opposite end of the spectrum from *Basura*, which involved the construction of a large scale housing development" and the defendant failed to make any factual declarations that the transaction involved interstate commerce).

[23] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

[24] Baker v. Osborne Dev. Corp., 71 Cal. Rptr. 3d 854 (Cal. App. Ct. 2005).

[25] Bruni v. Didion, 73 Cal. Rptr. 3d 395 (Cal. App. Ct. 2005).

[26] Adajar v. RWR Homes, Inc., 73 Cal. Rptr. 3d 17 (Cal. App. Ct. 2005). All three cases involve new home construction warranty programs provided by Home Buyers Warranty Corporation ("HBW"), a Colorado corporation. To obtain coverage under the program, a builder sends an enrollment fee and application formed signed by both the builder and the buyer. *See Baker*, 71 Cal. Rptr. 3d at 857; *Bruni*, 73 Cal. Rptr. 3d at 402; *Adajar*, 73 Cal. Rptr. 3d at 19. Then, HBW sends the buyer a certificate of warranty coverage and a warranty book. *See Baker*, 71 Cal. Rptr. 3d at 857; *Bruni*, 73 Cal. Rptr. 3d at 402.

[27] *Baker*, 71 Cal. Rptr. 3d at 857.

[28] *Id*.

arbitration provision.[29] The homebuyers countered by stating at the time they signed the Builder Application, the only arbitration clause they knew of was in the sales agreement. That arbitration provision limited its application to disputes over the deposit of funds in escrow.[30] In fact, the homebuyers only received the booklet a few weeks after moving into their homes. The court held that the arbitration agreement was "both procedurally and substantively unconscionable and therefore unenforceable."[31] The agreement was procedurally unconscionable because Osborne failed to alert the homebuyers to the arbitration clause, meeting the surprise element, and the parties had unequal bargaining power, meeting the oppressive element.[32] It was also substantively unconscionable because the arbitration clause was "one-sided."[33]

Similarly, in *Bruni v. Didion*, the homebuyers were not told to read the warranty, which contained an arbitration clause, before signing it and were never told how the warranty would affect their legal rights.[34] Some homebuyers received the warranty documents after signing, while some never received them at all. In addition, the arbitration provisions "[took] up roughly one full page in a 30-page booklet," which was entirely "in single-spaced, 10-point type."[35] The arbitration provisions also were "not distinguished from the rest of the booklet by either bolding or capitalization."[36] The court held that the arbitration clauses were procedurally unconscionable because the clauses were practically hidden from the homebuyers, the defendants failed to inform the plaintiffs about the clauses, and the sales agreement was a contract of adhesion. Furthermore, the arbitration clauses were substantively unconscionable because they violated the plaintiffs' reasonable expectations.[37]

Finally, in *Adajar v. RWR Homes, Inc.*, the homebuyers signed a warranty application, which provided that by signing, they affirmed that they saw a video about the warranty and received a sample warranty booklet.[38] In addition, the application provided that by signing, the homebuyers agreed to the terms of the binding arbitration provision. At trial, however, the builders were unable to produce a copy of the sample booklet and submitted 2001 and 2002 versions of the actual warranty instead.[39] The homebuyers argued that they could not be bound by the unknown terms of an arbitration provision and that most of them did not receive a video or a copy of the sample warranty booklet. The court held that the builders failed to prove the existence of an arbitration agreement.[40] The court distinguished this case from *Wise v. Tidal Construction Co.*,[41] where the buyer signed a warranty application attached to a warranty booklet containing the arbitration clause. The court stated that if the builders produced the actual arbitration clause, as the builder did in *Wise*, the case might be different.[42] But considering *Adajar* and the two preceding cases, *Baker* and *Bruni*, it is difficult to see the court enforcing the arbitration clause contained in the warranty booklet.

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[29] *Id*.
[30] *Id*. at 858.
[31] *Id*. at 864.
[32] *Id*. at 863.
[33] *Id*. at 864.
[34] *Bruni*, 73 Cal. Rptr. 3d at 404.
[35] *Id*. at 413.
[36] *Id*.
[37] *Id*. at 414.
[38] *Adajar*, 73 Cal. Rptr. 3d at 19.
[39] *Id*. at 20.
[40] *Id*. at 22.
[41] Wise v. Tidal Constr. Co., 583 S.E.2d 466 (Ga. 2003).
[42] *Adajar*, 73 Cal. Rptr. 3d at 24.

One common thread ties all of the above cases together – the homebuyers did not actually receive the warranty documents, which contained the arbitration clauses, until after they signed the sales contract. While reference was made to the existence of arbitration clauses, the buyers were not afforded the opportunity to read the warranty's actual terms. It appears that so long as homebuilders, and by extension warranty providers, supply the actual arbitration agreement to the buyer prior to or at the closing, the arbitration agreement will generally be upheld.

Why then do these cases keep arising in California? Are homebuilders and warranty providers trying to backdoor arbitration agreements into their sales contracts and warranty provisions? Or are they making honest mistakes and not learning from them?

B. Mandatory Arbitration Clauses in Home Construction Contracts in Nevada

Nevada courts also oppose mandatory arbitration provisions in home construction contracts. Similar to California, Nevada courts are sympathetic to homebuyers because of the unequal bargaining power in sales of new homes. Examination of Nevada's approach will focus on three cases: *Burch v. Second Judicial District Court of State of ex rel. County of Washoe*;[43] *D.R. Horton, Inc. v. Green*;[44] and *Gonski v. Second Judicial District Court of State of ex rel. County of Washoe*.[45]

We begin with *Burch v. Second Judicial District Court of State of ex rel. County of Washoe*, where the plaintiffs, James and Linda Burch, purchased a new home constructed by the defendant in 1997.[46] Four months after the closing, the defendant gave Linda Burch a thirty-one-page warranty booklet supplied by HBW and asked her to sign a warranty application form to enroll in HBW's warranty. She signed the application but did not read the warranty booklet.[47] The warranty covered material and workmanship defects for one year; electrical, plumbing and mechanical systems defects for two years; and structural defects for ten years. In 1999, the plaintiffs noticed severe problems with their house, including "saturated floor joists, wet insulation, muddy ground, and a wet, moldy foundation."[48] Consequently, they asked the defendant to remedy the problems. Mediation attempts fell through, so the plaintiffs filed complaint in district court.[49] The defendant filed a motion to compel arbitration, which the district court granted after concluding that the parties entered into a valid contractual agreement to arbitrate. The plaintiffs then filed a petition for a writ of mandamus, later granted by the Supreme Court of Nevada.[50] The court held that the arbitration clause in the warranty booklet was unconscionable and unenforceable.[51] The court noted that the clause was procedurally unconscionable because the plaintiffs were told the warranty would offer "extra protection for

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[43] Burch v. Second Judicial Dist. Ct. of State *ex rel.* Cnty. of Washoe, 49 P.3d 647 (Nev. 2002).

[44] D.R. Horton, Inc. v. Green, 96 P.3d 1159 (Nev. 2004).

[45] Gonski v. Second Judicial Dist. Ct. of State of *ex rel.* Cnty. of Washoe, 245 P.3d 1164 (Nev. 2010).

[46] *Burch*, 49 P.3d at 648.

[47] *Id*.

[48] *Id*. at 649.

[49] *Id*.

[50] *Id*. at 440. Note that at the time of this case, NEV. REV. STAT. ANN. § 38.205 held that court orders granting a motion to compel arbitration were not immediately appealable. Due to this, parties would file a petition for a writ of mandamus to challenge the motion to compel. The governing statute for a writ of mandamus is NEV. REV. STAT. ANN. § 34.170, which states that a "writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested."

[51] *Burch*, 49 P.3d at 651.

their home," did not have an opportunity to read the application or booklet or watch the HBW video, were not "sophisticated consumers," did not understand the warranty's terms, and could not easily find the arbitration clause.[52] The clause was substantively unconscionable because it granted the defendant's insurer, NHIC, "the unilateral and exclusive right to decide the rules that govern the arbitration and to select the arbitrators."[53] The court noted, however, that it was not "hold[ing] that a homebuyer warranty with an arbitration clause will always be unconscionable or unenforceable," but that in this case, "the HBW and its arbitration clause [were] unconscionable and, therefore, unenforceable."[54]

The court expanded on *Burch* in *D.R. Horton, Inc. v. Green*. In *D.R. Horton*, the plaintiffs purchased homes from the defendant builder.[55] The two-page sales agreements, printed in very small font, contained an arbitration clause at the bottom of the second page. "With the exception of the paragraph title, which was in bold capital letters like the other contract headings, nothing drew special attention to this provision."[56] Neither of the plaintiffs "understood that they would be required to fund one-half of the expenses of the arbitration and that these expenses could be more costly than standard litigation."[57] This was contrary to Nevada statute Section 40.655(1)(a), which allowed a construction defect claimant to "recover attorney fees or other damages proximately caused by the construction defect controversy."[58] After several problems developed with their homes, the plaintiffs notified the defendant that they intended to bring construction defect claims. After the mediation process was unsuccessful, the defendant demanded arbitration.[59] The plaintiffs responded by filing a complaint in district court seeking a declaration that the arbitration agreement was unenforceable. Then the defendant filed a motion to compel arbitration, which the trial court denied.[60] While the Supreme Court of Nevada found that the sales agreement was not a contract of adhesion, as the trial court did, it held that the arbitration agreement was unconscionable because "it was inconspicuous, one-sided and failed to advise the Homebuyers that significant rights under Nevada law would be waived by agreeing to arbitration."[61]

Lastly, in *Gonski v. Second Judicial District Court of State of ex rel. County of Washoe*, the plaintiffs purchased a home in a housing development from the defendant.[62] Months after the purchase, the plaintiffs alerted the defendant to several construction defects. After mediation attempts failed, the plaintiffs filed a complaint in district court.[63] Then, the defendant attempted to enforce two arbitration agreements, one in the sales agreement and the other in a limited warranty. The district court found that the arbitration agreements were not unconscionable and granted the motion to compel arbitration.[64] The plaintiffs filed a petition for a writ of mandamus, which the Supreme Court of Nevada granted. The court held that the arbitration agreement was

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[52] *Id*. at 650.
[53] *Id*.
[54] *Id*. at 651.
[55] *D.R. Horton*, 96 P.3d at 1160.
[56] *Id*. at 1161.
[57] *Id*.
[58] *Id*. at 1164.
[59] *Id*. at 1161.
[60] *Id*. at 1162. Under NEV. REV. STAT. ANN. § 38.247(1)(a), motions denying a motion to compel arbitration are immediately appealable.
[61] *D.R. Horton*, 96 P.3d at 1163, 1165.
[62] *Gonski*, 245 P.3d at 1166.
[63] *Id*.
[64] *Id*. at 1168.

unconscionable.[65] While the arbitration clause's procedural unconscionability from the signing and failure to highlight was low, the substantive unconscionability was high because it failed to "adequately address the arbitration costs and disregard[ed] . . . NRS Chapter 40 rights."[66]

From these cases, it appears that Nevada courts follow a similar approach to California. Recognizing an apparent need for added consumer protection in home construction contracts, the courts place a heavy emphasis on homebuilders making arbitration clauses readily identifiable and fully providing them to homebuyers, with an opportunity to read, before the closing.

C. Future Implication

The future implications of mandatory arbitration clauses in home construction contracts are plentiful. Primarily, they facilitate the recovery of the real estate market by efficiently resolving disputes born out of the real estate boom. Mandatory arbitration clauses in home construction contracts have softened the potential blow of the surge in construction defects claims on the real estate market. Homebuilders already struggling in California and Nevada have not been exposed to lengthy, more expensive lawsuits arising from homebuyers' construction defects claims. As a result, they have been able to keep costs down, which undoubtedly aids in their recovery.

Additionally, the privacy of arbitration results in a restoration of confidence in homebuilders. Public lawsuits exposing construction defects, at a time when new homebuyers are scarce, could lead to more potential buyers abstaining from purchasing a new home. While this may seem as though buyers are being blindfolded from the problem of construction defects so that homebuilders can gain some public confidence, the near future will tell whether the increase in defects claim truly arose from a shortage of quality workmanship in the wake of the housing boom. But with the real estate market in recovery, will workmanship improve because homebuilders are no longer struggling to keep up with demand? Or will workmanship decrease or remain the same because homebuilders are trying to cut costs, leading them to hire less skilled and cheaper contractors? Only time will tell.

Conversely, some homebuyers feel slighted by not being able to bring suit in court to recover damages from their defects claims. This disposition is fueled by parties such as Home Owners Against Deficient Dwellings ("HADD"), a consumer interest group that advises homeowners to "[a]void arbitration clauses" because "[a]rbitration can be biased in the company's favor, and it's private so others can't find out about complaints."[67] Further, despite the strong federal policy favoring arbitration, a federal interest may be argued to exist in protecting homeowners' ability to bring suit in court. If a homeowner's "loan is financed through the FHA [Federal Housing Authority] or VA [Department of Veterans' Affairs] and you file a claim against the third-party warranty company, [the homeowner] can choose between arbitration or going to court."[68] Therefore, it appears as though the federal government has identified an interest in protecting homeowners' ability to resolve warranty claims in court.

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[65] *Id*. at 1173.

[66] *Id*.; *see* NEV. REV. STAT. ANN. § 40.655(1)(a).

[67] *Binding Arbitration*, HOME OWNERS AGAINST DEFICIENT DWELLINGS, (Dec. 5, 2008), http://www.hadd.com/arbitration (last visited Apr. 19, 2012).

[68] *Warranties for Newly Built Homes: Know Your Options*, FEDERAL TRADE COMMISSION, http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea03.shtm (last modified April 24, 2009).

Ultimately, however, the many benefits of enforcing mandatory arbitration clauses in new home construction contracts outweigh any perceived detriments. Arbitration is generally cheaper and will provide a quicker remedy for homeowners and homebuilders alike. When problems with homes develop, homeowners are forced in many cases to live in hotels, with family, or with friends while their houses are repaired. These repairs can be lengthy and, in some situations, impossible. Adding a lengthy adjudication process to the traumatic effect of construction defects is too much for consumers. They should realize that arbitration often provides a better, less costly, and more expedient solution than a civil suit.

III. CONCLUSION

In the end, California and Nevada are invalidating arbitration agreements on the grounds of unconscionability when other states are enforcing those agreements. The courts in these states hinge their decisions on whether failure of homebuilders to alert homebuyers of the clauses and what they provide; whether the print was a larger font size, capitalized, or bolded; whether the terms of the arbitration clause were given to the homebuyers prior to the closing; and whether the homebuyers had an opportunity to read the arbitration clause.

Beneath the reasoning of these court decisions lies a disposition disfavoring arbitration clauses in home construction contracts. What these courts should realize, however, is that arbitration contracts aid in the recovery of the real estate market. In addition, despite increased construction defects claims, courts have benefited from less cases clogging up their dockets.

At the same time, however, it should be stated that not all arbitration clauses in home construction contracts should be enforced. Inevitably, courts in California and Nevada will rightly declare some clauses unconscionable. However, these courts should join the majority of jurisdictions and lighten their stance on arbitration clauses in home construction contracts.

OFF THE RESERVATION: NATIVE AMERICAN TRIBES REASSERTING SOVEREIGN IMMUNITY TO TRUMP ARBITRATION AGREEMENTS

Devin Ryan[*]

I. INTRODUCTION

The Supreme Court's decisions in *Turner v. United States*[1] and *United States v. U.S. Fidelity & Guaranty Co.*[2] firmly established the doctrine of tribal sovereign immunity. A Native American tribe enjoys sovereign immunity from suit, unless "Congress has authorized the suit or the tribe has waived its immunity."[3] Any such waiver must be clear and unequivocal to be effective.[4] Furthermore, "[c]ourts construe waivers of a tribe's sovereign immunity strictly and hold a strong presumption against them."[5]

Until recently, it was well settled that arbitration clauses constituted a clear waiver of a Native American tribe's sovereign immunity. In *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Supreme Court held that arbitration agreements constituted an express waiver of sovereign immunity.[6] However, since that time, tribes have contracted around the Court's decision by excluding certain enforcement portions of arbitration rules.

In *California Parking Services, Inc. v. Soboba Band of Luiseno Indians* ("*Soboba*"), the Fourth District California Court of Appeal held that an arbitration clause in a contract between a private contractor and a Native American tribe was not a waiver of the tribe's sovereign immunity.[7] The court distinguished *Soboba* from *C & L Enterprises* because this clause specifically excluded a provision, which provided for court enforcement of arbitral awards.[8] But should this be the outcome?[9] This article will examine the issue of when arbitration clauses rise to the level of a waiver of sovereign immunity; whether tribes should be allowed to avoid the

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[1] Turner v. United States, 248 U.S. 354 (1919).

[2] United States v. U.S. Fid. & Guar. Co., 309 U.S. 506 (1940).

[3] Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998); *see also* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

[4] C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001).

[5] Cal. Parking Servs., Inc. v. Soboba Band of Luiseno Indians, 128 Cal. Rptr. 3d 560, 563 (Cal. Ct. App. 2011) (citing Big Valley Band of Pomo Indians v. Superior Ct., 35 Cal. Rptr. 3d 357 (Cal. Ct. App. 2005)).

[6] *C & L Enters.*, 532 U.S. at 423.

[7] *Soboba*, 128 Cal. Rptr. 3d at 562, 565.

[8] *Soboba*, 128 Cal. Rptr. 3d at 565. The provision was Rule 48(c) of the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association, which reads, "Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." *Commercial Arbitration Rules and Mediation Procedures, Rule 48(c)*, AMERICAN ARBITRATION ASSOCIATION (June 1, 2009), http://www.adr.org/aaa/faces/rules (follow "Rules" hyperlink; then follow "Commercial Arbitration Rules and Mediation Procedures" hyperlink) (last visited Apr. 19, 2012).

[9] The *Soboba* court noted California Parking Services' argument that the court "should nevertheless find a waiver on the ground that it would be 'wrong and improper' to discard an entire arbitration provision simply because the Soboba Band 'slipped in' the words 'excluding Rule 48(c),' at the end of a sentence." The court stated that it was "sympathetic to the position of CPS," but it was "constrained in this case by the heavy presumption against waivers of immunity." *Id*. at 564.

enforceability of arbitration awards; and what practitioners should do when negotiating with Native American tribes to ensure the arbitral process goes forward.

II. ARBITRATION CLAUSES CONSTITUTE WAIVER OF SOVEREIGN IMMUNITY

Prior to *C & L Enterprises*, there was considerable disagreement amongst lower courts as to whether arbitration agreements constituted a waiver of tribal sovereign immunity. In *C & L Enterprises*, the Potawatomi Nation, "a federal recognized Indian Tribe," solicited C & L to install a roof on a commercial building.[10] The tribe owned both the building and the off-reservation land. The parties entered into a contract, which contained an arbitration provision and a choice-of-law clause.[11] Before C & L began work, however, the tribe opted "to change the roofing material from foam (the material specified in the contract) to rubber guard."[12] The tribe then solicited new bids and hired a different company to install the roof. C & L submitted an arbitration demand, alleging that the tribe "dishonored the contract."[13] The tribe declined to participate in the arbitration and asserted sovereign immunity. After the conclusion of the proceeding, the arbitrator rendered an award in favor of C & L in the amount of $25,400 in damages, plus attorney's fees and costs.[14]

Weeks later, C & L filed suit, seeking to enforce the award in an Oklahoma state court. The tribe appeared and moved to dismiss the action on the ground of sovereign immunity.[15] The district court denied the motion and confirmed the award. The Oklahoma Court of Civil Appeals affirmed, stating that "the [t]ribe lacked immunity because the contract giving rise to the suit was 'between an Indian tribe and a non-Indian' and was 'executed outside of Indian Country.'"[16] Thereafter, the Oklahoma Supreme Court denied review and the tribe petitioned for certiorari to the United States Supreme Court. While the petition was pending, the Court decided *Kiowa*, which held that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."[17] In light of this decision, the Supreme Court remanded for reconsideration. On remand, the Oklahoma Court of Civil Appeals held that the tribe was immune from suit under *Kiowa* and did not waive its sovereign immunity by entering into a contract that contained an arbitration clause.[18] The Oklahoma Supreme Court denied C & L's petition for review. The United States Supreme Court granted C & L's petition for certiorari to resolve the issue of whether an arbitration agreement constituted a waiver of a tribe's sovereign immunity.[19]

Justice Ginsburg, writing for the unanimous Court, declared that "the [t]ribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court; the

[10] *C & L Enters.*, 532 U.S. at 414.
[11] *Id*. at 415.
[12] *Id*. at 416.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Kiowa*, 523 U.S. at 760.
[18] *C & L Enters.*, 532 U.S. at 417.
[19] *Id*. at 418.

[t]ribe thereby waived its sovereign immunity from C & L's suit."[20] The court noted that the arbitration clause specified that the American Arbitration Association's Rules for the construction industry would apply, and that 48(c) of those rules stated, "the arbitration award may be entered in any federal or state court having jurisdiction thereof."[21] By agreeing to the arbitration under the AAA rules, the tribe effectively waived its sovereign immunity because it agreed to enforcement of an award by a federal or state court.[22]

For a time, this opinion made it clear that any arbitration agreement entered into by a Native American tribe would constitute a waiver of sovereign immunity. Focusing on the Court's reasoning which pertained to Rule 48(c), however, tribes found a loophole.

III. NO ENFORCEMENT, NO WAIVER

If the arbitration clause excludes the relevant enforcement rule, the tribes have not waived their sovereign immunity. In *Soboba*, "the Soboba Band, a federally recognized Indian tribe," contracted California Parking Services ("CPS") in March 2007 "to provide valet parking services to the Soboba Casino for three years."[23] The contract contained an arbitration clause that was fairly standard except for one minor tweak. The clause's declaration of the rules applicable to the arbitral proceeding stated that the proceeding "shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association (September 2005 edition or later) *excluding 48(c).*"[24] Even with this exclusion, however, the clause went on to state that "[t]he decision . . . shall be final and binding on both parties."[25] The contract also contained a choice-of-law provision, which stated that the "Agreement shall be governed by the laws of the State of California and, where applicable, Tribal and Federal Law."[26] In June 2009, after problems developed with CPS's valet service, the Soboba Band terminated the contract. Months later, CPS sought to compel arbitration pursuant to their contract.[27] Soboba demurred the motion to compel on the basis of sovereign immunity, and CPS opposed the demurrer. The district court denied CPS's petition to compel arbitration, holding that sovereign immunity barred compelling the Soboba Band to arbitrate.[28] The court reasoned that the tribe did not waive its sovereign immunity because the arbitration clause expressly excluded application of Rule 48(c), which provides that "[p]arties to an arbitration under these rules shall be deemed to have consented that

[20] *Id*. at 423.

[21] *Id*. at 419. Note that in the future, tribes can exclude this rule and similar AAA rules to avoid enforcement of an arbitration award. *See Soboba*, 128 Cal. Rptr. 3d at 565 (holding that the tribe did not waive its sovereign immunity because it excluded Rule 48(c) from the arbitration clause).

[22] After analyzing the choice-of-law clause in the contract, the Court also concluded that Oklahoma state court would be the appropriate forum to seek a judgment enforcing the award. *See C & L Enters.*, 532 U.S. at 419.

[23] *Soboba*, 128 Cal. Rptr. 3d at 562.

[24] *Id*. (emphasis in original).

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *Id*.

judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof."[29]

The Court of Appeals for the Fourth District of California affirmed the lower court's decision. While agreeing to arbitrate would ordinarily constitute a waiver of sovereign immunity, the court observed that by excluding Rule 48(c), the tribe was not consenting to a state or federal court having jurisdiction over it.[30] Therefore, the tribe did not waive its sovereign immunity and could not be compelled to arbitrate the dispute. The court rejected CPS's arguments that the court should find waiver anyway because (1) it would be inequitable to disregard an entire arbitration clause only the on ground that the tribe "'slipped in' the words 'excluding Rule 48(c)' at the end of a sentence"; (2) at the very least, the tribe consented to arbitration if not for the enforcement of the award; and (3) the choice-of-law provision supports a finding of non-waiver.[31]

First, although the court was sympathetic to CPS's situation, the court was "constrained in this case by the heavy presumption against waivers of immunity."[32] The court noted that a waiver of immunity is completely voluntary, and a tribe "may prescribe the terms and conditions on which it consents to be sued."[33] Next, the court found that compelling an arbitration that would not result with enforcement of the award would be meaningless. While CPS's second argument was "attractive on its face, since any other reading would make the arbitration clause pretty much illusory . . . it [was] without legal support."[34] Therefore, the court stated that the tribe's "rejection of the court's jurisdiction to enforce an arbitral award necessarily implies its rejection of the court's jurisdiction to compel arbitration as well."[35] Finally, the inclusion of the choice-of-law-provision did not persuade the court. While the Supreme Court found in *C & L Enterprises* that a choice-of-law provision supported a waiver of immunity, "the Court's holding did not hinge on this provision."[36] The purpose of the provision was solely "to clarify which forum and what law would *enforce* the arbitral award," not whether any award could be enforced against the tribe.[37]

But is this the right outcome? To begin, there is no point of including an arbitration clause that does not provide for arbitration. While the parties are free to draft the arbitration

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[29] *Id*. This provision is identical to other AAA rules of arbitration; *see, e.g.*, *Employment Arbitration Rules and Mediation Procedures, Rule 42(c)*, AMERICAN ARBITRATION ASSOCIATION (Nov. 1, 2009), http://www.adr.org/aaa/faces/rules (follow "Rules" hyperlink; then follow "Employment Arbitration Rules and Mediation Procedures" hyperlink) (last visited Apr. 19, 2012); *Real Estate Industry Rules (Including a Mediation Alternative), Rule 50(c)*, AMERICAN ARBITRATION ASSOCIATION (June 1, 2009), http://www.adr.org/aaa/faces/rules (follow "Rules" hyperlink; then search "Real Estate"; then follow "Real Estate Industry Rules (Including a Mediation Alternative)" hyperlink) (last visited Apr. 19, 2012); *Home Construction Arbitration Rules and Mediation Procedures, ARB-48(c)*, AMERICAN ARBITRATION ASSOCIATION (June 1, 2007), http://www.adr.org/aaa/faces/rules (follow "Rules" hyperlink; then search "Real Estate"; then follow "Home Construction Arbitration Rules and Mediation Procedures" hyperlink) (last visited Apr. 19, 2012); *Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes), Rule 51(c)*, AMERICAN ARBITRATION ASSOCIATION (Oct. 1, 2009), http://www.adr.org/aaa/faces/rules (follow "Rules" hyperlink; then search "Real Estate"; then follow "Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes)" hyperlink) (last visited Apr. 19, 2012).

[30] *Id*. at 563, 565.

[31] *Id*. at 564.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *Id*. at 565 (emphasis in original).

clause how they like, an exclusion of the enforcement provisions defeats the entire purpose of arbitration—to provide a final, binding judgment. CPS's oversight of the Rule 48(c) exclusion rendered the arbitration clause and the choice-of-law provision useless. In the end, the Soboba Band potentially disguised their intentions by consenting to an arbitration clause but including an exclusion of Rule 48(c).

In addition, CPS failed to bolster its argument that the tribe waived its sovereign immunity when it consented to arbitration that "shall be final and binding on both parties."[38] This provision conflicts with the exclusion of Rule 48(c). How can the arbitration be final and binding without court enforcement of the award? Assuredly, the court in *Soboba* was restrained by the strict interpretation of waivers and the policy supporting tribal sovereign immunity. At the very least, it should be gleamed from this case that any doubt as to an arbitration award's enforcement would preserve the tribe's sovereign immunity despite the arbitration clause.

The silver lining to this loophole's creation is the extent that a tribe can use it. Say for instance the Soboba Band compelled CPS to arbitration. It could not consent to the arbitration, go through the process, and then assert sovereign immunity after an unfavorable award was rendered.[39] But this does not provide any consolation to parties—such as CPS—who either by their lack of experience or poor lawyering are unable to arbitrate their disputes with Native American tribes. As the Supreme Court observed in *Kiowa*, "In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or have no choice in the matter, as in the case of tort victims. These considerations might suggest a need to abrogate tribal immunity," but "we defer to the role Congress may wish to exercise in this important judgment."[40] Until such time, CPS and parties like it are reserved to being unable to compel arbitration.

IV. CONCLUSION

In the end, the matter of tribal sovereign immunity waivers and arbitration clauses was once well settled following the Supreme Court's holding in *C & L Enterprises*. Seeking to avoid liability, however, tribes have created a loophole that, when used effectively, skirts the issue. By excluding enforcement provisions in the AAA rules, tribes can consent to arbitration and never be bound to it. Practitioners should be readily aware of this ability for tribes to avoid waiver of sovereign immunity and pay particular attention to the language employed in the arbitration clauses. Undoubtedly, this is not an ideal situation when contracting with Native American tribes. For now, however, practitioners must be cautious.

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[38] *Id*. at 562.

[39] *See* Oglala Sioux Tribe v. C & W Enters., 542 F.3d 224, 231 (8th Cir. 2008) ("Wholly mindful that a waiver of sovereign immunity must be clearly expressed, we hold that, under these conditions, where there are contractual arbitration agreements and a tribe actively participates in that arbitration, and in the course of that arbitration raises its own affirmative claims involving a clearly-related matter, the Tribe voluntarily and explicitly waives any immunity respecting that related matter . . .. If a tribe were allowed to operate under AAA rules, and after an adverse decision assert sovereign immunity and then walk away, it would convert sovereignty from a shield into a sword. A tribe could, with impunity, thumb its nose at authority to which it had voluntarily acquiesced. Sovereignty does not extend so far.").

[40] *Kiowa*, 523 U.S. at 759; *see also* Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 764 (1998) (Stevens, J., dissenting) (observing while it is too late to "repudiate the doctrine [of tribal sovereign immunity] entirely," the doctrine should not apply to off-reservation activities).

FOR BETTER OR WORSE: SURVIVING DIVORCE THROUGH ALTERNATIVE DISPUTE RESOLUTION

Teleicia J. Rose*

I. INTRODUCTION

The increase in the use and prevalence of arbitration agreements in commercial transactions has informed recent state legislative changes to family law procedures, specifically issues arising out of divorce proceedings.[1] The exponential increased use of arbitration in commercial and labor litigation has been attributed to the enactment of the Uniform Arbitration Act (UAA),[2] and the UAA has served as the framework for expanding the reach of arbitration into the area of family law. The UAA has been instrumental in the widespread use of arbitration. Thirty-five jurisdictions have adopted the UAA in its entirety; with another fourteen jurisdictions have enacting substantively similar legislation.[3] In response to some particularized problems arising from the vagueness of the UAA and in an attempt to codify the vast amount of state decisional law interpreting both the UAA and the Federal Arbitration Act (FAA),[4] the Revised Uniform Arbitration Act (RUAA) was promulgated in 2000.[5] The RUAA is a modernized version of the UAA with expanded procedural provisions and thirteen states have adopted the RUAA in its entirety.[6]

Because of the incorporation of many common law principles, the RUAA provides an excellent template for the creation of a body of specialized arbitration law applicable to family law proceedings. Section 6 of the RUAA provides that parties may agree, through writing, to submit "any controversy" either present or future to arbitration.[7] The language of section 6 of the RUAA is substantially similar to UAA section 1[8] and FAA section 2.[9] The breadth of the

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[1] *See* Thomas H. Oehmke & Joan M. Brovins, *Mediation and Arbitration of Family Law Disputes—Property, Support, Custody, and Family Time*, 118 AM. JUR. TRIALS 305, § 3 (2010); *see generally* Lynn P. Burleson et al., Model Family Law Arbitration Act, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS (March 12, 2005), available at http://www.aaml.org/library/publications/21215/model-family-law-arbitration-act/model-family-law-arbitration-act-1-10; *see generally* George K. Walker, *Family Law Arbitration: Legislation and Trends*, 21 J. AM. ACAD. MATRIM. LAW. 521 (2008).

[2] UNIF. ARBITRATION ACT (1956) (hereinafter UAA)(*amended by* UNIF. ARBITRATION ACT §§ 1-33 (2000) (hereinafter RUAA).

[3] RUAA, Prefatory Note (2009).

[4] Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

[5] RUAA, Prefatory Note.

[6] *See Id.*; *see also* Walker, *supra* note 1, at 522 ("The RUAA, drafted to replace the UAA, now over a half century old, continues to gain acceptance among the states, albeit at a slower than expected pace.").

[7] RUAA, § 6.

[8] UAA § 1 ("A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives.").

language in the provisions of the RUAA allows for a broad application of arbitration. Moreover, the phrase "any controversy" seems to expand upon the FAA, which was originally intended only to cover commercial and maritime contracts.[10] The breadth of controversies covered by RUAA section 6 arguably encompasses family law matters as well.[11] There is no express statutory provision exempting family law from the RUAA, however, there is also no express provision including family law.[12] Despite the lack of an explicit statutory directive, the use of arbitration in family law disputes has increased over the past thirty years.[13]

II. DIVORCE BY THE NUMBERS: THE USE OF ARBITRATION AGREEMENTS TO INCREASE THE EFFICIENCY, EQUALITY, AND ECONOMY OF DIVORCE

The virtues of arbitration that have made commercial and labor arbitration so attractive are also applicable to family law arbitration. The efficiency and neatness of reaching private agreements concerning disputes that relate to divorce such as alimony, child support, and asset allotment is especially enticing for parties who seek to conduct divorce proceedings in a civilized manner.[14] Arbitration minimizes time, cost, and emotional expenses, features that make arbitration attractive to parties in family court proceedings. The use of arbitration is also attractive because of the level of privacy it offers. Unlike court proceedings which are kept on public record with an open policy that allows the public to attend court proceedings, arbitration is quite different. In arbitration proceedings the process is private, the arbitrator(s), through party consent,

[9] 9 U.S.C. § 2 ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

[10] 9 U.S.C. § 1; *see* Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 Wake Forest L. Rev. 1 (1996) ("During the past decade, the Supreme Court resoundingly endorsed the emergence of arbitration as a primary forum for the resolution of commercial disputes" in expanding the reach of the FAA the Court has "rejected several legal doctrines that limited the ability of parties to adopt and enforce commercial arbitration provisions contractually."), *see also* Southland Corp.. v. Keating 465 U.S. 1, 25 (1984) ("One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.").

[11] *See* RUAA, Prefatory Note.("It is likely that matters not addressed in the FAA are also open to regulation by the States."). Seeing as that the scope of the FAA has been judicially expanded and has not explicitly exempted family law matters from it's coverage, it is arguable that states are free to adopt regulations address the proper procedures for arbitrating family law disputes. *Id*. (Moreover, the RUAA does not expressly exempt disputes arising out of family law matters from the acts' coverage and the act does not contain any public policy exception that would require exempting family law disputes.).

[12] *See Id*.

[13] *See Barton v. Barton*, 715 S.E.2d 529 (N.C. Ct. App. 2011); Fla. Stat. § 44.1011 (2012) (authorizing judges to order all contested family law controversies to mediation); Tex. Fam. Code § 6.602 (2012) (granting the court authority to refer suits for the dissolution of marriage to binding mediation).

[14] Arthur Mazirow, *The Advantages and Disadvantages of Arbitration as Compared to Litigation* (April 13, 2008), available at http://www.cre.org/images/MY08/presentations/The_Advantages_And_Disadvantages_of_Arbitration_As_Compared_to_Litigation_2_Mazirow.pdf (listing the following as advantages to arbitration: speedier resolution, cost effectiveness, relaxed rules of evidence, privacy of hearing due to the lack of a public record of the arbitration proceeding, expertise of arbitrators, and the informal nature of the proceedings).

can be sworn to confidentiality and the public is prohibited from attending the proceedings.[15] Moreover, the juxtaposition of jurisdictional diversity, the fact intensive inquiry required by family law disputes, the proclivity the trial judges have towards parties reaching private settlements, and the expertise of an arbitrator with a background in family law will likely be more adapt to the sensitive and specific family law issues as compared to trial judges. In the face of emotionally wrought court proceedings, consent-based privately held arbitration proceedings are arguably more attractive than forced court mediation.[16]

Despite the overwhelming advantages of family law arbitration, there are also deficiencies in using arbitration to redress family law disputes.[17] Since the vast majority of state and federal law concerning arbitration is intended to address the resolution of commercial disputes, there is no uniform law enacted or federalized to govern matrimonial arbitration.[18] The lack of uniformity incentivizes forum shopping in favor of jurisdictions that have enacted arbitration statutes permitting the arbitration of family law disputes. Moreover, states which have not adopted specific legislation for family law arbitration and are permitting family law disputes to be submitted to arbitration under the RUAA or the UAA currently promulgated in that state face deficiencies in the statutory provisions and insufficient statutory authority to adequately address and adjudicate all the issues that arise in matrimonial cases.[19]

The obvious shortcoming of the current arbitration law, which does not explicitly include family law arbitration, illustrates the need for specialized and specific family law arbitration. Federal law announcing a public policy favoring family law arbitration and legislation specifically outlining the procedures governing family law arbitration is necessary to ensure enforcement of arbitration awards. Moreover, for family law arbitration to be attractive to parties, there must be some guarantee of finality. I argue that any federal or state legislation specifically permitting family law should include references to well settled precedent, contained in federal and state statutes, that arbitral awards are both binding and final,[20] thereby increasing the value of arbitration proceedings for the parties.

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[15] American Arbitration Association, GUIDE FOR EMPLOYMENT ARBITRATORS, 1997 WL 1530574, at 8 (July 1, 1997) ("One of the reasons parties resort to arbitration is their desire for privacy. You should therefore maintain the privacy of proceedings, unless both parties agree to open the hearings or unless a statute requires otherwise."); s*ee, e.g.*, AAA Commercial R. 25 (directing arbitrators to "maintain the privacy of the hearings unless the law provides to the contrary.").

[16] *See* Mazirow, *supra* note 13.

[17] *Id*. (listing the disadvantages of arbitration in general as compared to litigation; the disadvantages include but are not limited to : lack of certainty in the ruling because arbitrators may make an award based on justice and equality and not upon the rules of law necessarily, hidden fees of arbitration, and the lack of a jury).

[18] *See* 9 U.S.C. § 2 (Family law is not a subject explicitly within the scope of the Act).

[19] Less than a dozen jurisdictions have legislation for family law arbitration, often times these provisions are not explicit and exhaustive statutes, rather statutes concerning family law arbitration are merely added to the respective states' versions of the UAA. *See* H. REV. STAT. ANN § 542:11 (1997); OKLA. STAT. ANN. TIT. 43, § 109H (WEST 2001); S.D. CODIFIED LAWS § 21-25B-2 (LexisNexis 2003 Pocket Supp.); TENN. CODE ANN. §§ 36-6-402(1), 36-6-409 (LexisNexis 2003 Supp.); TEX. FAM. CODE §§ 6.601, 153.0071 (Vernon 1998, 2002); WASH. REV. CODE §§ 7.06.020(2), 26.09.175 (West 1992, 2004 Cum. Ann. Pocket Pt.). *But see* Fla. Stat. Ann. § 44.104(1-14) (West 2003) (forbidding voluntary binding arbitration of child custody, visitation, or child support disputes).

[20] *See* sources cited *supra* note 15.

III. I DO, BUT I DON'T: ENFORCING ARBITRATION AGREEMENTS IN FAMILY LAW PROCEEDINGS

North Carolina has spearheaded this new caveat of arbitration through the development of comprehensive legislation permitting the use of arbitration in family law disputes, specifically disputes arising from divorce proceedings.[21] Additionally, six states, including Colorado, Connecticut, Indiana, Michigan, New Hampshire, and New Mexico, have enacted specific legislation addressing family law arbitration.[22] Out of the seven states that have specific statutory provisions for family law arbitration, North Carolina has the most extensive legislation on the matter. So extensive, that in 2004 the American Academy of Matrimonial Lawyers Arbitration Committee used the North Carolina Family Law Arbitration Act as a template for the promulgation of the Model Family Law Arbitration Act.[23]

A. North Carolina's Family Law Act (1999)

On October 1, 1999 North Carolina ushered in a new era of state legislation, which expanded the reach of arbitration. With the promulgation of the Family Law Act (FLAA) North Carolina became the first state to enact specific statutory provisions dealing extensively and exclusively with family law arbitration.[24] Since the enactment of the FLAA, Colorado, Connecticut, Indiana, Michigan, New Hampshire, and New Mexico have followed suit, using the North Carolina Statute as fodder for the enactment of specific state legislation for family law disputes, specifically matrimonial arbitration.[25]

Using the RUAA as a framework, the North Carolina legislature made concrete and specific changes and revisions to the UAA, melding the two to ultimately produce the FLAA. Noting the deficiencies in the application of laws on commercial arbitration to family law disputes, the North Carolina legislature made seven specific departures from the general state statute on arbitration. This piecemeal construction of the FLAA allowed the state legislature to tailor a law to meet the specific needs and unique disputes that arise out of family law. A particularly innovative aspect of the North Carolina statute is the finality and binding nature of family law arbitration agreements.[26] While the finality of arbitration agreements is common place in commercial arbitration disputes, this is the minority view amongst those states that have enacted family law arbitration statutes.[27] This lack of judicial review is a feature reserved from

[21] North Carolina Family Law Arbitration Act, N.C. GEN STAT §§ 50-41–50-62 (West 2012), (herein after "N.C. FLAA.").

[22] *See supra* note 15.

[23] Prefatory Note, Model Family Law Arbitration Act, (2004).

[24] N.C. FLAA §§ 50-4–62.

[25] *Supra* note 15.

[26] *See* N.C. Gen. Stat. §50-42 ("During, or after marriage, parties may agree in writing to submit to arbitration any controversy, except for the divorce itself, arising out of the marital relationship. Before marriage, parties may agree in writing to submit to arbitration any controversy, except for child support, child custody, or the divorce itself, arising out of the marital relationship. This agreement is valid, enforceable, and irrevocable except with both parties' consent, without regard to the justiciable character of the controversy and without regard to whether litigation is pending as to the controversy.").

[27] *See* Conn. Gen. Stat. § 46b-66(b) (2010); Ind. Code Ann. § 34-57-5-10.

North Carolina's adaptation of the RUAA.[28] The majority view on matters governed by family law arbitration requires judicial review of all marital agreements, including arbitration agreements.[29]

The North Carolina legislature specifically modified seven features of the RUAA which while applicable to commercial litigation would impede the use of arbitration in the family law context. The FLAA allows for modification of child custody or support settlements as well as alimony awards.[30] While modification seems to undercut the finality of an arbitration award, in family law matters it is especially important to allow for modification in select cases. Since determinations of custody, alimony, and other matters arising out of divorce require fact intensive inquiries, changes in circumstances require the ability to modify awards. For family law arbitration to be successful and to be purely a matter of process rather than a change of parties' substantive rights, the ability to modify the award is essential. While some features of the RUAA are not conducive to family law arbitration, others provide advantages to the family law arbitral process. One such feature retained from the RUAA is the accessibility of interim relief.[31] This notion of interim relief embodies the necessary ability to modify awards.

While commercial arbitration, plagued with permissibly adhesionary contracts seems to disregard concepts of fairness, family law arbitration requires it. North Carolina made specific provisions that would promote fairness and transparency of the arbitral process. Section 50-51(b) requires arbitrators presiding over family law arbitration to issue written, reasoned awards.[32] This provision is unlike commercial arbitration where parties who wish to receive a written and reasoned opinion of the proceedings must make specific and explicit provisions in the arbitration agreement requiring the arbitrator to provide written support and reasoning for the arbitral award.[33] This requirement of a reasoned award is especially important to family law arbitration because of the substantive inquires that the arbitrator must grapple with. In family law cases the arbitrator is much more likely to make findings on substantive mixed issues of fact and law such as disputes over custody and support. Since the FLAA provides for modification of the arbitral award it is important that reviewing courts have a sufficient record for review in order to make informed determinations concerning modification, confirmation, or vacatur. Another party

[28] *See* NC Gen. Stat. § 1-569.24 (2011); G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 355 S.E.2d 815 (1987) ("The purpose of arbitration is to reach a final settlement of disputed matters without litigation. Parties who have agreed to submit disputes to arbitration have also agreed to abide by the decision rendered by the arbitrator. Because of the finality and binding nature of arbitration agreements, generally, parties will not be allowed to be attack the regularity or fairness of the arbitral award through judicial recourse.").

[29] *See* Del. Fam. Ct. Civ. R. 16.1(a) (binding arbitration is permitted for child support determinations but is prohibited for matters concerning both custody and visitation); Carole Ann Masters v. Samuel Saunders Masters, 513 A.2d 104, 112 (Conn. 1986).

[30] The FLAA allows for the modification of awards, in selected circumstances, for alimony, post-separation support, child support, or child custody in the event of a substantial change in circumstances. *See* NC Gen. Stat §§ 50-56.

[31] "The arbitrator may issue orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy... A party to an arbitration proceeding may move the court for a provisional remedy if the matter is urgent and the arbitrator is not able to act in a timely manner or the arbitrator cannot provide an adequate remedy." *See* NC Gen. Stat. § 1-569.8(b)(1)-(2). Parties may seek interim relief from either the arbitrator or the court. The forms of interim relief include: an order of attachment or garnishment of wages, temporary restraining orders, preliminary injunctive relief, etc. *See* NC Gen. Stat. § 50-44(a), (b), (c)(1)-(6).

[32] NC Gen. Stat. § 50-51(b).

[33] *See* Legion Ins. Co. v. Insurance Gen. Agency, Inc., 822 F.2d 541, 543 (5th Cir. 1987); O.R. Sec., Inc. v. Prof'l Planning Assocs., 857 F.2d 742, 747 (11th Cir. 1988).

conscious legislative decision made by North Carolina concerns the number of arbitrators. In the FLAA, the North Carolina legislature was cost conscious—paying particularly close attention to the economic toll of arbitration on separating couples. As such, the FLAA mandates a sole arbitrator as the default rule for family law arbitration.[34] The sole arbitral default rule makes arbitration less expensive than the traditional three person arbitral panel utilized as the default rule in commercial arbitration.[35] This modification of the UAA is a practical one. Requiring a three member panel would make family law arbitration unaffordable and impractical to most middle class and low income parties.

Under the FAA the grounds for vacatur are limited, and prohibit merits review,[36] however, under the FLAA two modifications are inextricably intertwined: vacatur based on the arbitral award being volatile of the legal standard of the best interest of the child and merits review of the arbitral award.[37] The FLAA permits merits review of child custody determinations, by motion of a party, based on the grounds that the arbitrator's determination of custody was not in the best interest of the child.[38] The best interest standard is the current test for determining which parent or parent(s) will be awarded legal and physical custody of a child in a custody dispute.[39] Because the initial determination of custody is a substantive issue addressed by the arbitrator, the FLAA's provision permitting vacatur in cases where the best interest standard has not been met is a license for courts to engage in merits review.[40] There is a palpable public versus private tension in this section of the FLAA. Allowing for vacatur on this ground reflects the state's interest and responsibility to oversee the welfare of children within its jurisdiction.

The final substantive difference in the North Carolina statute and general federal and state statutes governing commercial arbitration is the "carve out" concerning prenuptial agreements containing arbitration agreements regarding child issues.[41] Section 50-42 of the FLAA states that prenuptial agreements regarding child support or child custody are neither binding nor enforceable.[42] This exemption is reasonable because the resolution of child custody and support issues are fact intensive inquiries and events that occur throughout the marriage have direct bearing on determining what is in the best interest of the child.[43] The thoroughness and overall comprehensive nature of the FLAA has also served as the framework for the Model Family Law Arbitration Act of 2004, subsequently promulgated by the American Academy of Matrimonial Lawyers.

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[34] NC Gen. Stat. § 50-45(a).

[35] *See* 9 U.S.C. §§ 1–16 (generally).

[36] Vacatur appropriate in limited situations including fraud, corruption, lack of disclosure by the arbitrator, or where the arbitrator exceeds his authority. *See* 9 U.S.C. § 10 (2010); Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 584 (2008).

[37] *See* NC Gen. Stat. § 50-54(a)(6).

[38] *Id*.

[39] *See* UNIF. MARRIAGE AND DIVORCE ACT § 402, cmt. (stating that the best interest of the child is the prevailing custody standard in jurisdictions throughout the United States).

[40] *See* RUAA (generally); UAA (generally) (Neither the UAA or the RUAA permits substantive—merits—review of arbitral awards).

[41] NC Gen. Stat. § 50-42(a).

[42] *Id*. ("Before marriage, parties may agree in writing to submit to arbitration any controversy, except for child support, child custody, or the divorce itself, arising out of the marital relationship.").

[43] *See* UNIF. MARRIAGE AND DIVORCE ACT § 402 (listing factors to be considered in determining custody, no factor is determinative).

B. The Model Family Law Arbitration Act

Five years after North Carolina enacted a substantive family law arbitration statute, the American Academy of Matrimonial Lawyers Arbitration Committee utilized that very statute as a framework to promulgate the Model Family Law Arbitration Act (MFLAA). Having the similar legal affect of a Restatement of Law the MFLAA is essentially a guideline for states interested in adopting their own legislation regarding family law arbitration. Much like North Carolina's FLAA, the MFLAA is patterned after the RUAA and makes specific provisions that cater to the unique needs and nature of family law disputes. Similar to the intentions of the FAA, the MFLAA is merely procedural and not intended to alter any substantive law.[44]

In section 101(a) the MLAA clearly states the purpose for the legislation; announcing a policy of permitting the use of arbitration of all family law disputes arising from marital separation or divorce.[45] As a model act intended to be adopted by the respective states, similar to the RUAA, the MLAA specifies that arbitration under it is intended to be performed pursuant to the family law litigation of the particular state.[46] Much like the FAA, RUAA, and the FLAA the primary purpose of the MLAA is to ensure that agreements to arbitrate family law disputes are both valid and enforceable.[47] Sections following section 106 of the MLAA borrow heavily from the language used in the FAA, with provisions for arbitrator disclosure and neutrality as well as guidelines for enforcement or vacatur of arbitral awards.[48]

IV. CONCLUSION

The adoption of specific family law arbitration statutes has been neither quick nor widespread. The lack of immediate acceptance of this form of arbitration is not surprising. The current state of family law nationwide is rather disjointed. Based on traditional notions of state sovereignty and constitutional concepts federalism, each respective state has a compelling state interest in promulgating rules and regulations that protect children, promote the well-being of the family, and protect the privacy of the family.[49] The statutes adopted by Colorado, Connecticut, Indiana, Michigan, New Hampshire, New Mexico, and North Carolina represent the level of specificity required to enact successful legislation as guidelines for family law arbitration. While every case may not be appropriate for submission to family law arbitration, the availability of alternative dispute resolution for family law issues is a natural caveat for the traditional subject matters covered by commercial arbitration. Through the correct modifications the arbitration of

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[44] Lynn P. Burleson et al., Model Family Law Arbitration Act, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS (March 12, 2005), available at http://www.aaml.org/library/publications/21215/model-family-law-arbitration-act/model-family-law-arbitration-act-1-10 ("[The MFLAA] offers an additional procedure for resolving family law issues besides, *e.g.*, litigation, settlement, mediation, collaborative procedures or other alternative dispute resolution (ADR) techniques.").

[45] MFLAA § 101(a).

[46] *Id*.

[47] *See* MFLAA § 106(a); 9 U.S.C. § 2.

[48] *See* MFLAA (generally); *see also* 9 U.S.C. §§ 1–16 (2010) (case law and the comments to the statutory provisions are helpful in interpreting the intent of the MFLAA).

[49] U.S. CONST., Amend. X (1791) ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

private matters can be a successful recourse for parties grappling with the difficult emotional and financial burdens of divorce or marital separation.

ARBITRATION AND THE MARCELLUS SHALE

Zach Morahan*

I. INTRODUCTION

The development of the Marcellus Shale in Pennsylvania and some surrounding states has presented many landowners with newfound wealth. But with the good often comes the bad, and litigation surrounding the extraction is not uncommon. The governing document between the landowner and the lessee is the lease. As such, it is important for each party to review the lease to ensure the provisions are acceptable. But many landowners, particularly when the development was in its infancy, did not have their leases reviewed by an attorney. And as a result, the leases sometimes included clauses very unfavorable to the landowner. An arbitration clause, depending on the specific details of the provision, can be the vehicle within which these unfavorable terms may be couched.

This article explores the recent legislation and case law involving arbitration within the Marcellus Shale Play. It then considers which laws apply to the arbitration agreement and concludes with a discussion of relevant considerations for practitioners.

II. THE COAL BED METHANE REVIEW BOARD

Practitioners should be aware of Pennsylvania Senate Bill 1108, which was introduced by Senators White, Wozniak, Scarnati, and Schwank, on June 6, 2011.[1] The introduced legislation modifies Section 6.4(e) of the Coal Refuse Disposal Control Act and expands the authority of the Coal Bed Methane Review Board. The amended section reads:

The purpose of the board shall be to consider objections and attempt to reach agreement on or determine a location for the coal bed methane well or access road. The board shall also have the authority to consider objections and reach agreement on or determine a location for natural gas wells.[2]

The bill further stated decisions of the board were subject to appeal to the "court of common pleas in the county where the property at issue is located."[3] The bill was referred to the Environmental Resources and Energy Committee. In the past, the Review Board's authority was limited to coal bed methane wells and access roads. The proposed legislation grants the Review Board authority to settle disputes on the location of natural gas wells. It is very important for practitioners to follow this legislation because it may drastically affect the procedure for some Marcellus disputes.

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[1] S.B. 1108, 2011–2012, Reg. Sess. (Pa. 2011).

[2] *Id*.

[3] *Id*.

III. RECENT CASE LAW DEVELOPMENTS

The Middle District of Pennsylvania recently heard a case involving an arbitration agreement between a landowner and a lessee in *Ulmer v. Chesapeake Appalachia, LLC.*[4] Ulmer petitioned the court to invalidate his lease, claiming it violated Pennsylvania's Minimum royalty statute.[5] Chesapeake moved to compel arbitration as stated in the parties' agreement. At issue in the case was whether the court would apply the Federal Arbitration Act or state law.[6] The court noted the FAA applied to transactions involving interstate commerce.[7] Ulmer's property subject to the oil and gas lease was located entirely within Pennsylvania and the court held the FAA did not apply.[8]

After determining that Pennsylvania law would apply, the court articulated a two-part standard used to determine whether arbitration is appropriate. The first prong is whether the parties agreed to arbitrate; once this prong is satisfied, a court must then determine whether the arbitration agreement is applicable to the current dispute.[9] After announcing the standard, the court approached the second prong first.[10] The court found the arbitration provision covered the current dispute.[11] It then addressed Ulmer's argument that the lease, including the arbitration provision, was void because it violated Pennsylvania's minimum royalty act.[12] The court noted Ulmer was challenging the contract in its entirety. In reaching its decision, the court relied on *Buckeye Check Cashing, Inc. v. Cardegna*.[13] In *Buckeye Check Cashing*, the United States Supreme Court held a challenge to the contract as a whole is a matter appropriate for the arbitrator.[14] The court reconciled the decision in *Buckeye Check Cashing* with Pennsylvania law by noting that the two are "functionally equivalent."[15] In reaching its decision, the court stated:

Where a party challenges the contract as a whole, either on a ground that directly affects the entire agreement or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid, the issue is to be considered by the arbitrator in the first instance.[16]

Thus, because Ulmer challenged the legality of the entire contract, the Court held the issue was appropriate for arbitration and granted Chesapeake's Motion to Compel Arbitration.[17] Knowledge of this rule is essential for successful challenges to arbitration clauses. If

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[4] Ulmer v. Chesapeake Appalachia, LLC, No. 4:08-CV-2062, 2009 U.S. Dist. LEXIS 124650 (M.D. Pa. Jan. 16, 2009).

[5] *Id.* at *1; 58 P.S. § 33 (stating that oil and gas leases are not valid unless they guarantee the lessor "at least one-eighth royalty of all oil, natural gas, or gas of other designations removed or recovered from the subject real property").

[6] *Ulmer*, 2009 U.S. Dist. LEXIS 124650, at *2.

[7] *Id.*

[8] *Id.*

[9] *Id.* at *3 (citing D & H Distrib. Co., Inc v. Nat'l Union Fire Ins. Co., 817 A.2d 1164, 1166 (Pa. Super. Ct. 2003)).

[10] *Id.*

[11] *Id.* The Court noted that the arbitration provision was broad and expansive. The agreement reads, "In the event of a disagreement between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with the arbitration shall be borne equally by the Lessor and Lessee.

[12] *Id.* at *4.

[13] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).

[14] *Id.* at 444.

[15] *Ulmer*, 2009 U.S. Dist. LEXIS 124650, at *5.

[16] *Id.* at *4.

[17] *Id.* at *7.

practitioners seek to avoid arbitration, their challenge must specifically target the arbitration agreement. Otherwise, any attack to the contract will be decided by an arbitrator.[18]

The District Court heard the same issue in *Hayes v. Chesapeake Appalachia, LLC.*[19] Once again, the landowner sought to invalidate the lease because it violated Pennsylvania's minimum royalty requirement.[20] Chesapeake moved to compel arbitration.[21] The defendants argued that the arbitration clause covered the dispute and was appropriate for arbitration because it was a "disagreement concerning the lease" as opposed to just the arbitration clause.[22] The court granted Chesapeake's motion to compel and held that the dispute was appropriate for arbitration based on the same reasoning employed in *Ulmer*.[23] Additionally, the Plaintiffs did not persuade the court by arguing that real estate matters are statutorily prohibited from arbitration.[24]

The Middle District of Pennsylvania once again heard a case involving an arbitration agreement pertaining to a Marcellus Shale lease in *Eisenberger v. Chesapeake Appalachia, LLC*.[25] This case concerned whether the parties actually entered into an agreement and, if so, whether the arbitration clause governed their current dispute. The Plaintiffs owned land in Wyoming County, Pennsylvania.[26] Premier Land Services, LLC ("Premier") contacted the Plaintiffs about signing an oil and gas lease.[27] Following Premier's original contact, the Plaintiffs contacted Premier and expressed an interest in possibly signing a lease with Chesapeake.[28] As a result, Premier provided the Plaintiffs with an unsigned lease which listed Mr. Eisenberger as a single man and the only lessor.[29] After Mr. Eisenberger signed and returned the lease, Mrs. Eisenberger noticed that the lease did not identify her as a co-owner of the land subject to the lease.[30] As a result, Mr. Eisenberger mailed and faxed a letter to Premier requesting that it void the current paperwork and send a new lease for review.[31] Premier later contacted Mr. Eisenberger and told him Chesapeake's legal department would handle the issue.[32] Approximately a week later, Premier contacted Mr. Eisenberger and stated Chesapeake thought the lease was valid.[33] Mr. Eisenberger subsequently notified Premier that he was revoking his

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[18] *Id*.

[19] Hayes v. Chesapeake Appalachia, No. 3:09-CV-619, 2009 U.S. Dist. LEXIS 124653 (M.D. Pa. May 15, 2009).

[20] *Id.*

[21] *Id.* at *2.

[22] *Id.* (relying on *Ulmer*).

[23] *Id*. at *3. The Court also noted Hayes' filings were not consistent with the Local Rules of Court of the Middle District of Pennsylvania. The Court found the Plaintiff's document lacked adequate responsive argument. Practitioners must follow the Local Rules. It was only because of the good nature of the Court that the Plaintiff's issue was heard. The Court could have declared the Defendant's motion unopposed because of the Plaintiff's lack of compliance to the Local Rules.

[24] *Id.* at *4 (stating that Pa. C.S. § 7361 did not stand for a broad policy not to sub real estate matters to arbitration).

[25] Eisenberger v. Chesapeake Appalachia, LLC, No. 3:09-CV-1415, 2010 U.S. Dist. LEXIS 44017 (M.D. Pa. May 5, 2010).

[26] *Id*. at *1. The Plaintiff's land was thought to overlie the Marcellus Shale. Many leases contained financially lucrative bonus payments.

[27] *Id*. at *2. Premier Land Services, LLC is a leasing agent of the Chesapeake.

[28] *Id.*

[29] *Id*. Mrs. Eisenberger was not listed as a lessor. Additionally, she did not sign the lease.

[30] *Id.*

[31] *Id.* at *2–3.

[32] *Id*. at *3. This correspondence was made by the President of Premier Land Services, LLC, John Corcoran.

[33] *Id*. Chesapeake offered an increase in the bonus payment.

offer.[34] The Plaintiffs then filed a complaint seeking a declaratory judgment stating the lease was not an enforceable contract but simply represented an offer.[35] The case was removed to the district court and Chesapeake moved to compel arbitration.[36]

The court articulated a two-part standard to determine whether parties must submit their disputes to arbitration. It explained the dispute would be appropriate for arbitration if the Plaintiffs entered into an agreement to arbitrate with Chesapeake and the current dispute fell within the agreed-upon provision.[37] The first prong of the test, whether the parties entered into an agreement to arbitrate, was at issue in this case. The court noted federal law usually preempts state law on arbitral issues, and state law is typically applied in diversity cases.[38] It then explained that, within diversity cases, courts should apply federal law in cases affecting interstate commerce and state law in cases that do not.[39] Because the lease in question concerned only land within Pennsylvania, the court applied Pennsylvania law.[40]

The court first turned to *Buckeye Check Cashing* and noted that challenges to the arbitration clause exclusively are for the courts to decide and challenges to the contract generally are appropriate for the arbitrator.[41] In *Buckeye Check Cashing*, Justice Scalia created an exception to the general rule. In a footnote he stated: "The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and oblige was ever concluded. Our opinion today addresses only the former."[42] He later stated, "it is for courts to decide whether the alleged obligor ever signed the contract,… whether the signor lacked authority to commit the alleged principal,…and whether the signor lacked the mental capacity to assent."[43] The district court did not find the case analogous to *Ulmer* and *Hayes*; rather, it held the issue fit within the area left unresolved in *Buckeye Check Cashing*.[44] As a result, the court found the dispute between Eisenberger and Chesapeake was for the court, and not an arbitrator, to decide.[45]

Subsequent to the court's decision, Chesapeake filed a Motion to Stay and a Renewed Motion to Compel Arbitration.[46] Chesapeake sought to stay the matter pending the decision in *Granite Rock v. Int'l Brotherhood of Teamsters*.[47] The court held there was no issue of contract formation before the Supreme Court in *Granite Rock*; therefore, granting a stay was inappropriate because the outcome of that case was unlikely to affect the current matter.[48] The court also

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[34] *Id*. Mr. Eisenberger requested Premier return all related documents. Also, Mr. Eisenberger did not cash a bank note representing the increase bonus payment and delay rental payments.

[35] *Id*. at *4.

[36] *Id*.

[37] *Id*. (citing Messa v. State Farm Ins. Co., 433 Pa. Super. 594, 641 A.2d 1167, 1168 (Pa. Super. Ct. 1994)).

[38] *Id*. at *5. (citing H.L. Libby Corp. v. Skelly and Loy, Inc., 910 F. Supp. 195, 197 (M.D. Pa. 1995)).

[39] *Id*. (citing Ulmer v. Chesapeake Appalachia, LLC, No. 4:08-CV-2062, 2009 U.S. Dist. LEXIS 124650 (M.D. Pa. Jan. 16, 2009)).

[40] *Id*.

[41] *Id*. at *7.

[42] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1 (2006).

[43] *Eisenberger*, 2010 U.S. Dist. LEXIS 44017, at *7 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 (2006)).

[44] *Id*. at *9 (finding that, unlike in *Ulmer* and *Hayes*, there was no meeting of the minds between Eisenberger and Chesapeake; the Plaintiffs argued they revoked their offer before the Defendant had an opportunity to accept).

[45] *Id*. at *10 (stating that compelling arbitration would be unfair if the parties never actually agreed to the terms of the contract).

[46] Eisenberger v. Chesapeake Appalachia, LLC, No. 3:09-CV-1415, 2010 U.S. Dist. LEXIS 44017 (M.D. Pa. May 5, 2010).

[47] *Id*. at *5.

[48] *Id*. at *7.

denied the Renewed Motion to Compel Arbitration because Chesapeake did not introduce any evidence for the court to change its position.[49] This case creates a situation where practitioners may sidestep the enforcement of an arbitration clause and a narrow exception for parties to gain access to the courts. If Eisenberger challenged the legality of the contract, rather than whether a contract was ever formed, it is likely the court would have ordered the matter to proceed to arbitration. *Eisenberger* is a good example of why practitioners must be aware of the *Buckeye Check Cashing* rule.

The future of the proposed legislation amending the Coal Bed Methane Review Board's authority over natural gas well sites may affect subsequent cases such as the aforementioned. Although the proposed legislation is limited to disputes regarding natural gas well sites, no one can be sure where the Board's authority will eventually end. For example, must the well location be at the heart of the dispute, or will any dispute somehow referencing a well location fall under the authority of the Board?

IV. STATE V. FEDERAL LAW: WHICH IS THE CORRECT LAW TO APPLY

Whether state or federal law will apply to a particular case is an important consideration for the practitioners in that case. In some cases, the state and federal laws are very similar.[50] Even though the laws are sometimes almost identical, the courts must determine which law is applicable. The courts may apply the Federal Arbitration Act or the comparable state statute.[51] In Pennsylvania, the applicable state law is the Pennsylvania Uniform Arbitration Act.[52] Typically, state law is applied in diversity cases unless the matter involves interstate commerce,[53] and the *Ulmer* decision articulated this position.[54] Because the property at issue was located entirely within Pennsylvania, the court held Pennsylvania law applied.[55]

Although the courts make clear Pennsylvania law applies in cases such as *Ulmer*, practitioners representing clients near state borders must be aware of the possibility of the application of the Federal Arbitration Act. Employing the logic used in *Ulmer*, it appears a dispute involving property located in both Pennsylvania and a neighboring state, such as West Virginia or New York, will apply the Federal Arbitration Act.

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[49] *Id*. at *9. The Court once again stated Pennsylvania law shall govern the case. Additionally, the Court questioned whether the Renewed Motion to Compel Arbitration was the appropriate procedural device to challenge the Court's application of state law. They further stated a Motion for Reconsideration was the appropriate procedural manner to challenge the Court's decision.

[50] Eisenberger v. Chesapeake Appalachia, LLC, No. 3:09-CV-1415, 2010 U.S. Dist. LEXIS 9688 (M.D. Pa. May 5, 2010). The Court noted the Third Circuit's interchangeable use of Federal and Pennsylvania law because the two are essentially identical.

[51] *See* H.L. Libby Corp. v. Skelly and Loy, Inc., 910 F. Supp. 195, 197 (1995).

[52] *See* 42 PA. CONS. STAT. § 7301.

[53] Merrill Lynch v. Masland, 878 F. Supp. 710, 712 (M.D. Pa. 1995).

[54] *Ulmer*, 2009 U.S. Dist. LEXIS 124650, at *2.

[55] *Id.*

V. UNCONSCIONABILITY AS A CONTRACT DEFENSE VOIDING ARBITRATION AGREEMENT

Section 2 of the Federal Arbitration Act states, "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[56] The Supreme Court articulated Section 2 of the Federal Arbitration Act evidences a strong policy towards the enforcement of arbitration agreements.[57] The comparable Pennsylvania statute has a provision very similar to Section 2 of the Federal Arbitration Act.[58] Regardless of what statute applies, state contract law defenses may render arbitration agreements invalid.[59]

One such defense, which may render Marcellus leases invalid, is an unconscionability defense.[60] A contract is unconscionable when there is "a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors the party asserting it."[61] Procedural unconscionability is derived from the absence of the "meaningful choice" and substantive unconscionability from the unreasonableness of the terms.[62] Both must be satisfied in a successful challenge of the contract on an unconscionability ground and the party challenging the provision shoulders the burden of proof.[63]

The two-part test for the unconscionability test is particularly important for practitioners handling Marcellus leases. For instance, if the lease is extremely unreasonable, but the lessor makes a meaningful choice in agreeing to it, an unconscionability defense will fail. This situation demonstrates the reason landowners should consult an attorney before signing a lease. The attorney should review the lease to identify unfair provisions and attempt to remove them through the negotiation process. At first glance, the gas company holds the higher ground in regards to negotiation; however, landowner coalitions help to balance that inequality.

The distribution of arbitration costs provides practitioners with an argument to render an agreement unconscionable. The arbitration provision in *Ulmer* read in part, "All fees and costs associated with the arbitration shall be borne equally by the Lessor and Lessee."[64] This distribution of the costs creates an obstacle for the landowner in pursuing a remedy to an alleged breach. The company essentially insulates itself from minor claims because it will not be worth it for lessors to shoulder half the costs of arbitration in addition to their attorney fees to seek a remedy. Even in more major disputes, the lessor's expenses incurred through arbitration costs may stop them from pursuing litigation. The distribution of arbitration costs may prove

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[56] 9 U.S.C. § 2.

[57] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[58] 42 PA. CONS. STAT. § 7303 ("A written agreement to subject any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity relating to the validity, enforceability or revocation of any contract.").

[59] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (noting such contract defenses to include fraud, duress, and unconscionability).

[60] Salley v. Option One Mortg. Corp., 925 A.2d 115, 119 (Pa. 2007) (stating unconscionability defense has both statutory—under 13 Pa. C.S. § 2302—and common-law grounds).

[61] *Id*.

[62] *Id*.

[63] *Id*. at 120.

[64] *Ulmer*, 2009 U.S. Dist. LEXIS 124650, at *2.

particularly burdensome to those with small amounts of leased acreage. Those with large amounts of leased land will probably be able to afford the arbitration through their bonus payment. Regardless, practitioners should attempt to negotiate the provision to put the costs on the lessee. Additionally, it may be in the lessee's interest to bear the full cost. If they do, they take away any possibility of a lessor's unconscionability claim based upon distribution of costs.

Practitioners should always discuss the effects of an arbitration agreement with their client before the client agrees to a lease. An explanation of the differences between arbitration and the courts is necessary because most landowners are not familiar with the arbitration process.[65] If the arbitration agreement distributes the costs to the client, an explanation and estimate of the additional costs is warranted so landowners can make an informed decision before agreeing to the contract.

VI. PRACTITIONER CONSIDERATIONS CONCERNING ARBITRATION AGREEMENTS IN MARCELLUS SHALE LEASES

The most important action for a practitioner is a careful reading of the lease before the client signs the lease. If the lease contains an arbitration clause, the practitioner should determine who will arbitrate the dispute and how the arbitrators are selected. For instance, under Pennsylvania's Uniform Arbitration Act, if for some reason the parties fail to appoint an arbitrator, or if the arbitrator is unable to perform his or her duty, the courts will appoint a replacement.[66] To ensure the client will have an arbitrator they want, the agreement should contain provisions for successor arbitrators. This eliminates the courts from appointing a replacement and creates stability.

Another consideration practitioners must be aware of is the enforceability of the arbitrator's award. The Federal Arbitration Act limits the grounds for vacatur in Section 10.[67] Pennsylvania's Uniform Arbitration Act has a provision similar to Section 10 of the Federal Arbitration Act.[68] The grounds in both statutes are limited and narrow. Thus, practitioners must inform their clients that the award will likely be final.

Practitioners should negotiate the lease before agreeing to a lease with an arbitration clause. As the saying goes, "you cannot get what you do not ask for." Thus, it never hurts to ask the company to strike the arbitration clause. The company's willingness to lease the property without an arbitration clause can hinge on factors such as the size of the parcel, the location of the parcel and the overall need of the parcel. For those landowners who do not possess particularly large or attractive parcels there are different ways to negotiate. For example, to gain more bargaining leverage, clients can join a landowner coalition as a form of collective bargaining.

Examination of the details of the arbitration clause is extremely important. For instance, in *Ulmer*, the arbitration provision stated, "all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association."[69] Practitioners cannot assume the rules of the American Arbitration Association are similar to those they encounter in court. Rather, they must carefully examine the rules to explain their implications to their clients.

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[65] An explanation is warranted even if the client is familiar with the process to protect from potential malpractice.
[66] 42 PA. CONS. STAT. § 7305.
[67] 9 U.S.C. § 10.
[68] 42 PA. CONS. STAT. § 7314.
[69] *Ulmer*, 2009 U.S. Dist. LEXIS 124650, at *2.

In a situation where the arbitration provision mandates the use of the American Arbitration Association rules, the arbitrator must determine whether the Commercial Rules or Expedited Rules will apply. R-1(b) of the Commercial Rules states, "Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration fees and costs."[70] This is significant because under the Expedited Rules, the arbitration can last only one day.[71] This provision merits explanation to the landowner so they understand the differences between arbitration and the court. Additionally, the benefits and consequences of the Expedited Rules should be explained. For instance, the Expedited Rules are beneficial because the dispute will be resolved quickly and at a lower cost. However, the consequence is the lack of time a party has to introduce evidence and present their case. If parties prefer the Expedited Rules, they may contract to them in their arbitration provision. However, they should be aware of potential disputes where the time crunch of the Expedited Rules is harmful.

A practitioner must also determine how the arbitrators are selected. In Ulmer's lease, the arbitration provision failed to state how many arbitrators would hear the dispute.[72] Under the Commercial Arbitration Rules, when an agreement is silent on the number of arbitrators, "the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed."[73] This creates a level of uncertainty for the landowner. If a practitioner encounters a provision which fails to state the amount of arbitrators, they should negotiate the lease to specify how many and how the arbitrators are selected.

VII. CONCLUSION

The Marcellus Shale presents exciting new economic opportunities for Pennsylvania and some of the surrounding states. As exciting as the play can be, it is important for landowners and attorneys to review leases to protect their interests. Although arbitration has advantages, landowners must be cautious when signing leases containing arbitration clauses and practitioners must be proactive in explaining the pros and cons of arbitration to their clients. Failure to do so may end in a malpractice action.

[70] Am. Arb. Ass'n., Commercial Arb. Rule-1(b) (2009).
[71] Am. Arb. Ass'n. Expedited Arb. Rule-8(a) (2009).
[72] *Ulmer*, 2009 U.S. Dist. LEXIS 124650, at *2.
[73] Am. Arb. Ass'n. Commercial Arb. Rule-15 (2009).

JUST A MATTER OF TIME: THE SECOND CIRCUIT RENDERS ANCILLARY STATE LAWS INAPPLICABLE BY AUTHORIZING ARBITRATORS TO DECIDE WHETHER A STATUTE OF LIMITATIONS CAN BAR ARBITRATION

Daivy P. E. Dambreville[*]

I. INTRODUCTION

The U.S. Supreme Court has long adhered to a federal policy favoring arbitration, and has consistently resolved ambiguities within arbitration clauses in favor of arbitration.[1] In applying this principle, courts are guided by the Federal Arbitration Act (FAA)[2] which provides the federal substantive law of arbitrability.[3] The Court has now consistently interpreted the FAA's main purpose as to guarantee that arbitration agreements are enforced according to their terms.[4] Yet, in regards to procedural matters of arbitrability there is a presumption that these matters should be decided by the court, unless otherwise stated in the arbitral agreement.[5] But where parties devise broad reaching arbitration agreements, we have seen the court determine that the arbitrator, not the court, is better equipped to decide arbitrability.[6] Likewise, where a choice-of-law provision introduces ambiguity into the arbitration agreement, the court has determined that the arbitrator, and not the court, shall decide procedural arbitration matters.[7] The court's deference to arbitrators on matters concerning choice-of-law provisions in opposition to arbitration has traditionally been based on ambiguous language found within a given provision.

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[1] *See* Volt Info. Scis. v. Bd. of Trs. of Leland Standard Junior Univ., 489 U.S. 468, 476 (1989) ("[D]ue regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.").

[2] Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

[3] *See* Bechtel Do Brasil Construções Ltda. v. UEG AraucÁria Ltda., 638 F.3d 150, 154 (2d Cir. 2011); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("We are guided by the 'federal substantive law of arbitrability' created by the Federal Arbitration Act.").

[4] *See Volt*, 489 U.S. at 479 ("The FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms."); *see also* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012) ("Section 2 of the FAA . . . requires that courts enforce arbitration agreements according to their terms."); *see also* Rent-A-Ctr., W., Inc. v. Jackson, 130 S. Ct. 2772, 2777 (2010) (explaining that the FAA places arbitration agreements on the same level as other contracts and mandates that courts enforce the agreements in accordance to their terms).

[5] *See* First Options v. Kaplan, 514 U.S. 938, 939 (1995) (noting that if there is "clear and unmistakable" evidence that the parties intended the issue of arbitrability to be decided by the arbitrator then the issue is in the jurisdiction of the arbitrator).

[6] *See* Howsam v. Dean Witter Reynolds, 537 U.S. 79, 84 (2002); *see also* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964) ("Thus, 'procedural questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for anaarbitrator, to decide.").

[7] *See* Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 62 (1995); *see also Volt*, 489 U.S. at 476 (concluding that in light of the federal policy favoring arbitration, ambiguities relating to the scope of the agreement should be resolved in favor of arbitration).

This suggests that in circumstances where parties' expressly, clearly, and specifically agree to have a particular law govern the arbitration procedure courts shall enforce the agreement, so long as it does not create ambiguity. Yet, courts have failed to provide guidance as to the level of clarity required to enforce an agreement whose provisions are opposition to arbitration.

Part I of this article will focus on the Second Circuit's recent expansion of the FAA, specifically its determination that ancillary state-laws governing procedural arbitration, including issues of timeliness, are preempted by the FAA.[8] By analyzing the Second Circuit's most recent decision in *Bechtel v. UEGA*, we will address the enhanced preemptive power of the FAA and shed light on serious concerns regarding the level of specific language required within the arbitration clause to ensure the enforcement of provisions written in opposition to arbitration.

Part II focuses on the Supreme Court's historical treatment of procedural arbitrability and illustrates its development from *Volt Information Sciences*[9] to *Mastrobuono* and *Howsam*. Ultimately, the Court's opinion in *Howsam*—which held that it is the arbitrator, and not the court, who rules on procedural issues such as whether a claim is time-barred—is shown to lead to a number of unresolved questions for the court. Part III examines the Second Circuit's most recent handling of procedural arbitrability issues, such as time limitations, and the disabling effect that the *Bechtel* holding has had on ancillary state laws of arbitration procedure. By effectively rendering ancillary state laws on arbitration inapplicable, the FAA has essentially become the absolute preemptive procedural law of arbitration within the Second Circuit. Under this theory, parties are virtually unable to contractually assign issues of procedural arbitrability to the courts.

Finally, I conclude that the *Bechtel* court correctly decided the issue and the subsequent effects will be beneficial to process of arbitration. The court's decision will have the effect of providing predictability to future parties of arbitration; it will also accord greater jurisdiction of arbitration issues to arbitrators; and, it will maintain the FAA's intended virtues of efficiency, cost effectiveness, and expeditiousness.

II. EVOLUTION OF PROCEDURAL ARBITRABILITY

A. Desperate Times: The Growth and Application of Contract Freedom in Arbitration

Section 2 of the FAA provides legal validity to the arbitral process and justifies agreements to arbitrate as lawful under the parties' freedom of contract rights.[10] In *Volt Information Sciences v. Board of Trustees of Leland Standard Junior University*, the Supreme Court first highlighted and emphasized the importance of contract freedom to the enforcement of

[8] *See Bechtel*, 638 F.3d at 154.

[9] *See Volt*, 489 U.S. at 468.

[10] 9 U.S.C. § 2 ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *see also* Dean Witter v. Byrd, 470 U.S. 213, 221 (1985); *see also* Stolt-Nielsen v. AnimalFeeds Int'l Corp, 130 S. Ct. 1758, 1774–75 (2010).

arbitration contracts.[11] The *Volt* court found that where the parties' contractual intent was *clearly* to have state law govern the arbitration, the state law was capable of invalidating the agreement to arbitrate.[12] The Court reasoned that section 4 of the FAA restricts the power of the courts by mandating them to compel arbitration, but must do so in the manner directed by the parties' agreement.[13] Pursuant to *Volt*, the parties are the masters of their arbitration agreement, and therefore they can decide which state laws will govern the arbitration process. Accordingly, we see the need for judicial oversight and interpretation in determining the parties' contractual intent. The need for judicial inclusion when deciding threshold matters of arbitrability seems to work against the FAA's essential benefits of efficient, expeditious, and inexpensive dispute resolution. Given these drawbacks, the *Volt* doctrine seems to have caustic limitations in practice. Consequently, subsequent cases have added qualifications and at times even contradicted the reasoning and decision in *Volt*.[14]

The Court explained, with greater clarity, the role of contract freedom in arbitration in *First Options of Chicago, Inc. v. Kaplan.*[15] In its decision, the Court declared the express language within the arbitration contract as the true source of final authority on matters of arbitrability.[16] In sum, under *Kaplan*, the court only enforces the rules created and agreed upon by the parties on issues submitted for arbitration, in accordance to the terms of the arbitration agreement.[17] In *Kaplan*, the arbitral contract's choice of law provision only governed issues, whereas in *Volt* the state law seemed to govern all related arbitration disputes. *Kaplan* generally continues to be applied by the Court. And yet, where a doubt as to the scope of the arbitration contract arises, the Court has consistently resolved the issue in favor of arbitration.[18] Again, the required inclusion of the judiciary in deciding the scope of arbitration seems to work in direct opposition of the essential benefits of the FAA.[19]

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[11] *See* THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 233 (Thomson/West 2007).

[12] *See Volt*, 489 U.S. at 479 ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.").

[13] *See id*. at 474–75 ("But § 4 of the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*'") (emphasis added).

[14] *See, e.g.*, *Kaplan*, 514 U.S. at 940–49.

[15] *See id*. at 938.

[16] *See id*. at 944 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.").

[17] *See id*. at 947.

[18] *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626–27 (1985) (explaining that we are beyond the time "when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals" could restrict arbitration. The court found that it was required to "rigorously enforce" arbitration agreements).

[19] Benefits such as cost effectiveness, efficiency, and less time consuming.

B. Time for Change: The Mastrobuono Effect on Procedural Arbitration Law

The subject of state law governing arbitrability was revisited and again redefined in the 1995 Supreme Court decision of *Mastrobuono v. Shearson Lehman Hutton*.[20] In *Mastrobuono*, the issue was "whether a choice-of-law provision may preclude an arbitration award of punitive damages that would otherwise be proper."[21] In other words, the question for the Court was whether the arbitral tribunal could award *Mastrobuono* punitive damages despite the agreed upon governing state law that prohibited arbitrators from awarding punitive damages.[22]

The Court ruled in *Mastrobuono* that the state law could not preclude the arbitral tribunal from awarding punitive damages.[23] The Court reasoned that neither the choice-of-law provision nor the arbitration award expressed an intention to prohibit the award of punitive damages, therefore the state law, at most, only introduced ambiguity into the arbitration agreement.[24] Here, we see the court determine that the act of simply choosing a governing law by party does not express the parties' intent to have a limiting rule enforced against arbitration.[25] The *Mastrobuono* court further noted that based on the federal policy favoring of arbitration, if an arbitration agreement is ambiguous, the ambiguities must be resolved in support of arbitration.[26] The manipulation and construction of the judicial line of reasoning in this case seems to suggest a motive by the court to compel and enforce arbitration by any available means.

Moreover, despite its affirmation that the purpose of the implementation of the FAA was to enforce arbitration agreements as written,[27] the *Mastrobuono* court again qualifies and, arguably, contradicts the doctrine in *Volt* by providing for a "party intent" evaluation. This evaluation takes into account what the parties would have reasonably intended to happen, as defined by the Court. This aspect of the decision is confusing and although Justice Stevens relied on language from *Volt* to sustain the Court's interpretation of the FAA, he concludes that the case boils down to what the contract specifically says about punitive damages.[28] In doing so, the court sets the specificity requirement of terms extremely high within the arbitration clause. In addition, the *Mastrobuono* court decides that contractual silence on a specific issue must be resolved in favor of arbitration.[29] Hence, under this doctrine, the parties must be extremely specific as to the agreed upon limitations on arbitration and they must unambiguously state their intentions within the arbitration clause.

In effect, the court suggests that, after *Mastrobuono*, the parties' choice of state law will be enforced only when it supports the recourse to arbitration *or* when the parties have expressly recognized and agreed that the state law contains a restriction to the right to arbitrate that is applicable to their agreement.[30] This approach to procedural arbitrability seems to almost always

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[20] *See Mastrobuono*, 514 U.S. at 52.

[21] *See id*. at 55.

[22] *See id*.

[23] *See id*. at 65.

[24] *See id*. at 62.

[25] *See id*.

[26] *See id*.; *see also Moses H. Cone*, 460 U.S at 24.

[27] *See* CARBONNEAU, *supra* note 11, at 233.

[28] *See Mastrobuono*, 514 U.S. at 58.

[29] *See id*. at 62.

[30] *See* CARBONNEAU, *supra* note 11, at 233.

inevitably resolve disputes in favor of arbitration. The *Mastrobuono* doctrine sets an unrealistic and unattainable standard for parties seeking procedural limitations on arbitration. Since it is very unlikely that parties could actually and accurately express the potentially infinite limitations to arbitration that they may intend to have enforced. This decision begs the question—how specific is specific enough?

C. So Little Time: Howsam and the Timeliness Issue

The issue of whether time limitations on arbitration are questions of arbitrability for the court to decide arose in *Howsam v. Dean Witter Reynolds*,[31] a 2002 Supreme Court case. In *Howsam*, the parties' choice of law had a time limitation rule that prohibited the invocation of arbitration on claims brought more than six years from the dispute.[32] The Court granted *certiorari* to the Tenth Circuit decision that held that the time limitation rule raised an issue about the dispute's arbitrability, which should only be resolved by the court and not by the arbitrator.[33]

As expected, the Supreme Court reversed the Tenth Circuit's decision.[34] Justice Breyer delivered the opinion for the Court, affirming that the time limitation rule raised a question of arbitrability, however he disagreed with the assertion that arbitrability questions were only for the court to decide.[35] He explained that the question of arbitrability is for the court to decide where the parties have not clearly provided otherwise.[36] We see here that parties can defer jurisdiction to the arbitrators on matters of arbitrability if they unambiguously state their intent within the arbitration clause.

Yet, the *Howsam* court also determines that in general circumstances (for example, procedural questions growing out of the dispute) where parties would likely expect the arbitrator to decide the matter, presumptively the arbitrator, not the court, would decide the matter.[37] Interestingly, the court provides a carve-out to its rule by creating an exception based on party expectation. The court goes further by concluding that parties' expect threshold matters of procedure to be decided by arbitrators.[38] It is unclear how the court came to this conclusion, however it cites the Revised Uniform Arbitration Act of 2000 (RUAA), which states that an "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled,"[39] as the basis for the exception.[40]

The outcome of this decision has been that, after *Howsam*, procedural questions on gateway issues (e.g. time limitations) are presumed not to be for the court, but within the

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[31] *Howsam*, 537 U.S. at 79.

[32] *Id*. at 82.

[33] *Id*.

[34] *See id*. at 86.

[35] *See id*.

[36] *See id*. at 83 (quoting AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)) ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'") (emphasis added).

[37] *See id*. at 84.

[38] *See id*.; *see also Moses H. Cone*, 460 U.S at 24–25 ("[T]he presumption is that the arbitrator should decide 'allegations of waiver, delay, or a like defense to arbitrability.'").

[39] RUAA § 6(c) cmt. 2, (2000).

[40] *See Howsam*, 537 U.S. at 85.

arbitrators' jurisdiction.[41] In other words, the court presumes that threshold issues of arbitration should be resolved by the arbitrator. Yet, this decision does not go so far as to expressly mandate procedural arbitrability jurisdiction to the arbitrator. The question still remains: whether parties can defer jurisdiction of procedural matters to the court when there is clear and unmistakable intent to do so, as stated in the arbitration clause. If the answer is yes, then how can parties actually accomplish this result?

III. *BECHTEL'S* DECISION ON PROCEDURAL ARBITRABILITY AND ITS EFFECT ON ANCILLARY STATE LAWS

A. Time Management: Bechtel Do Brasil Construções Ltda. v. UEG AraucÁria Ltda.

The Second Circuit recently had the opportunity to test the limits of *Howsam* regarding time limitation rules that preclude arbitration, in *Bechtel Do Brasil Construções Ltda. v. UEG AraucÁria Ltda*.[42] The issue in *Bechtel* involved the arbitrability of the statute of limitations defense. At issue were the conflicting terms contained in the arbitration clause. The agreement first states, "[a]ny dispute, controversy, or claim arising out of or relating to the Contract, or the breach, termination or validity thereof…*shall be finally settled by arbitration*," [43] and also includes a choice-of-law provision that specified that the procedure and administration of arbitration would be governed by New York Civil Practice Law.[44] Section 7502(b) of the New York Civil Practice Law states:

> If, at the time that a demand for arbitration was made or notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court….[45]

The District Court for the Southern District of New York found that the language of the contract showed "the parties' clear intent to select New York law for arbitration procedure", which includes limiting the arbitrators' power to adjudicate preliminary questions of timeliness.[46]

Upon review, the United States Court of Appeals for the Second Circuit found that, although the matter was a close one, the timeliness of a party's claims is a question for the

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[41] *See* CARBONNEAU, *supra* note 11, at 274 ("Therefore, 'procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator to decide.'").

[42] *See Bechtel*, 638 F.3d at 150.

[43] *See id*. at 154 ("Any dispute, controversy, or claim arising out of or relating to the Contract, or the breach, termination or validity thereof … *shall be finally settled by arbitration* in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce … except as these rules may be modified herein.") (emphasis added).

[44] *See id*. ("[T]he validity, effect, and interpretation of this agreement to arbitrate shall be governed by the laws of the State of New York,' and '[t]he law governing the procedure and administration of *any* arbitration instituted pursuant to Clause 37 is the law of the State of New York.'").

[45] *See id*. at 153.

[46] *See id*.

arbitrator, not the court.[47] The rationale for the court's decision was that, despite the contract's language indicating New York law as governing the arbitral procedure, the contract does not *specifically* mention timeliness disputes or a right of parties to resort to the courts.[48]

B. Running Out of Time: Bechtel's Furtherance of the Judiciary's Agenda on Arbitration

As illustrated by the *Mastorbuono*, *Howsam*, and countless other decisions, the Supreme Court has shown an almost impervious desire to compel arbitration and defer to the competence of arbitrators to rule over parties' claims. And to further these goals the Court seems to be less inclined to follow precedential reasoning for the sake of achieving a consistent end-result—compelling arbitration. The Second Circuit's holding in *Bechtel* befittingly abides by the Supreme Court's precedents. In *Bechtel*, the court compelled arbitration despite the parties' agreement to have arbitral procedures governed by a state-law—which explicitly permitted parties to assert statute of limitations grounds for barring arbitration on an application to the court.[49]

Despite the terms of the chosen state-law, the Second Circuit held that the arbitrator should decide the statute of limitations issue. On its face, this decision seems to go against established precedent insofar as the court seems unwilling to enforce the express terms of parties' agreement. However, the *Bechtel* court heavily relies upon the concept of *specificity* within contractual terms, as introduced and emphasized in *Mastorbuono*.[50] The court required parties to explicitly show that the arbitration clause contained specific language that indicated an intention to have the state limitation rule enforced.[51] And yet, the arbitration clause in *Bechtel*, seemingly, did contain the requisite language. The arbitration clause specifically named and declared the state law as "[t]he law governing the procedure and administration of … arbitration."[52] By agreeing to have New York law govern the arbitration procedure, it logically follows that the parties' intended to be bound by New York's law on arbitration procedure. Despite the parties' expressed intent, the *Bechtel* court found that the issue of procedural arbitrability was not governed by state law.

Unfortunately, the question of whether parties can defer jurisdiction of procedural matters to the court remains unclear. The *Bechtel* court has not only presumed that the arbitrator has jurisdiction as prescribed by *Howsam*,[53] but has, in effect, mandated jurisdiction to the arbitrator, in spite of the parties' agreement. This ruling clearly illustrates the continued effort by the courts to defeat laws which serve as obstacles to arbitration.

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[47] *See id*. at 154.

[48] *See id*. at 156.

[49] *See id*. at 153.

[50] *See Mastrobuono*, 514 U.S. at 62 (noting that under the common-law parties can not benefit from the doubt created by ambiguous language within a contract; for the court to enforce language against the interest of the parties' that drafted it, the contract must be unambiguous).

[51] *See Bechtel*, 638 F.3d at 155.

[52] *See id*. at 154.

[53] *See Howsam*, 537 U.S. at 85 (explaining that the condition precedent to arbitrability should be decided by the arbitrator).

1. The Court's Effect on Ancillary State Laws to the Arbitration Agreement

There are two possible explanations for the *Bechtel* court's decision. One explanation is that the court has decided that rules in opposition to arbitration will *only* be enforced where parties' specifically state the rule within the terms of the arbitration contract. This plausible explanation adheres to the *Kaplan* doctrine[54] insofar as the arbitration clause is considered the final, and likely the only, authority on matters of arbitrability. Under this interpretation however, state laws on arbitration procedure that are ancillary to the agreement are only applicable where the court deems it appropriate. In other words, it is at the court's discretion to apply ancillary state laws where they are found to favor to arbitration. This sort of pick-and-choose approach by the courts was first introduced by *Mastrobuono*,[55] and it completely undermines the parties' agreement and, consequentially, violates the parties' freedom of contract rights. Courts are expected to provide the legal community with uniformity and predictability in their rulings, yet this approach accomplishes neither.

Another explanation is that state laws on arbitration procedure are completely inapplicable and will not be adhered to or enforced by the court. Under this approach, parties are completely incapable of deferring issues of arbitrability to the court by way of state laws because the arbitration clause and the FAA are the *only* governing laws of procedure. Though the *Bechtel* court does not expressly state this as their approach, this seems to be the current position of the court. By rendering ancillary state laws on arbitration procedure inapplicable to the judiciary, the court has left parties incapable of choosing an alternative form of procedural law to govern arbitration. Following this line of reasoning, the *Bechtel* court expands the FAA's reach and application in regards to issues of procedural arbitrability, because its' decision effectively makes the FAA the absolute preemptive procedural law of arbitration in the Second Circuit.

In effect, after *Bechtel*, parties are virtually unable to defer jurisdiction on issues of procedural arbitrability to the courts because of the unenforceability of ancillary state laws and highly impractical burden of stating every enforceable limiting rule within the arbitral clause.

IV. CONCLUSION

Despite a contract clearly stating the parties' intent to have a state law govern the arbitration procedure, the Second Circuit court will ultimately compel arbitration whether or not it violates state law. After *Bechtel*, if the arbitration agreement does not, itself, contain a clear statement in regards to the statute of limitations being withheld from the arbitrator, the FAA will defeat any ancillary state law on timeliness, notwithstanding an agreement to have the state law govern the procedure and administration of the arbitration. Without specifically expressing the *disabling* rule in the arbitral clause, the procedural arbitration issues will proceed to the arbitrator. Essentially, the *Bechtel* court expands *Mastrobuono*'s ruling by determining that the FAA preempts ancillary state laws despite party intent. The *Mastrobuono* court sought to enforce what it thought the parties' intended to convey within the arbitration contract, as to prevent a party

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[54] *See Kaplan*, 514 U.S. at 944.

[55] *See* CARBONNEAU, *supra* note 11, at 233 ("[A]fter *Mastrobuono*, party choice as to state law will be fully respected only when the choice-of-law fosters the recourse to arbitration….").

from being penalized by an unfavorable rule. However, the *Bechtel* court compelled arbitration in accordance with the FAA despite the parties' intent not to have the FAA apply. Although the Second Circuit's decision can be criticized as not enforcing the terms stated within the arbitration agreement, the court has a very good reason for deciding in this fashion.

In conclusion, the Second Circuit's decision was correct because it provides predictability insofar as future parties to arbitration will not expect state laws on arbitral procedure—that are ancillary to the agreement—to be enforced. Second, this decision accords greater jurisdiction of arbitration matters to the arbitrator. As a result, courts will be alleviated from adjudicating on threshold procedural arbitrability issues that involve state laws. Lastly, the effect of the *Bechtel* decision is that the arbitration process will be more efficiency, less costly, and more expeditious; fulfilling the intended virtues of the FAA.

UNFAIR PREJUDICE IN THE UNITED KINGDOM: AN INALIENABLE RIGHT FOR SHAREHOLDERS COMES TO AN END AS COURTS RESOLVE SPLIT BETWEEN EXETER AND VOCAM

Paul Jorgensen*

I. INTRODUCTION

While sports typically generate a vast and extensive physical competition, the governance of organized sports also generates intense legal disputes. Recently, one of these disputes resolved an issue of corporate law in the United Kingdom, although the case is currently being appealed.[1] In *Re the Football Association Premier League Ltd. v. Fulham* ("Fulham"), decided in 2011, the court affirmed judgment on a purely legal issue previously left unclear: is an unfair prejudice action arbitrable?[2] Ultimately, the court decided to issue a stay of court proceedings pending the outcome of arbitration, reasoning that the subject is capable of being heard in arbitration.

This decision resolves an issue of corporate law which was in disarray due to the competing decisions of *Re Vocam Europe Ltd.* ("Vocam") and *Exeter City Association Club Ltd. v. Football Conference Ltd. and another* ("Exeter").[3] In *Vocam*, the court held that a court's capacity to render greater relief than an arbitrator could does not preclude arbitration.[4] Conversely, in *Exeter*, the court held against compelling arbitration on the grounds that the relief available in an arbitration cannot protect third party shareholders and creditors, noting that the statutory rights of shareholders are "inalienable."[5]

The case at hand, *Fulham*, chose to follow *Vocam* rather than *Exeter*.[6] In brief, the court found that it was unsound to apply the logic of a winding up action to an unfair prejudice action, and that the essence of *Fulham*'s dispute is merely contractual.[7]

Herein, a look at unfair prejudice in the United Kingdom as it pertains to arbitration will be followed through these three decisions. Consequently, the prior law shall be set out. It will be shown that the prior law is not irreconcilable. Then the present dispute will be delineated and an

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[1] *Fulham launch appeal against Premier League Chairman Sir David Richards*, THE INDEPENDENT, Aug. 16, 2011, http://www.independent.co.uk/sport/football/premier-league/fulham-launch-appeal-against-premier-league-chairman-sir-david-richards-2338525.html.

[2] *See* Re the Football Ass'n Premier League Ltd. v. Fulham Football Club (1987) Ltd., [2011] EWCA (Civ) 855, [94].

[3] *See* Re Vocam Europe Ltd., [1998] B.C.C. 396; Exeter City Ass'n Club Ltd. v. Football Conference Ltd., [2004] EWHC (Ch) 2304.

[4] *Vocam*, [1998] B.C.C. 396 [10].

[5] *Exeter*, [2004] EWHC (Ch) 2304, [22-23].

[6] *Fulham*, [2011] EWCA (Civ) 855, [76].

[7] *Id*. at 77,

analysis of the current court's logic will follow. Finally, a discussion of the desirability of the new state of the law will be presented.

II. BRIEF OVERVIEW OF UNFAIR PREJUDICE IN THE UNITED KINGDOM

Historically, the unfair prejudice action arose as an alternative to a derivative suit. It was envisioned as a personal remedy for shareholders to pursue in cases of personal or corporate wrongs perpetrated by corporate officers.[8] The idea dates back to the 1948 Companies Act, although it uses the term "oppressive conduct" in lieu of the current language introduced by the 1980 revisions to the same act.[9]

The unfair prejudice action today is defined by s.994 of the Companies Act 2006. According to that section, any member may petition on the grounds that "the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members."[10] In addition to such broad applicability, the remedies available to a successful application are wide and discretionary, allowing a court to "make such order as it thinks fit for giving relief."[11] This power includes, but is explicitly not limited to, the ability to "regulate the conduct of the company's affairs in the future."[12]

While a controversy exists regarding the scope of the action, the relevance of this for the purposes of arbitration is in the tension between a definition of unfair prejudice as a personal remedy for individual shareholders and a definition as an alternative to a derivative suit.[13] If the issue is considered a personal remedy, theoretically there is no reason arbitration should be unsuitable. The action primarily only implicates the contracting parties so a purely bilateral means of resolving the dispute, such as arbitration, should be unproblematic. However, a derivative suit is brought for the benefit of the corporation itself.[14] Consequently the corporation would be an indispensable party, at least in the United States, and arbitration would theoretically be an unsuitable method for resolving the dispute.[15]

This distinction is of particularly grave consequence when the remedies available in arbitration are considered. Arbitrators are only authorized through contract to make an award that affects the parties to the arbitration.[16] Consequently, while an English court would have unfettered discretion to issue judgments which affect the rights of third parties, the arbitrator could not govern the corporation with respect to other members whose interests are typically affected by derivative suits and their ilk.

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[8] Cheung, Rita. Corporate Wrongs Litigated in the Context of Unfair Prejudice Claims: Reforming the Unfair Prejudice Remedy for the Redress of Corporate Wrongs. COMPANY LAWYER 2008, 98.

[9] Griffin, Stephen. The Statutory Protection of Minority Shareholders: Section 459 of the Companies Act 1985. COMPANY LAWYER 1992, 83.

[10] Companies Act, 2006, c. 46 §994.

[11] Companies Act, 2006, c. 46 §996.

[12] Companies Act, 2006, c. 46 §996.

[13] *See* Cheung, Rita, Corporate Wrongs Litigated in the Context of Unfair Prejudice Claims: Reforming the Unfair Prejudice Remedy for the Redress of Corporate Wrongs, COMPANY LAWYER 2008, 98 (discussing the liberal and strict constructionist views of the unfair prejudice action).

[14] 19 AM. JUR. 2d Corporations §2082.

[15] 19 AM. JUR. 2d Corporations §2082.

[16] *See* Arbitration Act, 1996, c. 23 §67(1)(a); Arbitration Act, 1996, c. 23 §30(1)(c).

Today, under *Fulham*, the matter is resolved. Unfair prejudice is undoubtedly suitable for bilateral arbitration. It is not enough to assert the possibility that third parties could be strongly impacted by the results of the action and that arbitration would fail to address these concerns. However, in the past some courts considered that, as an alternative to a derivative action, unfair prejudice actions could not be resolved by arbitration and, though it is debatable, as a consequence where the impact of the actions is likely to address third parties arbitration may be barred. In theory, this rule is desirable but the practical importance of the distinction may be nonexistent, leading to a world where shareholder actions are de facto arbitrable as a whole.

III. THE PRIOR STATE OF THE LAW: HOW EXETER CAN BE READ CONSISTENTLY WITH VOCAM

While in *Fulham*, the court treats *Exeter* and *Vocam* as being fully at odds, this is not necessarily the case.[17] While some of the langauage in *Exeter* is particularly strident, a narrower construction of these authorities still presents a reasonable legal rule and rationale.[18]

A. Vocam Finds the Issue of Available Remedy Immaterial to Arbitrability

Factually, there is nothing particularly extraordinary about the situation in *Vocam.* The dispute at the heart of the issue comes from personal issues between directors of a company, Vocam Europe Ltd.[19] As a consequence of these issues, the majority shareholders of the company removed Mr. Hespe, a minority shareholder, from the board of directors.[20] Their stated reason was that he terminated his services under Clause 11.1 of the agreement that originally created the company. That agreement reads, in pertinent part, "Should [Mr. Hespe] decide within the first 24 months of the commencement of this agreement to terminate their services as per this agreement, they agree . . . to resign as directors of [the company] and hand back the rights for the Hesperides Midland zone."[21] Mr. Hespe then brought a petition for unfairly prejudicial conduct, alleging that the use of this clause was improper and merely intended "to obtain for themselves the large profits of the business now being made by [his] efforts."[22]

Responding to this accusation, the majority shareholders invoked clause 18 of the same agreement to refer the matter to arbitration.[23] This clause reads, "Any and all disputes between the parties hereto whether or not they arise under the agreement shall be settled and determined by arbitration . . ."[24] While there are multiple parties involved in the dispute who are not implicated by the arbitration clause, the difficulty for the purposes of the dispute in *Fulham* is given short shrift by the court here. The court quickly declares that one party, VIP, is entitled to a stay "and that it is no answer to such application that the remedies which would be available in the arbitration might not be as extensive as those which the English court would be able to grant

[17] *See* Re the Football Ass'n Premier League Ltd. v. Richards, [2011] EWCA (Civ) 855, [94].
[18] Exeter City Ass'n Football Club Ltd. v. Football Conference Ltd., [2004] EWHC (Ch) 2304 [23].
[19] *Re* Vocam Europe Ltd., [1998] B.C.C. 396 [1, 5].
[20] *Id*. at [5].
[21] *Id*. at [3].
[22] *Id*. at [1, 6].
[23] *Id*. at [10].
[24] *Id*. at [4].

on a successful application. . .”[25] Having decided that, the court exercised its discretion under the 1996 Arbitration Act to send the other related parties to arbitration.[26]

B. Exeter Overreaches When it Finds Shareholder Rights “Inalienable”

The Exeter City football club had steadily declined and in 2003 was demoted to competition in the Nationwide Conference from the third division of the Football League in 2003.[27] As such, Exeter is a member of Conference, the company which regulates football in the Nationwide Conference and must abide by its articles of association.[28] Understandably, with struggling athletic performance came a financial quagmire, the solution to which, as chosen by Exeter, was to pursue a creditor's voluntary arrangement (“CVA”) rather than enter into bankruptcy.[29]

According to the CVA, certain creditors, called “football creditors,” were required to be paid in full over five years while other creditors could expect to be paid substantially less.[30] This term was created specifically to address a longstanding policy of Conference with regard to article 5(3)(d) of their articles of association.[31] Under that article, a club can be expelled from Conference for entering into a CVA, which would destroy Exeter as a team.[32] The policy in question is that Conference will only “exercise that discretion in favour of the club [to not expel it from Conference] if, and only if, it can establish that “football creditors[]” will be paid in full.”[33] However, the Inland Revenue applied for a revocation of the CVS on account of this same term.[34] The Inland Revenue insists on equal treatment for itself and other creditors by Exeter.[35] Consequently, Exeter sued Conference for unfair prejudice in the policy by which it conducts its affairs, specifically the “football creditor” policy.[36]

In opposition to Exeter's petition, Conference sought a stay of proceedings to allow for arbitration by the terms of the articles of association, specifically rule K.[37] That section states: “[A]ny dispute or difference ('a dispute') between any two or more participants (which shall include for the purposes of this section of the rules the Association), including but not limited to a dispute arising out of or in connection with, including any question regarding the validity of (I) the rules or regulations of the Association; (ii) the rules and regulations of an affiliated association or competition; (iii) the statutes and regulations of FIFA and UEFA; or (iv) the laws of the game, shall be referred to and finally resolved by arbitration. . .”[38]

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[25] *Id*. at [10].
[26] *Id*. at [13].
[27] *See* Exeter City Ass'n Football Club Ltd. v. Football Conference Ltd., [2004] EWHC (Ch) 2304, [4].
[28] Id.
[29] *Id*. at [5].
[30] *Id*. at [6].
[31] *Id*. at [8-9].
[32] *Id*. at [8].
[33] *Id*. at [9].
[34] *Id*. at [7].
[35] *Id*. at [11].
[36] *Id*.
[37] *Id*. at 15.
[38] *Id*.

While the articles of association are not listed explicitly, the court decided that "any dispute" was wide enough language to include the articles of association.[39] Instead, the court ultimately decides that this arbitration would be against the public interest generally.

The judge compared the issue of unfair prejudice to the issue of winding up. It has historically been held that the right to apply for a winding up, or dissolution, of a company cannot be limited by contract.[40] A company is created entirely by statute and any statutorily created rights to manage the company cannot be removed[41]

In a winding up action, this makes a great deal of sense. The Companies Court is given special jurisdiction to hear these cases and special powers to render relief that are greater than a regular court.[42] However, the court goes farther than to say in analogous situations, the right cannot be abridged, leading to the conflict with *Vocam*. The court said, "The statutory rights conferred on shareholders to apply for relief at any stage are, in my judgment, inalienable and cannot be diminished or removed by contract or otherwise."[43] This is an extreme statement and it appears to be motivated by the same rationale which *Vocam* dismissed as inappropriate.[44] While *Vocam* dismissed the possibility that the availability of plenary relief could be determinative, *Exeter* points to a particular area of law, the winding up action, in which the capacities of a special court typically instructed to oversee the issue determines the issue of arbitrability to say that the unavailability of plenary relief is an acceptable reason for restricting arbitrability in shareholder driven actions.

C. Reconciling Exeter and Vocam as a Matter of Error, Scope, or Inherent Jurisdiction

In considering this stark difference, there are three means by which the two cases can be reconciled. First, and least convincingly, there is a technical possibility. Second, there are strong factual distinctions that can be made. Third, the matter could be settled by allowing for wide judicial discretion.

While not intellectually compelling, the court in *Exeter* makes the point that the arguments on which the court relies were not argued in *Vocam*.[45] Under this theory, it would have to be assumed that *Vocam* is purely erroneous. However, as tempting as that may be, as has already been pointed out, the court was motivated by the same concerns, the ramifications of an ineffective forum, in both cases.[46] Consequently, although merely trusting the word of the *Exeter* court would be simple, this theory cannot be maintained.

The best theory is merely to observe the most significant factual difference between *Vocam* and *Exeter*. *Vocam* concerned a specifically internal matter between shareholders and directors.[47] The choice to arbitrate was entered into knowingly and the ramifications of the choice

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[39] *Id*. at 18.

[40] *See Exeter*, [2004] EWHC (Ch) 2304 [21]; A Best Floor Sanding Party Ltd. v. Skyer Austl. Party Ltd. [1999] VSC 170.

[41] *Exeter*, [2004] EWHC (Ch) 2304, [22].

[42] *Id*.

[43] *Id*. at [23].

[44] *See* Re Vocam Europe Ltd., [1998] B.C.C. 396, [10].

[45] *Exeter*, [2004] EWHC (Ch) 2304, [23].

[46] *See Exeter*, [2004] EWHC (Ch) 2304, [23]; *Vocam*, [1998] B.C.C. 396, [10].

[47] *Vocam*, [1998] B.C.C. 396 [3, 5].

were clearly envisioned by the parties. Conversely, in *Exeter*, although the parties to the dispute are all members of the corporation, the motivation for the dispute would not have existed but for the interference of an important third party, namely creditors.[48] The rationale which was found so fundamentally important as to warrant the declaration that shareholders had "inalienable" rights was the public importance to "give protection to shareholders by enabling . . . special relief."[49]

Under this theory, the court's extreme language in granting "inalienable" rights should be tempered by the importance of the factual situation. The law under this theory would be that in situations where there is a significant public interest in protecting a third party to the litigation and arbitration cannot give relief sufficient to protect the third party, then arbitration is inappropriate.

Finally, the results could be reconciled as an exercise of "inherent jurisdiction in the court to stay proceedings where there is a more suitable alternative mans of resolving the dispute."[50] While the Arbitration Act of 1996 presents situations in which a stay is mandatory, where it does not apply a court retains the discretion to grant a stay regardless.[51] Here, assuming that the act does not apply, presumably under Section 9(4) that the agreement is "incapable of being performed" in the situation, the discrepancy between *Vocam* and *Exeter* could merely be a matter of legitimate case-by-case discretion in action.[52] While the court in *Vocam* found that the concern of remedies was not great enough, perhaps the court in *Exeter* found that the issue was a great concern.

Regardless of how this could have been reconciled, the issue has been rendered mostly moot. Although these arguments may come forth on appeal, *Fulham* presents a new interpretation which, as shall be shown, seems to destroy any impact which *Exeter* may have on the law.

IV. THE CURRENT LAW: FULHAM DISCREDITS EXETER

In *Fulham*, the court decided that *Exeter* was wrongly decided.[53] The court decided that there was no persuasive reason to extend the logic behind a winding up order to an unfair prejudice action.

A. The Factual Background: How the Organization Structure of FAPL Produced an Issue of Law

The Football Association Premiere League ("FAPL") is organized as a corporation with each of the twenty clubs involved in the league holding a single share.[54] The corporation and its members must abide by the articles of association, which includes a requirement to comply with the Football Association rules as well as an additional set of FAPL rules.[55] Fulham alleges that an

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[48] *Exeter*, [2004] EWHC (Ch) 2304 [6, 9, 11].
[49] *Id*. at [22].
[50] *Id*. at [14].
[51] *Id*.
[52] *Id*. at [13].
[53] *See* Re the Football Ass'n Premier League Ltd. v. Fulham Football Club (1987) Ltd., [2011] EWCA (Civ) 855, [88].
[54] *Id*. at [2].
[55] *Id*. at [9].

implied term of the FAPL rules is that the board will follow its fiduciary obligations and act in a disinterested manner when dealing with one club as opposed to another.

Fulham further alleges that this obligation was breached in 2009. At that time, Portsmouth, another club in FAPL, was in dire financial straits and required nine million pounds to avoid insolvency proceedings.[56] Consequently, Portsmouth sought to transfer one of its players, Mr. Peter Crouch.[57] In response, both Fulham and Tottenham made offers: Fulham offered nine million pounds and, by its account, was willing to pay eleven million while Tottenham made lower offers.[58] While the decision by Portsmouth to accept Tottenham's offer may be explainable by Mr. Crouch's personal preference, the fact remains that Tottenham increased its offer to nine million pounds on July 26th and the offer was accepted.[59]

The breach asserted was that the chairman of FAPL, Sir David Richards, was asked by the chairman of Portsmouth to facilitate the trade with Tottenham.[60] Sir David agreed and spoke with Tottenham on behalf of Portsmouth to obtain the increased offer which was acceptable to Portsmouth.[61] Fulham issued a complaint through internal channels which resulted in internal findings to the effect that Sir David mediated between the two clubs but did not facilitate a trade.[62] Fulham alleges that dismissing the complaint on the basis of these findings constitutes unfair prejudice to Fulham as a member of FAPL.[63]

While Sir David and FAPL do oppose this allegation in substance, the purpose of their opposition for the present case is merely to petition for a stay pending the results of arbitration.[64] They find substance for this position in the FAPL rules, particularly Section S, as well as the FA rules in Section K. In pertinent part, Section S reads, "Membership of the League shall constitute an agreement between the Company and Clubs and between each Club . . . to submit all disputes which arise between them . . . to final and binding arbitration . . . [Potential disputes include] other disputes arising from these Rules or otherwise."[65] Should Section S not apply, Section K states, "[A]ny dispute or difference between any two or more Participants . . . shall be referred to and finally resolved by arbitration under these Rules . . . [The above] shall not apply to any dispute . . . which falls to be resolved pursuant to any rules . . . in force of any Affiliated Association or Competition."[66] Faced with this language, the judge found, and with no disagreement herein, that the dispute and the parties fall within the scope of at least one of the above agreements.[67]

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[56] *Id*. at [3].
[57] *Id*. at [2].
[58] *Id*. at [3].
[59] *Id*. at [3, 4].
[60] *Id*. at [4].
[61] *Id*.
[62] *Id*. at [6].
[63] *Id*. at [12].
[64] *Id*. at [14].
[65] *Id*. at [17-18].
[66] *Id*. at [20].
[67] *Id*. at [91].

B. Interpreting Fulham: An End to the Inarbitrability of Unfair Prejudice

The court in *Fulham* views the issue posed by the decision in *Exeter* as three separable problems, each of which the court discusses. They are:

> (a) Whether the arbitration agreements contained in the FAPL Rules and the FA Rules purport . . . to refer to arbitration the issues which arise between the parties . . . (b) Whether, if so, the CA 2006 [containing the statutory provision regarding unfair prejudice] expressly or impliedly prohibits the reference to arbitration of such matters. (c) Whether, if there is no statutory prohibition . . ., public policy of the law of England and Wales prohibits such a reference.[68]

The first issue, namely the issue of construction of the agreement between FAPL and the clubs, is dealt with briefly and poses no barrier to arbitration. However, the other two are given significant weight.

Each of these questions must necessarily be considered in the abstract. Fulham must be able to prove that any unfair prejudice action must necessarily be inappropriate in arbitration.[69] They cannot rely on the particular facts of their complaint to inform the decision.[70] The statute itself must have been designed in such a way that makes a court the exclusive remedy or there must be a public policy to make a court the exclusive remedy. For instance, although Fulham argues that an arbitrator could not have made a decision affecting other shareholders (such as a winding up order), in the court's view this would only be proof that the arbitration should proceed with limitations to the available remedies rather than found inarbitrable.[71]

With this in mind, the court looks to the issue of construction of the statute itself, Corporations Act Section 994, as to whether it grants an "unfettered right of access" to a court.[72] Remarkably good evidence for the view that this right is unfettered does exist. After *Exeter* was handed down, Parliament seems to have considered the consequences of *Exeter*'s logic on similar litigation. Thus, when Parliament passed the Limited Liabilities Partnerships Regulations, it included provisions mimicking Section 994 of the Corporations Act with small adjustments, including one which appears to directly address *Exeter*.[73] It reads, "The members of an LLP may by unanimous agreement exclude the right [to petition for unfair prejudice] either indefinitely or for such period as is specified in the agreement."[74]

This clearly cannot square with *Exeter* in its statement that shareholders cannot abridge their rights by contract.[75] The failure of Parliament to modify the Corporation Act to include similar "opt-out" language may be seen as either tacit acceptance of *Exeter* for the purposes of corporate governance or an active attempt to view a stark distinction between the management of corporations and LLPs.[76]

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[68] *Id*. at [94].
[69] *Id*. at [50].
[70] *Id*.
[71] *Id*. at [61].
[72] *Id*. at [85].
[73] *Id*. at [86].
[74] *Id*.
[75] *See* Exeter City Ass'n Football Club Ltd. v. Football Conference Ltd., [2004] EWHC (Ch) 2304, [23].
[76] *Fulham*, [2011] EWCH (Civ) 855 [88].

However, the court here is hesitant to make inferences from the failure of Parliament to act. While an act of Parliament which modifies the language of the Corporations Act to exclude *Exeter* would limit the freedom of the court to decide, a failure to act is not an affirmation of correctness.[77] Consequently, without other evidence, the court finds that the statute does not give exclusive jurisdiction to courts in the same way that bankruptcy law gives exclusive jurisdiction to courts over winding up orders.

With respect to finding exclusive jurisdiction as a matter of public policy, the court draws a very narrow line. The court certainly admits that these types of situations exist. It acknowledges, for example, that a liquidation confers "rights . . . for the benefit of the creditors as a whole."[78] However, these types of policies come in two types, although the court does not explicitly state that they are exclusive types.

The first is one where the arbitrator is asked to decide something outside of his powers.[79] However, this is either redundant considering the inability of arbitrators to exceed the scope of their contractually given authority in the first place or impossible considering that when the relief traditionally available is outside the capacity of the arbitrator to give it merely requires the court to limit the scope of the proceeding.[80] If the court remains purely in the abstract, it should be impossible to find this type of public policy issue without some other means for invalidating the contract. Hence, the court does not find such an issue.

The other is when "determination of issues of this kind call for some kind of state intervention in the affairs of the company which only a court can sanction."[81] That is just as nebulous as it sounds. It is certainly implicated in a winding up and the court probably conceived of this language as applying to such matters as criminal penalties.[82] However, it gives little guidance as to what satisfies the condition. For present purposes however, the court does not find that unfair prejudice implicates this issue. The court views the action here as a mechanism for resolving the internal affairs of the corporation.[83] As evidence, it points to the present case, noting that this is a predominantly contractual issue regarding adjudication of officer conduct, factually analogous to the issues in *Vocam*, here between the chairman of a corporation and a member.[84] While the action allows for winding up which does implicate state intervention, this fact is not determinative. [85] The arbitrator is not required to give such an order and the court is confident that such an order will not be given, at least where the company is solvent.[86] Consequently, the case goes to arbitration.

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[77] *Id*.
[78] *Id*. at [74].
[79] *Id*. at [77].
[80] *Id*. at [61].
[81] *Id*. at [77].
[82] *Id*. at [38].
[83] *Id*. at [58].
[84] *Id*.
[85] *Id*. at 40].
[86] *Id*. at [58].

C. What Remains of Exeter in a Post-Fulham World?

We are left after this revision of the law with a puzzling question: to what extent are "[t]he statutory rights of shareholders to apply for relief . . . inalienable"?[87] The court's reasoning in *Fulham* ultimately draws a distinction between situations which merely "engage third party rights" and those which "represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process."[88] To what extent does this distinction continue to protect shareholders?

In any possible interpretation, shareholders uncontroversially have unfettered access to courts where a statute explicitly gives access by its terms.[89] Where legislative will is apparent, the courts will not interfere. However, this grant of access must be affirmative.[90]

At its narrowest, *Fulham* stands for the principle that, to successfully avoid a petition for arbitration, a plaintiff must prove something akin to the likelihood that state interventionist or public policy concerns will be addressed by an arbitral award. While the court finds that a winding up order is unlikely to be brought out by the current case on account of the FAPL's solvency, if empirical evidence had, for example, shown that a solvent company is typically wound up by an unfair prejudice action, arbitration probably would have been barred. The court did not address this counterfactual situation where such evidence was presented, and it was not required to address the issue to answer the petition. However, even if this narrow interpretation is true, it is unlikely to have practical value if future cases address the problem in the same way as the *Fulham* court did.

When considering a particular action in the abstract, how likely is a court to find a public policy concern that will most likely be implicated by the remedy? In the abstract, the *Fulham* court cannot even state conclusively that a criminal charge would likely implicate public policy.[91] The court is simply unclear regarding the type of evidence that would be necessary to prove an inarbitrable claim. It is unlikely that a plaintiff could ever prove the type of situation where the inability of an arbitrator to give a particular remedy would make the shareholder's supposed rights under *Exeter* prevail.

The court in *Fulham* even pedals back in terms of how this principle should apply to winding up actions. Entities cannot override by agreement the terms by which liquidation of assets proceeds because this is a power reserved for good cause in protecting creditors as a whole to the liquidator.[92] Similarly, they cannot agree to add conditions to execute a winding up petition.[93] It is, according to the court, clearly a matter of public policy. However, the court does "not suggest that it would have been unlawful for the members to have agreed not to petition to wind up."[94] In fact, the court decides that an agreement to arbitrate would act as an agreement to

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[87] Exeter City Ass'n Football Club Ltd. v. Football Conference Ltd., [2004] EWHC (Ch) 2304, [23].

[88] *Fulham*, [2011] EWCH (Civ) 855 [40].

[89] *Id*. at [85].

[90] *See Id*. at [88] (requiring more than inaction to find legislative intent for sustaining *Exeter's* rationale).

[91] *See Id*. at [38] (stating "it would be wrong . . . to draw from this any general rule that criminal, admiralty, family, or company matters cannot be referred to arbitration").

[92] *Id*. at [74].

[93] *See* Re the Football Ass'n Premier League Ltd. v. Fulham Football Club (1987) Ltd., [2011] EWCH (Civ) 855 [81]; *See Re Peveril Gold Mines Ltd*., [1898] 1 Ch. 122.

[94] *Fulham*, [2011] EWCH (Civ) 855 [81].

not present the winding up petition until the dispute has been resolved in arbitration, at which point a judge would decide whether or not to issue the order to wind up the company.[95]

This seemingly glib point highlights the status *Exeter* has been relegated to. The broadest construction of *Exeter's* language that is now permissible is to say that the conditions by which a shareholder driven action can be presented to an adjudicator cannot be modified. However, shareholders are entirely allowed to contract away access to a court in favor of arbitration unless public policy must, in all cases where the action is brought, be implicated by the remedy. Yet even then, shareholders could be required to agree in the articles that they will not bring actions seeking such remedies. De facto, *Exeter's* protections for shareholders no longer exist in the unfair prejudice action and it places it is even possible that shareholder rights have been eroded significantly in other types of actions.

V. CONCLUSION

The sweeping change to corporate law, wrought by *Fulham*, reaffirms a general theme of arbitration that it is pervasive. Shareholders no longer enjoy a special right of access to courts and must fight it out in arbitration with everyone else.

However, this commentator is not convinced that this rule is a desirable one. As a preliminary theoretical matter, if the rule actually does rest on the likelihood of a particular remedy, that type of line drawing will be difficult to do consistently. If that is not the case and third party shareholders and creditors are not given special protections, instead giving de facto plenary authorization to arbitral clauses located in articles of association, then this is a poor policy. It would put an end to the derivative suit and make the types of remedies capable of being administered by that action wastefully duplicative as arbitration would be required between the corporation and each individual shareholder.

From a fact specific point of view, consider the impact of this case on participation in the FAPL. The FAPL is a peculiarly structured entity in that participants pass in and out of FAPL for non-economic reasons.[96] Performance in a sport may move a shareholder from the Nationwide Conference to the FAPL and subject the shareholder to different rules. Success in this peculiar situation may become a hindrance. More generally, investment takes place in large corporations without much regard to the manner in which the corporation's rules are organized.

In cases where the corporation takes advantage of shareholders for the benefit of other shareholders, a minority shareholder with no control of the corporation, thrust into an arbitration agreement perhaps by an unusual structure such as FAPL, may be affected by an arbitration they are not a party to in a system where they never agreed to arbitrate or be unable to obtain an effective remedy that regulates the corporation as a whole.

A better rule would be a clearer rule for these corporate disputes. Rather than hinge the outcome on the likelihood of a particular remedy, which is in most cases impossible to predict ex ante, it would be more useful to ask whether the action forecloses interested parties from participating in the dispute or whether the dispute is an internal matter. The rule as it is makes a present outcome determined by a future event. This is an unacceptable rule because it attempts to create compromise by creating an unprovable condition.

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[95] *Id*. at [83].
[96] *Id*. at [2].

The best rule would be merely to ask if the dispute is, in essence, contractual in nature. This is even a part of the court's analysis in determining that winding up is unlikely. It states, "A dispute . . . about alleged breaches of the articles of association or a shareholder's agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards for the benefit of third parties."[97] While a rule that distinguishes between contractual and non-contractual disputes may have its own flaws, it is a distinction that could be proved on a case-by-case basis. The law as it is makes the burden of proof prohibitively high.

While it is perhaps the case that the *Exeter* rule should not have been entirely destroyed, the outcome of the law is clear. Under *Fulham*, so long as appeal does not contradict the situation, shareholders are bound to arbitrate their unfair prejudice claims.

[97] *Id*. at [77].

SECRETARIES ALWAYS GET A BAD REP: IDENTIFYING THE CONTROVERSY SURROUNDING ADMINISTRATIVE SECRETARIES, CURRENT GUIDELINES, AND RECOMMENDATIONS

Courtney J. Restemayer*

I. THE PLAIN LANGUAGE APPROACH AND CURRENT APPROACH TO THE ROLE OF ADMINISTRATIVE SECRETARIES TO INTERNATIONAL ARBITRATION TRIBUNALS

Through various modern forms of entertainment, print, and comedy the stereotype of "the secretary" often involves a hard-nosed, secretly beautiful, will-sleep-with-the-boss woman who simply carries out the commands of those above her in automated, non-opinionated fashion. Under a similar set of duties, Black's Law Dictionary defines "secretary" as "An administrative assistant … in charge of official correspondence, minutes of board meetings, and records of stock ownership and transfer."[1] Mechanical, tedious, but fundamentally important to the success of the business is the work of the enigmatic secretary. International arbitration tribunals, similar to most businesses, are subject to paperwork, documentation, and organization, to name a few of the tasks involved in the mechanical structure. The ability to effectively and efficiently carry out these tasks makes alternative dispute resolution desirable to clients, arbitrators, and institutions. But, as in any modern office plot, what if the secretary went outside her stereotypical role, authorized or not? Does her involvement create a violation of the sanctity not of her bosses affairs, but of the fundamental nature of arbitrations? The role of the administrative secretary to international arbitration tribunals remains ambiguous, varied, and often secretive to clients, creating wide controversy in the field today[2] comparable to a wife's suspicion of her husband's secretary.

A. Administration – Theoretical Role of "Secretaries"

It is important to remember, though arbitration is an alternative means of adjudication, it also is a profit making enterprise. Typical to most business enterprises, the theoretical role of tribunal secretaries is to assist the arbitral tribunal and facilitate complex or large arbitrations in purely an administrative function[3]. This function, however, is not the source of critic's "wife

[1] BLACK'S LAW DICTIONARY (9th ed. 2009).

[2] *See* U.N. COMMISSION ON TRADE LAW ("UNCITRAL") YEARBOOK, VOL. XXVII (1996), pt. 2 ("Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto").

[3] *See* ICC NOTE ¶ 3 (limits secretary function to administrative tasks); *see also* UNCITRAL Notes ¶ 24-27 (lists the types of administrative services that are allowed to aid the tribunal: providing meeting rooms and coordinating secretarial services); NCCCP, ARGENTINA, ART. 749 (tribunal secretary must attend all meetings and hearings between arbitrators and parties and/or their lawyers); s*ee also* A. Redfern and M. Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (3rd ed., Sweet and Maxwell, 1999), at ¶ 4-101 ("it is an established practice in large and complex international commercial arbitrations for the arbitral tribunal to appoint and administrative secretary or registrar to take charge of all administrative arrangements (which) would otherwise fall to be made by the arbitral tribunal and to act as a link between the parties an the arbitral tribunal.").

anxiety." Some assume secretaries can perform professional services that parallel clerical tasks comparable to those of law clerks[4]: legal research, brief and memorandum composition, and basic document review.[5] These roles have raised certain documented debate, but all sides agree the scope of professional tasks must be limited.[6] Several such instances, for example, involve analysis not only of jurisdictional law, but also of party submissions.[7] This practice, still, is more rare than the current movement or perhaps current *discovery*, that secretaries are now sitting in on deliberations[8] and drafting the awards for the tribunal.[9] One arbitrator in attendance at the most recent Global Arbitration Review (GAR) conference in London stated, "if the role of the facts and the party arguments are drafted incorrectly, it leads to confusion, misunderstanding, and misstating the arbitral award."[10] With such importance resting on the pen of the secretary, why has this practice evolved and thrived? The prominence grew, simply, through necessity to the future of arbitration.

Two fundamental principles in alternative dispute resolution, and more specifically arbitration, are the cost efficiency and speed of this form of adjudication as opposed to trial.[11] The basic idea is that the risks or issues surrounding administrative secretaries in arbitrations are vastly overshadowed by the benefits: (1) organization of procedure, (2) keeping records, (3) expediting deliberations, etc. Often business choose arbitration because they do not want to strain their relationships with adversarial trials as well as for speed and lower costs.[12] Arbitrations are currently getting more and more expensive as new rules or exceptions are implemented through jurisdictional laws or party contracts. While the average costs of arbitration does not surpass costs of trial, some large-scale arbitrations threaten while others overcome the economic division. Arbitral practitioners and arbitral institutes need more than the old reputation of arbitration proceedings as "quick and cheap" and needs to implement cost effective methods to its procedure to continue its prevalence in modern business and law[13]: enter the impregnable secretary.

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[4] *See generally* Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 576 (2006).

[5] UNICTRAL NOTE ¶ 27.

[6] *See* E. Schwartz, *The Rights and Duties of ICC Arbitrators'* in The Status of the Arbitrator, ICC Bull. Special Suppl. 67, 86 (P. Fouchard ed., 1995) (professional tasks are often implemented but under the direction and limitation of the tribunal); *see* ENGLISH ARBITRATION ACT § 24(1) (1996) (allows secretaries to draft facts but prohibits extension to procedural orders or parts of the award); ICC NOTE ¶ 3 ("administrative secretary must not assume the functions of an arbitrator…by becoming involved in the decision-making process…or expressing opinions or conclusions.").

[7] *See generally* Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 576 (2006).

[8] *See, e.g.*, *A Guide to the NAI Arbitration Rules* 224 (Bommel van der Bend, Marnix Leijten and Marc Ynzonides eds., Kluwer Law International 2009); *see also* H J Snijders, Nederlands Arbitragerecht, Kluwer 2007, p 274.

[9] *See* Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB INT'L 147, 152 (2002).

[10] Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/.

[11] THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE (5th ed. 2009).

[12] *Id.*

[13] *Id.*

1. Organization and Procedure

"Time is of the essence" and "time is money" are the simple, yet appropriate, reasoning establishing speed as one of the fundamental principles of arbitration. Scheduling often becomes a balancing act between promoting party equality and time pressures: dates need to be set, paperwork filed for proceedings and arbitrators, and venues booked. Arbitration institutions often take care of these elements,[14] but ad hoc arbitration lacks the formalities.[15]

2. Records

Records in arbitration proceedings may take many different forms. First, if the call to arbitration is not through submission – the process where parties willing agree to submit a current dispute to arbitration – the contract containing the arbitral clause becomes the first document to obtain. Appointed or employed secretaries will find the scope, the choice of law, the jurisdiction, and other party bargained matters within that clause.[16]

Second, even if the scope is broad or ambiguous, parties may mutually chose at the start to submit only certain issues to arbitration. The "issues" therefore, need to be documented and implemented to create barriers of consideration. Making note of these key elements helps eliminate challenges to the award de facto.[17] Under this same premise, where secretaries are permitted to employ "professional tasks"[18] they will obtain relevant subject-matter and jurisdictional law.[19] In light of recent technological advances, secretaries familiar and proficient in IT skills greatly aid the tribunal with preparation.[20]

Third, a record of the parties' stances or arguments is essential for arbitrators when rendering a decision. Without documentation of facts or arguments, the reasoning for an award is weakened by calls of arbitrator partiality or corruption[21]. While courts often find this argument without merit[22], challenges slow down the arbitral process for clients. Recently, Netherlands Supreme Court ruled that, absent previous party provisions, a record is not mandatory and tribunal secretary notes are not subject to disclosure:

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[14] UNICTRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS, UNCITRAL YEARBOOK XXVII (1996) Art. 4 ¶ 26 ("Some arbitral institutions routinely assign such persons to cases administered by them").

[15] *Id*. ("In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.").

[16] THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE (5th ed. 2009).

[17] *Id.*

[18] UNICTRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS, UNCITRAL YEARBOOK XXVII, ART. 4 (1996).

[19] *Id*.

[20] ARB. HK P GUIDE 8.18 § 8-81, 82 ("In heavy document cases, this is particularly useful because the secretary can provide considerable assistance with regard to the collation of the documents and save the time of the tribunal in finding documents at any stage of the proceedings… In recent times where cases are prepared with a high technological content, the secretary usually has better IT skills than the tribunal and this again provides useful assistance to the tribunal.").

[21] THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE (5th ed. 2009).

[22] *See* Eelco Meerdink, *Supreme Court Rules Arbitral Tribunal Not Required to Disclose Hearing Notes*, 15 NO. 1 IBA ARB. NEWS 131 *reviewing*, Knowsley SK Ltd. v. AGJ Van Wassenaer van Catwijck, Amsterdam Court of Appeal (Dec. 2 2008), LJN BG9050, case no 200.010.430/01 SKG, NJF 2009, 39.

> In addition to party autonomy, another policy argument can be raised against the disclosure of the informal notes of the tribunal's secretary, namely the imprecise and potentially inaccurate nature of the notes. Contrary to a formal report prepared by the arbitrators**,** informal notes taken by a secretary do not necessarily reflect an accurate and complete account of the hearing. Indeed, such notes may very well contain a biased description or an incomplete account of the debate because they were not prepared for the purpose of providing a faithful report. If (informal) notes of a tribunal's secretary had to be disclosed upon the request of a party, arbitrators would have to make sure that these notes contain a correct account of the hearing (and nothing more).[23]

In cases where arbitrators did not take notes, or their notes are lacking, they can rely on the notes of tribunal secretaries in a limited capacity to fill gaps; consequently, this practice promotes the accuracy of arbitral awards.

Lastly, whether or not the secretary herself drafts the arbitral award, both the secretary's personal notes and the award become a record compiled primarily by institutions for their personal record keeping:

> Irrespective of the issue of party autonomy, the issue arises whether the preparation of a transcript or minutes--and their communication to the parties--should be encouraged. We think it should. At a minimum, a basic report giving a factual account of the main substantive arguments and procedural discussions and decisions should be made for each arbitration hearing. [24]

Therefore, allowing a secretary access to relevant documents and keep records promotes time and cost efficiency and allows Institutions to keep detailed business records.

3. Expediting Deliberations

Some arbitral institutions outline the time frame for arbitrations in their governing standards or rules.[25] This is one way the arbitral community maintains the speed of its adjudication. Deliberations, however, with or without this constraint can take long periods of time meanwhile businesses stall operation in expectancy of the award. Similar to the role of easing the compilation of a record collected during proceedings, secretaries may also aid the deliberation phase of arbitration through drafting the award. Oftentimes, this also saves the parties money because the hourly rate of a tribunal secretary is lower than the arbitrator. [26]

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[23] *Id.*

[24] *See* Eelco Meerdink, *Supreme Court Rules Arbitral Tribunal Not Required to Disclose Hearing Notes*, 15 NO. 1 IBA ARB. NEWS 131 *reviewing*, Knowsley SK Ltd. v. AGJ Van Wassenaer van Catwijck, Amsterdam Court of Appeal (Dec. 2 2008), LJN BG9050, case no 200.010.430/01 SKG, NJF 2009, 39.

[25] *See generally* ICC NOTE, ART. 24 ("The time limit within which the Arbitral Tribunal must render its final Award is six months. Such time limit shall start to run from the date of the last signature by the Arbitral Tribunal or of the parties of the Terms of Reference, or, in the case of application of Article 18(3), the date of the notification to the Arbitral Tribunal by the Secretariat of the approval of the Terms of Reference by the Court.").

[26] Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/.

4. Issue with Duplicity

While the scope of the secretary authority is the forefront of critic concerns, critics also maintain that requiring or authorizing secretaries in arbitral proceedings does not always keep costs lower. In fact, one critic at the recent GAR conference stated he believed secretaries were duplicitous and just cost clients more money when parties request secretarial services: many arbitrators have what he called "back-up" in their office or chambers that deal with the administrative elements of the proceedings.[27] Therefore, when parties acquiesce to secretary involvement, they are paying for the same services arbitrators are already using but less formally. Further, the Secretary-General in ICSID arbitrations often will assign a secretary to arbitral proceedings[28]; additionally, often tribunals will add secretaries to assist them directly.[29]

B. Appointment and Procedure

Cinematically, it is not until after the secretary is hired that the wife wishes she had taken part in the hiring process. While no overarching policy guides the appointment of tribunal secretaries, and its subsequent procedure, many commentators believe consent[30] to be the cornerstone for use in the future; a premise, wary wives would adamantly support.

1. Institutional Rules

Institutions run the gambit of restricting secretary use to a more laissez faire method. This section summarizes the major Arbitral Institution's regulations on tribunal secretaries in current use.

a. AAA

Current American Arbitration Association Commercial Arbitration Rules are silent on tribunal secretaries. Instead, the only direction this Institution provides comes from the Code of Ethics for Arbitrators in Commercial Disputes: Canon V and Canon VI.[31] Appointment is left to the discretion of arbitrators, subject to informing parties but not requiring consent[32]; still, the requirement to inform the parties remains unenforceable without a definition of who qualifies as a

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[27] Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/.

[28] *See* ICSID ADMINISTRATIVE AND FINANCIAL REGULATIONS, REG. 25 (2005), available at http://www.worldbank.org/icsid/basicdoc/partC-chap05.htm#r25; *see also*, Antonio R. Parra, *The Role of the ICSID Secretariat in the Administration of Arbitration Proceedings under the ICSID Convention*, 13 FOREIGN INVESTMENT L.J. 85 (1998).

[29] *Id*.

[30] *See* Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 576 (2006).

[31] AAA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, CANONS V, VI (2004), available at http://www.adr.org/sp.asp?32124.

[32] AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI § B (2004), available at http://www.adr.org/sp.asp?32124.

"secretary". Canon IV suggests that any help in connection with reaching a decision could arguably be considered the "secretary" definition:

> The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.[33]

The Code of Ethics, however, lacks any other information defining "secretary" which lends itself to creating a loophole to disclosure. Because "back-up" falling within Canon IV, Section B is bound to the same "oath" of "Canon VI: An Arbitrator Should Be Faithful To The Relationship Of Trust And Confidentiality Inherent In That Office"[34] any loopholes could cause serious distrust in the confidentiality of disclosed information. Similarly, Canon V, Sections B and C, "An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision…An arbitrator should not delegate the duty to decide to any other person" [35]seem to contradict Canon VI[36] and result in lack of enforcement or effectiveness.

b. United Nations Commission on International Trade Law

The United Nations Commission on the International Trade Law published its current, nonbinding guides to secretary roles in its 1996 Notes on Organizing Arbitral Proceedings ("UNICTRAL Notes")[37]:

> Finalized by UNCITRAL in 1996, the Notes are designed to assist arbitration practitioners by providing an annotated list of matters on which an arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings, including deciding on a set of arbitration rules, the language and place of an arbitration and questions relating to confidentiality, as well as other matters such as conduct of hearings and the taking of evidence and possible requirements for the filing or delivering of an award. The text may be used in both ad hoc and institutional arbitrations.[38]

Section 4 (Articles 24-27)[39] addressing "administrative services that may be needed for the arbitral tribunal to carry out its functions" lays out four guiding provisions for assistance. Essentially, it attempts to establish the limited role as purely organizational – but it's not that

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[33] *Id*.
[34] AAA, *supra* note 32, Canon VI.
[35] AA, *supra* note 32, Canon V §§ (B), (C).
[36] AAA, *supra* note 32, Canons V, VI.
[37] UNICTRAL Notes (1996), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1996Notes_proceedings.html.
[38] *Id*.
[39] *Id*.

simple.[40] The UNICTRAL Note's lack of definitions lends to a more controversial usage, termed "professional assistance", meaning legal research.[41] Critics worry by controlling the secondary knowledge of the arbitrator, the secretary can effectively sway the award with principal driven agenda. Those favoring the professional assistance approach argue this knit picking is highly unnecessary and slows down the progress of adapting arbitration practices to changing global needs.[42] In other forms of adjudication this process is a cornerstone of legal practice: judicial clerks and staff supplying judges with case decisions, briefs, and memorandums.[43] Beyond actually finding these resources, secretaries often summarize materials. Like Canon VI's broadening of Canon V in the AAA Code of Ethics, Section 17, Articles 82 and 83 broaden the provisions under Section 4: Article 82 allows arbitrators to appoint a secretary to prepare the record of hearings without party consent[44] and Article 83 expands to transcripts taken of hearing recordings.[45] Proponents argue the experience young lawyers gain from fulfilling the role of arbitral secretary, comparable to a judicial clerk, is necessary to developing the arbitrational skills of future generations. [46]

c. ICSID's Regulation 25

The Secretary-General appoints the secretary in ICSID arbitrations, who, then, must adhere to these guidelines laid out in Regulation 25 of the ICSID Administrative and Financial Regulations:

> (a) represent the Secretary-General and may perform all functions assigned to the [Secretary-General] by these Regulations or the Rules with regard to individual proceedings or assigned to the [Secretary-General] by the Convention, and delegated by him to the Secretary;
> (b) be the channel through which the parties may request particular services from the Centre;
> (c) keep summary minutes of hearings, unless the parties agree with the Commission, Tribunal or Committee on another manner of keeping the record of the hearings; and

[40] Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 579 (2006).

[41] *See* Partasides *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration* (2002) 18(2) ARB. INT'L 147, 149 (asserts that the secretary's function vary from purely administrative to decision-making depending on the arbitrator); *see also*, UNCITRAL Notes on Organizing Arbitral Proceedings ¶ 26-17 (1996), available at http://www.uncitral.org/pdf/English/texts/arbitration/arb-notes/arb-notes-e.pdf.

[42] *See* C.H. Schreuer, THE ICSID CONVENTION: A COMMENTARY (2001) (asserts secretaries are usually legal staff).

[43] THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE (5th ed. 2009).

[44] AAA Rules, Art. 82.

[45] AAA Rules, Art. 83.

[46] C.H. Schreuer, THE ICSID CONVENTION: A COMMENTARY 1210 n. 18 (Cambridge UP, 2001) (tribunal secretaries are usually part of legal staff).

(d) perform other functions with respect to the proceedings at the request of the President of the Commission, Tribunals or Committee, or at the direction of the Secretary-General.[47]

At first glance, this Regulation intends to address several ambiguities in the role of the secretary. It lists the duties, how a secretary is appointed, who appoints, and her approachability with parties. Part (d) still remains troubling: "other functions" and "respect to the proceedings" erase the formal enumerated role of the secretary and once again opens the function to interpretation where the end justifies the means.

II. CURRENT LEGISLATION ATTEMPTING TO REGULATE LOOPHOLES AND AMBIGUITIES

A. ICC Court of Arbitration

1. Past Loose Guidelines

Though the ICC's Rules of Arbitration lack direction on tribunal secretaries, in 1995, their appointment became subject to the Note from the Secretariat of the ICC Court Concerning the Appointment of Administrative Secretaries by Arbitral Tribunals (hereafter the "Note"):

> The ICC provides this Note to parties and arbitrators at the outset of arbitral proceedings. The Note states that the tribunal may appoint a secretary, but only upon the consent of all parties, and only after informing the parties of the secretary's identity and the duties he or she will perform.[48]

Further, the Note limits those duties to administrative tasks in order to avoid any influence on the deliberation. The Notes critics argue it challenges party autonomy by allowing the arbitrator this outside power and through limiting the role of the secretary, which they believe should be left to the parties to decide.[49]

One major flaw in the ICC's attempt to regulate arbitral secretaries is the Note only outlines specific instances where the secretary cannot act[50]; yet, stating prohibitions and limitations rather than defining power and role perpetuate the current ambiguities. The limitations themselves contain vague language including "decision-making process"[51], inviting interpretation

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[47] *See* ICSID Administrative and Financial Regulations, Reg. 25 (2005), available at http://www.worldbank.org/icsid/basicdoc/partC-chap05.htm#r25; *see also*, Antonio R. Parra, *The Role of the ICSID Secretariat in the Administration of Arbitration Proceedings under the ICSID Convention*, 13 FOREIGN INVESTMENT L.J. 85 (1998).

[48] Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 577 (2006).

[49] *Id*.

[50] *Id*.

[51] ICC NOTE.

of what actions occur before the decision-making process begins, which overlap, and does that mean the secretaries duties are at an end or can it overlap without being involved in the opinion aspect of the process?

It is clear, however, that the ICC recognized the need for some regulation to guide future arbitrations. Their first attempt, while ultimately failing to address the continuing concerns of the ADR community, shows that these issues are not on the backburner but don't have a ready solution without more regulation: critics believe the ICC is taking away party autonomy.[52] Currently, the ICC is devising an actual set of guidelines concerning secretaries.[53]

2. Devising New Guidelines

In 2012, the ICC printed a revamped set of rules, taking effect January 1st. While the rumored new guidelines containing suggested clauses for tribunal secretaries has yet to be published the new rules included this provision in Article 15, Section 1:

> The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.[54]

The composition of the court changes slightly from "tribunal secretary" to a Secretariat, an ICC employee whom the Secretary-General appoints case-by-case. Article 2, Sections 2-5 outlines the standards for procedure:

> 2. The Court shall not appoint Vice-Chairmen or members of the Court as arbitrators. They may, however, be proposed for such duties by one or more of the parties, or, pursuant to any other procedure agreed upon by the parties, subject to confirmation.
> 3. When the Chairman, a Vice-Chairman or a member of the Court or of the Secretariat is involved in any capacity whatsoever in proceedings pending before the Court, such person must inform the Secretary General of the Court upon becoming aware of such involvement.
> 4. Such person must refrain from participating in the discussions or in the decisions of the Court concerning the proceedings and must be absent from the courtroom whenever the matter is considered.
> 5. Such person will not receive any material documentation or information pertaining to such proceedings.[55]

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[52] *See* Pierre Lalive, *Un Post-Scriptum et Quelques Citations*, ASA Bull. 1, 35-43 (1996).

[53] Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL Arbitration REVIEW, 21 Dec 2011, available at www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary; *see also*, Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB. INT'L 147, 152 (2002).

[54] ICC RULES, ART. 15(1) (2012).

[55] ICC RULES, ART. 2 (2012).

III. WHERE SUSPICIONS ARISE AND INEVITABLY SUCCUMB TO THE TYRANNICAL INTERPRETATION OF LAWYERS

A. In One Corner - Confidentiality

Confidentiality, the ability for parties not to air their dirty laundry, is another fundamental principal in arbitration. One of the few countries to implement new laws regulating confidentially, Peru's statue stipulates:

> Unless otherwise agreed, all participants in the arbitration (arbitrators, secretaries, arbitration institution, witnesses, experts, the party representatives and legal counsel) are to keep the arbitration proceedings and the award confidential…That said, the confidential nature of the notes taken by the secretary does not necessarily follow from the confidentiality of deliberations in chambers.[56]

While certain players are necessary to the process, the tribunal secretary might not qualify. In fact, arbitrators cannot disclose any part or the arbitration. If secretaries are used, does the confidentiality protection vanish? What if the role of the secretary is to keep a record of the proceedings or attend and transcribe deliberations? These questions push for more limited access for secretaries in order to preserve confidentiality. Still, which is more desirable, limiting access or allowing someone who was "never in the room" to have such a fundamental impact on the outcome?

B. In the Other Corner – Party Autonomy and the Level of Direct Communication with Arbitrators

1. Husband's Hiring Secretaries without Wives' Input: Arbitrators Preempting Party Autonomy

Parties have the right to select at least one arbitrator[57], given certain guidelines. This right to select arbitrators, however, is directly undermined when those arbitrators either do not disclose their employment of "back-ups"[58] or even under transparency the arbitrators or regulating institution chooses the secretaries[59]. Given the unstable and unbound nature of secretaries' involvement in the final awards, this calls into question the true freedom of whose opinion guides

[56] Legislative Decree No. 1071 (published in El Peruano, the official gazette, June 28, 2008).

[57] THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE (5th ed. 2009).

[58] Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/.

[59] ICSID NOTE.

the procedures.[60] Party autonomy is at odds with any attempt to regulate secretary usage without consent of the parties or their overriding authority.[61]

2. Secretary "Miscellaneous Services" Raises Brows

Duplicity or uninformed appointment occurs regularly in arbitral proceedings[62], acting as the default where formal rules allow or are silent. Current efforts attempt to move away from the current default and secret nature of using or appointing secretaries to having all peoples involved in the arbitral proceedings assume a secretary will be used.[63] Parties then have the option of addressing the use and terms of the secretary involvement at the front-tend of the proceedings. Then, the unnecessary costs become more prominent when using a secretary hinges on the explanation of her necessity.

C. Drafting the Office Boundaries

1. Delegations

Normally, arbitral duties should not be delegated.[64] In the Note from the Secretariat of the ICC Court Concerning Appointment of Administrative Secretaries by Arbitral Tribunals, which provides that the work of any secretary (somewhat analogous to the clerk of an American judge) "must be strictly limited to administrative tasks" and that the secretary "must not influence in any manner whatsoever the decisions of the Arbitral Tribunal." [65]

2. "4th Arbitrator" Perception

The crux of the controversy surrounding the secretary rests on how much influence the position wields. Often deemed the "4th Arbitrator"[66], many worry through compiling resources, handling sole documentation of proceedings, and sometimes drafting the award, the power the

[60] Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 578 (2006).

[61] *See* Pierre Lalive, *Un Post-Scriptum et Quelques Citations*, ASA Bull. 1, 35-43 (1996).

[62] Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/.

[63] *See* National Code of Civil and Commercial Procedure Law, Art. 749, Book IV (1981).

[64] *See* AAA/ABA CODE OF ETHICS, SUPRA NOTE 16, CANON V(C).

[65] ICC INT'L CT. ARB. BULL. AT 77, 78 (Nov. 1995).

[66] *See* Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB. INT'L 147, 152 (2002).

secretary holds includes the ability to decide the award herself because her notes are not always subject to disclosure.[67]

a. Mechanistic v. Substantive Reasoning

The mechanistic role of the tribunal secretary ideal encompasses the same administrative roles akin to the traditional secretary: filing, scheduling, documenting[68]. But it never is that simple. Even drawing the distinction between mechanistic and substantive reasoning[69] is blurred. For instance, if the secretary is documenting the minutes or record of the proceedings unmonitored, or perhaps untrained in a court reporter capacity, how hidden is her opinion, her agenda, her perceptions of the parties? While it is not impossible to provide impartial documentation, these reports are not subject to authoritative review for veracity.[70] Even unintentional opinions could flood the documents arbitrators will review before giving the award. One arbitrator in attendance at the GAR conference, commented that the facts and arguments that surface during proceedings are indispensible to identifying the reasoning behind an award[71]. If the record truly is this imperative to the outcome, these common, and often background, practices warrant structure and guidance.

Even more poignant is the practice of allowing secretaries to draft the arbitral awards. One arbitrator who admitted to regularly endorsing awards written by secretaries defends the practice as "reflecting a conversation"[72] rather than an invitation for secretaries to give opinion:

> In CIETAC practice, where there are three arbitrators, the presiding arbitrator will take a principal role in driving the issues through the hearing. During or following the hearing, he or she will preside over an internal meeting among the arbitrators and will discuss the open issues involved. Where the arbitrators can reach an opinion, such opinion will be noted by the secretary in charge of the case who attends the hearing and the arbitrator's meeting throughout the process. In most cases, the presiding arbitrator is under a general duty to prepare the draft Award recording the opinion of the case, with the assistance of the handling secretary of CIETAC secretariat.[73]

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[67] *Knowsley SK Ltd v. AGJ Van Wassenaer van Catwijck*, Amsterdam Court of Appeal (Dec. 2 2008), LJN BG9050, case no 200.010.430/01 SKG, NJF 2009, 39 (Nor. Courts ruled that the tribunal secretary's notes are protected, if parties have not otherwise stipulated. In cases where Arbitrators do not publish reasons for the award or take discoverable notes themselves, it is reasonable to wonder how heavily Arbitrators relied on this potentially opinion heavy secretary notes.).

[68] *See* ICC NOTE ¶ 3.

[69] *See* Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB. INT'L 147, 149 (2002) (secretarial duties range from administrative to decision making).

[70] *Id*.

[71] Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/.

[72] Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/.

[73] Jerry Yulin Zheng, ARB. CHN P GUIDE 11(5)(d), 11-102 (2004).

His position was one of transparency that secretaries are used throughout the proceedings and deliberations with no extra charge to the parties. He views the role of arbitral secretaries as a trade usage, necessary to maintain the current efficiency of arbitral proceedings. [74]

The general benefits of secretary involvement in the substantive reasoning portion of arbitration proceedings go beyond diminishing costs and time and can include well-crafted awards with little jeopardy of challenge. Secretaries can spend more time on researching and drafting than arbitrators for the same fee to parties.[75] Also, rhetorical skills should be a determining factor in appointing secretaries. This skill could prove indispensible if compared to dismal, ambiguous, or incorrectly drafted awards produced by arbitrators.

D. Payment: It's More Than Petty Cash

The final issue strays from the normal controversial issue path of proceedings and highlights the clear lack of guidance concerning the practice of using secretaries: who pays for this?[76]

1. Lower Rate Than Arbitrators

The popular conception is that the billing rate for arbitrators is vastly higher than the hourly rate of secretaries who are qualified to do the more nominal tasks.[77] Under this theory, even when the parties are not aware a secretary is involved, billing for secretary services is appropriate because it saves the parties money:

> Many arbitrators find it useful to appoint a secretary to the tribunal who will carry out administrative functions on behalf of the tribunal and render assistance to the tribunal before, during and after the hearing. In heavy document cases, this is particularly useful because the secretary can provide considerable assistance with regard to the collation of the documents and save the time of the tribunal in finding documents at any stage of the proceedings. Time spent by the secretary will be at a lower charging rate than that of the tribunal.[78]

2. Ad Hoc v. Institutions

The distinction between ad hoc and institutional run proceedings also affects who pays the secretaries. However, there is no common billing procedure among institutions: some keep

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[74] Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/.

[75] *Id.*

[76] *See generally* Matthew Gearing, ARB CHN P GUIDE 9(11)(B), 9-71(2003); *see also* Neil Kaplan, ARB. CHN P GUIDE 8(18), 8-84 (2003) *citing* ICC International Court of Arbitration Bulletin, Vol. 6(2) (note from the secretariat of the ICC Court concerning the appointment of administrative secretaries by arbitral tribunals).

[77] Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/.

[78] Neil Kaplan and Andrew Aglion, ARB. CHN P GUIDE 8(18), 8-81 (2003).

secretaries on their payroll as part of their service[79]; others appoint outside secretaries or allow arbitrators to appoint outside secretaries[80], and parties are often billed for any services rendered. Ad Hoc Arbitrations often lend themselves to more negotiated secretary fees because payment procedures are not wrapped up in Institution Standards.[81]

3. Inequality of Bargaining Power

Secretaries can create bias through more than simply drafting awards or recording proceedings with their opinions. When arbitrators are given the discretion to appoint their own secretaries, which is usually the case, they sometimes hire within their own firms or organizations.[82] In instances where the arbitrator who appoints the secretary was a party-chosen arbitrator[83] the equality of proceedings shift significantly. Still, some situations create inequality for both parties by allowing the arbitrators to empirically add costs from unbargained fee or wage amounts without consent[84] or even disclosure.

IV. THE ANSWER KEY TO THE FOLLY OF AMBIGUITIES: RECOMMENDATIONS

While it is undisputed arbitral institutions are attempting to address the problems apparent the arbitral secretary relationship, the attempts thus far are failing because of the hesitancy to regulate this practice. In order to maintain their competitive appeal, new regulations or provisions set either vague limitations or include a savings-clause to protect their appeal. Basically, no one wants to look like the jealous wife. In order to actually fix the issues, broad regulations are unacceptable. Instead, the following is a list of proposed regulations and guidelines to achieve the most optimal balance of party autonomy and fixed, predictable treatment of arbitral secretaries:

A. Statistics

One possible cause of creating the multitude of positions regarding secretaries lies in the undocumented statistics. Most institutions do not keep statistics on the appointment of secretaries, if party consent was given, who appointed the secretary, how the secretary was paid, if the award challenged, etc.[85] Without clear proof favoring any one opinion of how the secretary should function, the debate will not likely die after guidelines are implemented. Before Institutions do implement regulations, data needs to be gathered from on going arbitrations.

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[79] *See* ICSID RULES.

[80] *See* ICC RULES, ART. 11(1).

[81] *See* Emilia Onyema, *The Role of the International Arbitral Tribunal Secretary*, 9 VILANOVA J. INT'L COM. L. & ARB. 99, 101-102 (2005).

[82] Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/.

[83] THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE (5th ed. 2009).

[84] UNCITRAL NOTE.

[85] Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 578-79 (2006).

B. Selection: Let the Wife Run the Hiring Process

Similar to the procedure of choosing arbitrators, the selection of the secretary or secretaries should mirror party preferences and bargains. If only one secretary is needed, the rules governing arbitrator neutrality also apply. Arbitrators should retain the right to recommend secretaries with full disclosure of their relationship to better enable parties to make an informed decision.

C. Appointment and Scope of Duties

Secretaries should not be the default assumption in arbitral proceedings. Instead, arbitrators must (1) notify all parties of the need/desire for secretarial aid, (2) allow for party designation of the secretaries, (3) have party consent before any appointment, (4) notify parties of costs, and (5) allow parties to dictate the level of involvement. This last provision, (5), eliminates the differing interpretations of what is clerical and what is analytical: parties establish a case-by-case designation of secretarial power. Commentators are divided on whether any actions beyond administrative actions are appropriate[86] but under the scope of party autonomy this argument vanishes. If leaving this decision to the parties seems an error or misguided given party lack of concern or experience perhaps institutes should produce generic templates, similar to the current practice of arbitral clauses, as a basis subject to mutual party modification[87].

V. WIFE V. SECRETARY

A. Conclusion Immersed in Suspicious Minds

Ultimately, until the arbitration community produces a strong consensus on the tribunal secretary's defined role, full disclosure and cantor should guide current proceedings. When friends and family solicit cautions and warnings not to trust her husband's secretary (Jean Harlow) in Wife v. Secretary, Linda (Myrna Loy) challenges the unconditional trust of her marriage to Van (Clark Gable)[88]. Similarly, no matter how tight an Institution might think it's guidelines to the scope of tribunal secretaries or how much contracting parties believe it rests on party autonomy, once trust is called into question it is hard to mend. This mistrust of arbitration proceedings could have a detrimental affect on this form of dispute resolution. Consequently, arbitrators should learn from Gable's mistake and always be forthright with the use and role of their secretaries in order to maintain the sanctity of arbitration.

[86] Third Biennial Colloquium on Arbitration and ADR organized by the Centre for Legal Studies in Salzburg (June 2004).

[87] THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE (5th ed. 2009).

[88] WIFE V. SECRETARY (Metro-Goldwyn-Mayer 1936).

UNITED STATES SUPPORTS IRANIAN ARBITRATION OVER PUBLIC POLICY AGAINST TRANSACTING WITH IRAN

Megan Hill*

I. INTRODUCTION

Cubic's dispute with Iran goes back to 1977, when it entered into a contract to sell and service an Air Combat Maneuvering Range for use by the Iranian Air Force. Like other military items, however, the system went undelivered after the Iranian revolution of 1979.[1] The ICC awarded compensation to the Ministry of Iran. The Ministry subsequently filed a motion for prejudgment interest covering the period between the ICC's final award and the district court's confirmation.[2] The district court held that the ICC's arbitral award was valid but denied the motion for attorneys fees and prejudgment interest.[3] The United States has a strong public policy toward the confirmation of foreign arbitration awards that outweighs current restrictive trade policies with Iran. Also, prejudgment interest and legal fees are available in an arbitration confirmation award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[4]

II. FACTUAL BACKGROUND

A. Contractual History

On October 23, 1977, Cubic International Sales Corporation, predecessor in interest to appellant Cubic Defense Systems, Inc. ("Cubic"), a United States corporation, contracted with the Ministry of War of the government of Iran, predecessor of appellees Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("Ministry"), for sale and service of an air combat maneuvering range for use by Iran's military.[5] The Contracts provided for progress payments upon completion of specified portions of work, pursuant to which Iran paid Cubic $12,608,519 under the Sales Contract and $302,857 under the Service Contract as of October 4, 1978.[6]

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[1] Kenneth Ofgang, *Ninth Circuit Upholds Arbitration Award in Favor of Iran*, METROPOLIAN NEWS-ENTERPRISE (Dec. 16, 2011), http://www.metnews.com/articles/2011/iran121611.htm.

[2] Ministry of Def. & Support v. Cubic Def. Sys., 29 F.Supp.2d 1168, 1172 (S.D. Cal. 1998).

[3] Ministry of Def. & Support v. Cubic Def. Sys., 2011 U.S. App. LEXIS 24839 at *5 (9th Cir. Cal. Dec. 15, 2011).

[4] Steve Cox, *Ministry of Defense of Iran v. Cubic Defense*, WILLIAMETTE UNIVERSITY COLLEGE OF LAW (Dec. 15, 2011), http://willamettelawonline.com/2011/12/ministry-of-defense-of-iran-v-cubic-defense/.

[5] Ministry of Def. & Support v. Cubic Def. Sys., 2011 U.S. App. LEXIS 24839 at *3 (9th Cir. Cal. Dec. 15, 2011).

[6] Ministry of Def. & Support v. Cubic Def. Sys., 29 F.Supp.2d 1168, 1171 (S.D. Cal. 1998).

In 1978 and early 1979, political unrest and revolution developed in Iran, resulting in the Shah's departure from Iran and the return from exile of Ayatollah Ruhollah Khomeini.[7] The former Shah of Iran, Mohammed Reza Pahlavi, ruled the Imperial Republic of Iran form 1953, when he assumed control of the government, until shortly before his death in 1979.[8] Unrest developed and intensified in Iran during the Shah's rule and the Shah appointed the Prime Minister to head a regency council and left the country.[9] Meanwhile, exiled religious leader Ayatollah Ruhollah Khomeini returned and brought about the collapse of the Prime Minister's regime. The Ayatollah was then vested with the final authority to rule and established the Islamic Republic of Iran.[10] The Iranian Revolution resulted in the nonperformance of the contracts.[11]

Ministry alleged that Cubic breached both Contracts by removing its service specialists from Iran and by failing to deliver the military system and equipment.[12] Cubic alleged that in February and March of 1979, Cubic sent Ministry notices of completion of Milestone 3 of the Sales Contract and demanded payment of $5,403,651. According to Cubic, Ministry did not respond to these notices, accept delivery, or make payment. Ministry then claimed that after the Iranian Revolution in 1979, Cubic sold the goods to a third party, retained the sale proceeds, and failed to notify Ministry of the possibility of resale on August 3, 1979.[13] Consequently, the parties agreed in 1979 that the contracts would be discontinued and that Cubic would try to resell the equipment, with a later settlement of the accounts and in 1981, Cubic sold a modified version of the equipment to Canada.[14]

In 1982, the Ministry filed breach of contract claims against Cubic with the Iran-United States Claims Tribunal at the Hague.[15] In 1987, the tribunal issued an order stating that it lacked jurisdiction to hear the matter.[16] Pursuant to the Sales and Service Contracts, in 1991, the Ministry filed a request for arbitration before the International Court of Arbitration of the International Chamber of Commerce (ICC).[17] Article 15 of the Sales Contract and Article 18 of the Service Contract both state that "[a]ny controversy, dispute or claim arising out of or relating to [these contracts] or breach thereof shall be settled by arbitration in the City of Zurich, Switzerland, in accordance with the laws of the Government of Iran in effect as of the date of [these contracts]."[18]

Ministry and Cubic appointed their respective Arbitrators in 1992, and the ICC appointed a Panel Chair on May 6, 1993. On July 14, 1993 the Parties attended a pre-hearing conference at which the Terms of Reference for the Arbitration were decided.[19] The ICC ordered bifurcation of the dispute, deferring the issue of quantification of the claim and counterclaim. A hearing was then held on all issues except for the quantification pursuant to the ICC's previous Order.[20] In

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[7] *Id.*

[8] Minister of Defense of Islamic Republic v. Gould, Inc., 887 F.2d 1357 (9th Cir. Cal. 1989).

[9] *Id.*

[10] *Id.*

[11] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *4.

[12] Ministry of Def. & Support, 29 F.Supp.2d at 1171.

[13] *Id.*

[14] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *4.

[15] Ministry of Def. & Support, 29 F.Supp.2d at 1171.

[16] *See* Ministry of Nat'l Def. of the Islamic Republic of Iran v. Gov't of the United States, 14 Iran-U.S. Cl. Trib. Rep. 276, 1987 WL 503814 (1987).

[17] Ministry of Def. & Support, 29 F.Supp.2d at 1171.

[18] *Id.*

[19] *Id.*

[20] *Id.*

1995, the ICC Tribunal issued an Order finding that the Ministry's claim for reimbursement and Cubic's counterclaim were not time-barred by the Iranian statute of limitations and that the bifurcation of the proceedings was no longer applicable.[21] The ICC made a final award in May 1997. The final award makes a net award of $2,808,519 plus pre-award interest in favor of the Ministry. The ICC also directed Cubic to reimburse the Ministry $60,000 for arbitration costs.[22] The ruling was issued by the Panel Chair, with dissents from both Arbitrators. One Arbitrator dissents on the ground that Ministry is entitled to more relief than awarded and the other Arbitrator dissents in judgment finding for Cubic.[23]

In June 1998, after Cubic failed to pay, the Ministry filed a petition in federal district court to confirm the ICC's award under the New York Convention.[24] The district court issued an order granting the Ministry's petition. The Ministry subsequently filed a motion for prejudgment interest covering the period between the ICC's final award and the district court's confirmation. The motion also requested attorney's fees based on Cubic's alleged failure to comply with the ICC's decision.[25] The district court denied the motion, concluding that prejudgment interest and attorney's fees were unavailable in an action to confirm a foreign arbitration award under the Convention.[26]

The district court entered judgment in August 1999. Cubic appealed confirmation of the award and the Ministry cross appealed denial of prejudgment interest and attorney's fees.[27]

B. Background on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings.[28] The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.[29]

The United States became a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") in 1970, and Congress soon after enacted legislation implementing the provisions of the Convention into domestic law, codified as

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[21] *Id.*

[22] *Id.* at 1172.

[23] *Id.*

[24] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *4 (citing 9 U.S.C. s 207).

[25] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *5.

[26] *Id.*

[27] *Id.* at *5-6.

[28] *1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention*, UNCITRAL, http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html (last updated 2012).

[29] *Id.*

Chapter II of the Federal Arbitration Act ("FAA"), Pub.L. 91-368, 84 Stat. 692 (1970).[30] A district court's "review of a foreign arbitration award is quite circumscribed."[31] There is a general pro-enforcement bias under the Convention.[32]

The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.[33] The grounds for refusing to recognize or enforce an arbitral award include:

> (a) The parties to the agreement…were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings ro was otherwise unable to present [his or her] case; or
> (c) The award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part the award which contain decision on matter submitted to arbitration may be recognized and enforced.[34]

III. PROCEDURAL HISTORY

A. Cubic's Argument in District Court

1. Article V(1) (c)

On June 25, 1998, the Ministry filed its petition for an order confirming the ICC's award. Cubic cross-motioned for an order vacating the award on October 9, 1998.[35] The district court considered their decision pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards. Considering its early precedent in the case, *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, the court determined that it shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.[36] Section 10 of the FAA and case law addressing domestic arbitration set forth grounds upon which a court may refuse to confirm an

[30] *Codified* at 9 U.S.C. §§ 201-208.

[31] Ministry of Def. & Support, 29 F.Supp.2d at 1172 (citing Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764, 770 (9th Cir. 1992)).

[32] *Id.*

[33] Ministry of Defense, 969 F.2d at 770 (citing 9 U.S.C. §207).

[34] Ministry of Def. & Support, 29 F.Supp.2d at 1172 (citing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)).

[35] Ministry of Def. & Support, 29 F.Supp.2d at 1172.

[36] Ministry of Def. & Support, 29 F.Supp.2d at 1172 (citing Ministry of Defense, 969 F.2d at 770 (citing 9 U.S.C. s 207)).

arbitration award. These grounds, however, are not applicable to confirmation under the Convention.[37]

Cubic's first argument is that the ICC award violates Article V(1) (c) of the Convention because it deals with differences not contemplated by or not falling within the terms of the submission to arbitration and it contains decisions on matters beyond the scope of the submission to arbitration.[38] In addition, Cubic alleges that the award violates Article (1) (c) because it ignores the terms of the Parties' Contracts and therefore any decision which exceeds the scope of that jurisdictional reference is improper.[39] Cubic takes issue with the following legal theories:

> (1) The conclusion that the Parties agreed in 1979 to discontinue the Contracts at least for the time being, i.e., until the results of Cubic's attempt to resell the System would be known (Award s 10.11);
> (2) The conclusion that there was an "implicit agreement for the postponement of the maturity date of any such claims until Cubic has resold the equipment or declared its inability to resell" (Procedural Order No. 6 s 1.3);
> (3) The conclusion that there was "a factual termination of the contracts at the request of Iran" (Award s 11.22); and
> (4) The finding that it can be implied from the Termination for Convenience Clause that "Cubic shall credit Iran with…products manufactured for Iran prior to the termination of the Contracts" (Award s 13.6).[40]

Cubic argues that the Tribunal decided issues not submitted by the Parties and issued a ruling based upon legal theories not contemplated and/or asserted by the Parties.[41]

Cubic also disputes the Tribunal's reference to the Principles of International Commercial Contracts and to principles of fairness, including good faith and fair dealing.[42] Cubic argues that these references violate Article V(1) (c) because the principles exceed the scope of the Terms of Reference.

2. Article V(1) (a)

Article V(1) (a) provides that a court may refuse to confirm an arbitral award if an agreement in writing, including an arbitral clause in a contract or an arbitration agreement, is not valid under the law to which the parties have subjected it.[43] Cubic argued that the four theories of the Tribunal that Cubic contests constitute oral amendments to the Contracts' arbitration clauses

[37] Ministry of Def. & Support, 29 F.Supp.2d at 1172.
[38] *Id.* at 1173.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 1174.
[43] *Id.*

and Terms of Reference and therefore violate the Convention's requirement that the agreements be in writing.

3. Article V(1) (b)

Article V(1) (b) allows a court to refuse confirmation of an arbitral award if the "party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present [his or her] case."[44] Cubic argues that it was denied a meaningful opportunity to present its case because

> (1) The Ministry shifted its factual and legal theories throughout the proceedings;
> (2) The Tribunal issued interim decisions regarding bifurcation of the proceedings; and
> (3) The legal theories and remedies articulated in the award were not previously presented.[45]

B. District Court's Opinion

1. Article V(1) (c)

The district court reasoned that the Terms of Reference allow the Arbitrators leeway in resolving the conflict that the Parties presented to them. The questions posed for the Arbitrators were presented in the following manner in the Terms of Reference:

> The issues to be determined shall be those resulting from the Parties' submissions and which are relevant to this adjudication of the Parties' respective claims and defenses. In particular, the Arbitral Tribunal may have to consider the following issues (but not necessarily all of these or only these, and not necessarily in the following order)….[46]

The Arbitrators were neither required to consider all of the disputes nor limited to the issues listed, but could consider additional issues in resolving this dispute.[47] The Court reasoned that the award is within the parameters of those twelve issues, even if the legal theories applied are different from those presented in the Parties' pleadings.[48] Therefore the use of legal theories not presented by the Parties is acceptable under the Terms of Reference.[49]

In response to Cubic's argument that the use of legal theories not presented by the Parties precludes confirmation of the award, the Court held that under the Convention, a court is to

[44] Ministry of Def. & Support, 29 F.Supp.2d at 1175.
[45] *Id.*
[46] Ministry of Def. & Support, 29 F.Supp.2d at 1173.
[47] *Id.*
[48] *Id.*
[49] Ministry of Def. & Support, 29 F.Supp.2d at 1174.

determine "whether the award exceeds the scope of the [arbitration agreement], not whether the award exceeds the scope of the parties' pleadings.[50] The subject matter of this dispute is the Service and Sales Contract between Cubic and the Ministry, which the ICC award resolves and although not based on the same legal theories as stated in the pleadings cannot be a basis for refusing to confirm it.[51]

The court determined that the reference to the Principles of International Commercial Contracts or the reference to equitable principles does not exceed the scope of the Terms of Reference.[52] That Cubic disagrees with the Tribunal's response to the applicability of international law is not a reason to find that the Tribunal addressed issues beyond the scope of the Terms of Reference.[53] This Court's discretion in reviewing a foreign arbitration award is circumscribed.[54] The principles were applied within the terms of the submission to arbitration and therefore the court ruled that the award granted by the Tribunal does not violate Article V(1) (c).[55]

2. Article V(1) (a)

The Tribunal has the task of resolving the dispute over the Contracts between the Ministry and Cubic. The district court held that the court cannot refuse to confirm the award simply because the legal theories and conclusions presented in the award differ from those contemplated by the Parties in their pleadings.[56] Legal theories used by adjudicators to resolve contract disputes are not considered oral amendments to the contract or the arbitration agreement.[57] The district court ruled that the award does not violate Article V(1) (a).

3. Article V(1) (b)

The district court determined that even if Cubic's allegations were true, Cubic's claims do not rise to the level required by Article V(1) (b) to justify a refusal to confirm the award.[58] The district court reasoned that Cubic's active participation in the entire process demonstrates notification of the proceedings.[59] In addition, Cubic was also able to present its case and therefore Cubic had its day in court and had ample opportunity to present its interpretation of the facts and its legal theories to the Tribunal.[60] The district court ruled that the award did not violate Article V(1) (b).

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[50] *Id.* at 1174 (citing Ministry of Defense, 969 F.2d at 771).
[51] Ministry of Def. & Support, 29 F.Supp.2d at 1174.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Ministry of Def. & Support, 29 F.Supp.2d at 1174.
[57] Ministry of Def. & Support, 29 F.Supp.2d at 1175.
[58] *Id.*
[59] *Id.*
[60] *Id.*

IV. COURT OF APPEALS

A. Cubic's Argument

1. Public Policy

Cubic contends that the district court erred by confirming the ICC's award because confirmation is contrary to the public policy of the United States. The Convention's public policy defense, Article V(2) (b) states:

> Recognition and enforcement of an arbitral award may…be refused if the competent authority in the country where recognition and enforcement is sought finds that…(b) The recognition or enforcement of the award would be contrary to the public policy of that country.[61]

Cubic argues that confirmation of the ICC's award is contrary to a fundamental public policy of the United States against trade and financial transactions with the Islamic Republic of Iran.[62] Cubic demonstrates this policy by referencing several sanctions the United States has imposed on Iran.[63] Cubic claims that the sanctions prohibit Cubic from paying the ICC's award unless the Treasury Department's Office of Foreign Assets Control (OFAC) issues a specific license.[64] Cubic extends the policy against payment of an award to confirmation of an award.[65] Although the sanctions do not specifically prohibit the confirmation of the award, Cubic sees them as evidence of a comprehensive United States policy against trade, investment, and economic support for Iran that makes even confirmation of the ICC's award repugnant to the public policy of the United States.[66]

Cubic cites *Bassidji v. Goe* to support its argument. In that case the court considered the scope and purpose of a set of sanctions prohibiting virtually all trade with and investment in Iran by a United States person.[67] The court suggested that any "transfer of wealth to Iran," or any "payment [that] would provide funds to the Iranian economy," would violate the "fundamental purposes," if not necessarily the letter, of the regulations.[68]

In the alternative, Cubic argues that confirmation of the ICC's award is contrary to the public policy of the United States because "affirmance of the judgment would put Cubic in the nightmare position of being subject to an apparently enforceable judgment when Cubic and any of its involved agents would commit crimes by paying or allowing payment."[69]

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[61] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *10 (citing N.Y. Convention, art. V(2)).

[62] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *11.

[63] *See* Iranian Assets Control Regulations, 31 C.F.R. pt. 535; Iranian Transactions regulations, 31 C.F.R. pt. 560; Weapons of Mass Destruction Proliferators Sanctions Regulations, 31 C.F.R. pt. 544.

[64] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *12.

[65] *Id.*

[66] *Id.*

[67] *Id.* at *13 (citing Bassidji v. Goe, 413 F.3d 928 (9th Cir. 2005)).

[68] *Id* at *14 (citing Bassidji, 413 F.3d at 935, 939).

[69] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *20.

2. ICC Award not Binding

Cubic argues that the ICC award has not become binding on the parties.[70] Under the Convention:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that…(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.[71]

3. Not a Money-Judgment

Cubic contends the district court's judgment is not a money judgment and is therefore not subject to postjudgment interest because it does not specify the dollar amount of the arbitration award.[72] Cubic argues that postjudgment interest should be tolled because Cubic has been prevented, through no fault of its own, from paying the judgment after it was confirmed by the district court.[73]

B. Court of Appeal's Opinion

1. Public Policy

The Court of Appeals recognized that there is a presumption of favoring international arbitration awards under the Convention and therefore construed the public policy defense narrowly.[74] The defense only applies when confirmation or enforcement of a foreign arbitration award "would violate the forum state's most basic notions of morality and justice."[75] The court held that the public policy in support of the recognition of foreign arbitration awards carries more weight than the regulatory restrictions governing payment of the ICC's award.[76] The United States has a strong public policy favoring the confirmation of foreign arbitration awards.[77] The goal of the Convention and the subsequent American adoption of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and awards are enforced in

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[70] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *21.

[71] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *22 (citing N.Y. Convention, art. V(1)).

[72] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *23.

[73] *Id.* at *25.

[74] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *10 (citing Parsons & Whittemore Overseas Co. v. Societe generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974)).

[75] *Id.* at *11.

[76] *Id.* at *14.

[77] Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764, 770 (9th Cir. 1992) (quoting Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 516 (2d Cir. 1975)).

signatory countries.[78] The Court of Appeals determined that in order for Cubic to prevail, Cubic must demonstrate a countervailing public policy sufficient to overcome the presumption favoring upholding foreign arbitration agreements.[79]

The Court of Appeals held that Cubic did not meet its burden. The court reasoned that the sanctions against relations with Iran do not preclude the confirmation of the ICC award.[80] The Iranian Assets Control Regulations do not prohibit payment, let alone confirmation, of the ICC award.[81] The court also reasoned that although Cubic argues that the regulations prohibit payment absent a license, there is a great difference between payment and confirmation.[82] Confirmation of the award transfers no wealth to Iran and therefore confirmation does not violate the public policy against economic support for the government of Iran.[83] Payment is subject to licensing rather than barred absolutely, and therefore the court held that confirmation should not be refused because payment is prohibited when payment may in fact be authorized by the government's issuance of a specific license.[84] The fact that the license can be issued supports the confirmation of the award.[85] The court also reasoned that the applicable regulations provide general licenses authorizing legal representation of Iran in legal proceedings in the United States relating to disputes between Iran and a United States national.[86] Although the regulations do not expressly authorize confirmation of the award in favor of Iran, the regulations show that legal proceedings to resolve disputes such as this one are, short of payment of a judgment, not in conflict with United States sanctions policy.[87] Lastly, the United States government's confirmation that the ICC's award comports with the national and foreign policy of the United States is entitled to great weight.[88] For the previous reasons the Court of Appeals held that confirmation of the ICC's award is not contrary to the public policy of the United States under Article V(2) (b) of the Convention.[89]

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[78] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at * 14(quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1974)).

[79] *Id.* at *15.

[80] The Iranian Assets Control Regulations block the transfer of certain property in which Iran has an interest. A general license, however, authorizes the transfer of property interests acquired after January 1981. *See* 31 C.F.R. § 535.579 (a). The Supreme Court has already held that Iran's interests in this case are covered by that general license. *See* Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 556 U.S. 366 (2009).

[81] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *16.

[82] *Id.*

[83] *See* Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F.Supp. 800, 820 (D.Del. 1990) ("Although Sun Oil argues that confirmation of this award would mean that U.S. dollars would end up financing Qadhafi's terrorist exploits, the Court has already pointed out tha the President is empowered to prevent any such transfer through the Libyan Sanctions Regulations.").

[84] Br. of the United States as Amicus Curiae 3-4 ("if this Court affirms the confirmation of the award, the Treasury Department can issue a license requiring Cubic to make any payment satisfying the judgment into a blocked account held in the Ministry's name by a U.S. financial institution.").

[85] *See* Belship Navigation, Inc. v. Sealift, Inc., No. 95 CIV. 2748, 1995 WL 447656, at *6 (S.D.N.Y. July 28, 1995) ("Any award that Belship might recover through arbitration would be placed in a 'blocked' interest bearing account until relations with Cuba improve to the point where the funds may be released to Belship. Allowing arbitration to proceed will hardly violate the United States' 'most basic notions of morality and justice.'").

[86] *See* 31 C.F.R. § 544.507 (a) (3) (authorizing "legal services to…persons whose…interests in property are blocked," for the "[i]nitiation and conduct of domestic U.S. jursidction").

[87] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *18, *19.

[88] *Id.* at *19.

[89] *Id.* at *20.

The Court of Appeals also addressed Cubic's alternative argument and ruled that there is no showing that the judgment is unpayable because a license can be issued.[90] If however the court confirmed an unpayable award, the affected party could seek a stay of execution of judgment.[91]

2. Binding Effect of ICC Award

The Court of Appeals holds that Cubic argument that the ICC award has not become binding on the parties is without merit.[92] An arbitration award becomes binding when "no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal)."[93] The court reasoned that Cubic does not dispute that all arbitration appeals have been exhausted in this case.[94] Thus the award has become binding and Article V(1) (e) does not apply.[95]

3. Money-Judgment

The governing statute provides that "interest shall be allowed on any money judgment in a civil case recovered in a district court."[96] The Court of Appeals adopted the Third Circuit's definition of money judgment.[97] Under this definition, a money judgment consists of two elements: "(1) an identification of the parties for and against whom judgment is being entered, and (2) a definite and certain designation of the amount which plaintiff is owed by defendant."[98] The court compared this case with *EEOC v. Gurnee Inns, Inc.* In *EEOC v. Gurnee Inns, Inc.*, 956 F.2d 146 (7th Cir. 1992), the district court ordered the defendant to pay specified sums to a number of employees, "less appropriate payroll deductions."[99] The Seventh Circuit rejected the defendant's argument that this was not a money judgment, stating: "the awards did not lose their character as sums certain simply because they were subject to the mechanical task of computing the payroll deduction.[100] In this case, the court held that although the judgment does not spell out the amount of the ICC's award, a definite and certain designation of the amount that Cubic owes the Ministry is readily discernible by looking to the arbitration award itself.[101] The Court of Appeals ruled that the judgment of the district court satisfied both elements of a money judgment.

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[90] *Id.* at *21.

[91] 30 Am. Jur. 2d Executions § 314 (2011) ("a stay of execution is proper upon a showing that an immediate enforcement of the judgment will result in unnecessary hardship to the judgment debtor.").

[92] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at * 20.

[93] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *22 (citing Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F.Supp. 948, 958 (S.D.Ohio 1981) (quoting G. Aksen, American Arbitration Accession Arrives in the Age of Aquarius: United Foreign Arbitral Awards, 3 Sw. U.L.Rev. 1, 11 (1971)).

[94] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *22.

[95] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *23 (Article V(1) (e) imposes a finality requirement rather than incorporating common law excuses for nonperformance of a contract).

[96] 28 U.S.C. § 1961(a).

[97] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *24.

[98] *Id.* (citing Penn Terra Ltd. V. Dep't of Envtl. Res., 733 F.2d 267, 275 (3d Cir. 1984).

[99] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *95.

[100] *Id.*

[101] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *25 (The district court recognized that the ICC ordered "Cubic to pay Iran $2,808,591 with simple interest of 12% annum from September 24, 1991 until May 5, 1997," and "to reimburse Iran $60,000 which was advanced by Iran" for the cost of arbitration.).

In addition to Cubic's alternative argument that Cubic has been prevented from paying the judgment, the Court reasoned that the plain language of §1961 forecloses that argument.[102] The Court of Appeals ruled that the Ministry is therefore entitled to postjudgment interest.[103]

4. Post-award/Prejudgment Interest and Attorney's fees

The Ministry argued that the district court abused its discretion by denying the Ministry's motion for post-award, prejudgment interest covering the period following the ICC's final award in May 1997.[104] The district court concluded it lacked authority to award prejudgment interest.[105] The Court of Appeals held that the district court erred.[106] First the court reasoned that "[w]hether to award prejudgment interest in cases arising under federal law has in the absence of a statutory directive been placed in the sound discretion of the district courts."[107] Secondly, the court reasoned that nothing in the federal statutes implementing the Convention, or in the Convention itself, reveals any intention on the part of Congress or the contracting states to preclude post-award, prejudgment interest.[108] The court also reasoned that nothing restricts the court's jurisdiction over collateral issues such as prejudgment interest and therefore falls within the district court's discretion.[109] Lastly, because the losing party has an incentive to withhold payment, the absence of authority to grant post-award, prejudgment interest would be a result contrary to the purposes of the Convention.[110] The Court of Appeals held that federal law allows a district court to award post-award, prejudgment interest in actions under the Convention.[111]

The Ministry also argued that the district court abused its discretion when it denied the Ministry's motion for attorney's fees based on what it contends was Cubic's willful bad faith in failing to abide by the ICC's award.[112] The district court denied the request because it concluded that it lacked jurisdiction.[113] The Court of Appeals reasoned that federal courts have authority to award attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[114] Accordingly the Court of Appeals held that federal law permits an award

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[102] 28 U.S.C. § 1961(a) ("interest shall be allowed on any money judgment in a civil case recovered in a district court").

[103] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *26.

[104] *Id.*

[105] According to the Ninth Circuit, a district court's "review of a foreign arbitration award is quite circumscribed," and, the district court has "little discretion." Ministry of Defense of the Islamic Republic of Iran v. Gould, 969 F.2d 764, 770 (9th Cir. 1992). The Convention does not provide for the award of interest by a district court, but rather only provides for the confirmation of the arbitral award. In this case, the award does provide for some pre-judgment interest, and it is that which this Court confirmed. However, Iran can point to no binding authority under which this Court would be authorized to award interest in addition to that already awarded by the ICC. Neither the Convention, Congress' implementation of that Convention under 9 U.S.C. s [s] 200-208, nor binding case law authorize[s] the award of pre-judgment interest by a district court reviewing an arbitral award under the Convention.

[106] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *27.

[107] *Id.* (citing Waterside Ocean Navigation, 737 F.2d at 153).

[108] *Id.* (citing Waterside Ocean Navigation, 737 F.2d at 154 ("[T]he Convention is silent on the question of pre-judgment interest.")).

[109] Ministry of Def. & Support, 2011 U.S. App. LEXIS 24839 at *29.

[110] *Id.* (citing Nat'l Oil Corp., 733 F.Supp. at 821).

[111] *Id.*

[112] *Id.* at 30.

[113] *Id.*

[114] *Id.* at *31 (citing Sheet Metal Workers' Int'l Ass'n Local Union No. 359 v. Madison Indus., Inc., 84 F.3d 1186, 1192 (9th Cir. 1996).

of attorney's fees in an action under the Convention.[115] Because the district court did not believe it had the authority, it did not address the Ministry's allegations that Cubic acted in bad faith. Therefore the case is remanded to the district court.[116]

V. IMPLICATIONS

The Court of Appeals ruling in favor of confirming the ICC's arbitral award further demonstrates the strong public policy in favor of arbitration. Public policy is one of seven defenses to the confirmation of an arbitration award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention."[117] In this case, with support from the United States government's amicus brief, the Court of Appeals for the Ninth Circuit determined that the public policy in favor of confirming international arbitral awards outweighs the public policy against transacting with Iran.

The Court's ruling also enforces the goals and purpose of the Convention. Chapter 2 of Title 9 of the United States Code contains the New York Convention and the enabling legislation by which it was ratified by the United States in 1970. The goal of the New York Convention is to facilitate international business transactions by promoting enforcement of arbitral agreements in contracts involving international commerce.[118] The Convention requires courts in subscribing countries to enforce arbitration awards as if the awards were made in that country, subject to limited grounds on which enforcement may be refused.[119]

Section 2 of the Federal Arbitration Act (FAA) states that agreements to arbitrate…shall be valid irrevocable, and enforcement.[120] This policy favoring agreements to arbitrate and the enforcement of arbitral awards extends to a policy favoring the enforcement of foreign arbitral awards. Since the 1979 Iranian Revolution, relations between the United States and Iran have been hostile. Since 1995, the United State has had an embargo on trade with Iran.[121] Sanctions against transacting with Iran have continued to be renewed and extended by the United States causing further tension between the two nations. However the result of this dispute and the confirmation of the arbitral award in favor of the Ministry of Iran, further exemplifies the strong public policy that outweighs even the decade's worth of sanctions placed against any economic transactions that would benefit Iran.

VI. CONCLUSION

Despite the United State's public policy against transacting with Iran, the Court of Appeals confirmed the ICC award in favor of Iran. Although public policy is one of seven defenses to the confirmation of an arbitration award under the Convention on the Recognition and

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[115] *Id.* at *32.

[116] *Id.* at *33.

[117] Kenneth Ofgang, *Ninth Circuit Upholds Arbitration Award in Favor of Iran*, METROPOLIAN NEWS-ENTERPRISE (Dec. 16, 2011), http://www.metnews.com/articles/2011/iran121611.htm.

[118] Richard R. Ryan, *Enforcement of Arbitration Agreements and Awards in Insurance Coverage Disputes*, http://www.mcandl.com/arbitration.html (last updated 1999).

[119] *Id.*

[120] 9 U.S.C. §2.

[121] *Islamic Revolution of 1979*, IRAN CHAMBER SOCIETY (Feb. 19, 2012), http://www.iranchamber.com/history/islamic_revolution/islamic_revolution.php/

Enforcement of Foreign Arbitral Awards, known as the "New York Convention," the Court of Appeals hereby furthers the goals of fostering international business by confirming international arbitration awards. Moreover, the Court of Appeal's ruling exemplifies the United State's strong policy favoring the confirmation of international arbitration awards.

THE MISAPPLICATION AND MISINTERPRETATION OF FORUM NON CONVENIENS

Mohita K. Anand*

I. INTRODUCTION

Forum non conveniens is a legal doctrine that is applied in common law judicial systems. It occurs when courts seised of a case decline to exercise jurisdiction in the belief that justice would be better served if the trial occurred in another court.[1] *Forum non conveniens* began in the United States in the nineteenth century with courts allowing discretionary dismissal when parties and the subject matter were unrelated to the forum.[2] This doctrine has developed into a two step analysis, which requires proof that an alternative forum is available and follows with a balancing of private and public interests to determine whether a trial court should exercise its discretion to stay or dismiss in favor of a foreign forum.[3] In *Monegasque de Reassurances S.A.M (Monde Re) v. Nak Naftogaz of Ukraine ("Monde Re v. Naftogaz")* and *Figueiredo Ferraz e Engenharia de Projeto Ltda v. Republic of Peru* ("*Figueiredo Ferraz v. Republic of Peru*"), however, the United States Court of Appeals misinterpreted and misapplied the doctrine of *forum non conveniens*. The Court of Appeals allowed the doctrine to be used as a defense to the enforcement of arbitral awards, thus complicating the criteria for the enforcement of future international arbitration awards.

II. DISCUSSION ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The parties as well as the Court of Appeals in both *Monde Re v. Naftogaz* and *Figueiredo Ferraz v. Republic of Peru* heavily relied upon the interpretation of Article III and Article V in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). The United States Supreme Court defined the role of the New York Convention as encouraging the recognition and enforcement of commercial arbitration agreements in international contracts as well as unifying the standards by which arbitration agreements are to be observed.[4] Thus, in an effort to fulfill that goal, Article III of the New York Convention requires the recognition and enforcement of arbitral awards in accordance with procedural rules.

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[1] Ronald A. Brand & Scott R. Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (2007).

[2] *Id*. at 37.

[3] *Id*.

[4] *In the Matter of the Arbitration Between: Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine and State of Ukraine* 311 F.3d 488, 494 (2002).

Article III of the Convention states:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.[5]

The New York Convention further expresses the reasons for denying the enforcement of an award in Article V:

(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

[5] 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the New York Convention, UNCITRAL, *available at* http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html.

(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.[6]

III. IN THE MATTER OF THE ARBITRATION BETWEEN: MONEGASQUE DE REASSURANCES S.A.M. (MONDE RE) V. NAK NAFTOGAZ OF UKRAINE

A. Background

On January 16, 1998, AO Gazprom, a Russian company, entered into a contract with AO Ukragazprom, a Ukranian company.[7] The contract provided for Ukragrazprom to transport natural gas by pipeline across Ukraine to various destinations throughout Europe. As consideration to the contract, Ukragazprom was entitled to withdraw 235 million cubic meters of natural gas. According to Gazprom, however, Ukragazprom breached the contract by making additional unauthorized withdrawals of natural gas. Gazprom sought and received reimbursement for the value of the improperly withdrawn gas from its insurer, Sogaz Insurance Company ("Sogaz").[8] Sogaz was then to be reimbursed by the Appellant, Monegasque De Reassurances S.A.M. ("Monde Re") due to a reinsurance agreement.[9] As a result, Monde Re asserted its right to pursue an arbitration claim regarding the excessive gas withdrawal and filed a claim against Ukragazprom with the International Commercial Court of Arbitration in Moscow, Russia on April 22, 1999.[10] In July 1999, Nak Naftogaz of Ukraine ("Naftogaz") assumed the rights and obligations of Ukragazprom.[11] In May 2000, the dispute was presented to three arbitrators who awarded 88 million dollars to Monde Re for the payment it made to Sogaz.[12] Dissatisfied with the outcome, Naftogaz filed an appeal in the Moscow City Court. The Moscow City Court declined to cancel the award, which was later affirmed by the Supreme Court of the Russian Federation.[13]

[6] *Id.*
[7] *Monegasque*, 311 F.3d at 491.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 492.

B. District Court's Decision

Before the Moscow City Court and the Supreme Court of the Russian Federation decided on the case, Monde Re filed a petition for confirmation of the arbitral award in the United States District Court for the Southern District of New York against Ukraine and Naftogaz. Monde Re claimed that Naftogaz was acting as an agent, instrumentality, or alter ego of Ukraine, and thus sought to confirm the award against both parties.[14] Monde Re pleaded three causes of action in the petition. The first contention based on the arbitral award, sought confirmation of the award and entry of judgment against Naftogaz. Second, based on the belief that Ukraine controls Naftogaz and is responsible for its obligations under the award, Monde Re requested confirmation and judgment against Ukraine. The last contention pleaded in the petition, sought confirmation and judgment against Ukraine on the allegation that Ukraine and Naftogaz acted as joint venturers.[15]

On January 22, 2001, Naftogaz moved to dismiss the petition due to the lack of personal jurisdiction. On the same day, Ukraine separately moved for dismissal of the petition based on the district court's lack of subject matter or personal jurisdiction.[16] The District Court granted Ukraine's motion to dismiss Monde Re's petition on the grounds of *forum non conveniens* on December 4, 2001.[17] The Court used the two step analysis, beginning with a determination as to the availability of an alternative forum based on the arbitration exception to the Foreign Sovereign Immunities Act. This Act states that a party may bring an action or may confirm an award pursuant to an arbitration agreement between a sovereign state and a private party if the award is or may be governed by a treaty or any other international agreement in force in the United States calling for the recognition and enforcement of arbitral awards.[18] The Court held the applicability of *forum non conveniens* to cases arising under the Convention, and thus determined Ukraine as an adequate alternative forum.[19]

The District Court then assessed whether the parties' private interests and public interests favored adjudication in the United States. The District Court found that the private interest factors weighed heavily in favor of dismissal due to extensive discovery and an evidentiary hearing that would be required because the necessary witnesses were not within the court's subpoena power and the necessary documents were written in the Ukrainian language.[20] The District Court then turned to an analysis of the public interest factors, finding that "Ukraine has a great interest in applying its own laws, especially with respect to establishing the ownership interest of Naftogaz."[21] The District Court dismissed the case.[22] Monde Re subsequently filed an appeal.

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 493.
[20] *Id.*
[21] *Id.*
[22] *Id.*

C. Court of Appeals' Decision

Monde Re filed an appeal on the basis that the doctrine of *forum non conveniens* cannot be applied to a proceeding that is to confirm an arbitral award.[23] This argument is dependent upon the Convention's requirement that each signatory must recognize arbitral awards and enforce them according to the procedural rules of the territory in which the award is relied upon. Applying Article V of the Convention, the enforcement of an award is subject only to those seven defenses listed, which does not include *forum non conveniens*.[24] As a signatory of the Convention, Monde Re contended that a United States court must recognize and enforce any arbitral award as a treaty obligation, without consideration of whether the court is a convenient forum for the enforcement proceeding.[25]

The Court of Appeals disagreed with Monde Re's arguments. The Court of Appeals noted that the proceedings for enforcement of foreign arbitral awards are subject to the rules of procedure that apply in the courts where enforcement is sought. An exception to this rule is that "substantially more onerous conditions…than are imposed on the recognition or enforcement of domestic arbitral awards" may not be imposed.[26] The Court of Appeals further relied on the Supreme Court's classification of f*orum non conveniens* as "procedural rather than substantive."[27]

The Court of Appeals rejected Monde Re's argument that Article V of the Convention set forth the only grounds for refusing to enforce a foreign arbitral award.[28] The Court argued that signatory nations are free to apply different procedural rules so long as the rules in Convention cases are not more burdensome than those procedural rules set forth in domestic cases. If this requirement is met, the Court argued that whatever rules of procedure for enforcement are applied by the enforcing state are acceptable, without reference to any other provision of the Convention.[29] Thus, *forum non conveniens*, a procedural rule, may be applied in domestic arbitration cases, brought under the provisions of the Federal Arbitration Act, and consequently applied under the provisions of the Convention.[30]

In applying *forum non conveniens*, the Court used the two step analysis: determining the existence of an alternative forum and then balancing public and private interests. The Court began the analysis with a determination of the level of deference owed to the plaintiff's choice of forum. The Court measured this degree by a sliding scale:

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[23] *Id*. at 495.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*. at 496.
[28] *Id*.
[29] *Id*.
[30] *Id*.

> U.S. forum was motivated by forum-shopping reasons – such as…the inconvenience and expense to the (respondent) resulting from litigation in that forum – the less deference the (petitioner's) choice commands, and, consequently, the easier it becomes for the (respondent) to succeed on a forum non convenience motion by showing that convenience would better be served by litigating in another country's courts. [31]

The Court noted that Monde Re's reasoning for bringing the case forth in the United States was unclear and found that the jurisdiction provided by the Convention was the only link between the United States and the parties. The Court granted little deference to Monde Re's choice of forum. The Court then moved to determine the existence of an alternative forum; *forum non conveniens* may not be granted unless an adequate alternative forum exists. The Court rejected Monde Re's argument that Ukraine is an inadequate forum due to general corruption throughout the political system. It held that Gazprom, a Russian company, voluntarily conducted business with Ukragazprom, a Ukrainian company, and thus would have anticipated a possibility of litigation in Ukraine.[32] Therefore, the Court found Ukraine to be an appropriate alternate forum.

The second step in determining the application of *forum non conveniens* requires a balancing of factors.[33] Private interest factors relate to the convenience of the litigants, such as the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling, and the cost of attendance of willing witnesses.[34] The Court contended that to determine Ukraine's liability, litigation would require the attendance of witnesses beyond the subpoena power of the district court and the availability of pertinent documents in the Ukrainian language.[35] The Court held that the private interest factors favored the application of *forum non conveniens* and the dismissal of the case.[36]

The other set of factors to be applied are the public interest factors, which include administrative difficulties, imposition of jury duty upon those who bear no relationship to the litigation, the local interest in resolving local disputes, and the problem of applying foreign law.[37] The Court found that because issues governed by the law of Ukraine and Russia were previously raised, Ukrainian courts were better suited than United States courts to determine the legal issues. In addition, the Court held that local courts should determine the localized matters.[38] Consequently, the Court determined that the public interest factors also weighed in favor of dismissal of the case.[39]

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[31] *Id*. at 498.
[32] *Id*. at 499.
[33] *Id*. at 500.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*. at 501.
[39] *Id*.

D. Conclusion

The Court of Appeals found that the judgment of the district court was properly concluded. It affirmed the district court's dismissal of the proceeding and application of the *forum non conveniens* doctrine favoring a forum in Ukraine.[40]

E. Implications

The Court of Appeals in *Monde Re v. Naftogaz* misinterpreted and misapplied the doctrine of *forum of non conveniens*. Its interpretation of Article III of the New York Convention allowed *forum non conveniens* to be used as a means to deny enforcement of an arbitral award. The procedural component to Article III, however, relates to formalities of an application to confirm or enforce an award, such as fees and the structure of the request.[41]

Further, the decision in *Monde Re* v. *Naftogaz* reinforced the cautiousness that courts must use when applying *forum non conveniens*, especially when enforcing arbitration awards under the New York Convention. It has been discussed that courts must not immediately dismiss such cases to an alternative forum due to a lack of an existing nexus with the United States.[42] The New York Convention is to assure transacting businesses that arbitration clauses and arbitral awards will be enforced and that rules of procedural fairness will be observed.[43] The purpose of the Convention is to aid foreign courts in enforcing arbitration awards wherever assets are available, free of prejudice, or not subject to local rules that tend to make enforcement of awards difficult in courts.[44] The consideration of the doctrine of *forum non conveniens* as a grounds for refusal under Article V threatens the reliability and efficiency of international arbitration as can be seen in the latter case.[45]

IV. FIGUEIREDO FERRAZ V. REPUBLIC OF PERU

A. Background

In *Figueiredo Ferraz v. Republic of Peru*, an agreement was entered into in 1997 by Appellee, Figueirdo Ferraz Consultoria E Engenharia de Projeto Ltda. ("Figueiredo"), a Brazilian corporation, and the Programa Agua Para Todos, an instrumentality of the Peruvian government. The Republic of Peru ("Republic"), the Ministry of Housing, Construction and Sanitation ("Ministry"), and the Programa Agua Para Todos ("Program") collectively act as Appellants.[46]

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[40] *Id.*

[41] Matthew H. Adler, *Figueiredo v. Peru: A Step Backward for Arbitration Enforcement*, Northwestern Journal of Int'l Law and Business Ambassador (2012) *available at*: http://www.pepperlaw.com/publications_article.aspx?ArticleKey=2286.

[42] *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. The Republic of Peru, Ministerio de Vivienda, Construccion y Saneamiento, Programa Agua Para Todos*, U.S. App. 1,49 (2011).

[43] *Id.* at 50.

[44] *Id.*

[45] *Id.*

[46] *Figueiredo*, U.S. App. at 2.

Pursuant to this agreement, Figueiredo was to prepare engineering studies on water and sewage services for Appellants in Peru.[47] The agreement provided: "The parties agree to subject themselves to the competence of the Judges and Courts of the City of Lima on Arbitration Proceedings, as applicable."[48]

After a fee dispute arose, Figueiredo commenced arbitration against the Program.[49] In January 2005, the arbitral tribunal rendered an award ("Award") against the Program for over $21 million in damages, $5 million of which was principal and the remainder of which was accrued interest and cost of living adjustments.[50] As a result, the Ministry appealed the decision in the Court of Appeals in Lima. It challenged the Award and sought nullification on the ground that, under Peruvian law, the arbitration was an "international arbitration" involving a non-domestic party. Therefore, recovery should have been limited to the amount of the contract.[51] In October 2005, the Lima Court of Appeals denied the appeal and ruled that because Figueiredo designated itself as a Peruvian domiciliary in the agreement and in the arbitration, the arbitration was not an "international arbitration," but a "national arbitration" involving only domestic parties.[52] The Court found the Award permissible.

A Peruvian statute established a limit to the annual amount that any state agency could pay on a judgment to three percent of that agency's annual budget.[53] It states:

> Should there be requirements in excess of the financing possibilities expressed above, the General Office of Administration of the corresponding sector shall inform the judicial authority of its commitment to attend to such sentences in the following budgetary exercise, to which end it is obliged to destine up to 3% of the budgetary allotment assigned to the division by the source of ordinary resources.[54]

Although, Figueiredo had not confirmed the arbitration award in a Peruvian court or obtained a judgment in Peru, the Program began making payments on the Award. As a consequence of the three percent cap, the Program had paid just over $1.4 million of the $21 million award at the time the case was heard.[55]

B. District Court's Decision

In January 2008 Figueiredo filed a petition in the Southern District of New York to confirm the Award and obtain a judgment for $21,607,003.[56] Figueiredo sought to seize $21 million on account in New York because of the Peruvian government's sale of bonds.[57] In September 2009, the District Court denied the Appellants' motion to dismiss. The District Court

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[47] *Id.* at 3.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 4.
[52] *Id.*
[53] *Id.* at 5.
[54] *Id.*
[55] *Id.* at 7.
[56] *Id.*
[57] *Id.*

recognized that although the Panama Convention establishes jurisdiction in the United States, "there remains the authority to reject that jurisdiction for reasons of convenience, judicial economy, and justice."[58] When considering the adequacy of an alternative forum, the District Court concluded that although Peruvian law permits execution of arbitral awards, "only a U.S. court 'may attach the commercial property of a foreign nation located in the U.S.'"[59] The District Court ruled that the Program and the Republic were not separate entities under Peruvian law. Thus, dismissal of the case was inappropriate under the *forum non conveniens* doctrine. Accordingly, Peru was subject to the Award despite not having signed the consulting agreement.[60] Appellants subsequently filed an interlocutory appeal based on the ground of *forum non conveniens*.[61]

C. Court of Appeals' Decision

The Court of Appeals heavily relied upon the precedent case of *Monde Re. v. Naftogaz,* which upheld a dismissal of a case based on *forum non conveniens.*[62] The Court applied the two step analysis to determine the applicability of the *forum non conveniens* doctrine, beginning with the determination of the existence of an alternate forum. The District Court concluded that although Peruvian law permits execution of arbitral awards, "only a U.S. court 'may attach the commercial property of a foreign nation located in the U.S."[63] The Court of Appeals, however, dismissed this reasoning and held that because only a United States court may attach a defendant's particular assets located in that country, such as Peru's assets located in New York, it does not render a foreign forum inadequate.[64] According to the court, if this were the case, no suit with the objective of executing open assets located in the United States could ever be dismissed.[65]

In addition, when determining the adequacy of an alternate forum and execution on a defendant's assets, adequacy of the forum is dependent upon whether some of the defendant's assets are present in the forum, not whether the precise assets located in the United States can be executed in the forum. Further, adequacy of the alternate forum is not dependent upon "identical remedies."[66] Even though a plaintiff may recover less in an alternate forum, that forum is not rendered inadequate.[67] According to the *Piper* Court, however, an alternative forum would be inadequate if the remedy available in the foreign forum would be considered no remedy at all.[68] Thus, the Court of Appeals determined the existence of an alternative forum available in Peru.

The Court of Appeals proceeded to the next step in the analysis, a balancing of the private and public factors. The Court, in accordance with the Appellants, deemed the three percent cap under the statute to be a highly significant public factor that warranted the dismissal

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[58] *Id*. at 13.
[59] *Id*.
[60] *Id*.
[61] *Id*. at 9.
[62] Id. at 14.
[63] *Id*. at 13.
[64] *Id*.
[65] *Id*.
[66] *Id*. at 16.
[67] *Id*.
[68] *Id*. at 17.

of the case under the *forum non conveniens* doctrine.[69] The Court observed that the statute serves the public interest.[70] The Court found that the *forum non conveniens* doctrine weighed heavily against exercising jurisdiction in the United States due to a number of other factors such as:

(1) the underling claim arising from a contract executed in Peru,
(2) a corporation claiming to be a Peruvian domiciliary,
(3) the suit to be against an entity that appears to be an instrumentality of the Peruvian government, and lastly
(4) the public factor of permitting Peru to apply its cap statute to the disbursement of governmental funds to satisfy the award.[71]

Despite the favored policy of enforcing arbitral awards, the Court gave much significance to Peru's cap and found that both the public and private factors weighed in favor of the application of the *forum non conveniens* doctrine. The Court held that *forum non conveniens* was applicable. Due to the doctrine's procedural law nature, the Court held that the doctrine may act as a bar to the enforcement of an arbitral award despite its nonappearance as a limitation in Article V of the New York Convention.[72]

D. Conclusion

In conclusion, the Second Circuit Court of Appeals dismissed the petition on grounds of *forum non conveniens*. The Court, however, conditioned the dismissal of the petition on Appellants' consent to continue the suit in Peru. The Court included a waiver that subject the parties to the further condition that should, for any reason, the courts of Peru decline to entertain a suit in determining the enforcement of the Award, the lawsuit may then be reinstated in the District Court.[73]

E. Implications

In *Figueiredo Ferraz v. Republic of Peru* the Court's decision in allowing *forum non conveniens* to defeat the enforcement of a New York Convention awards complicates and weakens the United States policy regarding arbitration awards. The Court of Appeals' decision in using the *forum non conveniens* doctrine as a defense undermines the expectations under which the parties have formed their contract.[74] Further, the Supreme Court in *Scherk v. Alberto – Culver Co.* stated:

[69] *Id*. at 19.
[70] *Id*.
[71] *Id*.
[72] *Id*. at 39.
[73] *Id*. at 22.
[74] *Id*. at 29.

> Uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensible precondition to achievement of the orderliness and predictability essential to any business transaction.[75]

The agreement between the Program and Figueiredo in this case specified that all disputes would be resolved by the courts of Lima. Specifying the forum in the agreement served as an essential component to the freedom of the contract for the parties. It further created a sense of order and predictability to the business transaction.

The Restatement (Third) of the U.S. law of International Commercial Arbitration states: "An action to enforce a New York or Panama Convention award is not subject to stay or dismissal on forum non conveniens ground."[76] The accompanying Reporters' Note explains:

> Considering that the Convention grounds for nonrecognition and nonenforcement are meant to be exclusive, it would be incompatible with the Convention obligations for a court of Contracting State to employ inconvenience as an additional basis for dismissing an action for enforcement of an award that is otherwise entitled, as a matter of treaty obligation, to enforcement.[77]

The Restatement and its accompanying note clearly object to the use of *forum non conveniens* to stay or dismiss arbitral awards. Yet, in the present case, the Court of Appeals misapplied and misinterpreted Article V of the New York Convention in its holding that the *forum non conveniens* acted as a procedural law. Ultimately, the Court of Appeals breached its international obligations under the New York Convention by allowing one of its courts to refuse to recognize and enforce a New York Convention award for a reason other than one stated in Article V. The application of *forum non conveniens* in this case further defied another major goal of the Convention of creating a uniform standard through which agreements to arbitrate may be observed and arbitral awards would be enforced in signatory countries.[78]

V. COMPARISON BETWEEN MONDE RE V. NAFTOGAZ AND FIGUEIREDO FERRAZ V. REPUBLIC OF PERU

The Court of Appeals through their decisions in *Monde Re v. Naftogaz* and *Figueiredo Ferraz v. Republic of Peru* essentially weakened international arbitration. The *Figueiredo* Court heavily relied upon the binding precedent of *Monde Re*, despite the few similarities present between both cases. In *Monde Re v. Naftogaz*, Monde Re brought forth a suit not only against Naftogaz but also against the Ukrainian government. In a similar fashion, in *Figueiredo v. Peru*, Figueiredo brought forth an arbitration award against the Program and sought enforcement in

[75] *Id*. at 30.
[76] *Id*. at 39.
[77] *Id*.
[78] *Id* at 38.

New York against the Republic of Peru.[79] Both the Monde Re Court and the Figueiredo Court created a new exception to the enforcement of arbitral awards by applying the doctrine of *forum non conveniens*, thus contradicting the principles of the New York Convention. The numerous substantial differences between *Figueiredo* and *Monde Re* could have allowed the Second Circuit to abandon *Monde Re v. Naftogaz* as precedent.

Monde Re v. Naftogaz affirmed a District Court's dismissal based on *forum non conveniens*, while in *Figueiredo v. Peru*, the majority reversed the District Court's decision to maintain jurisdiction. The *Figueiredo* Court almost exclusively relied on Peru's interest in applying its statute to determine the dismissal of the case.[80] The majority in *Figueiredo* defied the Court's opinion in *Iragorri v. United Technologies Corporation*. The *Iragorri* Court held:

> The decision to dismiss a case on forum non conveniens ground lies wholly within the broad discretion of the district court and may be overturned only when we believe that discretion has been clearly abused. In other words, our limited review encompasses the right to determine whether the district court reached an erroneous conclusion on either the facts or the law, or relied on an incorrect rule of law in reaching its determination. Accordingly, we do not, on appeal, undertake our own de novo review simply substituting our view of the matter for that of the district court.[81]

The *Figueiredo* Court failed to establish that the District Court's discretion had been clearly abused. Many argue that the *Figueiredo* Court significantly lowered the threshold for the application of *forum non conveniens* and increased the opportunity for second guessing of district courts and their ability to retain jurisdiction over enforcement proceedings.[82]

Further, *Monde Re* is distinguishable in another respect to *Figueiredo*. In *Monde Re*, the Court concluded when analyzing the private factors that additional evidence was required to determine Ukraine's liability. To the contrary, the *Figueiredo* Court held that no additional discovery of documents was required for the Court to decide on the case. As a result, this significant difference between *Monde Re* and *Figueiredo* presents a ground for the *Figueiredo* Court to dismiss reliance upon *Monde Re*'s outcome.

In *Monde Re*, Monde Re attempted to impute the defendant's contractual liability to its sovereign Ukraine. Due to the relevant witnesses and documents located in Ukraine, the Court concluded the existence and importance of private interests, which weighed heavily in favor of dismissal.[83] In *Figueiredo*, the majority failed to suggest that the District Court erred in its finding that the issue could not be properly resolved in the Southern District of New York without undue inconvenience to either party or to the court.[84] Rather, the majority argued that the three percent cap under the statute was a highly significant factor that justified overturning the District Court's decision.

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[79] Charles H. Brower II, *December Surprise: New Second Circuit Ruling on Forum Non Conveniens in Enforcement Proceedings* Kluwer Law Int'l *available at* http://kluwer.practicesource.com/blog/2012/december-surprise-new-second-circuit-ruling-on-forum-non-conveniens-in-enforcement-proceedings/.

[80] *Id.*

[81] *Figueiredo*, U.S. App. at 46.

[82] Brower, *supra* note 80.

[83] *Figueiredo*, U.S. App. at 47.

[84] *Id.* at 48.

In addition, the majority held that when substantive law is favorable to one of the parties, the law serves as a public interest factor that contributes to the *forum non conveniens* balance.[85] Thus, the Court held Peru's statute to serve as a substantive law that favored Peru, and as a result significantly contributed as a public interest factor that contributes to the *forum non conveniens* balance. By giving importance to the public factor of Peru's statute, the Court created a new reason for parties to avoid arbitration enforcement. Litigants might argue that it is "inconvenient" for them to travel and protect their assets.[86]

The Supreme Court held that whether an alternative forum's substantive law is more or less favorable to the party seeking dismissal should not be a considered factor when deciding the *forum non conveniens* motion.[87] This reasoning was implemented in *Monde Re*, where the Court indicated that the outcome was not premised upon the fact that United States law was less favorable to the defendants than Ukrainian law by stating that "Ukrainian law specially provides for the execution of judgments against government properties."[88]

The vast number of differences between *Monde Re v. Naftogaz* and *Figueiredo Ferraz v. Republic of Peru* gives rise to questions regarding the *Figueiredo* Court's reliance upon *Monde Re* as precedent. *Monde Re* held, and *Figueiredo* followed, the principle that when enforcing arbitral awards under the New York Convention, courts must consider *forum of non conveniens*.[89] The misinterpretation and misapplication of *forum non conveniens* in the United States diverges from the structure and purpose of arbitration law and has ultimately weakened U.S. arbitration.

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[85] *Id.*

[86] *December Surprise: New Second Circuit Ruling on Forum Non Conveniens in Enforcement Proceedings*, supra note 81.

[87] *Figueiredo*, U.S. App. at 48.

[88] *Id.* at 49.

[89] *December Surprise: New Second Circuit Ruling on Forum Non Conveniens in Enforcement Proceedings*, supra note 81.

THE 2012 INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION: MEETING THE NEEDS OF THE INTERNATIONAL ARBITRATION COMMUNITY IN THE 21ST CENTURY

Meeran Ahn*

I. INTRODUCTION

The International Court of Arbitration (ICA) of the International Chamber of Commerce (ICC) is among the world's major institutions for resolving international commercial and business disputes.[1] The ICC's Court of Arbitration was established in 1923[2] and has administered more than 17,000 cases.[3] The reach and global prominence of the ICA is reflected in its 2010 statistics. In 2010, 793 cases were filed, 479 awards rendered, and involved 2,145 parties from 140 countries.[4] ICC arbitration offers an attractive alternative to court litigation because it offers less costly and time-consuming advantages, in addition to confidentiality and freedom for the parties to choose the place of arbitration, applicable rules of law, language of the proceedings, and arbitrators.[5] The formal procedures of ICC arbitration lead to a binding decision from an arbitral tribunal that is enforceable to both domestic arbitration laws and international treaties.[6]

The last revision to the ICC's Arbitration Rules was in 1998.[7] Due to changing business needs and practices, the ICC decided to revise the 13-year-old framework and develop a modern set of arbitration rules.[8] The revision process began in 2008 by a 20-member drafting committee, also supported by a task force composed of over 200 members from the ICC, Court members, the ICC Secretariat, and practitioners.[9] The ICC World Council adopted the new Rules in Mexico City on June 11, 2011 and were issued on September 12, 2011, with the Rules enforceable on

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[1] International Chamber of Commerce, Arbitration Today, *available at* http://www.iccwbo.org/court/arbitration/id4584/index.html (last visited Oct. 3, 2011) [hereinafter Arbitration Today].

[2] International Chamber of Commerce, International Court of Arbitration: Resolving Business Disputes Worldwide (Feb. 2012), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/810_Anglais_05.pdf. [hereinafter Resolving Business Disputes Worldwide].

[3] Arbitration Today, *supra* note 1.

[4] International Chamber of Commerce, Facts and Figures on ICC Arbitration-2010 Statistical Report, *available at* http://www.iccwbo.org/court/arbitration/index.html?id=41190 (last visited Oct. 3, 2011) [hereinafter Facts and Figures].

[5] Resolving Business Disputes Worldwide, *supra* note 2.

[6] International Chamber of Commerce, Arbitration and ADR Rules, *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf (last visited Oct. 5, 2011) [hereinafter ICC RULES OF ARB.].

[7] International Chamber of Commerce, Rules of Arbitration, *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf (last visited Oct. 4, 2011) [hereinafter *ICC Rules of Arbitration 1998*].

[8] Press Release, International Chamber of Commerce, ICC Launches New Rules of Arbitration (Sept. 12, 2011), *available at* http://www.iccwbo.org/index.html?id=45658.

[9] *Id*.

January 1, 2012.[10] The new Rules expand the 1998 Rules from being composed of 35 Articles and 3 Appendices to 41 Articles and 5 Appendices. The ICC Arbitration Rules are intended to be used globally in arbitrations conducted in any language and subject to any law.[11]

The ICC explains in the introduction to the new Rules that the Rules "remain faithful to the ethos, and retain the essential features, of ICC arbitration, while adding new provisions . . ."[12] The ICC has three major aims for the revision. First, the revised Rules aim to better serve the businesses and governments engaged in international commerce and investment.[13] Second, the revised Rules intend to update the Rules to the existing and future standards and practices in arbitration.[14] The third aim is to reduce time and costs of ICC arbitration and ensure that the arbitral process is conducted expeditiously and in a cost-effective manner.[15] John Beechey, Chairman of the ICC International Court of Arbitration, stated that one of the principal aims of the Court is to "ensure that its Rules promote efficiency in the arbitral process and that they reflect current business practice, consistent with the overriding objective of doing justice between the parties . . . while remaining faithful to the ethos, and retaining the essential features, of ICC Arbitration."[16]

The revised Rules are more evolutionary rather than revolutionary because they do not make fundamental changes. The revisions update the ICC Rules to the standards and practices currently used in international arbitral proceedings. This article will look into the major changes and new provisions in the 2012 ICC Arbitration Rules.

II. INTRODUCTORY PROVISIONS

A. Article 1 International Court of Arbitration

The revised Rules define the role of the ICC's International Court of Arbitration. Under Article 1 paragraph 2, the 2012 Rules declare that the ICC Court is the *only* body authorized to administer arbitrations in accordance with the ICC Rules of Arbitration.[17] In addition, by agreeing to arbitrate under the ICC Rules, the parties accept that the arbitration is administered by the ICC Court.[18] This provision is an expansion of Article 1 paragraph 2 of the 1998 Rules, which defines the function of the court to only be to ensure the application of the ICC Rules of Arbitration.[19] The revised provisions tackle the problems occurring in ad hoc arbitration, when the parties agree to arbitrate under the ICC Rules, but are administered by another institution.[20] The new

[10] *Id*.
[11] ICC RULES OF ARB. (2012).
[12] *Id*.
[13] Release, International Chamber of Commerce, *supra* note 8.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] ICC RULES OF ARB. art. 1(2) (2012).
[18] ICC RULES OF ARB. art. 6(2) (2012).
[19] *ICC Rules of Arbitration 1998* at art. 1(2).
[20] Steven Finizio, Kirsten O'Connell & Charlie Caher, Revised ICC Rules of Arbitration, WilmerHale (Sept. 13, 2011) *available at* http://www.wilmerhale.com/files/Publication/1c2433eb-91e4-462e-8801-83c6dc9757d7/Presentation/PublicationAttachment/428e3250-4b76-4312-8862-87dc1f95008d/International%20Arbitration%20Alert.pdf [hereinafter Revised ICC Rules of Arbitration].

provisions establish the ICC Court as the sole body that is authorized to administer arbitrations governed by ICC Rules, making the ICC Rules ineffective in ad hoc arbitration. The Rules and the ICC Court are both strengthened in international arbitration by establishing a firm role for the Court and giving the Court exclusive control over arbitrations conducted under ICC Rules.

B. Article 3 Written Notifications or Communications; Time Limits

Article 3 illustrates the ICC's aim in updating the Rules to respond to current business practices and needs.[21] Article 3 paragraph 2 permits the Secretariat and the arbitral tribunal to use email, already the norm, as a means of communication and leaves the option open for the use of other technology by allowing "any other means of telecommunication."[22] This provision illustrates the aim of the revision to reflect modernization and the current methods of communication and practice.

III. COMMENCING THE ARBITRATION

A. Article 4 Request for Arbitration

The revised Article 4 includes new language regarding the request for arbitration.[23] Under Article 4 of the 1998 Rules, a request for arbitration requires only "a description of the nature and circumstances of the dispute giving rise to the claim(s)."[24] Now, under Article 4 paragraph 3, a basis for the claims must also be given in addition to the description.[25] This additional requirement is also found in Article 5 paragraph 5 of the revised Rules, which requires a "basis upon which the counterclaims are made."[26] The changes reflect the ICC's aim to revise the Rules to make them more conducive to efficient arbitration. By requiring a basis for claims and counterclaims, the arbitral tribunal and the parties benefit from having a firm foundation of the claims and enable the proceedings to be more focused and transparent.[27]

Also in Article 4, the revised Rules add language concerning the relief sought.[28] When stating the relief sought, the revised provision requires a request to contain "the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims."[29] The revision expands the requirement in the 1998 Rules, which require only "an indication of any amount(s) claimed."[30] The new Rules discourage any tactics to intentionally conceal the true amount of damages or unintentionally neglect to calculate an accurate amount. An accurate figure of the amount in dispute will help construct efficient arbitral procedures and

[21] ICC RULES OF ARB. art. 3 (2012).
[22] ICC RULES OF ARB. art. 3(2) (2012).
[23] ICC RULES OF ARB. art. 4 (2012).
[24] *ICC Rules of Arbitration 1998* at art. 4(3)(b).
[25] ICC RULES OF ARB. art. 4(3)(c) (2012).
[26] ICC RULES OF ARB. art. 5(5)(a) (2012).
[27] Revised ICC Rules of Arbitration, *supra* note 20.
[28] ICC RULES OF ARB. art. 4(3)(d) (2012).
[29] *Id*.
[30] *ICC Rules of Arbitration 1998* at art. 4(3)(c).

may even lead to settlement.[31] A similar provision also applies to counterclaims in the new Rules.[32]

B. Article 6 Effect of the Arbitration Agreement

Article 6 paragraph 3 is an entirely new provision addressing challenges to jurisdiction.[33] Under the 1998 Rules, a prima facie finding on jurisdiction is resolved by the ICC Court.[34] Now, any jurisdictional challenges are referred directly to the arbitral tribunal rather than the ICC Court, unless the Secretary General of the Court refers it to the Court.[35] This new default rule requiring the arbitral tribunal to directly determine the prima facie decision on jurisdiction will expedite jurisdictional challenges by skipping the extra step of going to the ICC Court. The involvement of the arbitral tribunal at the early stage allows the arbitrators to have a better understanding of the case and accelerate the arbitral process.

IV. MULTIPLE PARTIES, MULTIPLE CONTRACTS, AND CONSOLIDATION

A key addition to the revised Rules is the section devoted to issues regarding multiple parties, multiple contracts, and consolidation.[36] Article 7 and Article 9 are two new provisions and Articles 8 and Article 10 revise articles of the 1998 Rules.[37] Under the 1998 Rules, only the parties to an arbitration agreement can participate in the proceedings under the agreement, and subsequently, the arbitration award will only bind those parties. However, the reality of many international commercial and business transactions involve more than one contract and/or multiple parties. Under the old Rules, many parallel proceedings led to wasteful cost and time because arbitral proceedings under the ICC Rules could not be consolidated. These Rules fostered inconsistent outcomes, defeating the aims of arbitral proceedings. Thus, the two revised and two new provisions in this section recognize the complexity of international arbitration and embody the objective to modernize the Rules to reflect current practices.

A. Article 7 Joinder of Additional Parties

Article 7 is a new provision addressing joinder of additional parties to an arbitral proceeding.[38] The new rule permits any party to join a third party to the arbitration by filing a Request for Joinder to the Secretariat, on the condition that an arbitrator has not been confirmed or appointed.[39] A request for joinder after an arbitrator has been appointed or confirmed requires

[31] Revised ICC Rules of Arbitration, *supra* note 20.
[32] ICC RULES OF ARB. art. 5(5)(b) (2012).
[33] ICC RULES OF ARB. art. 6(3) (2012).
[34] *ICC Rules of Arbitration 1998* at art. 6(2).
[35] ICC RULES OF ARB. art. 6(3) (2012).
[36] ICC RULES OF ARB. arts. 7-10 (2012).
[37] *Id*.
[38] ICC RULES OF ARB. art. 7 (2012).
[39] ICC RULES OF ARB. art. 7(1) (2012).

all parties to agree on the request, including the additional party.[40] Article 7 also allows the ICC Secretariat to fix a time limit for this submission.[41]

This new provision tackles a critique of arbitration, specifically the abuse of undue delay, and attempts to resolve the abuse of delay by preventing any joinder request from holding up the appointment of arbitrators. In relation to Article 7, the revised definitions of terms in the Rules are noteworthy. The Rules now define new words: "additional party" includes one or more additional parties; "party" or "parties" include claimants, respondents or additional parties; and "claim" or "claims" now include any claim by any party against any other party.[42] The definitions clarify these formerly ambiguous terms and account for the complexity of current international arbitral proceedings.

B. Article 8 Claims Between Multiple Parties

Article 8 revises Article 10 of the 1998 Rules and focuses on issues of claims between multiple parties.[43] Article 10 of the 1998 Rules does not include an express provision on claims between multiple parties.[44] The old Article 10 addresses rules on nominating arbitrators to the tribunal by multiple parties.[45] Article 8 paragraph 1 permits any party in an arbitration with multiple parties to make claims (or counterclaims) against any other party to the arbitration, provided that the Terms of Reference have not been signed or approved by the Court.[46] Thereafter, such claims or counterclaims require the authorization of the arbitral tribunal.[47]

C. Article 9 Multiple Contracts

Like Article 7, Article 9 is a new provision and deals with claims arising out of multiple contracts.[48] The Article permits these claims to be brought in a single proceeding, "irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules."[49] Article 9 is subject to Article 23(4), which hinders any party from making new claims once the Terms of Reference have been signed or approved by the Court, unless authorized by the arbitral tribunal.[50] Because of this limitation, parties may decide not to have claims arising from multiple contracts be heard in a single arbitration where they have not agreed to do so in their contracts. Parties may want to opt out of Article 9 when drafting their arbitration agreements to ensure that claims from different contracts cannot be brought together.[51]

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[40] *Id*.
[41] *Id*.
[42] ICC RULES OF ARB. art. 2 (2012).
[43] ICC RULES OF ARB. art. 8 (2012).
[44] *ICC Rules of Arbitration 1998* at art. 10.
[45] *Id*.
[46] ICC RULES OF ARB. art. 8(1) (2012).
[47] ICC RULES OF ARB. art. 8(3) (2012).
[48]ICC RULES OF ARB. art. 9 (2012).
[49] *Id*.
[50] ICC RULES OF ARB. art. 23(4) (2012).
[51] Revised ICC Rules of Arbitration, *supra* note 20.

D. Article 10 Consolidation of Arbitrations

The last Article in this section, Article 10, expands the ICC Court's ability to consolidate arbitrations.[52] Under the 1998 Rules, the ICC Court can only consolidate multiple claims arising out of a legal relationship between the same parties.[53] Article 10 of the revised Rules allows the ICC Court, at a party's request, to consolidate separate arbitrations under three circumstances: when all parties have agreed, when claims are made under the same arbitration agreement, or although made under different arbitration agreements, they are "compatible" arbitration agreements.[54] This provision attempts to address the issue of cost. Generally, multiple arbitrations involving different parties increase costs of the arbitral process. By broadening the scope of the Court's consolidation procedures, the revision attempts to keep arbitration costs down.

V. THE ARBITRAL TRIBUNAL

A. Article 11 General Provisions

Article 11 revamps the independence of arbitrators as expressed in Article 7 of the 1998 Rules.[55] While Article 7 of the 1998 Rules demands the arbitrator "be and remain independent of the parties involved in the arbitration,"[56] the revised Rules also explicitly require the arbitrator "be and remain impartial and independent."[57] The addition of impartiality is in accordance with other arbitration institutions, such as the UNCITRAL Arbitration Rules and the IBA Guidelines on Conflicts of Interest in International Arbitration, which require the arbitrator to be impartial. [58] The updated Rules continue to uphold the requirement that arbitrators remain professionally and personally separate from the parties, and although impartiality is assumed, the ICC Rules now explicitly require arbitrators to remain subjectively unbiased toward the parties.

In relation to the impartiality requirement, Article 11 paragraph 2 also mandates the arbitrator, before appointment or confirmation, to sign a statement of "acceptance, availability, impartiality and independence" to avoid any conflict of obligations.[59] This provision expands the "statement of impartiality" in Article 7 paragraph 2 of the 1998 Rules by including the arbitrator's availability.[60] This procedural change is an effort to promote efficiency of arbitral proceedings by ensuring that arbitrators have and will devote the time to conduct the arbitration. By including a statement of availability, the ICC aims to address the criticism that arbitrations are plagued by delays due to over-booked arbitrators.[61] The revised provision also enhances the Court's ability to appoint accessible and competent arbitrators.

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[52] ICC RULES OF ARB. art. 10 (2012).

[53] *ICC Rules of Arbitration 1998* at art. 4(6).

[54] ICC RULES OF ARB. art. 10 (2012).

[55] ICC RULES OF ARB. art. 11 (2012).

[56] *ICC Rules of Arbitration 1998* at art. 7(1).

[57] ICC RULES OF ARB. art. 11(1) (2012).

[58] UNCITRAL ARB. RULES art. 6 ¶ 7 (2010); IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION pt. I(1) (2004).

[59] ICC RULES OF ARB. art. 11(2) (2012).

[60] *ICC Rules of Arbitration 1998* at art. 7(2).

[61] Revised ICC Rules of Arbitration, *supra* note 20.

B. Article 13 Appointment and Confirmation of the Arbitrators

Article 13 revises Article 9 of the 1998 Rules regarding the appointment of arbitrators.[62] Under the 1998 Rules, the Court can only appoint the arbitrator upon a proposal by an appropriate National Committee.[63] If the National Committee fails to make a proposal within the time frame or the Court does not accept the proposal made, the Court can request a second proposal or request one from another National Committee.[64] Under the old Rules, the Court relies on a National Committee for the appointment of sole arbitrators. The new Rules allow the ICC Court to directly appoint an arbitrator in limited circumstances, including when "the Court considers that it would be appropriate to appoint an arbitrator from a country . . . where there is no National Committee" or the President certifies that a direct appointment is "necessary and appropriate."[65]

Finally, as more arbitration involves states or state entities, the revised Rules permit the ICC Court to appoint an arbitrator when "one or more of the parties is a state or claims to be a state entity."[66] The ICC modernized the Rules to reflect the rise in cases where at least one of the parties is a state. As reported in the ICC's 2010 Statistical Report, in 10% of cases, at least one of the parties was a State or parastatal entity.[67]

VI. THE ARBITRAL PROCEEDINGS

A. Article 22 Conduct of the Arbitration

One of the principle objectives of the revisions was to foster efficiency and limit the costs of arbitral proceedings.[68] Peter Wolrich, Chairman of the ICC Commission on Arbitration, commenting on the new Rules said, "The new Rules meet the growing complexity of today's business transactions, the needs surrounding disputes involving states, and the demand for greater speed and cost-efficiency."[69] In contrast to the 1998 Rules, which do not provide an express requirement for expeditious and cost-effective arbitral proceedings, the revised Rules explicitly command that the arbitral tribunal and the parties "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute."[70] The new provision codifies the sentiment held by parties and arbitral tribunals to conduct arbitral proceedings without delay and without driving up costs, also acknowledging that every case is distinct and has different requirements. Article 22 paragraph 2 furthers this concept and empowers the arbitral tribunal to adopt procedural measures to ensure effective case management, which are further discussed in Article 24.[71] This provision is broadly worded, giving the tribunal the ability to tailor these procedural measures to each arbitral proceeding,

[62] ICC RULES OF ARB. art. 13(4) (2012).
[63] *ICC Rules of Arbitration 1998* at art. 9(3).
[64] *Id*.
[65] ICC RULES OF ARB. art. 13(4) (2012).
[66] *Id*.
[67] Facts and Figures, *supra* note 4.
[68] Release, International Chamber of Commerce, *supra* note 8.
[69] *Id*.
[70] ICC RULES OF ARB. art. 22(1) (2012).
[71] ICC RULES OF ARB. art. 22(2) (2012).

which as expressed in Article 22 paragraph 1, is characterized by its own "complexity and value."[72]

Article 22 also includes a new provision on confidentiality.[73] Confidentiality is one of the advantages of arbitration and makes it attractive for settling disputes. Although a sense of duty to keep arbitral proceedings confidential is implied, the array of arbitration rules have taken different approaches to the issue of confidentiality. Some arbitration rules have included a confidentiality provision while many remain silent on the issue and leave the issue to the agreement of the parties to explicitly state a duty of confidentiality.[74] The 1998 Rules follow the latter view and do not provide an express provision on the confidentiality of proceedings, although Article 20 paragraph 7 of the 1998 Rules empower the tribunal to take measures to protect trade secrets and confidential information.[75] Now, the Rules expressly provide, under Article 22, that the arbitral tribunal may make confidentiality orders on a case-by-case basis.[76] According to the provision, the tribunal may continue to take measures to protect "trade secrets and confidential information," but can now conceal the existence of the arbitration.[77]

The new provision confers broad power to the tribunal to issue orders concerning confidentiality, but only upon the request of any party. The provision continues to uphold the freedom of contract idea and still leaves the issue of confidentiality up to the parties and the terms of the arbitration agreement. Therefore, parties to ICC arbitration may want to consider addressing the duty of confidentiality in their arbitration agreements. Although the revised Rules still do not impose a duty of confidentiality on the parties or establish a default confidentiality provision, the new rule allows flexibility to the parties and the tribunal in addressing the confidentiality issue and acknowledges that parties should not be restricted.[78] The inclusion of the confidentiality provision in the revised Rules is likely to be hailed as sufficiently serving the different commercial sectors that have an interest in protecting sensitive information.

Lastly, paragraphs 4 and 5 of Article 22 describe the required behavior of the arbitral tribunal and the parties during the conduct of the arbitration.[79] With no exceptions, the Rules mandate that the arbitral tribunal "act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."[80] In exchange, the parties respect the tribunal and comply with orders given by the arbitral tribunal.[81] The duty to comply with tribunal orders codifies the parties' obligation to arbitrate in good faith.

B. Article 24 Case Management Conference and Procedural Timetable

Promoting expeditious and cost-effective arbitration, Article 24 of the new Rules focuses on case management and a procedural timetable. Under the 1998 Rules, the arbitral tribunal lacks any express powers to enforce case management. Article 24 now requires the arbitral tribunal to

[72] ICC RULES OF ARB. art. 22(1) (2012).
[73] ICC RULES OF ARB. art. 22(3) (2012).
[74] Revised ICC Rules of Arbitration, *supra* note 20.
[75] *ICC Rules of Arbitration 1998* at art. 20(7).
[76] ICC RULES OF ARB. art. 22(3) (2012).
[77] *Id*.
[78] Revised ICC Rules of Arbitration, *supra* note 20.
[79] ICC RULES OF ARB. arts. 22(4)-(5) (2012).
[80] ICC RULES OF ARB. art. 22(4) (2012).
[81] ICC RULES OF ARB. art. 22(5) (2012).

convene a case management conference with the parties when writing the Terms of Reference, or soon thereafter, to establish procedural measures that assist in a speedy and cost-effective arbitration.[82] The provision refers to Appendix IV, which lists case management techniques that can be adopted to manage the case effectively.[83] The new Appendix to the Rules suggest techniques that include rendering one or more partial awards on key issues, identifying preliminary issues that can be resolved, conducting part or all of the arbitration on a documents only basis, and limiting the length and scope of written submissions to avoid repetition and maintain focus on key issues.[84] Appendix IV also suggests producing documents with submissions, avoiding excessive time and cost associated with document requests.[85] When documents are requested they should be relevant and be provided within a reasonable time.[86]

Article 24 paragraph 2 also requires a procedural timetable to aid in conducting a speedy arbitral proceeding and to avoid delays.[87] In addition, the Rules allow the arbitral tribunal to adopt further procedural measures or modify the timetable as the arbitration proceeds, ensuring the exercise of effective case management throughout the whole proceeding.[88]

C. Article 27 Closing of the Proceedings and Date for Submission of Draft Awards

Article 27 also addresses concerns about delays in ICC arbitration, specifically the delay of draft awards.[89] Article 27 defines the closing of a proceeding to be either after the last hearing or the filing of the last authorized submissions, whichever comes later.[90] The revised definition of a closed proceeding is less ambiguous than the definition under Article 22 of the 1998 Rules, which describe a proceeding to be closed once the parties have a "reasonable opportunity to present their case."[91] The loose definition of "closed proceeding" led to delays in the admission of the award because a draft award is issued after a proceeding is closed. The revised Article 27 instructs the arbitral tribunal to report to the Secretariat and the parties the date it expects to present its draft award for approval as soon as possible after the last hearing.[92] Article 22 of the 1998 Rules is more lax requiring "an approximate date" once the proceedings close.[93] The new Article pressures the arbitral tribunal to deliver the draft award in accordance to the timetable or even sooner. This mechanism for transparency and monitoring the time it takes the arbitral tribunal to deliver the award illustrates the Rules' effort to provide efficient arbitration and prohibit delays.

Closely related to the objective of the revisions to promote efficiency and limit the costs of arbitral proceedings is Article 37 paragraph 5.[94] Under this provision, the revised Rules

[82] ICC RULES OF ARB. art. 24(1) (2012).
[83] ICC RULES OF ARB. app. IV (2012).
[84] *Id*.
[85] *Id*.
[86] *Id*.
[87] ICC RULES OF ARB. art. 24(2) (2012).
[88] ICC RULES OF ARB. art. 24(3) (2012).
[89] ICC RULES OF ARB. art. 27 (2012).
[90] *Id*.
[91] *ICC Rules of Arbitration 1998* at art. 22(1).
[92] ICC RULES OF ARB. art. 27 (2012).
[93] *ICC Rules of Arbitration 1998* at art. 22(2).
[94] ICC RULES OF ARB. art. 37(5) (2012).

indicate cost consequences for parties that do not conduct the arbitration efficiently and in a cost-effective fashion.[95] The arbitral tribunal may take party action into account when making decisions as to the allocation of costs.[96] Although under Article 31 of the 1998 Rules the arbitral tribunal has cost shifting power,[97] the new provision gives the tribunal more power in allocating the costs of the proceedings to the parties and more power to judge the behavior of parties, ultimately rewarding good behavior. Thus, the new language urges parties to conduct the arbitral proceeding expeditiously and in good faith.

D. Article 29 Emergency Arbitrator and Appendix V

The most evolutionary change to the ICC Arbitration Rules is the introduction of the emergency arbitrator in Article 29 and Appendix V (the "Emergency Arbitrator Provisions").[98] Although the concept of an emergency arbitrator is new to the ICC Rules, rules of other arbitral institutions, such as the AAA and SIAC, include the concept.[99] The 1998 Rules allow the arbitral tribunal to order interim or conservatory measures, but do not include provisions for urgent interim relief when a tribunal has not been formed.[100] Under the 1998 Rules, a party seeking interim or conservatory relief would need to seek judicial authority. Now, Article 29 and Appendix V allow a party to apply for an emergency arbitrator to review interim or conservatory measures that cannot wait until an arbitral tribunal is formed.[101] In essence, an application for an emergency arbitrator can be submitted before the file is transmitted to the arbitral tribunal and even before the Request for Arbitration is submitted. The emergency arbitrator is appointed by the President of the ICC Court "within as short a time as possible, normally within two days from the receipt of the Application."[102]

Once appointed, the emergency arbitrator exercises broad power and can conduct the proceedings as the emergency arbitrator considers appropriate, with the requirement that the arbitrator acts "fairly and impartially."[103] The emergency arbitrator issues an Order, not an award, which is binding on the parties,[104] but not on the ensuing arbitral tribunal.[105] The Order, made no later than fifteen days from the date when the emergency arbitrator receives the file, must determine whether the application for interim relief is admissible and whether the emergency arbitrator has jurisdiction.[106] Once the arbitral tribunal is constituted, it may modify, terminate, or annul the Order.[107] The Emergency Arbitrator Provisions apply only to parties that are signatories of the arbitration agreement and do not apply to arbitration agreements signed before the revised Rules enter into force on January 1, 2012, where the parties have opted out of it, or have agreed to

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[95] *Id*.
[96] *Id*.
[97] *ICC Rules of Arbitration 1998* at art. 31.
[98] ICC RULES OF ARB. art. 29 (2012); app. V (2012).
[99] AAA COMMERCIAL ARBITRATION RULES O-1 (2010); SIAC Rule 26.2 (2010).
[100] *ICC Rules of Arbitration 1998* at art. 23.
[101] ICC RULES OF ARB. art. 29(1) (2012).
[102] ICC RULES OF ARB. app. V, art. 2(1) (2012).
[103] ICC RULES OF ARB. app. V, art. 5(2) (2012).
[104] ICC RULES OF ARB. art. 29(2) (2012); app. V, arts. 6(1), 6(6) (2012).
[105] ICC RULES OF ARB. art. 29(3) (2012).
[106] ICC RULES OF ARB. app. V, arts. 6(2), 6(4) (2012).
[107] ICC RULES OF ARB. art. 29(3) (2012).

another pre-arbitral interim measure procedure.[108] These restrictions assist in preventing abuse of the emergency arbitrator proceeding, with the opt-out provision ensuring that an emergency measure is truly urgent, and the limitation to signatories of the parties protecting, to some extent, the responding party.

Furthermore, emergency arbitrator proceedings do come with a cost. An applicant must pay upfront a total of $40,000; $10,000 for ICC administrative expenses and $30,000 for the emergency arbitrator's fees and expenses, with the potential for increased costs to be determined by the President of the ICC Court.[109] Finally, Article 29 paragraph 7 does not preclude any party from seeking urgent interim or conservatory measures from a judicial authority.[110]

The new Emergency Arbitrator Provisions provide many advantages for parties seeking urgent interim relief. First, the emergency arbitrator administers a temporary solution in the form of a binding order.[111] Although it is not an award, relief is still administered. Second, the whole process is expeditious and not meant to last longer than three weeks, from the submission of the application for an emergency arbitrator to the issuance of the order.[112] Third, the emergency arbitrator does not impinge on the arbitral proceeding itself because an emergency arbitrator's involvement ceases once the arbitral tribunal is formed.[113] In addition, the emergency arbitrator cannot "act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application."[114] The final advantage of the Emergency Arbitrator Provisions is the avoidance of the court. Seeking a state court for urgent interim relief does not always guarantee relief. In some instances, utilizing a state court may not even be an option under the arbitration agreement if state court jurisdiction has been excluded. However, even if the option to seek relief from judicial authority exists, it may be undesirable to do so. Seeking urgent interim relief from a state court would contradict the initial intention of the parties to proceed to arbitration, to avoid the courts. Therefore, the new Emergency Arbitrator Provisions offer a viable option for parties seeking urgent interim relief.

One weakness of the emergency arbitrator provisions is the issue of enforceability. The Order is not an award that can be enforced by state courts. However, the drafters acknowledge this weakness by confirming in Article 29 paragraph 7 that the new Emergency Arbitrator Provisions do not hinder parties from seeking urgent interim relief from state courts.[115] Another disadvantage of the new provisions is the high cost. The minimum fee of $40,000 for an application is quite significant, even for large monetary claims.[116] Ultimately, parties considering urgent interim relief through the Emergency Arbitrator Provisions will need to weigh the advantages and disadvantages of the provisions as opposed to seeking relief through judicial authority. The new provisions offer a detailed process that has the potential to be effective in providing urgent interim relief. The potential advantages of the new Emergency Arbitrator Provisions will help continue to make ICC arbitration attractive.

[108] ICC RULES OF ARB. arts. 29(5)-(6) (2012).
[109] ICC RULES OF ARB. app. V, arts. 7(1)-(2) (2012).
[110] ICC RULES OF ARB. art. 29(7) (2012).
[111] ICC RULES OF ARB. art. 29(2) (2012); app. V, arts. 6(1), 6(6) (2012).
[112] ICC RULES OF ARB. app. V, arts. 2(1), 5(1), 6(4) (2012).
[113] ICC RULES OF ARB. art. 29(3) (2012).
[114] ICC RULES OF ARB. app. V, art. 2(6) (2012).
[115] ICC RULES OF ARB. art. 29(7) (2012).
[116] Revised ICC Rules of Arbitration, *supra* note 20.

VII. AWARDS

Under the Awards section of the new Rules, a provision on remission of awards is included in Article 35, which is not in the 1998 Rules.[117] Although remission of arbitral awards is rare, Article 35 instructs the Court to "apply mutatis mutandis to any addendum or award"[118] and remit the case back to the same tribunal, which must consider the reasons for the remission.

VIII. COSTS

New provisions are included in Article 36 and 37 concerning costs.[119] Article 36 paragraph 4 now addresses the other new Articles in section three of the 2012 Arbitration Rules involving joinder of additional parties and claims between multiple parties.[120] Article 36 authorizes the Court to fix advances on costs and allocate them to the parties.[121] Article 37 includes the new provision, also discussed above, which empowers the arbitral tribunal to take into account the behavior of the party and whether the party conducted the arbitration in an expeditious and cost-effective manner when apportioning costs.[122] The same Article also includes a provision where in the event the arbitration is terminated before a final award is rendered or claims are withdrawn, the Court is to "fix the fees and expenses of the arbitrators and the ICC administrative expenses."[123] The arbitral tribunal is authorized to decide the allocation of costs if the parties have no agreement on this issue.[124]

IX. MISCELLANEOUS

The only change within the Miscellaneous section of the new Rules is in Article 40 addressing limitation of liability. Under the 1998 Rules, arbitrators, the Court and its members, the ICC and its employees, or the ICC National Committees cannot be liable for any act or omission connected to the arbitration.[125] The new Rules include the same language, but add "except to the extent such limitation of liability is prohibited by applicable law."[126]

X. CONCLUSION

The 2012 ICC Rules of Arbitration maintains the essential framework of the 1998 Rules while also making a genuine effort to modernize the Rules to reflect the present demands of international arbitration. The revised Rules codify existing practices[127] and address issues arising

[117] ICC RULES OF ARB. art. 35(4) (2012).
[118] *Id*.
[119] ICC RULES OF ARB. arts. 36, 37 (2012).
[120] ICC RULES OF ARB. art. 36(4) (2012).
[121] *Id*.
[122] ICC RULES OF ARB. art. 37(5) (2012).
[123] ICC RULES OF ARB. art. 37(6) (2012).
[124] ICC RULES OF ARB. art. 37(5) (2012).
[125] *ICC Rules of Arbitration 1998* at art. 34.
[126] ICC RULES OF ARB. art. 40 (2012).
[127] *See, e.g.*, ICC RULES OF ARB. art. 3 (2012).

in international commercial disputes involving multiple parties and contracts.[128] The new emergency arbitrator provisions also reflect the evolutionary nature of the 2012 Rules,[129] and new and revised provisions ensure expeditious and cost-efficient arbitral proceedings.[130] The revised Rules guarantee that the ICC will continue to be one of the world's leading arbitral institutions.

[128] *See, e.g.*, ICC RULES OF ARB. arts. 7-10 (2012).
[129] *See, e.g.*, ICC RULES OF ARB. art. 29; app. V (2012).
[130] *See, e.g.*, ICC RULES OF ARB. arts. 7, 10, 22(1), 22(2), 24 (2012).

MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE?

Michelle Polato*

I. INTRODUCTION

In a world where traditional diplomacy often comes up short in ensuring stable inter- and intra-state relations, the use of mediation in managing political disputes is on the rise.[1] *Mediation in Political Conflicts: Soft Power or Counter Culture?*[2] brings to light the global role played by mediation in political peacemaking. The value of the volume is in its approach. As stated by Jacques Faget, editor of and contributor to *Mediation in Political Conflicts*, the overarching goal of the book is to analyze the "recent rise in mediation strategies and the emergence of new players in the peace building process—NGOs [non-governmental organizations] with various legal statuses, charismatic personalities, private groups, academics and religious networks."[3] To this end, essays and case studies from eleven authors are offered to add to the reader's understanding of the variety of mediation processes and to suggest approaches for the further development of political mediation as an increasingly important peacemaking process.

Mediation in Political Conflicts is a generally accessible and informative assessment of the modern use of political mediation. The book, however, is not without its flaws. For one thing, its title is deceiving. Although written primarily for political mediators, policy advisors and legal scholars, *Mediation in Political Conflicts* might also appeal to a larger audience, as some discussions tend to serve as a general introduction into the larger field of mediation. This seeming lack of a single audience can be both good and bad. On the one hand, *Mediation in Political Conflicts* truly has something for everyone. On the other, the anthology's broad appeal seems to come at the cost of its not being directly pertinent to anyone in particular. Between these extremes, however, *Mediation in Political Conflicts* speaks mainly to an audience of political mediators, policy advisors to programs developing and implementing political mediation, and to legal scholars.

The second shortcoming of *Mediation in Political Conflicts* is that its overall approach is disjointed. Besides the overarching theme of political mediation, there seems to be very little cohesiveness to the book. From one chapter to the next, an inconsistency in vocabulary leaves the reader wondering whether the authors are on the same page, or whether they are writing on different concepts entirely. Although this criticism was predicted by Faget, he believes that this multiplicity allows the chapters to "enrich each other and show how difficult it is to apprehend the concept of mediation."[4] While this may be true, the divergence from one chapter to the next proved distracting.

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[1] Jacques Faget, *The Metamorphosis of Peacemaking*, *in* MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE? 1, 1 (Jaques Faget ed., 2011).

[2] MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE? (Jaques Faget ed., 2011).

[3] Faget, *supra* note 1, at 2.

[4] *Id.* at 21.

Lastly, although *Mediation in Political Conflicts* offers an analysis of the rise of political mediation strategies, its analysis is incomplete. This criticism was also recognized by Faget who notes that the book "reflects a European approach, which is admittedly limited, developed by the French, Spanish, Swiss and German specialists . . . ."[5] Despite these flaws, however, the value of the volume far surpasses any criticisms which may be leveled at it, and *Mediation in Political Conflicts* rises to the level of an important new development in the field of alternative dispute resolution.

The following review summarizes and evaluates the book. In Part II, the foundation-laying first chapter is explored. Part III addresses the ethical requirements of political mediation. In Part IV, selected case studies are summarized. Finally, in Part V, the concluding chapter of the book is evaluated and a final analysis of the book is given.

II. TOWARDS TRANSFORMATIVE MEDIATION

Although tending towards the theoretical, the first chapter, authored by Jacques Faget, is not only accessible but it is also indispensable in understanding the ultimate practical value of *Mediation in Political Conflicts*. The first part of this section summarizes some fundamental principles and definitions as elucidated by Faget. The second part of this section will describe the approach adopted by Faget in analyzing mediation efforts deployed in connection with political conflicts.

A. Basic Principles

1. Mediation in Political Conflicts: A Historical Perspective

Although Faget identifies the 1907 Hague Conference as the historical event from which political mediation emerged, he is quick to note that the use of political mediation has changed over the past century in at least two ways.[6] First, mediation efforts have changed in tandem with the underlying nature of the political conflicts; due to the decline in inter-state conflicts over the past century, mediation is now most often utilized in intra-state conflicts.[7]

The second way in which the use of mediation in political conflicts has changed is the frequency with which it is implemented.[8] Between 1990 and 1996, sixty-four percent of political conflicts were mediated, compared with twenty percent between the end of the Second World War and 1962.[9] That a majority of political conflicts are mediated certainly speaks to the acceptance of the method, the need for the process, and calls for more legal attention to this matter.

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[5] *Id.*
[6] *Id.* at 1.
[7] *Id.* at 1-2.
[8] Faget, *supra* note 1, at 1.
[9] *Id.*

2. Political v. Social Conflicts

In addition to giving the reader an historical perspective on the use of mediation in political conflicts, Faget also distinguishes between social and political conflicts. Without saying much about the former, Faget defines a political conflict as a "territorial, identity based, economic, or ethnic"[10] competition for political power which takes on a "violent and non-regulated dimension . . . ."[11] To illustrate this definition, Faget points to the struggles in the Basque country, Northern Ireland, Cyprus, Timor, and Sudan.[12] These disputes, although mainly intra-state in nature, often taken on international dimensions.[13]

3. Mediation Defined and Differentiated

Because "[o]ne of the innovative objectives of the present volume is to focus exclusively on mediation,"[14] Faget defines mediation and distinguishes it from negotiation and conciliation. Faget's definition depicts "mediation as a consensual process of conflict regulation in which an impartial, independent third party without any decision-making power helps people or institutions to improve or set up relations through exchanges and, as far as possible, to solve their conflicts."[15]

This proposed definition sets mediation apart from negotiation in a few ways. First, mediation requires intervention by a third party whereas negotiation can be conducted without intervention.[16] Second, negotiation is about quick fixes whereas mediation is about finding a long-term solution with a view towards restoration.[17] Third, while the goal of negotiation is compromise, mediation seeks a win-win result.[18]

As for the distinction between conciliation and mediation, Faget turns to etymology: "[C]onciliation is etymologically defined by its objective (*conciliare* means 'to unite') whereas mediation is defined by its methodology (*mediare* means 'to be in the middle')."[19]

It must be mentioned, however, that *Mediation in Political Conflicts* falls short of Faget's vision of a book which is focused solely on mediation as distinct from other non-litigious processes of dispute resolution. Of the eight substantive chapters which follow his introductory chapter, only two explicitly treat mediation as defined by Faget.[20] The other six chapters either

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[10] *Id.* at 3.

[11] *Id.*

[12] *Id.*

[13] Faget, *supra* note 1, at 3.

[14] *Id.* at 2 ("I adopt here a most uncommon position, insofar as the word 'mediation' is often synonymous with 'negotiation' in international relations. Such an undifferentiated usage is conspicuously visible in many scholarly works . . . .").

[15] *Id.* at 3.

[16] *Id.*

[17] *Id.*

[18] Faget, *supra* note 1, at 3.

[19] *Id.*

[20] Manel Canyameres & Anne Catherine Salberg, *Historical Contribution to the Ethical and Methodological Principles of Mediation, in* MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE?, *supra* note 2, at 31-44; Xabier Itçaina, *The Power of Powerlessness: Religious Actors' Peaceful Mediation in the Basque Conflict, in* MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE?, *supra* note 2, at 65-88.

give mediation a different definition,[21] are ambiguous as to the subject they treat,[22] or barely treat mediation at all.[23] While this divergence does not detract from the ultimate value of these chapters, it does work to negate the cohesion and uniformity of approach that Faget holds *Mediation in Political Conflicts* out as having.

4. Modes of Mediating and the Power Debate

A mediator can assume several positions in relation to a political conflict. Mediators may be facilitators, formulators or manipulators.[24] These different roles represent the different degrees of involvement that a mediator can have in the process. As a facilitator, the mediator exerts the least control with the result that the parties to the mediation end up shaping the process and giving it content.[25] The role played by the facilitator is illustrated by the approach of the Norwegian mediators in the Israeli-Palestinian conflict of 1993.[26] The emergent "Norwegian model" is characterized by "joint action from both state actors and NGO representatives, secrecy and a conception of mediation based on mutual trust and not on power."[27]

As a formulator, the mediator assumes more control over the peacemaking process. The formulator sets both the procedural and the substantive agenda by, for example, establishing how many and what types of sessions to have, and by proposing solutions to the parties.[28] Lastly, as a manipulator, the mediator uses power, persuasion and resources to "present ultimatums—what Jimmy Carter did for the successful conclusion of the Camp David agreement in 1979."[29] Although it is a commonly held view that mediators should not limit themselves to one specific role but should adapt their approach according to the needs of the specific situation, Faget notes

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[21] Viola Boelscher, *Human Rights and Mediation—A Much Discussed but not Resolved Relationship: Views on International Cooperation, in* MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE?, *supra* note 2, at 45 ("[T]he term 'mediation' will be used in a broad sense, based on conflict transformation including pre-conciliation, conciliation and reconciliation phases and the whole area of peace building.").

[22] Pierre Anouilh, *From 'Charity' to 'Mediation', From the Roman Suburbs to UNESCO: The Rise of the 'Peace Brokers' of the Community of Sant'Egidio, in* MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE?, *supra* note 2, at 89-114 (using "negotiators," "mediators" and "peace brokers" interchangeably); Aurélien Colson & Alain Pekar Lempereur, *A Bridge to Lasting Peace: Post-Conflict Reconciliation and Mediation in Burundi and the Democratic Republic of Congo, in* MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE?, *supra* note 2, at 153-169 (treating "negotiation," "mediation" and "reconciliation").

[23] Pilar Gil Tébar, *The Catholic Church as Mediator in the Chiapas Conflict, in* MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE?, *supra* note 2, at 115-134 (outlining the Church's historical role as an "advocate" for the indigenous people in the Chiapas Conflict); Elise Féron, *Management of Violence and Mediation Practices at Urban Interfaces in Northern Ireland, in* MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE?, *supra* note 2, at 137-152 (exploring community response efforts to local ethnic violence); Monika M. Sommer, *Traditional Approaches and their Relevance to Coping with Contemporary Conflicts: Experiences from a Border Region in Africa, in* MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE?, *supra* note 2, at 171-196 (treating traditional African conflict resolution ceremonies).

[24] Faget, *supra* note 1, at 8.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 19 n.16.

[28] *Id.* at 8.

[29] Faget, *supra* note 1, at 8.

that in order to wear the manipulator's hat, a mediator must command the type of international influence that is wielded by, say, the President of the United States.[30]

Closely related to the discussion of the different roles of the mediator is the power debate. Faget identifies seven forms of power that a mediator may have: The power to reward; the power to sanction; the power of expertise; the power of legitimate authority; the power of pre-existing relations; the power of the messenger to "go-between" and inform the parties; and the "power of powerlessness."[31] The issue of power divides the field with some believing that warring parties will only listen to a mediator who can hold something over their heads. Others believe that the only true mediator is the one with no power. Still others believe that a mix of the two approaches is best, with the mediator initially extolling no power but then later switching to a power-based approach.[32]

B. Disparate Approaches: Realism v. Pluralism

After an accessible introduction into the basic principles of political mediation, Faget launches into the pith of his argument. As mentioned above, the objective of *Mediation in Political Conflicts* is to analyze various mediation strategies in the realm of political peacemaking.[33] This analysis can be approached from one of two theoretical perspectives: The realist paradigm and the pluralist paradigm.[34] Faget is a proponent of the latter, believing that the pluralist approach lends itself to a more dynamic understanding and adaptable application of mediation as a tool for political peacemaking, and therefore, that it is the proper framework through which to further develop political mediation strategies.[35]

Faget rejects the realist paradigm as unworkably Western. He notes that the realist paradigm is "clearly based on an ethnocentric Western vision of the world" and is accordingly not sensitive to cultural variations that bear on the ultimate efficacy of political mediation globally.[36] For example, realists treat peace as the ultimate goal of mediation.[37] The only goal of mediation, however, should be to place the mediator "in the middle" in the hopes that communications between the parties will be established.[38] By placing peace on a pedestal, realists ignore "the potential positive dimension of conflict for countries or peoples under domination."[39] Treating peace as the ultimate goal can be to the detriment of the parties if the complex underlying causes which sparked the conflict are not fully addressed. Indeed, in "preaching peace," political mediators bear a close resemblance to religious missionaries: "[T]he old missionaries preached God and salvation, the new missionaries preach peace and democracy. . . . Both have a gospel, even if they do not like to admit it, that someone from the West will save the Rest of the planet."[40]

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[30] *Id.*
[31] *Id.* at 9.
[32] *Id.* at 9-10.
[33] *Id.* at 2.
[34] Faget, *supra* note 1, at 2.
[35] *Id.* at 5-20.
[36] *Id.* at 5.
[37] *Id.*
[38] *Id.* at 3.
[39] Faget, *supra* note 1, at 5.
[40] *Id.* at 19-20.

Because the realist paradigm treats peace as the ultimate goal of mediation, it follows that the realist literature is geared towards finding "the golden formula that would bring peace to the world."[41] In the process of trying to divine this formula, realists assign values to different outcomes so as to tell which mediations are "successful." According to Faget, although this approach is certainly helpful in some regards, it is ultimately biased because it "gives more importance to the short to midterm objective result—signing a treaty, a ceasefire, an arrangement, opening talks, curbing violence—than to the . . . mid to long-term subjective consequences [such as] the quality of communication, a change in the populations' attitude, [or] the building of common projects."[42]

In contrast to the realist's quantitative approach to political mediation, the pluralist approach, championed by Faget, is sufficiently flexible to acknowledge the variety of mediation processes and the diversity of their results. The pluralist paradigm embodies a more comprehensive approach to assessing political mediation; one that is capacious enough to encompass the "transformative model" of mediation. The transformative model is largely concerned with party empowerment and recognition of the "Other."[43] "According to this model, conflicts [are] crises in human interaction."[44] The goal of the mediator is thus to get the parties talking: "Reaching an agreement [is] not the ultimate goal; what matter[s] [is] the quality of communication between the players."[45]

As is illustrated throughout the rest of the book, a qualitative approach to analyzing mediation strategies which encompasses the transformative model is indeed better suited in dealing with the complexities of modern political conflicts. This position is not only beneficial in a purely academic sense, but it is also practically significant. In light of the reality that the field of political mediation lacks standardized concepts and practices,[46] the pluralist paradigm is an important guiding principle going forward.

C. Conclusion and Analysis

The first chapter by Jacques Faget is a good illustration of how *Mediation in Political Conflicts* can sometimes have a broad appeal at the expense of not being immediately relevant to anyone in particular. Certain material in this chapter was generally informative and would prove useful as an introduction to mediation in general, and to political mediation in particular. This general introductory material, which might be redundant to a seasoned practitioner, was enmeshed in a larger discussion of theoretical paradigms that would be inaccessible to the average reader and might only serve to inform a policy advisor, legal scholar, or political mediator. That being said, however, the first chapter by Faget is one of the most informative and comprehensive chapters of the whole book. It truly provides something for everyone and its content and tone effectively sets the stage for the chapters which follow.

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[41] *Id.* at 5.
[42] *Id.* at 10.
[43] *Id.* at 15.
[44] Faget, *supra* note 1, at 15.
[45] *Id.*
[46] *Id.* at 14.

III. THE ETHICAL STAKES OF MEDIATION PRACTICES

A. Essential Rules

As has been shown, the political mediator can wear many hats. But does that mean there can be no universal set of ethics to govern his or her behavior? Manel Canyameres and Anne Catherine Salberg, in chapter two of *Mediation in Political Conflicts*, answer this question in the negative.[47] These authors look to the history of political mediation—specifically at the Treaty of Westphalia of 1648, which was mediated by Alvise Contarini and Fabio Chigi, and which put an end to the Thirty Years' War—and gather core ethical standards that, although central to the "successful development of a mediation process, are weak in many political 'mediation' processes" of modern times.[48] This chapter presents a pertinent, practical, and accessible analysis of the ethical role of the political mediator.

1. Independence

The question of mediator independence goes to the issue of trust and acceptance by the parties.[49] As such, independence of the mediator is one of the most fundamental aspects to mediating political conflicts – conflicts that are more often than not rife with mistrust. The more a mediator can maintain a disinterested posture towards the underlying controversy, the more efficacy the process will have.[50] This makes sense in the light of human nature: If one party believes that the mediator is acting on behalf of the other party, that party will become hostile to the mediation process itself.

The mediation efforts in connection with the Treaty of Westphalia lasted five years.[51] This protracted duration was mainly due to the parties' suspicions and distrust of the mediators.[52] And even though Contarini and Chigi were instructed to "overcome difficulties with patience and forbearance,"[53] the records indicate that Contarini nearly abandoned his role because he was tired of the bribery on the one hand, and the incessant finger-pointing on the other.[54] To their great acclaim, however, Contarini and Chigi eventually won the trust of the warring elites, putting an end to the Thirty Years' War and bringing attention to the central import and power of mediator independence.[55]

The idea of mediator independence is just as central to the efficacy of political mediation today.[56] But can there be such a thing as a truly independent mediator in today's world? After all, as Faget notes, modern political meditation is "often elaborated 'from the top' . . . carried out by NGOs financially dependent on governments."[57] So does this mean that modern political

[47] Canyameres & Salberg, *supra* note 20, at 36, 39-44.
[48] *Id.* at 43.
[49] *Id.* at 40.
[50] *Id.*
[51] *Id.* at 34.
[52] Canyameres & Salberg, *supra* note 20, at 33-35.
[53] *Id.* at 34.
[54] *Id.* at 35.
[55] *Id.* at 35-36.
[56] *Id.* at 40.
[57] Faget, *supra* note 1, at 20.

mediation is doomed to be ineffective? Not necessarily. Canyameres and Salberg indicate that Chigi and Contarini were themselves closely linked to the Roman Catholic Church, which was a party to the conflict.[58] Therefore, absolute independence is not necessary. Rather, "[t]he independence of the mediator means that . . . the financing for his activity should respect his autonomy of action."[59]

2. Impartiality

Closely related to the issue of independence is that of impartiality. Mediator impartiality is geared toward winning the confidences of the disputing parties.[60] A mediator achieves this by not judging the conflict, that is, by remaining indifferent.[61] Once a mediator wins a party's confidence, he or she must keep it or risk endangering the process. A key concept to mediator impartiality is therefore confidentiality.[62]

Mediator impartiality—re-enforced by the mediator's strict adherence to confidentiality—is indisputably every bit as important today to the efficacy of political mediation as it was in the days of the Treaty of Westphalia. But does this mean that modern political mediation must be conducted outside the purview of the media?[63] This is a difficult question in light of the public's thirst for transparency. Surely a compromise can be struck wherein general information about the process can be publicized, while the work of the mediator remains secret.[64] At the end of the day, however, the political parties will have to trust the mediator to resist the claim to TV fame.[65]

3. Lack of Decision-Making Power

The model of mediation which emerged from the practice of Contarini and Chigi was one of "letting common interests prosper,"[66] a model based on the belief that "an agreement can only be reached as a result of the 'willingness of the parties.'"[67] Again, this ethical command makes sense in the light of human nature: The more responsibility the mediator shoulders for the resolution of the conflict, less responsibility will be assumed by the parties, who might then consider a final agreement as externally imposed, and who consequently, might be less likely to abide by the resolution. In this way, "[a]n excess of support has a negative effect on . . ."[68] the process. So as to maintain a lack of decision-making power, Contarini and Chigi were instructed "to avoid proposing solutions to the parties," and "not to agree to arbitrate."[69]

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[58] Canyameres & Salberg, *supra* note 20, at 40.
[59] *Id.*
[60] *Id.* at 40-41.
[61] *Id.* at 37, 41.
[62] *Id.*
[63] Canyameres & Salberg, *supra* note 20, at 41.
[64] *Id.*
[65] *Id.* at 41-42.
[66] *Id.* at 38.
[67] *Id.* at 43.
[68] Canyameres & Salberg, *supra* note 20, at 42.
[69] *Id.* at 34.

Canyameres and Salberg argue that the proscription against mediator decision-making power is just as feasible and relevant today.[70] This does not mean, however, that the proscription is a command that mediators extol the power of powerlessness; rather, the mediator remains free to assume various degrees of control over the process.[71] The mandate that the mediator be without decision-making power is simply a command—no matter how much power the mediator assumes—that the mediator always considers whether to "persist or desist with regard to the feasibility of the mediation, if his intervention may also be counterproductive."[72]

B. Human Rights Approach

The ethical responsibilities of the political mediator take on a new dimension in conflicts involving human rights violations. In chapter three, Viola Boelscher argues that, in the face of human rights violations, political mediation efforts risk being unethical and ineffectual if the rights of the victims are not given due weight: First, mediation efforts risk being unethical in political conflicts involving human rights violations because, if a mediator were impartial—that is, nonjudgmental—the mediator would actually appear partial towards the violators.[73] Second, political mediation efforts risks being ineffectual in conflicts in which there have been human rights violations if the rights of the victims are not given due weight because it is not "possible to build a lasting peace if none of the economic, social, political and civil human rights [issues] are addressed."[74] Human rights violations are often at the core of political conflicts and if the underlying issues are not resolved—or even addressed in the mediation process—conflict is sure to erupt again.[75]

After analyzing the "complex relationship between human rights and mediation"[76] in Guatemala, Uganda, Afghanistan, the Philippines and Colombia, Boelscher proposes a human rights based approach to mediating political conflicts involving human rights violations.[77] Although there is "no common formula,"[78] the main characteristic of such a mediation effort is its integration of all affected groups into the mediation process.[79]

C. Conclusion and Analysis

Unlike the first chapter by Faget, which is at times only useful to the beginner as an introduction, and at other times only useful to the practitioner, legal scholar or policy advisor, chapter two by Canyameres and Salberg is relevant to the full spectrum of potential readers. First, the basic ethical principles which can be drawn from the experiences of Contarini and Chigi are useful to introduce the unseasoned but curious beginner. Second, because these basic ethical

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[70] *Id.* at 42.
[71] *Id.*
[72] *Id.*
[73] Boelscher, *supra* note 21, at 60.
[74] *Id.* at 57.
[75] *Id.* at 59.
[76] *Id.* at 45.
[77] *Id.* at 59.
[78] Boelscher, *supra* note 21, at 59.
[79] *Id.* at 60.

principles are shared across specialities within the larger field of mediation,[80] chapter two of *Mediation in Political Conflicts* serves as a beneficial reminder to the mediator practicing in other fields of the importance of these ethical precepts. Finally, because chapter two outlines one of the first successfully mediated political disputes, and draws comparisons with modern political mediation, it is a useful contribution to the political mediator, policy advisor and legal scholar dealing with the issue of ethics in modern political mediation.

Chapter three by Viola Boelscher is admittedly more limited in appeal and might only be relevant to political mediators practicing internationally, policy advisors and academics. That is not to say, however, that the layman or the mediator practicing in other fields will not find this chapter to be an accessible thought experiment: By highlighting the tension between the ethical duties of a mediator, the cultural context of any given political dispute, and the jus cogens norm against human rights violations, chapter three of *Mediation in Political Conflicts* is an important contribution to any reader's understanding of the ethical stakes of political mediation in the modern world.

IV. SELECTED CASE STUDIES

Although *Mediation in Political Conflicts* presents the reader with six chapters providing just as many case studies, only three chapters will be explored here. While the other three case studies also offer beneficial perspectives, they were ultimately not selected for review because their contributions are either redundant with other chapters, or of limited relevance to the practical task of analyzing political mediation strategies.

A. The Catholic Church in the Basque Conflict

Chapter four, by Xabier Itçaina, presents the reader with an analysis of the mediation efforts of the Roman Catholic Church in the Basque country conflict. Though "religious actors have long represented the second largest group of political mediators in the world,"[81] it does not follow that the mediation efforts of religious actors are effortless. Rather, the mediation efforts of the Catholic Church in the Basque country seem to be complicated *because* they are made by the Church. Putting it mildly, Itçaina observes that "the Church's commitment to mediation in the Basque conflict has not gone smoothly."[82] The shortcoming of the Church is seen as an effect of "the controversy over its supposed impartiality, independence and absence of decision-making power."[83]

First, the independence of the Church is greatly debated due to its historical involvement in the conflict.[84] Indeed, the Church's mediation efforts in the Basque conflict are deployed by the "Basque clergy" seated in the "Basque Catholic Church"—the very nomenclature tends to

[80] Canyameres & Salberg, *supra* note 20, at 39 ("Other fields of mediation such as family, commercial or civil mediation, which have consolidated over the past decades, are supported by ethical principles that are not much different from those described above.").

[81] Itçaina, *supra* note 20, at 67.

[82] *Id.*

[83] *Id.*

[84] *Id.*

suggest a stake in the underlying conflict.[85] This perceived insider status engenders mistrust.[86] Second, the Church's impartiality is also questioned.[87] However, unlike the Church's perceived lack of independence, the lack of impartiality might not be so detrimental, as partial mediators are not categorically precluded from winning the confidences of the parties: "[S]uccessful mediators need not systematically be impartial, and the game theory model reveals that bias, to a certain extent, notably through sharing information, is not only acceptable but sometimes necessary."[88] However, it remains an open question whether the Church's perceived partiality is workable in the Basque conflict. Lastly, the Church is seen as wielding significant influence over political decision-making which seems to undercut their ability to allow the conflicting parties to come to a voluntary agreement.[89]

B. The Private Community as Mediator

In chapter five, Pierre Anouilh analyzes the rise of Sant'Egidio—a private Italian community—as an internationally accepted political mediator. Although "Sant'Egidio is, above all, a Catholic organisation,"[90] it is not a branch of the Church in the way that the Basque Church is. Rather, the community is a private one which originated as a charitable organization that has since come to be seen as a legitimate political mediator.[91]

Sant'Egidio emerged on the international stage with the successful mediation of the political conflict in Mozambique in 1992.[92] The "Mozambican success," however, has yet to be duplicated.[93] Even so, Sant'Egidio remains a highly acclaimed player in the field of political mediation.[94] Anouilh explains this curious phenomenon by reference to Sant'Egidio's "symbolic capital."[95] Anouilh defines symbolic capital as a "cultural form of *credit* …. It is not a universal form of capital; it is highly historical and deeply entrenched in socio-cultural practices …. One of the main aspects of symbolic capital is that it is largely unrecognised as *capital* and recognised as *legitimate competence*."[96]

Anouilh identifies several "symbolic goods" possessed by Sant'Egidio. First, from the beginning, the community has displayed economically disinterested behavior which gives the community independence.[97] Second, the community's founders come from wealthy families and are well-educated and well-known intellectual and religious figures in Italy and worldwide.[98] Third, and related to the second point, the community's founders belong to very powerful social networks.[99] Fourth, by virtue of their strong background in charitable work, Sant'Egidio is seen

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[85] *Id.* at 75.
[86] Itçaina, *supra* note 20, at 80.
[87] *Id.* at 75.
[88] *Id.* at 77.
[89] *Id.* at 80-82.
[90] Anouilh, *supra* note 22, at 91.
[91] *Id.* at 112.
[92] *Id.* at 90.
[93] *Id.* at 112.
[94] *Id.* at 111.
[95] Anouilh, *supra* note 22, at 104-11.
[96] *Id.* at 104 (citing PIERRE BOURDIEU, THE LOGIC OF PRACTICE (1990)).
[97] *Id.* at 105-06.
[98] *Id.* at 107.
[99] *Id.* at 107-09.

as honest and virtuous.[100] These "symbolic goods" identified by Anouilh lend Sant'Egidio an aura of competence despite its not having successfully mediated a political dispute in nearly two decades.

C. NGO Mediation in Burundi and the Democratic Republic of Congo

Chapter eight, by Aurélien Colson and Alain Pekar Lempereur, explores the impact of the work of ESSEC IRÉNÉ, a non-governmental organization, on two recent political conflicts in Africa. This NGO has developed a mediation mechanism which has been implemented in Burundi since 2003 and in the Democratic Republic of Congo since 2006.[101] The mechanism begins as a workshop that includes not only political representatives from every level—including officials and non-officials such as rebels—"but also representatives from the civilian, economic and media worlds."[102] The framework is a five day retreat.[103] For the first three days, issues relating to the conflict are not discussed; rather the focus is on building relationships.[104] It is only in the last two days that the participants begin to identify issues and consider solutions.[105] At the end of the five days, the process is not over; the initial workshop merely marks the beginning and follow-up workshops are held every three months with the result that, over time, essential networks are developed.[106]

Colson and Lempereur explore three distinctive marks of this mechanism: First, this mediation mechanism focuses on the parties and "necessitates the appropriation or ownership of the mechanism by local actors."[107] Second, this process takes a long-term view as evidenced by the holding of follow-up workshops.[108] Third, this form of mediation "demands the integration of the most radical actors" into the process.[109]

D. Conclusion and Analysis

The case studies reviewed above were selected because they each illustrate a different aspect of the "recent rise in mediation strategies and the emergence of new players in the peace building process"[110] which *Mediation in Political Conflicts* analyzes. Chapter four, by Xabier Itçaina, was selected for review primarily because "religious actors have long represented the second largest group of political mediators in the world,"[111] and Itçaina effectively outlines the dimensions of the role of the Catholic Church as mediator in the Basque county conflict. By illustrating the tension that exists in the mediation role of the Church, and by providing a pertinent example of how critical mediator independence, impartiality and lack of decision-

[100] Anouilh, *supra* note 22, at 111.
[101] Colson & Lempereur, *supra* note 22, at 158.
[102] *Id.*
[103] *Id.* at 159.
[104] *Id.*
[105] *Id.*
[106] Colson & Lempereur, *supra* note 22, at 161.
[107] *Id.* at 160.
[108] *Id.*
[109] *Id.*
[110] Faget, *supra* note 1, at 2.
[111] Itçaina, *supra* note 20, at 67.

making power can be to political mediation—even where the mediator is as prominent as the Catholic Church—chapter four has significant value and is worth exploring independently.

Chapter five, by Pierre Anouilh, was selected because the case of the community of Sant'Egidio demonstrates how private citizens and communities can become dominant players in the global political mediation market. Because the use of the private community as a legitimate political mediator is currently on the rise,[112] Anouilh's inquiry into the status of Sant'Egidio is pertinent to the overarching analysis of rising mediation strategies and, as such, is a practical contribution to any reader's understanding of modern political mediation.

Chapter eight, authored by Aurélien Colson and Alain Pekar Lempereur, illustrates an innovative mediation mechanism which has been implemented in two violent political conflicts to date. This case study was selected for review because "mediation is often carried out by NGOs"[113] and Colson and Lempereur provide the reader with a fascinating glimpse at the work of one non-governmental organization, ESSEC IRÉNÉ, and the impact that the strategies employed by this NGO have had in both Burundi and the Democratic Republic of Congo.

Each of these three chapters would prove useful to political mediators, policy advisors to programs developing and implementing political mediation, and to legal scholars involved with political mediation. Because the case studies reviewed above were accessible and informative, they would also prove generally useful to the novice and to mediators in other fields whose curiosities are piqued by political mediation. The case studies that were not selected for review are still informative and interesting in their own right and might find appropriate audiences in legal scholars, anthropologists or historians. In the end, however, the three chapters which were not selected had too remote a connection to the overall inquiry into the rise of mediation strategies.[114]

V. CONCLUSION

In the final chapter of *Mediation in Political Conflicts*, Jacques Faget attempts to answer the question posed by the book's subtitle: Is political mediation an exercise of soft power complimenting traditional diplomacy; or, is political mediation a counter culture movement initiated "from below?"[115] Faget believes there is more support for a finding that modern political mediation is an exercise of soft power, formulated "from above."[116] Although the significance of the "from above" versus "from below" taxonomy is not immediately clear, the reader is led to believe that the division is pertinent to a workable understanding of political mediation going forward.

With his eye to future research, Faget suggests two variables for further study: The independence of the political mediator; "and the methodology of the mediation process."[117] These two variables are significant because "[t]he neotenic potentialities of mediation—in the sense of a metamorphosis of political conflict regulation—are all the stronger if mediators are

[112] Anouilh, *supra* note 22, at 103.

[113] Faget, *supra* note 1, at 20.

[114] *See supra* note 23 and accompanying text.

[115] Faget, *supra* note 1, at 2.

[116] Jacques Faget, *Conclusion, in* MEDIATION IN POLITICAL CONFLICTS: SOFT POWER OR COUNTER CULTURE?, *supra* note 2, at 198.

[117] *Id.* at 199.

independent from the powers that be and if they adopt a non-directive and transformative methodology."[118]

In conclusion, *Mediation in Political Conflicts* is an indispensable contribution to the field of political mediation. The book, however, is not beyond criticism. One glaring problem the reader cannot help but notice is that *Mediation in Political Conflicts* seems to lack a specific audience. While the title of the book indicates that its content might only be relevant to political mediators and other practitioners or scholars directly involved with political mediation, some chapters would be accessible and informative to a broader audience of mediators in other fields, while other chapters would only be of interest to a more specialized group of readers, such as legal anthropologists or historians.

A second issue with the book is that it lacks a uniform approach. While this is partly due to the fact that *Mediation in Political Conflicts* is authored by eleven different individuals with various backgrounds, it is also due to a lack of consistency in vocabulary used and topics treated from chapter to chapter. Despite Faget's strong characterizations of the book in his introductory chapter—holding *Mediation in Political Conflicts* out as a pluralist analysis of the rise of mediation strategies focusing solely on mediation as distinct from other non-litigious dispute resolution processes[119]—the reality of the matter is that *Mediation in Political Conflicts* falls short of this vision. Maybe if the book were formatted so that the authors were in dialogue with one another—with one author responding to the last, and so on—the book would have presented a more cohesive approach to political mediation while still maintaining its multiplicity of views.

Notwithstanding the criticisms which might be leveled at the book, *Mediation in Political Conflicts* rises to the level of a noteworthy work. Its significance is due primarily to two facts: First, a majority of modern political conflicts are mediated.[120] Second, as of yet, there are no standardized concepts or practices in the field of political mediation.[121] Because *Mediation in Political Conflicts* furthers a flexible approach to the understanding and development of modern political mediation strategies, this book represents an indispensable step in the movement towards developing mediation practices that respond to the reality of political conflicts today.

[118] *Id.*
[119] Faget, *supra* note 1, at 2.
[120] *Id.* at 1.
[121] *Id.* at 14.

FUNDAMENTALS OF LABOR ARBITRATION

Christen L. Rafuse*

I. INTRODUCTION

Fundamentals of Labor Arbitration[1] was co-authored by Jay E. Grenig and Rocco M. Scanza, both of whom are on the labor panel of the American Arbitration Association.[2] Scanza and Grenig are experienced on the topic of labor arbitration; between the two, they have over a half-century of "experience as advocates, arbitrators, administrators, educators, and trainers in workplace dispute resolution."[3] The authors' extensive experience comes as a comfort for readers, who can be reassured that their "how-to" manual was written by two competent people who have been greatly involved in arbitration for years. Additionally, it may come as a comfort to readers that this book was not written by a sole author. Because Grenig and Scanza worked as a team to write this book, the views in it are likely to be more comprehensive and aggregate rather than one-sided.

Labor Arbitration: What You Need to Know, published by the American Arbitration Association almost three decades ago, was this book's predecessor and has been completely reconstructed by Grenig and Scanza.[4] *Fundamentals of Labor Arbitration* is the first volume of the forthcoming "AAA/ICR Dispute Resolution Series."[5] This book contains important material for readers such as attorneys, arbitrators, and arbitrating parties who are eager to learn about the arbitration process and its details.[6] The book states that it intends to serve as an introductory guide to labor arbitration and to help both arbitrators and parties involved to more efficiently reach a resolution[7] – and it accomplishes this objective by breaking down the arbitration process into sizable and comprehensible sections of material designed to instruct both the experienced and inexperienced reader. The book manages to explain arbitration in detail but also in a way that is concise and does not slow down more experienced readers, making it a very useful book for arbitrators in practice and for arbitrating parties.

William K. Slate II, the president of the American Arbitration Association, described this book in a foreword as a "milestone publication."[8] Slate notes that the book was written with "today's sophisticated ADR audience in mind while retaining an emphasis on the practical and on understanding" the ADR process.[9]

Similarly, Martin Scheinman, "Foremost Benefactor of the Scheinman Institute on Conflict Resolution," stated in another foreword that he wants to give arbitrators a "new and

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[1] JAY E. GRENIG & ROCCO M. SCANZA, FUNDAMENTALS OF LABOR ARBITRATION 1 (2010).

[2] *Id.* at ii.

[3] *Id.* at xi.

[4] *Id.* at i.

[5] *Id.* at i.

[6] GRENIG & SCANZA, *supra* note 1, at i.

[7] *Id.* at i.

[8] WILLIAM K. SLATE, *FOREWORD* TO JAY E. GRENIG & ROCCO M. SCANZA, FUNDAMENTALS OF LABOR ARBITRATION 1, ix (2010).

[9] *Id.* at ix.

positive message," specifically "to educate and train a new cohort of arbitration practitioners from the labor and management communities" by publishing this new book.[10]

Slate and Scheinman were correct in their views; the book manages to properly balance its content for both an experienced and a more novice audience without disadvantaging one over the other. The process of arbitration is broken down into such detail that *Fundamentals of Labor Arbitration* proves to be a most useful manual for both the experienced and inexperienced. Any new arbitrator or arbitrating party would find it advantageous to pick up this book and at least browse through it to get an idea of what the arbitration process entails.

II. SUMMARY

Fundamentals of Labor Arbitration is divided into ten chapters, each with multiple sections for easy reference. Grenig and Scanza have made it incredibly easy for a reader to pick up the book and quickly find the section he or she is looking for because of the way the authors have broken down the text. Because of this, *Fundamentals of Labor Arbitration* would be most useful as a guide to be consulted in sections rather than read as one continuous text. The chapters are sometimes slightly disjointed, but it seems as though this is the nature of a manual; it does not read as a narrative with chapters that perfectly flow into one another, but Grenig and Scanza did a good job tying together various bits of information and topics as neatly as possible.

A. The First Chapter of Fundamentals of Labor Arbitration

Chapter One notes that arbitration has been flourishing as a method of resolving issues, and labor laws have thus been encouraging this process.[11] The book states that some of the main points of arbitration are to improve communication between employer and employee, to provide a cost-effective remedy of resolution, and to have the dispute presided over by an impartial third party who is capable of making a binding decision.[12] However, there is also something known as advisory arbitration, or "factfinding," in which the decision is merely a recommendation and is not binding on either party.[13] The authors tend to add lesser-known facts about arbitration (such as "factfinding" arbitration), which is helpful to parties who may be interested in a different form of arbitration other than binding. Although the authors do not delve into factfinding arbitration much, at least the reader is informed of the fact that it exists as another way for parties to resolve a dispute. An interested reader or arbitrator could easily do more research on the topic and determine whether or not that form of arbitration is better suited to the needs of the arbitrating parties, or if one of the parties may like to use it in the future for a different dispute. Grenig and Scanza are quite adept at giving the reader the information he or she needs, and some extraneous information that he or she may be interested in, but which is not necessary to understanding the process of typical arbitration.

Chapter One also explains two types of arbitration. One is "interest arbitration," which is used to solve conflicts arising over the creation of a labor agreement.[14] These disputes are usually

[10] GRENIG & SCANZA, *supra* note 1, at x.
[11] *Id.* at 1.
[12] *Id.* at 1–2.
[13] *Id.* at 2.
[14] *Id.* at 2–3.

caused by a disagreement over the prospective terms going into the contract between employer and employee[15] or into the collective bargaining agreement, which sets forth which complaints are covered by the grievance procedure.[16] The other type of arbitration is grievance arbitration, or "rights arbitration," which arises over the "interpretation or application" of the language already implemented in a contract.[17] As stated previously, *Fundamentals of Labor Arbitration*, even in the very first chapter, is already adept at giving cursory, brief explanations of terms that are comprehensive but do not slow down a more experienced reader.

Chapter One additionally discusses mistakes and misuses of arbitration that minimize the efficiency of the process; for example, utilizing arbitration to harass the other party or cause monetary harm, not complying with discovery, and so forth.[18] This type of section serves as a warning and a reminder to arbitrating parties.

In this sense, *Fundamentals of Labor Arbitration* proves useful for the parties who are going to be using arbitration in lieu of a judicial procedure; it gives instructions for both arbitrators and the parties themselves. The types of checklists seen throughout Chapter One are very helpful and common throughout the book itself. Many checklists may seem like sheer common sense, but could easily be accidentally disregarded when overshadowed by the process of arbitration. For example, one of the arbitrating parties could rely on the checklist in Chapter One, which describes how to control the costs of arbitration and make the process even more cost-efficient.[19] Some of these include: "not changing the hearing date, not filing unnecessary briefs, coming to the hearing prepared, [and] avoid[ing] unnecessary case citations."[20] For each party involved, cost-efficiency will usually be a concern, and is often one of the main reasons for defaulting to arbitration instead of litigation in the first place. Guidance on how to keep these costs at a minimum will therefore be useful for the arbitrating parties. The checklists therefore serve as good reminders to parties and arbitrators on how to act properly and make the best possible use of the arbitration process.

B. The Second Chapter of Fundamentals of Labor Arbitration

Chapter Two focuses on the United States Supreme Court decisions regarding labor arbitration and the Labor-Management Relations Act (hereinafter LMRA).[21] Chapter Two specifically emphasizes "the trilogy," a set of three Supreme Court decisions which reinforced a policy favoring arbitration.[22] This section of *Fundamentals of Labor Arbitration* also provides the reader with a certain topic, such as "breach of contract," and then quickly provides the applicable case law to the subject.[23] Although the authors mainly give holdings of these decisions rather than facts or procedural history, always included is the citation of the case. An intrigued reader could easily research a case on Westlaw or LexisNexis if he or she thought it applicable to his or her own case. This chapter thus serves as a good inventory of decisions for certain areas of

[15] GRENIG & SCANZA, *supra* note 1, at 2–3.
[16] *Id.* at 17.
[17] *Id.* at 2.
[18] *Id.* at 5.
[19] *Id.* at 6.
[20] GRENIG & SCANZA, *supra* note 1, at 6.
[21] *Id.* at 9.
[22] *Id.* at 10.
[23] *Id.* at 11.

arbitration, but again does not slow down the reader with unnecessary facts or information. Because this book is a manual, and not a treatise of arbitration law, sections such as this are very beneficial to give the reader a quick "how-to" while providing the reader with tools to learn more in depth if he or she desires to do so.

This section also provides the reader with a good understanding of how courts generally treat arbitration, and how arbitration has evolved as an autonomous entity. Understanding case law is important to understanding how arbitration works and *Fundamentals of Labor Arbitration* gives the reader just enough information to understand how arbitration works in contrast to the judicial system, but also gives the reader extra information to pursue if he or she desires.

C. The Third Chapter of Fundamentals of Labor Arbitration

Chapter Three expands Chapter One's initial discussion upon grievance complaints.[24] Generally, grievance claims are resolved before the parties have to submit to arbitration because the procedure provides multiple chances for the parties to settle.[25] Grievances that ultimately end in arbitration usually involve applying or interpreting the agreement's terms.[26] Chapter Three then continues by focusing its audience on future arbitrators rather than future arbitrating parties, providing a basic "how-to" handle these grievances rather than a guide on the substantive law.

Together, Chapters One, Two, and Three "provide the background necessary to understand the labor arbitration process and why labor disputes often end up in arbitration."[27] These chapters explain the types of arbitration and arbitration's advantages, and also address the sources of labor arbitration in statutes and case law.[28] Most importantly, the chapters discuss the entire process of arbitration, from beginning to end.[29] These chapters serve as a very important guide to arbitrators and arbitrating parties because it breaks the process down into succinct, understandable detail for the reader to follow. Again, it may serve as a comfort for the reader to know that the authors have extensive experience in this field, and worked together to come up with the perfect manual.

D. The Fourth Chapter of Fundamentals of Labor Arbitration

Chapter Four explains the role of the arbitrator in a grievance procedure and how to properly pick an arbitrator.[30] This chapter also provides for disadvantages and advantages of having one arbitrator as opposed to multiple arbitrators, different methods for selecting an arbitrator, sources of information about arbitrators, and questions to ask about arbitrators.[31] Particularly helpful is the checklist on page thirty, which provides what to look for in an arbitrator, such as prior rulings, availability, and cost.[32] This checklist, as well as the list of

[24] *Id.* at 17.
[25] GRENIG & SCANZA, *supra* note 1, at 2, 17.
[26] *Id.* at 18.
[27] *Id.* at xi.
[28] *Id*.
[29] *Id*.
[30] GRENIG & SCANZA, *supra* note 1, at 28.
[31] *Id.* at 28–34.
[32] *Id.* at 30.

questions to ask about an arbitrator,[33] provide a great way for a party to learn more about the arbitrator that will be presiding over the dispute, and may even give insight into what the arbitrator deems important in a dispute or how the arbitrator will rule. This type of checklist is common throughout the book and invaluable for those who are unfamiliar with the arbitration process, especially someone who has never before picked an arbitrator. Those who are more experienced of course have the option of skipping over these checklists, or merely using them as a way to double-check they have already done what was needed; in this sense, the checklists often serve as reminders for the more experienced rather than as teachers.

E. The Fifth Chapter of Fundamentals of Labor Arbitration

Chapter Five notes that being organized and ready for the arbitration hearing is "essential to successful advocacy."[34] The chapter provides multiple checklists in order to prepare: one checklist for reviewing the arbitral clause,[35] one for conducting an investigation,[36] one for reviewing the grievance steps,[37] one for selecting witnesses[38], and another for preparing witnesses.[39] Again, this is the reason why *Fundamentals of Labor Arbitration* is so useful; its checklists serve as a great reminder or learning tool. The book therefore appeals not only to prospective arbitrators, but also to future arbitrating parties. Anyone who is about to go through the arbitration process could use this book to his or her advantage, even if he or she is not arbitrator. By providing a tool with which arbitrating parties can familiarize themselves with arbitration, the authors have made this book successful.

Combined, Chapters Four and Five explain how to initiate the arbitration process and go through the stages of preparation before the hearing.[40] Chapters Four and Five combined explain how to fully prepare for the arbitration process as either an arbitrator or as an arbitrating party. Chapters One through Five therefore serve as a "crash course" mainly for those unfamiliar with the arbitrating process, though these chapters do have beneficial aspects for even the more experienced readers. However, readers who are newer to the idea of arbitration will most likely find these first five chapters to be the most useful because these chapters break down the process leading up to the arbitration hearing in great detail, and will make someone unfamiliar with the hearing much more comfortable. By understanding what goes into arbitration before the hearing, the reader will have a much more comprehensive understanding of the hearing. The parties will therefore know what to expect, how to voice their opinions effectively, and so forth. It was wise of Grenig and Scanza to break down the process so minutely and spend five chapters explaining things step-by-step, rather than trying to explain during the chapter on the hearing itself.

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[33] *Id.* at 32.
[34] *Id.* at 37.
[35] GRENIG & SCANZA, *supra* note 1, at 37.
[36] *Id.* at 39–40.
[37] *Id.* at 38–39.
[38] *Id.* at 41–42.
[39] *Id.* at 42–43.
[40] GRENIG & SCANZA, *supra* note 1, at xi.

F. The Sixth Chapter of Fundamentals of Labor Arbitration

Chapter Six focuses on both the substantive and procedural matters of the arbitration hearing.[41] The chapter outlines the process of selecting the hearing location and date,[42] and then moves on to the order of proceedings in a general arbitration hearing.[43] This section is particularly helpful for those unfamiliar with an arbitration proceeding because the chapter does not merely list the steps of the proceeding, but delves into each step rather thoroughly. An unfamiliar reader therefore learns what each step entails and how it fits into the larger picture of the arbitral hearing. Also, a reader unfamiliar with arbitration can easily see how arbitration both parallels and deviates from the normal judicial process. Similarly, an arbitrator or party more familiar with the hearing can use this chapter to double-check his or her own conduct, and ensure that nothing will be overlooked during the hearing.

Because Chapters One through Five explain the preparation for the hearing in such detail, the chapter on the hearing itself is surprisingly simple to understand. Again, Grenig and Scanza did a commendable job leading up to Chapter Six.

G. The Seventh Chapter of Fundamentals of Labor Arbitration

Chapter Seven focuses on the labor arbitration principles followed by arbitrators.[44] Generally, a contract may be terminated "at-will" by employer or employee so long as the contract does not specify the amount of time for which the employee will be employed.[45] In an attempt to protect the employees from the more unpredictable at-will employment, many collective bargaining agreements state that the employee may only be disciplined for "just cause."[46]

When faced with a "just cause" arbitration dispute, an arbitrator must initially decide if the facts provide grounds for the employer's accusation against the employee.[47] The chapter characterizes seven tests for just cause, expanding upon each one and then provides criticism of these seven tests.[48] These tests are particularly helpful for an employee who may want to know the strength of his or her claim. Many of these tests inquire into due process concerns, the relation between offense and disciplinary action, amount of evidence against the employee, and so forth.[49] The arbitrator in this type of dispute often decides whether the worker was given due process,[50] specifically "whether the employee charged with misconduct was given notice of employer work rules, orders, and rules of conduct, and whether the employee…received notice of the charges."[51] Depending on the seriousness of a violation of due process, a violation may have serious consequences on the award rendered.[52] Also, the arbitrator must determine if the employee's

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[41] *Id*.
[42] *Id.* at 46.
[43] *Id.* at 47–55.
[44] *Id.* at 57.
[45] GRENIG & SCANZA, *supra* note 1, at 57.
[46] *Id*.
[47] *Id*.
[48] *Id.* at 58–64.
[49] *Id*.
[50] GRENIG & SCANZA, *supra* note 1, at 57.
[51] *Id.* at 66.
[52] *Id*.

offense is proportionate to the disciplinary action.[53] The arbitrator often looks to whether the discipline imposed is similar to the employer's treatment of other like offenses, or whether this employee has been improperly singled out.[54]

This chapter serves as a good explanation of discipline dispute resolution in arbitration. An arbitrating party will therefore have sufficient notice of what the arbitrator is looking for, what the arbitrator will decide, and what evidence to be sure to present. The arbitrating parties will clearly need to be prepared for this type of dispute, and this chapter certainly helps.

However, this chapter seems slightly out of place. It appears as though the authors wanted to insert this section into the book, but were unsure of exactly how to incorporate it in with the rest of the text. In general, this book is sometimes a little disjointed, but it seems as though this is the nature of a manual. The text does not always flow together logically, because *Fundamentals of Labor Arbitration* is not a narrative but more of a "how-to," causing some sections to feel out of place.

H. The Eighth Chapter of Fundamentals of Labor Arbitration

Chapter Eight explains the rules used by arbitrators in order to interpret contracts, specifically labor agreements.[55] This chapter sets forth the "primary rules of interpretation," such as the "plain meaning rule" and other staples of contract interpretation.[56] That short section gives an excellent "crash course" for either an arbitrator or an arbitrating party in the basics of how to interpret a contract. The authors have also provided a checklist of "other rules of interpretation" and things to look for when reading through a contract.[57] Another beneficial aspect of this chapter is its short summary of the parol evidence rule, and an explanation of when it may apply to contract terms.[58]

One good tip to arbitrating parties that this chapter provides is to look to both court decisions and previous arbitration awards in order as guidance on cases involving the same contract provisions.[59] Though a previous arbitration award will not be binding on an arbitrator, he or she may still be persuaded to rule in the same fashion if the facts and issue in the case are very similar. [60]

Overall, this chapter was fairly useful, but will be more beneficial to arbitrators and arbitrating parties who have specific disputes over contracts. This chapter therefore appeals to a more specialized group, while the other chapters serve more as a manual. Again, this is why sometimes *Fundamentals of Labor Arbitration* seems disjointed; the authors try to give as much preliminary information as possible, but the information does not always fit together perfectly.

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[53] *Id.* at 57.
[54] *Id.* at 65.
[55] GRENIG & SCANZA, *supra* note 1, at xii.
[56] *Id.* at 69–70.
[57] *Id.* at 71–72.
[58] *Id.* at 74.
[59] *Id*.
[60] GRENIG & SCANZA, *supra* note 1, at 75.

III. THE NINTH CHAPTER OF FUNDAMENTALS OF LABOR ARBITRATION

Chapter Nine lists the requirements of arbitration awards, and discusses these awards in depth.[61] The book explains, "An arbitration award is the decision of the arbitrator on the issue or issues the parties agreed to submit to arbitration."[62] Typically, the arbitration award is a sole sentence merely proclaiming whether or not the grievance was granted;[63] surprisingly, the arbitrator is under no duty whatsoever to explain the reasoning for his or her grant or denial of the grievance.[64] This is one way arbitration is significantly different from litigation, and arbitrating parties would therefore find this section useful. Those unfamiliar with the process may feel slighted by a one-sentence award, but sections such as this truly help a party prepare for the arbitration process and its unexpected nuances.

The gravity of this chapter proves to be cautionary to arbitrating parties. For example, if a party does not appear for a hearing, the arbitrator is allowed to hear testimony and issue a decision as though the party had indeed appeared.[65] An inexperienced arbitrating party needs to be aware of important details in order to strengthen and continue a claim, and *Fundamentals of Labor Arbitration* provides those necessary details.

Chapter Nine also stresses that under the Federal Arbitration Act, there are few grounds upon which vacatur will be granted:

> [W]here the award was procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrator; where the arbitrator was guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown; or where the arbitrator refused to hear evidence material to the controversy.[66]

Although these are the only statutory grounds upon which a court may review the award, the authors also note that some courts have vacated arbitration awards for "manifest disregard of the law."[67] "Manifest disregard" is not commonly applied to arbitration awards, but when it is the court applies a very strict test: the arbitrator must have been aware of a clear, definitive law and purposefully not applied it, thereby failing to give the party a fair hearing.[68] This section on vacatur is very useful to arbitrators as a guideline for what not to do throughout the process of arbitration. If an arbitrator provides reason for a party to seek vacatur, it may reflect poorly on that arbitrator and possibly his or her institution. Similarly, this section again proves cautionary to parties arbitrating; the arbitrator's decision is going to be binding upon the parties unless one of the extreme statutory grounds arises. Parties may not always realize just how final the arbitration award really is, and knowing this ahead of time will prepare the parties for what otherwise may come as a serious shock.

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[61] *Id.* at xii.
[62] *Id.* at 77.
[63] *Id.*
[64] *Id.* at 78.
[65] GRENIG & SCANZA, *supra* note 1, at 80.
[66] *Id.* at 82.
[67] *Id.* at 83.
[68] *Id.*

A. The Tenth Chapter of Fundamentals of Labor Arbitration

Chapter Ten details "labor arbitration in the public sector."[69] In the public sector, the employee-employer relationship is generally subject to statutes rather than a union's conditions.[70] As a result, a policy favoring arbitration is not always fostered; courts often restrict what may or may not be arbitrated, reasoning that governmental decisions should not be decided in such a private and confidential setting.[71] Public sector arbitration may also raise constitutional issues, and because some government employees also possess a "property interest in their employment," due process from the government employer may be required.[72]

Chapter Ten proves useful to point out the differences between private and public sector employment arbitration. A government employee in the process of arbitration would find this chapter enlightening, especially if he or she has had no experience with arbitration before. This section may also be helpful to an arbitrator, though if the arbitrator is presiding over this type of dispute, it is possible that because of this arbitration niche, the arbitrator would already know much of what is in this chapter. However, as always, the chapters would prove useful to even experienced arbitrators because they could always use the book as a reference or a reminder as to what they are supposed to do and how they are supposed to conduct themselves.

IV. *FUNDAMENTALS OF LABOR ARBITRATION* APPENDICES

One of the most helpful aspects of this book is the appendices beginning on page ninety-five. These appendices serve as very good references, and are incredibly helpful when reading through the book itself because the authors often do not pause to explain things easily found in the appendices.

For example, Appendix A consists of a table of court decisions and arbitrations awards.[73] The table lists the cases and the awards in alphabetical order, complete with the case or award's full citation, and where it can be found in the book itself.[74] A reader could therefore easily look up an applicable case on Westlaw or LexisNexis to learn more about the case. However, one issue with this appendix is that it could easily become outdated if a court made a significant decision that perhaps overturned another decision. Although information such as that would show on Westlaw or LexisNexis, if the reader looked the case up in a print source, the reader might think the case was still good law. Also, even if the reader just saw the case mentioned in *Fundamentals of Labor Arbitration*, the reader may think the case is still good law even though it may have been overturned.

Appendix B contains a "glossary of labor arbitration terms" commonly used in labor arbitration.[75] This section is particularly helpful for those not fully acquainted with the labor arbitration process. By having this glossary of terms in an appendix rather than explaining each term as it is used throughout the book, Grenig and Scanza allow for fluidity throughout the text, not stopping to enlighten unfamiliar readers but also not slowing down the more familiar readers

[69] *Id.* at xii.
[70] GRENIG & SCANZA, *supra* note 1, at 85.
[71] *Id.* at 86.
[72] *Id.* at 89.
[73] *Id.* at 95.
[74] *Id.* at 95–97.
[75] GRENIG & SCANZA, *supra* note 1, at 99.

with superfluous definitions. The ability of the authors to cater to a wide range of audiences is truly one of the major strengths of *Fundamentals of Labor Arbitration*.

Appendix C provides the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes."[76] This appendix is useful as a reference, mainly for arbitrators rather than arbitrating parties (although arbitrating parties may want to see a model on how their arbitrator is supposed to conduct himself or herself).

Appendix D is a copy of the Federal Arbitration Act.[77] This appendix provides a useful tool for those unacquainted with the arbitration process and laws. Because the Federal Arbitration Act (hereinafter FAA) is referenced throughout *The Fundamentals of Labor Arbitration*, having an unabridged copy of the act right in Appendix D is very convenient, allowing the reader to see the FAA as a whole, rather than being given small snippets of it throughout the text without any way to understand how a specific section of the FAA fits with the rest of it. Although it can sometimes be distracting to have to flip to the appendix to receive a definition or look at a section of the FAA, the authors are consistent in their approach of providing both inexperienced and experienced readers with information without slowing down the more veteran with extra information that can easily be found at the end of the book.

Appendix E is the Labor-Management Relations Act.[78] This appendix omits certain chapters from the Labor-Management Relations Act, leaving only the sections relevant to the *Fundamentals of Labor Arbitration*. However, this appendix is not referenced much throughout *The Fundamentals of Labor Arbitration*, so a reader unfamiliar with the Labor-Management Relations Act would not be highly confused or left in the dark because of the omissions.

Appendix F provides a list of "AAA Labor Case Management Offices," including names, telephone numbers, addresses, and email addresses of labor case managers throughout the country.[79] However, an issue with Appendix F may arise if these employees resign, or any of the information changes. Simply by one change in the telephone numbers or employees, this book could become outdated and no longer as useful or credible.

V. THE STRENGTHS OF *FUNDAMENTALS OF LABOR ARBITRATION*

A. Grenig and Scanza's Accomplishments

The authors note in the preface that their goal is to "provide a solid base of information about grievance and arbitration procedures, while also explaining what advocates and arbitrators actually do."[80] Grenig and Scanza were incredibly successful in accomplishing their objective, for this would be a very useful book in practice. It serves as a near-perfect guide for both those unfamiliar and familiar with the process of arbitration. Grenig and Scanza have done a commendable job breaking down the complicated arbitration process into sizable, comprehensible chunks of material.

[76] *Id.* at 117.
[77] *Id.* at 137.
[78] *Id.* at 145.
[79] *Id.* at 165.
[80] GRENIG & SCANZA, *supra* note 1, at xi.

As stated before, the most beneficial aspect of *Fundamentals of Labor Arbitration* is its appendices. Having a table of court decisions and arbitration awards,[81] a glossary of labor arbitration terms,[82] a copy of both the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes[83] and the Federal Arbitration Act,[84] and a list of contacts from the American Arbitration Association[85] all in one place is invaluable. It serves as a perfect "go-to" for referencing any of these, and would most likely be used often in practice.

There is much to be learned from *Fundamentals of Labor Arbitration* (as its title may suggest). For example, Chapter One states how arbitration and mediation are two separate entities, but that there is also a hybrid alternative dispute resolution known as med-arb, a combination of mediation and arbitration.[86] In the med-arb process, the mediator becomes the arbitrator if the parties cannot come to an agreement during mediation.[87] The mediator-turned-arbitrator then resolves the conflict through the arbitration process.[88] This process may not be as well-known as traditional mediation or arbitration, and can provide arbitrators, mediators, or parties looking to resolve a dispute with a different form of dispute resolution that is possibly better tailored toward their particular needs.

VI. THE WEAKNESSES OF FUNDAMENTALS OF LABOR ARBITRATION

A. The Authors' Approach to the FAA

One shortcoming of *Fundamentals of Labor Arbitration* is that it fails to address how truly important the FAA is to arbitration as an autonomous entity separate from the courts. Carbonneau notes in *Cases and Materials on Arbitration Law and Practice*[89] that the FAA, enacted in 1925, "is a landmark piece of legislation that ended the era of would-be hostility to arbitrating in the United States."[90] The FAA creates a policy of favoring arbitration and enforcing arbitration awards by limiting the role of the judicial system in arbitration.[91]

A helpful tactic in Appendix D's copy of the FAA would be to mark the changes made through case law after every section. For example, in *Cases and Materials on Arbitration Law and Practice*, Carbonneau gives each section of the FAA, followed by a commentary explaining what each section has come to mean by way of case law.[92] It would have been beneficial for Grenig and Scanza to address how the FAA has progressed over time, and how the FAA has affected arbitration. Providing the reader with an easy-to-read guide of the FAA complete with applicable case law would prove very beneficial to current and future arbitrators, as well as arbitrating parties. However, Scanza and Grenig may have chosen not to delve into the FAA

[81] *Id.* at 95.
[82] *Id.* at 99.
[83] *Id.* at 117.
[84] *Id.* at 137.
[85] GRENIG & SCANZA, *supra* note 1, at 165.
[86] *Id.* at 3.
[87] *Id*.
[88] *Id*.
[89] THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 1 (West 2009).
[90] *Id.* at 51.
[91] *Id.*
[92] *Id.* at 57–91.

because they did not deem it essential to understanding labor arbitration. As stated before, Scanza and Grenig often reference certain things throughout the text of *Fundamentals of Labor Arbitration* and give the reader enough information to independently research, so as not to slow the rest of the book down with extraneous information. Mostly, this tactic is smart because the manual is a "crash course" rather than a treatise of the law, but sometimes it leaves the reader wanting a little more information.

B. The Sequence and Flow of the Text

Another drawback of *Fundamentals of Labor Arbitration* is that it sometimes tends to seem disjointed. Although the authors seem to have taken great care in compiling the chapters, there is a lack of "flow" between the subsections of each chapter and between the chapters themselves. To someone unfamiliar with arbitration, this may seem somewhat overwhelming because it appears as though there is an abundant amount of information that comprises the "bigger picture" of arbitration. However, it is possible that because this book is intends to be a manual, it would be very difficult for the chapters and subsections to have better flow. As it stands now, the book is not conducive to be "read" in a narrative fashion, but should rather be "consulted" during the course of practice or during arbitration. Although inexperienced arbitrators or arbitrating parties may wish to read it in one sitting, doing so proves to be overwhelming because of the amount of information in this book, some of which may not be useful or applicable to certain arbitration claims. It is therefore most helpful as a reference for smaller issues, rather than for learning all about arbitration in one shot.

VII. CONCLUSION

Overall, *Fundamentals of Labor Arbitration* would be a helpful book in practice for arbitrators in any stage of their career, and for arbitrating parties in any stage of the arbitration process. Despite a few small shortcomings, Scanza and Grenig have done a commendable job in breaking down the material into comprehensive sections that are easy to reference. Although this book is not always perfect in its sequence and sometimes seems disjointed, its strengths greatly outweigh its weaknesses. The book is quite impressive and the extensive experience of the authors seeps onto the pages themselves. The authors have written a very good guide to labor arbitration that will likely be a manual for years to come.

MEDIATING INTERNATIONAL CHILD ABDUCTION CASES: THE HAGUE CONVENTION

Michele Merritt*

I. INTRODUCTION

Mediating International Child Abduction Cases: The Hague Convention[1] is the seventh book in the Hart Publishing series "Studies in Private International Law."[2] The book is authored by Sarah Vigers, an experienced international family law attorney and former lawyer for the "Permanent Bureau of the Hague Conference on Private International Law."[3] After working in international family law for a number of years, Vigers decided to pursue an LLM. at the University of Aberdeen.[4] Her graduate thesis on mediating child custody disputes under the Hague Convention was recommended for publication and is the basis for this volume.[5]

Unlike the other works from this series, *Mediating International Child Abduction Cases: The Hague Convention* is the only volume with a focus on mediation.[6] This work does not focus on the mediation process itself; rather it explores the reasons why mediation should be a more widely embraced practice under the Hague Convention. Vigers argues that mediation, in context of child custody and family disputes, helps to open the lines of communication between the parties and foster lasting agreements.[7]

Though narrow in scope, this work is broadly applicable, particularly due to its discussion of the use and effectiveness of mediation efforts in child custody disputes. If nothing else, this book is an enjoyable read for any lawyer, mediator or individual interested in international law, family law, mediation, or the Hague Convention. This book could easily be read in an afternoon, as it is a manageable ninety-five pages. Vigers also carefully crafts specific sections of this book for a Convention audience, making this work practical for use within the Convention context.

II. SUMMARY

Mediating International Child Abduction Cases: The Hague Convention consists of six chapters, the first of which introduces the reader to the purpose, structure and scope of the book.[8] Chapters Two through Four focus on addressing three key questions: "What is Convention mediation; how can a mediation process fit within the urgent time constraints of the Convention and its regional application in the [European Union]; and why offer mediation in Convention

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[1] SARAH VIGERS, MEDIATING INTERNATIONAL CHILD ABDUCTION CASES: THE HAGUE CONVENTION (2010).

[2] *Id.* at i.

[3] *Id.* at iiv.

[4] *Id.*

[5] *Id.*

[6] VIGERS, *supra* note 1, at ii.

[7] *Id.* at 64–65.

[8] *Id.* at 1–9.

cases?"[9] These three chapters offer the most significant research and theories, useful to both international and family law attorneys, as well as mediators under the Hague Convention.

Chapter Five is interesting in its own right, as it presents a unique perspective into the role of the child in the mediation process.[10] Though this chapter seems somewhat unrelated to the author's thesis, Vigers expertly crafted a natural transition for the reader that beautifully incorporates the chapter into the broader framework of the book. Vigers concludes in the sixth and final chapter by reiterating her hope for this work: that it will be interesting and enlightening for both attorneys and mediators, while encouraging the use of mediation under the Hague Convention as an effective means of dispute resolution.[11]

III. CHAPTER 1: INTRODUCTION[12]

The introductory chapter of this book provides the reader with a road map of the upcoming chapters. Vigers provides details of how she conducted her research and why she chose to research the topic of mediation under the Hague Convention. She explains that mediation is often recommended as a method of resolving international custody disputes under the Convention, but is rarely utilized in practice.[13] As a professional in this field, Vigers witnessed this phenomenon first hand and wrote this book to "offer a response to some of the perceived barriers to the use of mediation in the Convention context."[14]

Chapter One also provides the reader with some basic background information about the Hague Convention, including the operative language of Article I.[15] Vigers assists the reader's understanding of Article I by breaking it down into its key components and explaining the significance of the section in the framework of mediation.[16]

This early analysis of the Hague Convention becomes a helpful point of reference for the reader as the book progresses into more complex material. In general, this chapter is important because it sets the stage for the chapters that follow. Vigers provides the reader with enough information to see the big picture, which makes the research and theories presented in subsequent chapters much easier to understand.

IV. CHAPTER 2: WHAT IS CONVENTION MEDIATION?[17]

In Chapter Two, Vigers explains that one of the factors preventing the more widespread use of mediation under the Hague Convention is that "there is [no] clear understanding of what mediation is" or how mediation works in conjunction with applying the Convention.[18] This lack of clarity has led to confusion over when and how mediation should be utilized in Convention

[9] *Id.* at vii.
[10] *Id*. at 76–90.
[11] VIGERS, *supra* note 1, at i–iiiv.
[12] *Id.* at 1.
[13] *Id.*
[14] *Id.* at 3.
[15] *Id.* at 7.
[16] VIGERS, *supra* note 1, at 7–9.
[17] *Id.* at 10.
[18] *Id.*

cases. Vigers argues that this clouded definition has prevented mediation from being fully developed as a means of alternative dispute resolution under the Convention.[19]

A. "Definitional Difficulties"[20]

To help develop a cohesive definition of "Convention mediation," Vigers begins by making a distinction between mediation, arbitration and voluntary resolution meetings.[21] She argues that "mediation" is a term that has developed an incredibly vague definition and has come to encompass "any process which promotes agreement between the parties with the assistance of a third party."[22] In the context of the Hague Convention and family law, mediation takes on three forms: "informal negotiations; the court process; and formal non-adversarial processes."[23]

In the first form, informal negotiations, assistance is offered by a third party who is often not a trained mediator and is not bound to follow any particular set of rules or guidelines in conducting the proceeding.[24] Unlike other forms of mediation, informal negotiations can even occur in the absence of one of the disputing parties.[25] Court processes, on the other hand, involve litigating or adjudicating the dispute; however, in the early pre-trial stage, judges actively assist in negotiations between the parties in an effort to reach a mutually agreeable resolution.[26] The third form of mediation, formal non-adversarial process, also involves a neutral third party; however, this third party is expertly trained in mediation.[27]

Under the Hague Convention, "mediation" has been used to describe several different assisted dispute resolution processes.[28] Vigers attributes much of this confusion to the definitional variations of the member states and the lack of a clear mediation process under the Convention.[29] Vigers suggests the following working definition: "Mediation is a voluntary and confidential process through which parties can reach their own agreements, which are not legally binding. Mediation is undertaken with the assistance of a trained and qualified mediator who is impartial, independent and neutral."[30] Vigers believes this definition is "broad enough to encompass many different styles of mediation … yet narrow enough to ensure clarity of understanding."[31]

After providing the reader with a working definition of "mediation," Vigers explains the significance of the mediation process itself by noting that, though a clear definition of mediation is necessary to encourage the more widespread use of the process under the Convention, mediation requires the support of the legal system to be effective.[32] In other words, for mediation to work successfully, there must be a solid foundation of law and procedures that govern

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[19] *Id.*
[20] *Id.* at 11.
[21] VIGERS, *supra* note 1, at 11.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] VIGERS, *supra* note 1, at 11.
[27] *Id.* at 12.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 19.
[31] VIGERS, *supra* note 1, at 19.
[32] *Id.* at 20.

mediation proceedings.[33] Though the Hague Convention itself provides support for mediation, "[c]ontracting States must also ensure that their domestic framework for handling Convention applications is adequate to support mediation."[34] Without both domestic and international support, mediation as an alternative dispute resolution process loses its effectiveness.[35] Unfortunately, domestic support of the States has been a source of some problems for mediation under the Convention. The States contracted under the Hague Convention are diverse and vary in terms of culture, tradition and economic development, which Vigers argues has contributed to the sporadic use of mediation in Convention cases.[36]

To conclude this section of Chapter Two, Vigers provides the reader with a clear and concise summary of the mediation process under the Convention. She details step-by-step how a mediation proceeding should operate under the Convention, from the initial interview to the final agreement.[37] This practical illustration aids the reader in visualizing the mediation process and understanding the significance of the material presented in the beginning of the section.

B. "Place in the Procedure"[38]

This section of the book seems to be aimed towards a Convention audience. Vigers provides the reader with a great deal of Convention information, some of which becomes repetitive. For this reason, this author chose to consolidate certain subsections and highlight the arguments with a more universal application.

After Vigers establishes a general definition of "Convention mediation," she moves on to describe where mediation fits in the Convention procedure.[39] Vigers argues that mediation should be viewed as an alternative to the court hearing, not a precursor.[40] In explaining this position, Vigers makes an important distinction between these two options; mediation is a voluntary substitute for a hearing, but is not equivalent to a court hearing.[41] Parties are not forced to develop agreements in mediation.[42] In the event that an agreement cannot be reached, the case is simply referred to the court for a hearing.[43] Conversely, the court's ruling from the hearing requires the parties' strict compliance; failure to obey the ruling would be contempt of court.[44]

Many States have recognized that mediation and the court hearing process can work together to create a more efficient process.[45] In these States, mediation serves as the first step to the hearing process, and parties are only granted hearings in the event mediation fails.[46] Vigers

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] VIGERS, *supra* note 1, at 21–22.
[37] *Id.* at 23–24.
[38] *Id.* at 24.
[39] *Id.*
[40] *Id.* at 25.
[41] VIGERS, *supra* note 1, at 27.
[42] *Id.* at 28–29.
[43] *Id.* at 28.
[44] *Id.* at 28.
[45] *Id.* at 29–30.
[46] VIGERS, *supra* note 1, at 30.

advocates that a similar policy, making mediation a mandatory precursor to a court hearing, would also be effective under the Convention.[47]

C. Conclusion

Chapter Two provides the reader with a useful analysis of the term 'mediation' in the context of the Hague Convention. Although the definitional section seemed redundant at times, Vigers successfully conveyed to the reader that 'mediation', as currently defined under the Convention, takes on a number of different forms. Unlike the previous chapter, this chapter seemed to be directed to Hague Convention scholars or members; Vigers placed considerable emphasis on identifying the flaws of the current system and crafting a recommended remedy for issues discussed. Though the broad applicability of this chapter may be limited, the manner in which Vigers wrote the chapter allowed the common reader to easily follow along.

V. CHAPTER 3: "HOW CAN A MEDIATION PROCESS FIT WITHIN THE CONSTRAINTS OF THE CONVENTION?"[48]

In Chapter Three, Vigers focuses on how mediation can be effective in the context of the Hague Convention.[49] She explains that mediation must be tailored to work within the limitations of the Convention for it to be implemented successfully.[50] To explain this position, Vigers begins by addressing the need for specialization among Convention mediators.[51] She then moves on to discuss how the challenges of the Convention can be successfully addressed by mediation.[52]

A. "Convention Mediation as a Specialism"[53]

Mediation under the Hague Convention is unique from other traditional forms of mediation because it operates under a number of strict limitations.[54] According to Vigers, mediating disputes under these circumstances requires experience and specialization.[55] There are currently three models for specialized convention mediation. The first model takes place in the state of refuge, and involves the use of expertly trained State mediators.[56] The second approach is a "bi-national co-mediation model" in which two trained mediators are used, one from each State party to the dispute.[57] The final model is "a 'mediation based approach' where all relevant

[47] *Id.* at 30–31.
[48] *Id.* at 33.
[49] *Id.*
[50] *Id.*
[51] VIGERS, *supra* note 1, at 33.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 33–34.
[56] VIGERS, *supra* note 1, at 34.
[57] *Id.*

professionals are expected to view the application against the backdrop of mediation and to consider how mediation might assist the parties."[58]

Most experts agree that the best model for Convention mediation is the first model because it is the most practical, efficient and cost-effective of the three models presented.[59] Vigers dismisses the third model as unworkable because it is viewed against a traditional mediation backdrop, which is completely unlike Convention mediation.[60] The second model's bi-national co-meditation approach seems like a workable option to ensure neutrality; however, Vigers argues that this model's focus on protecting neutrality is unnecessary.[61]

In explaining her position, Vigers reminds the reader of two main facts: first, mediators are required to be neutral, which eliminates the need for additional protections; second, mediators merely manage the process, it is the parties who hold the decision making power.[62] Supporters of the co-mediator approach contend that, having a mediator from each state party to the dispute ensures knowledge of the domestic legal system in both states.[63] Again, Vigers rejects this argument, "where detailed legal advice is required to assist the parents' discussions this should be sought from a lawyer or through the Central Authority and fed-back into mediation."[64] In other words, it is not the job of the mediators to provide the parties with legal advice.[65]

B. "Responding to Specific Challenges"[66]

According to Vigers, there are three issues that arise with the application of Convention mediation.[67] "Firstly, questions of jurisdiction and applicable law; secondly, the extent of the scope of Convention mediation; and thirdly, the interaction between mediation and the court process."[68] Vigers address each of these issues in turn, describing how specialization and training of mediators mitigates these problems.

With regard to jurisdiction and applicable law, Vigers explains that the source of this issue may be over the misunderstanding of what mediation really is in the Convention context.[69] Mediators should remind the parties that Convention mediation is completely unlike a Convention court hearing.[70] In a hearing, the court is bound by procedural and substantive laws in creating an order. Conversely, in mediation, the substantive laws of the State are not controlling.[71] The parties themselves decide which substantive law to apply to their mediated

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[58] *Id.* at 35.
[59] *Id.* at 38.
[60] *Id.* at 36
[61] VIGERS, *supra* note 1, at 36.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] VIGERS, *supra* note 1, at 39.
[67] *Id.* at 40.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] VIGERS, *supra* note 1, at 40.

agreement.[72] This freedom is only limited by procedural safeguards within the Convention, which prevent parties from signing away their legal rights or obligations.[73]

The second issue that arises under Convention mediation is its scope.[74] Mediators in Convention child abduction disputes deal with a broad range of issues, ranging from custody to support.[75] Vigers argues that dealing with these issues requires Convention mediators to gain specialized training.[76] Experienced and properly trained mediators are better able to recognize and avoid mediating issues that are beyond the scope of the Convention, such as property division and divorce.[77]

The final issue discussed by Vigers is the relationship between mediation and the courts.[78] This is one issue that is difficult to resolve, as failed mediation attempts necessarily turn to the court system for resolution.[79] Because mediation processes are confidential and the scope of mediation is broader than the Convention hearings, these two processes must be treated as independent from one another.[80] As such, professionals working within the constraints of the Convention need to be aware of the differences between these two processes.[81]

After having established the issues specialization would address, Vigers moves on to also point out the benefits of a uniform process for dealing with cases under the Convention. Vigers argues that a uniform procedure mandating the use of mediation as a first step would help to expedite proceedings, giving the parties a chance to come to a mutually agreeable solution without the burden or expense of litigating their dispute before a court.[82]

C. Conclusion

In this chapter, Vigers goes into great detail discussing the effect a uniform procedure would have on Convention mediation.[83] Unfortunately, as the chapter progressed these points felt drawn out, causing the reader to become lost in the minute details of the Convention application process. Unlike the previous chapters, which flow smoothly from section to section, the heavy use of subsections leave this chapter feeling fragmented. The overarching theme of the subsections becomes lost at various points, forcing the reader to refer back to the beginning of the chapter to understand the context of Vigers arguments. Summarizing the key points from the chapter and consolidating the subsections would remedy this problem and make for a much easier read.

Vigers seemed to use this chapter as a vehicle for putting forth a recommended mediation plan for Convention authorities. Much of the information provided by Vigers in this chapter seems geared to a "Convention" audience, which may explain Vigers's unique organization of this chapter. Experts working under the Hague Convention may find Vigers layout and

[72] *Id.*
[73] *Id.* at 41.
[74] *Id.*
[75] *Id.*
[76] VIGERS, *supra* note 1, at 41.
[77] *Id.*
[78] *Id.* at 42.
[79] *Id.*
[80] *Id.*
[81] VIGERS, *supra* note 1, at 42.
[82] *Id.* at 42–52.
[83] *Id.* at 42–57.

breakdown of information useful in drafting a uniform procedure for mediation under the Convention.

VI. CHAPTER 4: "WHY MEDIATE IN CONVENTION CASES?"[84]

In Chapter Four, Vigers seeks to explain why mediation should be implemented in child abduction cases arising under the Hague Convention.[85] The main goal and purpose of this chapter is to "promote a greater use of mediation in Convention cases by highlighting how it can add value to the current regime."[86]

Vigers breaks this chapter into two main parts; the effectiveness of mediation in addressing current concerns arising from the Convention; and the usefulness of mediation in rebuilding the relationships between the disputing parties.[87] By separating her arguments, Vigers is able to "offer a response to some of the perceived barriers to the use of mediation in the Convention context," which is a main goal of this work.[88] This structure also aids the reader in understanding the crux of Vigers arguments and the practicality of their application in Convention cases.

A. "Responding to Concerns Surrounding the Operation of the Convention"[89]

Vigers begins this chapter by providing the reader with a brief background of the Hague Convention and the reasons behind its formation.[90] At the time the Convention was created the drafters operated under the belief that "abductors were generally non-custodial fathers removing children from the primary caretaker mothers" and that such actions were not in the best interest of the child.[91] Therefore, the Convention sought to prevent the abducting parent from benefiting from their wrongful act and mandated the child return to their home State and their primary caretaker until the Convention process concluded.[92]

However, since the creation of the Convention, there has been a significant rise in the number of primary caretaker mothers acting as abductors.[93] This shift has created a number of problems under the Convention because returning the child to the home State may compete with the goal of returning custody to the primary caretaker.[94] Given the focus of the Convention is to serve the child's best interests, this provision has become the topic of much debate among Convention scholars.[95]

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[84] *Id.* at 61.
[85] *Id.*
[86] VIGERS, *supra* note 1, at 61.
[87] *Id.*
[88] *Id.* at 3.
[89] *Id.* at 61.
[90] *Id.* at 61–64.
[91] VIGERS, *supra* note 1, at 62.
[92] *Id.* at 63.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 64.

Vigers suggests that the incorporation of mediation in Convention litigation process would "[allow] the parents to consider the best ultimate option for the child."[96] Mediation opens the lines of communication and encourages the parties to cooperate in creating a custody arrangement that best serves their child's interests.[97] Vigers does acknowledge that this type of mediation may not be possible in all situations.[98] Some cases, such as those involving domestic violence, may not be suitable for mediation due to fear, anger or an imbalance of power between the parties.[99]

B. Value of Mediation

One of the main pieces of data cited by Vigers in support of Convention mediation is the long-term satisfaction of the participants with the process.[100] In general, parties who were able to successfully mediate their disputes were more satisfied than parties who chose to litigate their dispute.[101] To further support her argument, Vigers states, "There is greater adherence to agreements which are generally more durable, and mediation can reduce conflict and improve communication, promoting continuing agreement as opposed to litigation which can be conflict enhancing."[102] Encouraging a positive co-parenting relationship is beneficial to both parties as well as the child, which is in keeping with the mission and purpose of the Convention.[103]

C. Conclusion

This chapter provided the reader with a great deal of information regarding the history of the Hague Convention and the context in which disputes most often arise. Many unanswered questions that the reader was left with after the first half of the book were answered in this chapter. Unlike Chapter Three, the sections in this chapter were concise, fluid and well written. Chapter Four also most directly addresses the premises of Vigers arguments presented in the earlier chapters. By saving the information presented in this chapter until this point in the book, Vigers is able to present her arguments to a more educated reader, who is able to follow the reasoning and logic behind her contentions.

VII. CHAPTER 5: "THE VOICE OF THE CHILD"[104]

Unlike the previous chapters, which focused on Convention mediation, Chapter Five focuses on the subject of the dispute -- the child. The main question Vigers seeks to address is, "whether and how to hear a child in Convention court proceedings?"[105] In this Chapter Vigers

[96] VIGERS, *supra* note 1, at 65.
[97] *Id.* at 64–65.
[98] *Id.* at 67.
[99] *Id.* at 67–68.
[100] *Id.* at 72.
[101] VIGERS, *supra* note 1, at 72.
[102] *Id.*
[103] *Id.* at 73.
[104] *Id.* at 76.
[105] *Id.*

argues that "the voice of the child can be heard in Convention mediation" and "that the views of the child can be better taken into account through mediation."[106]

A. "The Voice of the Child in Mediation"[107]

The role of the child's voice in mediation varies by State. Vigers presents two primary models currently in use: the "child-focused" model, where the child is not heard; and the "child-inclusive" model, where the child's voice is encouraged and incorporated into the proceedings. [108] There are numerous arguments in support of each of these approaches. Proponents of the "child-focused" model argue that children should not be involved in the mediation process in an effort to protect the interest of the child.[109] Proponents of the "child-inclusive" model, on the other hand, argue that exclusion of the children from the process is "overly paternalistic." [110] Furthermore, empirical research on this subject showed that the involvement of the child in mediation helped the disputing parents focus on creating an amicable agreement to best serves the child's needs.[111] Though this may encourage mediators to suggest involving the child in the process, it does not change the fact that "there is no requirement to hear a child in mediation" and the decision of whether to involve the child in the proceedings belongs solely to the parents.[112]

In the Convention setting, children are still rarely involved in mediation proceedings.[113] However, there has been some support for involving children in the mediation process, provided they are of an age and maturity where they can adequately express themselves.[114]

Vigers suggests a three-prong approach for ensuring the child's voice is heard in Convention mediation cases.[115] The first prong is to create some sort of "mechanism specifically for Convention applications [that] allows the voice of the child to be heard within the appropriate context."[116] The second prong is to have the child interviewed by a neutral third party, who then prepares a report on the child's views.[117] The last prong is to explain the outcome of the proceedings to the child in a way the child can understand.[118] Vigers argues that this three-prong model creates a workable third option for involving the child in the mediation process. This option, in theory, should satisfy the critics of both the child-focused and child-inclusive models as it permits the child to be heard, but in a controlled and limited fashion.[119]

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[106] VIGERS, *supra* note 1, at 76.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 77.
[110] *Id.* at 78.
[111] VIGERS, *supra* note 1, at 79.
[112] *Id.* at 77.
[113] *Id.* at 86.
[114] *Id.*
[115] *Id.* at 88.
[116] VIGERS, *supra* note 1, at 88
[117] *Id.* at 89.
[118] *Id.*
[119] *Id* at 90–91.

B. Conclusion

In this chapter, Vigers sought to bring attention to the fact that children are often key players in Convention cases, but their parents and the system often silence their voices. Vigers provided the reader with a background and summary of the role of children in traditional mediation and under the Convention. Through the presentation of empirical research, Vigers informed the reader of the strengths and weaknesses of the two main models for including children in Convention mediation. The manner in which the material was presented allowed the reader to follow along with Vigers logic in creating a third option for hearing children in Convention cases.

Though this chapter seemed directed towards a Convention audience, and would no doubt be useful to Convention attorneys, Vigers research and theories could also have a broader application in the field of family law. Should the 'third option' Vigers suggests be successful in the Convention setting, it may also be a viable means of incorporating the voice of the child into domestic family mediation.

VIII. CONCLUSION

The concluding chapter of this book focuses on Vigers hope and aspirations for her work.[120] Vigers' goal in writing this work was to address the issues keeping parties from utilizing mediation in the Convention setting. Given the lack of risks, and number of benefits mediation offers, she hopes she was able to prompt more widespread use of mediation as an alternative dispute resolution tactic.

The series editors describe this work as "short but beautifully crafted," which is an excellent characterization of this piece.[121] Though certain chapters of the book seemed policy driven and aimed towards a 'Convention' audience, Vigers manages to provide the reader with an in-depth look into the complexities of the Convention process. Each chapter of this work addressed a specific issue, which aided Vigers in achieving her goal of exploring and countering the alleged barriers to Convention mediation.[122]

In writing this volume, Vigers concentrated on international child abduction within the context of The Hague Convention and disputes arising under the European Union. By narrowing the scope of this work, Vigers left some questions unanswered; such as the effectiveness of Convention mediation in child abduction cases outside of the European Union. Vigers' limited scope left the door open for other researchers to investigate the effectiveness of Convention mediation in broader range of international disputes. As a whole, Vigers was successful in creating an interesting and accessible read, which provides a fascinating glimpse into the cross-disciplinary impact of The Hague Convention and the usefulness of mediation as an alternative dispute resolution tactic.

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[120] *Id*. at 92–95.
[121] VIGERS, *supra* note 1, at vii.
[122] *Id.* at 3.

A DECADE AND SOME CHANGE: A LOOK INTO THE NEW 2012 ICC RULES OF ARBITRATION

Linnea Ignatius*

I. INTRODUCTION

January 1, 2012 will bring large changes for the arbitration community. The newly revised International Chamber of Commerce (hereinafter ICC) Rules of Arbitration will take effect, addressing over a decade of shifts in the arena of international commercial arbitration. The changes reflected in the new Rules have three principal objectives: (1) adapting the rules to address the growing complexity of disputes and the increasing need for urgent interim remedies in business disputes; (2) reducing time and costs in arbitration; and (3) making the rules more flexible for use in investment arbitration.[1] Procedural matters have seen a fair amount of change, molding the rules to accommodate the growing complexity of international business disputes. Seemingly, the more bureaucratic nature of the ICC process has remained untouched.[2]

The new 2012 Rules are published in a booklet along side the ICC Alternative Dispute Resolution Rules. The rules have been published together in an effort display a more holistic approach to dispute resolution techniques.[3] "To the extent necessary to do so, new measures and procedures have been introduced, such that the 2012 Rules of Arbitration respond to today's business needs while remaining faithful to the ethos, and retaining the essential features, of ICC arbitration", stated John Beechey, chairman of the ICC International Court of Arbitration about the new Rules.[4] The changes have been received warmly, with open arms, and address issues that have been raised over the past decade. Ideally, these changes will make ICC arbitration competitive with other forms of international commercial arbitration that seem to be more popular at this point in time. Though the changes have taken large steps in the direction of streamlining arbitration and creating a process that is more time and money conscious, only time will tell if the changes truly enhance and aid ICC arbitration.

II. THE INTERNATIONAL CHAMBER OF COMMERCE

The International Chamber of Commerce was founded in 1919, with the objective of serving global business by encouraging and supporting trade and investment, the free flow of capital, and the open market for goods and services. The organization's international secretariat

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[1] "The New ICC Rules Uncovered." Hogan Lovells International LLP publication. http://ehoganlovells.com/ve/7131j9991W7160D7385 (last visited Oct. 15, 2011).

[2] George Burn and Louise Woods, "United Kingdom: The New Rules of Arbitration" http://www.mondaq.com/x/148188/Arbitration+Dispute+Resolution/The+New+ICC+Rules+Of+Arbitration (last visited Oct. 12, 2011).

[3] "ICC Unveils New Rules of Arbitration" Press Release from USCIB on Sept. 14, 2011. http://www.uscib.org/index.asp?documentID=4155 (last visited Oct. 12, 2011).

[4] *Id.*

was established in Paris, France and remains there today.[5] The ICC has grown from its humble beginnings of representing the private sectors of Belgium, Britain, France, Italy, and the United States to its current state as a business organization with thousands of member companies and associations in roughly 120 countries.[6]

The ICC covers a plethora of business related activities, including arbitration and dispute resolution, business self-regulation, fighting corruption, and making the case for open trade, amongst many other undertakings.[7] The Chamber's International Court of Arbitration was created in 1923. The Chamber is an intricate organization with various committees and groups. The ICC World Council is the equivalent of the general assembly in other major intergovernmental organizations.[8] As opposed a typical intergovernmental organization, delegates to the Council are business executives, not government officials.[9] National committees name delegates to the Council, who then elect the Chairman and Vice-Chairman who serve 2-year terms.[10] Further, the Council elects the Executive Board who is charged with implementing ICC policy.[11] Commissions act as the cornerstone of the ICC and are composed of over 500 business experts who, voluntarily, create ICC policy and elaborate its rules.[12]

III. ICC INTERNATIONAL COURT OF ARBITRATIONS AND ITS RULES

A. The ICC International Court of Arbitration

"The ICC International Court of Arbitration is the world's leading institution for resolving international commercial and business disputes."[13] Since its beginning, the Court of Arbitration has heard roughly 17,000 cases, becoming more and more popular each year. In 2010, 793 cases were filed, involving over 2,000 parties across 140 countries.[14] The Court's popularity has grown in response to the ever-changing face of international business initiatives and exchange, as many have found arbitration to have many advantages over classic litigation. The Court is an attractive alternative to many because of its confidential and international nature. Entities can handle issues free from the fears of "home court advantages", damaging publicity, and unfamiliar intricacies of foreign jurisdictions.[15] Additionally, parties are drawn to arbitration because it is less time consuming and less expensive than classic litigation.

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[5] "What is ICC?" http://www.iccwbo.org/id93/index.html (last visited Oct. 13, 2011).

[6] *Id.*

[7] *Id.*

[8] "How ICC Works" http://www.iccwbo.org/id96/index.html (last visited Oct. 13, 2011).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] "International Court of Arbitration: Arbitration Today" http://www.iccwbo.org/court/arbitration/id4584/index.html (last visited Oct. 13, 2011).

[14] *Id.*

[15] *Id.*

The ICC International Court of Arbitration organizes and supervises arbitration, but it does *not* resolve the disputes itself.[16] Independent arbitrators, selected by the parties, carry out the actual arbitration under the auspices of the Court and its rules. Further, the Court makes "every effort to ensure that the award is enforceable in national courts", even though, in most instances, parties comply with the arbitral orders.[17] As one rightly assumes, the ICC Court of Arbitration performs under the ICC Rules for Arbitration and requires all those participating in its arbitrations to do the same.

B. The ICC Rules of Arbitration

The current ICC Rules of Arbitration were last revised in 1998. The new rules, which will become effective on January 1, 2012, have been updated to take into account over a decade's worth of changes in practice, technology, and expectations of users. The 2012 revision of the rules is the culmination of two years of work within the ICC Commission on Arbitration that consisted of 620 dispute resolution specialists from 90 countries.[18] Specifically, the "Task Force on the Revision of the ICC Rules of Arbitration"[19] was created in October of 2008 to focus on the revision of the 1998 rules.[20] The Task Force consisted over 175 members from 41 difference countries.[21] They were charged to (1) study all suggestions received from National Committee, members of the ICC, users of ICC rules of arbitration and other; (2) determine if amendments to the ICC Rules of Arbitration were necessary or useful; and (3) make any recommendations for the amendment of ICC Rules of Arbitration that they deemed to be useful or necessary.[22]

The new rules were revealed at an ICC conference in Paris that took place from September 12–13, 2011. The New Rules were received warmly, and were acclaimed for taking into account issues and concerns that had been voiced by the arbitration community over the years.[23] Paris was just the first stop on a series of launch events scheduled for the fall of 2012. Conferences will take place in Hong Kong (Oct. 10), Singapore (Oct. 12), Dubai (Oct. 31) and Miami (Nov. 6) to promote and explain the changes made to the 1998 Rules. The conferences will also act as the premier opportunity for practitioners to acquire a comprehensive overview of the 2012 changes and will provide an opportunity to learn from the individuals who partook in

[16] "International Court of Arbitration: What the Court Does" http://www.iccwbo.org/court/arbitration/id4590/index.html (last visited Oct. 13, 2011).

[17] "What the Court Does" http://www.iccwbo.org/court/arbitration/id4590/index.html (last visited Oct. 16, 2011).

[18] Des Williams, "The New ICC Rules of Arbitration" Legal brief from September 2011. http://us-cdn.creamermedia.co.za/assets/articles/attachments/35317_2011_09_ldr_arbitration_dw~1.pdf.

[19] The Task Force was chaired by Peter Wolrich (United States) and co-chaired by Michael Bühler (Germany) and Laurence Craig (France).

[20] "Task Force on the Revision of the ICC Rules of Arbitration" http://www.iccwbo.org/policy/arbitration/id28796/index.html. Last visited 10/16/2011.

[21] *Id.*

[22] *Id.*

[23] *Id.*

the revision process.[24] At present, the 2012 Rules are only officially available in English, French, German, Portuguese and Spanish.[25]

IV. NOTABLE CHANGES AND ADDITIONS IN THE 2012 REVISION OF THE ICC RULES OF ARBITRATION

The ICC Rules of Arbitration were adopted by the ICC World Council in June 2011 and will apply to all ICC arbitrations starting on January 1, 2012. Many changes have been made to the 1998 Rules to address issues faced under the previous rules, codify practices that take place under the 1998 Rules, reflect changes in technology, and to ensure the future use of arbitration as a means of problem solving. Jason Fry, secretary general of the ICC International Court of Arbitration stated, "[o]ne of the key objectives of the revision to the rules was to seek to address some of the criticism of international arbitration, which is that it is too expensive, time consuming, over-lawyered and isn't really addressing the parties' business needs."[26] This paper will not address every change made to the 1998 Rules, but will attempt to shed light on the main changes and additions.

A. Requirements at the Commencement of Arbitration

The 2012 Rules now require parties to provide more information at the onset of the arbitral process. As changed from the 1998 Rules, a party submitting a Request for Arbitration must now provide "the basis upon which the claims are made," a statement of the relief sought, "together with amounts of any quantified claims" and, when possible, an "estimate of the monetary value of any other claims."[27] The 1998 Rules required the submitting party to provide a "description of the nature and circumstances giving rise to the claim" and statement of the relief sought and when possible an "indication of any amount(s) claimed."[28] Further, the 2012 Rules now allow the claimant and respondent to submit other documents or information that they feel may be relevant or contribute to the efficient resolution of the dispute.[29]

"According to the drafters of the Rules, the new requirements were aimed at avoiding the 'North American' habit of submitting brief, conclusory request for arbitration seeking specific relief and extensive discovery without and substantive evidence."[30] Starting the

[24] Press Release, USCIB "ICC Unveils New Rules of Arbitration" http://www.uscib.org/index.asp?documentID=4155 (last visited Oct. 12, 2011).

[25] The 1998 Rules were officially available in Arabic, Brazilian Portuguese, Chinese, Czech, Dutch, English, French, German, Polish, Russian, Spanish Thai and Turkish.

[26] A quote from Jason Fry, secretary general of the ICC International Court of Arbitration when speaking in Toronto on Sept. 22, 2011. Quote comes from Jennifer Brown, "New ICC rules of arbitration aim to cut costs and time" in Canadian Lawyer Magazine. http://www.canadianlawyermag.com/legalfeeds/467/New-ICC-rules-of-arbitration-aim-to-cut-costs-and-time.html.

[27] Article 4(3)(c) and (d) of the ICC Rules of Arbitration (2012).

[28] Article 4(3)(b) and (c) of the ICC Rules of Arbitration (1998).

[29] Article 4(3)(h) and 5(f) of the ICC Rules of Arbitration (2012).

[30] "The 2012 ICC Rules of Arbitration: New Rules, New Responsibilities", October 3, 2011, Crowell & Moring, LLP. http://www.crowell.com/NewsEvents/AlertsNewsletters/all/2012-ICC-Rules-of-Arbitration-New-Rules-New-Responsibilities (last visited Oct. 12, 2011).

arbitration off on the right foot is essential to a successful arbitration, whose decision will not fall to issues that can be brought by the parties after the arbitration process has concluded.

B. Emergency Arbitrators

The process of obtaining arbitrators and putting an arbitral tribunal in place can take weeks or even months. At times, urgent events arise that cannot wait for this process to take place. Up until the 2012 revision, there was no proper avenue to expedite the arbitral process.[31] The 2012 Rules provide for the use of an "emergency arbitrator". Article 29 of the 2012 Rules, pursuant to Appendix V, gives the President of the ICC Court the power to appoint an emergency arbitrator when a requesting party can demonstrate that urgent relief is necessary.[32] The emergency arbitrator may make an order, to which the parties undertake to comply.[33] The order of the emergency arbitrator will not bind the arbitral tribunal, once formed, with respect to any question, issue, or dispute determined in the emergency order.[34] Ultimately, the arbitral tribunal may "modify, terminate or annul" the emergency order.[35] This addition to the rules provides a timely response to urgent matters, while ensuring the parties that they may still use arbitration to solve the matter at hand, as oftentimes, was previously decided by the parties as the proper form of dispute resolution.

C. "Impartial and Independent" Arbitrators

The 1998 Rules explicitly required arbitrators to "be and remain independent of the parties involved in the arbitration."[36] In an effort to match the requirements of UNCITRAL arbitration rules, the LCIA Rules and the IBA Guidelines on Conflict of Interest in International Arbitration, the 2012 Rules require an arbitrator to be not only independent, but also impartial. Additionally, prior to appointment or confirmation, a prospective arbitrator must sign a statement of acceptance, availability, impartiality and independence.[37] The 1998 Rules only required a statement of independence. Further, the 2012 Rules now require an arbitration to make a statement as to their availability.[38] Seemingly, the statement confirming availability was added in an effort to eschew instances in which highly sought after arbitrators took on too many cases, leading to delay.[39] This requirement is a prime example of the 2012 Rules initiative to insure the efficiency of the arbitral process.

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[31] Prior to the rule change, the only way to address an issue immediately, in the context of ICC arbitration was via national courts in the jurisdiction where the arbitration was to take place. This process stood in the face of the intentions of the parties, who seemingly, chose the use of arbitration to avoid having the dispute settled by a court.

[32] Article 29 of the ICC Rules of Arbitration.

[33] Article 29(2) of the ICC Rules of Arbitration.

[34] Article 29(3) of the ICC Rules of Arbitration (2012).

[35] Article 29(4) of the ICC Rules of Arbitration (2012).

[36] Article 7(1) of the ICC Rules of Arbitration (1998).

[37] Article 11(2) of the ICC Rules of Arbitration (2012).

[38] *Id.*

[39] George Burn and Lousie Woods, "United Kingdom: The New ICC Rules of Arbitration" http://www.mondaq.com/x/148188/Arbitration+Dispute+Resolution/The+New+ICC+Rules+Of+Arbitration (last visited Oct. 12, 2011).

Alongside requiring arbitrators to sign a confidentiality agreement, the new Rules enable the tribunal to hand down orders regarding the confidentiality of the proceedings and any other matter involved with the arbitration.[40] Appendix I discusses confidentiality with regard to everyone participating in the work of the Court.[41] This section addresses confidentiality requirements beyond just arbitrators and addresses those who have access to material related to the work of the Court and its Committees in general.[42] Additionally, Article 13 now allows the ICC Court, in certain situations, to directly appoint any person whom it finds suitable to act as an arbitrator.[43] This provision is another example of the ICC's effort to cut delays in the arbitral process.

D. Challenges to Jurisdiction

The 1998 Rules addressed challenges to jurisdiction, in specific circumstances. According the to 1998 Rules, the ICC Court could rule on questions[44] as to whether the ICC tribunal had jurisdiction to hear a case. The new Rules specify that arbitral tribunal should, in most instances, be the only body to rule on matters of jurisdiction.[45] Under the new Rules, the arbitral tribunal will now decide a variety of issues that were previously decided by the ICC Court under the 1998 Rules. The arbitral tribunal will decide any challenge to existence, validity or scope of the arbitration agreement, the consolidation of multiple arbitrations, and the determination of jurisdiction in the event of a party's failure to submit an answer.[46] This new power is sidelined in the event that the Secretary General refers the matter to the ICC Court for its decision on whether and to what extent an arbitration shall proceed. At this juncture, an arbitration shall proceed if and to the extent that the court is *prima facie* satisfied that an arbitration agreement under the Rules may exist.[47]

E. Multiple Contracts and Parties

In part, the 2012 revisions simply codified practices that have been occurring under the 1998 Rules. Amongst the highly anticipated codifications were the new rules on joinder and arbitration involving multiple contracts or multiple parties to an arbitration. This addition is extremely important to the growth and impact of the ICC because international commercial relationships usually involve multiple parties and multiple contracts. Article 7 addresses the joinder of additional parties, stating that a party who wishes to "join an additional party to the arbitration shall submit its request for arbitration against the additional party to the

[40] Article 22(3) of the ICC Rules of Arbitration (2012).

[41] Appendix I, Article 6 of the ICC Rules of Arbitration (2012).

[42] *Id.*

[43] Article 13(4) of the 2012 revision allows the Court to directly appoint an arbitrator where (1) one or more of the parties is a state or claims to be a state entity; or (2) the Court considers it appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; 0r (3) the President certifies to the Court that a situation exists, that in the President's opinion, make a direct appoint necessary or appropriate.

[44] Article 6 of the ICC Rules of Arbitration (1998).

[45] Article 6 of the ICC Rules of Arbitration (2012).

[46] Article 6(3) of the ICC Rules of Arbitration (2012).

[47] Article 6(4) of the ICC Rules of Arbitration (2012).

Secretariat."[48] This is a large change, as the 1998 Rules did not contain any provision for addressing the joinder of additional parties.

A party may join without the consent of the other parties prior to the confirmation or appointment of the arbitrator.[49] But, once the arbitrator(s) have been confirmed or appointed, all parties must agree to the joinder of the additional party.[50] Some critics of the addition suggest that the "tight time limit imposed in the joinder provision may result in its under utilization."[51] The new provision allows either the claimant or the respondent to join additional parties to the arbitration. Where a party is joined, they are allowed to nominate an arbitrator jointly with either the claimant or the respondent.[52]

The 1998 Rules contained no provisions for claims arising out of multiple contracts. Now, Article 9 of the 2012 Rules allows for claims arising out of or in connection more than once contract to be handled in a single arbitration, "irrespective of whether such claims" were made under one or more than one arbitration agreement under the Rules.[53] Additionally, pursuant to Article 10, a party that is involved in more than one arbitration, stemming from the same arbitration agreement, involving the same parties or in connection with the same legal relationship, may request that the court have everything consolidated into a single arbitration.[54] This application may be made at any stage during which arbitrations are pending under the Rules.

F. Case Management Procedures

The 2012 Rules demonstrate a concrete effort by the ICC to create a more cost effective and efficient arbitration process. This was a main goal of the Task Force and drafting committee because ICC arbitration has a reputation of being one of the slower forms of arbitration.[55] Particularly, Article 22 states "the arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost effective manner, having regard to the complexity and value of the dispute."[56] "The new provisions on case management remain purposely broad, giving the arbitrators more latitude to control the parties by means most effective given the particular context of the parties and the specific complexities of the case."[57] Fry, with regard to Article 22, stated "[w]e felt it necessary to have a case management

[48] Article 7(1) of the ICC Rules of Arbitration (2012).

[49] Article 7(1) of the ICC Rules of Arbitration (2012).

[50] *Id.*

[51] Richard Power, "Briefing note on the ICC Rule Changes" 10/06/2011. http://kluwerarbitrationblog.com/blog/2011/10/06/briefing-note-on-icc-rule-changes/ (last visited Oct. 12, 2011).

[52] Article 12(7) of the ICC Rules of Arbitration (2012).

[53] Article 9 of the ICC Rules of Arbitration (2012).

[54] Article 10 of the ICC Rules of Arbitration (2012).

[55] George Burns and Louise Woods, "United Kingdom: The New ICC Rules of Arbitration" http://www.mondaq.com/x/148188/Arbitration+Dispute+Resolution/The+New+ICC+Rules+Of+Arbitration (last visited Oct. 12, 2011).

[56] Article 22 of the ICC Rules of Arbitration (2012).

[57] Annalise Nelson, "The Revised ICC Rules of Arbitration" Kluwer Arbitration Blog. http://kluwerarbitrationblog.com/blog/2011/09/15/the-revised-icc-rules-of-arbitration/ (last visited Oct. 12, 2011).

conference as a tool for the arbitral tribunal to bring parties together right at the outset of the case in order to decide how this case should be conducted. It's compulsory and cannot be avoided."[58]

The 2012 Rules expressly give the tribunal specific case management responsibility. Under the new rules, the tribunal must convene a case management conference to consult the parties on procedural measures that may be adopted.[59] Case management is further addressed in Appendix IV, which suggests a variety of strategies to be used by the tribunal and the parties to control time and cost of the arbitration. Suggestions include identifying issues that can be resolved by agreement between the parties or their experts, identifying issues to be decided solely on the basis of the documents rather than through oral evidence and legal argument, and limiting the length and scope of written submission. The manner in which the case management conference takes place is at the discretion of the tribunal. It may occur via telephone, in person, or teleconference.

Another addition to the rules, aimed at improving the efficiency of the process, is the requirement that the tribunal inform the Secretariat of a concrete date by which it expects to be able to submit an award to the ICC Court for review.[60] The 1998 Rules were much more lax on this matter and only required the tribunal to provide an "approximate" date.[61]

G. Other Miscellaneous Changes

The 2012 revision has made sweeping changes to some portions of the 1998 Rules, but it also reflects more minute changes that affect the overall process and efficiency of ICC arbitration. For example, the new rules reflect changes in information technology. The rules have been written to reflect current modes of communication and legal notice requirements. Words such as "telex"[62] have been updated and replaced with broadly defined forms of communication in an effort to provide flexibility for future technological advancements.[63] Rules about costs have been tweaked to allow the tribunal to take into account "the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner".[64] Though the 1998 Rules vaguely addressed the tribunal's ability to allocate the proportion that each party was responsible for, the 2012 revision now codifies an express rule wasteful and negligent behavior can be factored into allocating costs.[65]

Article 17 of the 2012 Rules allows the arbitral tribunal or the Secretariat to request "proof of authority" of any party representative at any time after the commencement of

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[58] A quote from Jason Fry, secretary general of the ICC International Court of Arbitration when speaking in Toronto on Sept. 22, 2011. Quote comes from Jennifer Brown, "New ICC rules of arbitration aim to cut costs and time" in Canadian Lawyer Magazine. http://www.canadianlawyermag.com/legalfeeds/467/New-ICC-rules-of-arbitration-aim-to-cut-costs-and-time.html.

[59] Article 24 of the ICC Rules of Arbitration (2012).

[60] Article 27(a) of the ICC Rules of Arbitration (2012).

[61] Article 22(2) of the ICC Rules of Arbitration (1998).

[62] The word "telex" was used in Article 3 "Written Notifications or Communications" of the 1998 Rules.

[63] Article 3 of the 2012 Rules provides that, "Such notification or communication may be made by delivery against receipt, registered post, courier, email, *or any other means of telecommunication* that provides a record of the sending thereof." (emphasis added).

[64] Article 37(5) of the ICC Rules of Arbitration (2012).

[65] Article 31(3) of the ICC Rules of Arbitration (1998) and Article 37(5) of the ICC Rules of Arbitration (2012).

arbitration.[66] Seemingly, Article 17 aims to promote efficiency while insuring that only legitimate claims are brought. This article is linked to Article 26(4), formerly Article 21(4), which states, "[t]he parties may appear in person or through duly authorized representatives…".[67] The former Article 21(4) was seen as referring to the authority of counsel to represent a party.[68] Now, according to drafter of the 2012 Rules, Article 17 "encompasses more complex scenarios, including where parties have not signed the arbitration agreement or relevant contracts; or where one party disputes the authority of a representative".[69] Requiring parties to submit evidentiary proof of their authority to bring a claim has been added / more thoroughly fleshed out in the 2012 Rules to ensure that any decision is binding in fact and cannot be disputed on a jurisdictional basis after the fact.[70]

V. CONCLUSION

Overall, the 2012 Rules attempt to offer a modernized framework for ICC arbitration. The changes focus on the need for efficiency and insuring cost-effective arbitration. The revision represents over a decade of requested changes, codifications of previously applied practices and an attempt to meet the growing complexity of international business transaction. Further, with investment treaties on the rise, the changes in the 2012 Rules could entice parties to stray from the traditionally used UNCITRAL proceedings or ISCIS arbitrations.[71] Though the changes are definitely a step in the right direction, only time and the actual implementation of the rules will truly tell if the amendments and additions have changed ICC arbitration for the better.

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[66] Article 17 of the ICC Rules of Arbitration (2012).

[67] Article 26(4) of the ICC Rules of Arbitration (2012).

[68] "The 2012 ICC Rules of Arbitration: New Rules, New Responsibilities", October 3, 2011, Crowell & Moring, LLP. http://www.crowell.com/NewsEvents/AlertsNewsletters/all/2012-ICC-Rules-of-Arbitration-New-Rules-New-Responsibilities (last visited Oct. 14, 2011).

[69] *Id.*

[70] *Id.*

[71] Annalise Nelson, "The Revised ICC Rules of Arbitration" Kluwer Arbitration Blog, http://kluwerarbitrationblog.com/blog/2011/09/15/the-revised-icc-rules-of-arbitration/ (last visited Oct. 12, 2011).

MAKING THE WITHDRAWAL: THE EFFECT *AT&T MOBILITY V. CONCEPCION* WILL HAVE ON STATE LAWS SIMILAR TO CALIFORNIA'S *DISCOVER BANK* RULE

Zachary R. Brecheisen*

I. INTRODUCTION

The Supreme Court's holding in *AT&T Mobility v. Concepcion* has had a profound effect on the law of arbitration in the United States. Before *AT&T Mobility*, many state and federal courts had routinely held as unenforceable adhesive arbitration agreements containing class action waivers. In one fell swoop, the Supreme Court has upended the conventional thinking on contract unconscionability rules and placed a target over a multitude of state laws that resemble California's Discover Bank rule challenging the Federal Arbitration Act's (FAA) jurisdiction over class-wide arbitration waivers.

State and federal courts are still sorting out *AT&T Mobility*'s preemptive effect on state laws governing the unconscionability of class-wide waivers in arbitration clauses. Since many states have adopted different degrees and adaptations of the *Discover Bank* rule at issue in *AT&T Mobility*, the holding will likely force courts to address each state's rule on an individual state-by-state basis. Several federal courts have already applied *AT&T Mobility*, holding that the FAA preempts all state laws similar to *Discover Bank*. These cases have shown federal courts' willingness to broadly construe *AT&T Mobility* to preempt state laws which rely primarily on public policy rationale to find class arbitration waivers unconscionable.

This Comment will survey state unconscionability laws barring class-wide arbitration waivers and analyze (A) which laws the FAA has already preempted, (B) which laws are likely to be preempted upon challenge, and (C) the possibility that some state laws may remain outside the scope of the FAA.

II. BACKGROUND

In 2005, the California Supreme Court in *Discover Bank* addressed the unconscionability of class-wide arbitration waivers in contracts of adhesion.[1] The case involved a consumer who challenged the validity of the arbitration clause in his standard credit card agreement.[2] Specifically, plaintiff argued that the class action waiver rendered the arbitral clause unconscionable and thus unenforceable under California law.[3]

The California Supreme Court agreed with plaintiff, articulating the three-part "*Discover Bank* rule." Accordingly, class action waivers are unconscionable when: (1) the waiver is found in a consumer contract of adhesion drafted by a party with superior bargaining power; (2) the

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[1] Discover Bank v. Superior Court, 113 P.3d 1100, 1103 (Cal. 2005).

[2] *Id.*

[3] *Id.* at 1104.

disputes between the parties predictably involve small amounts of damages; and (3) the party with superior bargaining power is alleged to have carried out a scheme to deliberately cheat large numbers of consumers out of individually small claims of money.[4] The court found that the class-action waiver at issue satisfied all three elements and thus held the contract was unenforceable. In its holding, the court emphasized the crucial importance of having class procedures available to consumer to effectively prosecute small-dollar claims.[5] The court reasoned that to hold otherwise would allow Discover Bank to escape "responsibility for [its] own fraud, or willful injury to the person or property of another."[6]

Last year, in *AT&T Mobility*, the U.S. Supreme Court addressed whether California's *Discover Bank* rule directly conflicted with the FAA or whether it was permissible under the "savings provision" of FAA § 2.[7] Specifically, FAA § 2 allows states to invalidate arbitration agreements on "grounds as exist at law or in equity for the revocation of any contract."[8] The savings provision therefore allows a court to strike down arbitration agreements under "generally applicable contract defenses, such as fraud, duress, or unconscionability."[9] In the context of class-wide arbitration provisions, however, the Supreme Court noted that the savings provision cannot be so broadly applied such that the exception would eventually overwhelm the FAA's general rule favoring enforceable arbitration.[10]

The Court viewed the *Discover Bank* rule as essentially a general requirement that class-wide arbitration always be available to consumers bound by arbitration contracts.[11] The majority was particularly concerned with how the three prongs of the *Discover Bank* rule were almost universally applicable to all consumer contracts, effectively rendering its applicability almost limitless.[12] Justice Scalia's majority opinion dismissed the so-called "limits" of the *Discover Bank* rule and implied the rule was not actually an "application of [the] unconscionability doctrine … [but instead a] state policy placing bilateral arbitration categorically off-limits for certain categories of consumer fraud cases, upon the mere *ex post* demand by any consumer."[13]

After a lengthy critique of class-wide arbitration, the Court held that California's broad *Discover Bank* rule was outside the scope of the savings provision in FAA § 2 and the rule was therefore preempted by the FAA.[14] The Court emphasized that the savings provision does not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" in enforcing agreements to arbitrate as written.[15] Although the *Discover Bank* unconscionability rule applied to all contract terms, its application had a disproportionate impact

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[4] *Id.* at 1110.

[5] *Id.* at 1108–09 (quoting Linder v. Thrifty Oil Co., 2 P.3d 27, 38 (Cal. 2000)).

[6] *Id.* (quoting CAL. CIV. CODE § 1668 (2011)).

[7] AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1746 (2011); Federal Arbitration Act, 9 U.S.C. § 2 (2006).

[8] 9 U.S.C. § 2.

[9] *AT&T Mobility*, 131 S. Ct. at 1746.

[10] *Id.* at 1748 ("In other words, the act cannot be held to destroy itself.").

[11] *Id.* at 1750 ("Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*.").

[12] *Id.* ("The rule is limited to adhesion contracts … but the times in which consumer contracts were anything other than adhesive are long past …. The [requirement of predictably small damages], however, is toothless and malleable … and the [requirement of an alleged scheme to cheat consumers] has no limiting effect, as all that is required is an allegation.").

[13] Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1211 (11th Cir. 2011) (citing *AT&T Mobility*, 131 S. Ct. at 1750).

[14] *AT&T Mobility*, 131 S. Ct. at 1753.

[15] *Id.* at 1748.

on arbitration provisions.[16] The *Discover Bank* rule, therefore, "[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" under the FAA.[17] Stated more broadly, the Supreme Court envisioned the FAA preempting state laws that rely on public policy grounds to allow a consumer to demand class-wide arbitration *ex post*, despite contractually agreeing to submit all disputes to bilateral arbitration.[18]

In its holding, the Court roundly rejected the dissent's argument that class-wide arbitration was "necessary to prosecute small-dollar claims that might otherwise slip through the legal system."[19] Instead, the Court saw that the FAA's overriding purpose was to protect bilateral arbitration agreements, prioritizing freedom of contract over any "unrelated" public policy interests inherent to small-dollar claims.[20] This language struck directly at the heart of the consumer protection rationale behind *Discover Bank*.[21]

III. DISCUSSION

Despite the Supreme Court's scathing critique of class-wide arbitration in *AT&T Mobility v. Concepcion*, the concept of class-wide arbitration and its availability remains alive and well. However, state laws requiring the availability of class-wide arbitration—despite consumers having already waived the procedure pursuant to contract—would almost certainly be preempted by the FAA. The status of state laws resembling *Discover Bank* is presently in flux. Some courts have held that the FAA preempts such state laws, while other state laws remain undecided.

A. States Where Courts Have Already Applied AT&T Mobility v. Concepcion

Several federal courts have addressed the holding in *AT&T Mobility* when applying the law of states in which class-wide arbitration waivers have been held as unenforceable. The U.S. Courts of Appeals for the Third, Eighth, and Eleventh Circuits have reviewed the state unconscionability rules of New Jersey, Minnesota, and Florida in light of the Court's decision in *AT&T Mobility*.[22] Additionally, federal district courts have reviewed the unconscionability rules

[16] *Id.* at 1747.

[17] *Id.* at 1753.

[18] *Cruz*, 648 F.3d at 1212.

[19] *AT&T Mobility*, 131 S. Ct. at 1753 (citing 131 S. Ct. at 1761 (Breyer, J., dissenting)).

[20] *Id.* at 1753; *see also Cruz*, 648 F.3d at 1212.

[21] The California Court of Appeals has recently sought to circumvent the *AT&T Mobility* holding by using the same public policy rationale of protecting consumers with small-dollar claims to find arbitration clauses containing class waivers, but relying on other pro-defendant provisions. Sanchez v. Valencia Holding Co., LLC, 135 Cal. Rptr. 3d 19 (Cal. Ct. App. 2011), *review granted and opinion superseded by* 272 P.3d 976 (Cal. 2012).

[22] Litman v. Cellco P'ship, 655 F.3d 225, 232 (3d Cir. 2011) (rejecting New Jersey's law that held waiver of class arbitrations are unconscionable); Green v. SuperShuttle Int'l, Inc., 653 F.3d 766, 769 (8th Cir. 2011) (holding *AT&T Mobility* would bar plaintiffs from bringing an unconscionability argument under Minnesota common law to challenge a class waiver); *Cruz*, 648 F.3d at 1208 (discussing *AT&T Mobility* and its effect on Florida's unconscionability doctrine).

of Pennsylvania, Washington, and Oregon.[23] As these are some of the first cases to review class-wide arbitration waivers in the wake of *AT&T Mobility*, they are useful to predict how courts may interpret the Supreme Court's holding when analyzing similar rules in other states. Taken together, these initial cases demonstrate a tendency by federal courts to broadly apply *AT&T Mobility*'s holding to preempt state laws that ban class-action waivers on public policy grounds.

1. New Jersey

In *Muhammed v. County Bank of Rehoboth Beach, Del.*, the New Jersey Supreme Court articulated its unconscionability rule when faced with a class-wide arbitration waiver in a consumer contract.[24] *Muhammed* involved a payday loan agreement that specifically prohibited class arbitration and class litigation in the event of a dispute.[25] The court held that adhesive contracts are unconscionable where (1) they waive a party's right to a class action in both the arbitration and litigation forums and (2) the "disputes between the contracting parties predictably involve small amounts of damages."[26] The court was particularly sympathetic to the argument that absent class-wide proceedings, "rational consumers may decline to pursue individual consumer-fraud lawsuits because it may not be worth the time spent prosecuting the suit, even if competent counsel was willing to take the case."[27] Echoing the rationale behind *Discover Bank*, the New Jersey Supreme Court found ruling otherwise would serve as a functional exculpation of the drafting party's wrongful conduct.[28]

In *Litman v. Cellco Partnership*, the U.S. Court of Appeal for the Third Circuit reviewed New Jersey's *Muhammed* rule for the first time in light of *AT&T Mobility*.[29] Prior to *AT&T Mobility*, the Third Circuit upheld the *Muhammed* rule in *Homa v. American Express Co.* by stressing that *Muhammed* applied to class-action waivers that prevent a party from seeking class proceedings in both arbitration *and* litigation.[30] The court originally found that this distinction triggered the savings provision of FAA § 2 because the rule did not expressly target arbitration agreements, but was instead a "generally applicable contract defense."[31] The *Homa* distinction was no longer applicable given that the class waiver upheld in *AT&T Mobility* applied to both class arbitration and litigation.[32] The Third Circuit abrogated its prior decisions, construing

[23] King v. Advance Am., Nos. 07-237, 07-3142, 2011 WL 3861898, at *6 (E.D. Pa. Aug. 31, 2011) (finding Pennsylvania unconscionability rule banning class waivers preempted by the FAA); Adams v. AT&T Mobility, LLC, 816 F. Supp. 2d 1077, 1088 (W.D. Wash. 2011) (discussing *AT&T Mobility*'s effect on Washington's *Scott* rule); Willis v. Debt Care, USA, Inc., No. 3:11-cv-430-ST, 2011 WL 7121456, at *6–8 (D. Or. Oct. 24, 2011) (analogizing Oregon's unconscionability rule banning class waivers to *Discover Bank* rule).

[24] Muhammed v. Cty Bank of Rehoboth Beach, Del., 912 A.2d 88, 99 (N.J. 2006).

[25] *Id.* at 91–93.

[26] *Id.* at 99.

[27] *Id.*

[28] *Id.* at 100.

[29] Litman v. Cellco P'ship, 655 F.3d 225, 232 (3d Cir. 2011).

[30] Homa v. Am. Express Co., 558 F.3d 225, 230 (3d Cir. 2009).

[31] *Id.*

[32] AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

AT&T Mobility broadly and holding, in *Litman*, that the FAA preempts the *Muhammed* rule, despite the distinction previously relied upon in *Homa*.[33]

2. Florida

Unlike New Jersey, Florida courts did not create a succinct state-wide doctrine on the unconscionability of class-action waivers in arbitration agreements.[34] In *McKenzie v. Betts*—Florida's most recent pre-*AT&T Mobility* case—the plaintiff attacked the validity of a class-action waiver found within a cash advance agreement.[35] The *McKenzie* court struck down the class-action waiver on public policy grounds because it precluded consumers from effectively pursuing a civil action against another party to an adhesive contract.[36] Specifically, the plaintiff provided sufficient expert testimony to persuade the court that competent attorneys would not represent plaintiffs in individual arbitration proceedings for small-dollar disputes, thus denying consumers a viable option to exercise their protected consumer rights.[37]

The Eleventh Circuit examined Florida's unconscionability law post-*AT&T Mobility* in *Cruz v. Cingular Wireless*, which involved a class waiver agreement almost identical to the contract at issue in *AT&T Mobility*.[38]

> The court read *AT&T Mobility* broadly to mean the FAA would preempt any "state rules mandating the availability of class arbitration based on generalizable characteristics of consumer protection claims."[39]

Though the court believed *AT&T Mobility* had broad applicability, the court concluded that the holding would require a case-by-case analysis under the particular circumstances of the class-wide arbitration waiver.[40] The court did not target any specific Florida law on class-wide waivers, but stated in dicta that the FAA would preempt any Florida law that invalidates class waiver provisions "simply because the claims are of small value, the potential claims are numerous, and many consumers might not know about or pursue the potential claims absent class

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[33] *Litman*, 655 F.3d at 231 ("We understand the holding of *Concepcion* to be **both broad and clear**"). (emphasis added); *see also* Wolf v. Nissan Motor Acceptance Corp., No. 10-cv-3338 (NLH)(KMW), 2011 U.S. Dist. LEXIS 66649, at *19-20 (D.N.J. June 22, 2011) (finding *AT&T Mobility* invalidates New Jersey's *Muhammad* rule).

[34] Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1213 n.12 (11th Cir. 2011); *Compare* Fonte v. AT&T Wireless Servs., Inc., 903 So. 2d 1019, 1025 (Fla. Dist. Ct. App. 2005) (upholding class waiver because the consumer had all the same substantive rights against AT&T despite the waiver, including attorney's fees, injunctive relief and damages), *with* McKenzie v. Betts, 55 So. 3d 615, 623 (Fla. Dist. Ct. App. 2011) (striking down class waiver provision based on credible evidence that competent counsel would not represent individual plaintiffs in small claims), *and* Powertel, Inc. v. Bexley, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) (striking down class waiver provision because it precluded availability of punitive damages, injunctive relief and the ability to pursue class action on claims that are "too small to litigate individually").

[35] *McKenzie*, 55 So. 3d at 618–19.

[36] *Id.* at 624.

[37] *Id.* at 623.

[38] *Cruz*, 648 F.3d at 1210–11.

[39] *Id.* at 1212.

[40] *Id.* at 1205, 1214–15; *see* AT&T Mobility LLC v. Fisher, No. DKC 11-2245, 2011 U.S. Dist. LEXIS 124839, at *20 (D. Md. Oct. 28, 2011).

procedures."[41] The court's language strongly echoes Justice Scalia's *AT&T Mobility* attack on the "unrelated" public policy rationale behind protecting consumers with small-dollar claims.[42]

3. Minnesota

Minnesota did not have a specific rule addressing the unconscionability of class waivers in contracts of adhesion. The Eighth Circuit, however, still applied *AT&T Mobility* to reject the plaintiff's attempt to apply the unconscionability analysis to a class-wide arbitration waiver.[43] In *Green v. SuperShuttle International, Inc.*, the Eighth Circuit upheld the trial court's decision to compel individual arbitration, despite the plaintiff's argument that the class-wide waiver provision was an "unfair and inequitable practice" in violation of Minnesota consumer protection laws.[44] Although Minnesota courts had not articulated an unconscionability rule specifically on class waivers, the court determined that *AT&T Mobility*'s holding would bar any attempts to use Minnesota public policy grounds to strike down class-wide arbitration waivers.[45]

4. Pennsylvania

Pennsylvania laid out its rule on the unconscionability of class arbitration waivers in *Thibodeau v. Comcast Corp.*[46] In *Thibodeau*, the Pennsylvania Superior Court articulated a rule striking down class-wide litigation and arbitration waivers in contracts of adhesion as expressly unconscionable and unenforceable.[47] To support its broad holding, the court stressed the public policy behind granting consumers the right to proceed as a class on small-dollar claims.[48] Like the *McKenzie* court in Florida, the Pennsylvania Superior Court was particularly concerned about the lack of qualified representation available to consumers seeking small-dollar recoveries.[49] The court reasoned that adhesive contracts forcing consumers to litigate or arbitrate individually would effectively immunize defendant corporations from most consumer grievances.[50]

After *AT&T Mobility*, the U.S. District Court for the Eastern District of Pennsylvania looked to *AT&T Mobility*, along with the Third Circuit's discussion in *Litman*, to hold that the FAA preempted *Thibodeau*.[51] In *King v. Advance America*, the court declined to apply *Thibodeau* and granted defendant's motion to compel individual arbitration.[52] The court discerned no significant difference between Pennsylvania's *Thibodeau* rule, California's *Discover*

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[41] *Cruz*, 648 F.3d at 1213.

[42] *See* AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

[43] Green v. SuperShuttle Int'l, Inc., 653 F.3d 766, 769 (8th Cir. 2011).

[44] *Id.*; *see* Minnesota Fair Labor Standards Act, MINN. STAT. §§ 177.21–.35 (2011).

[45] *Green*, 653 F.3d at 769.

[46] Thibodeau v. Comcast Corp., 912 A.2d 874, 885 (Pa. Super. Ct. 2006); *see generally* Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 864–67 (Pa. Super. Ct. 1991) (endorsing class arbitration as a "fair an efficient method of adjudicating" small-dollar consumer claims).

[47] *Thibodeau*, 912 A.2d at 886.

[48] *Id.* at 884 ("Class action lawsuits are and remain the essential vehicle by which consumers may vindicate their lawful rights.").

[49] *Id.* at 885.

[50] *Id.*

[51] King v. Advance Am., Nos. 07-237, 07-3142, 2011 WL 3861898, at *6 (E.D. Pa. Aug. 31, 2011).

[52] *Id.*

Bank rule, or New Jersey's *Muhammed* rule.[53] The court also noted that the Third Circuit, in *Litman*, suggested Pennsylvania's *Thibodeau* rule was even more likely to contravene the FAA than the preempted *Muhammed* rule.[54] Relying heavily on *Litman*, the court broadly construed *AT&T Mobility* to find the FAA preempted state unconscionability laws that relied on general concepts of public policy.[55]

5. Washington

Washington originally announced its rule on the unconscionability of class waivers in 2007 when the Washington Supreme Court refused to enforce such a waiver in a cellular service provider agreement.[56] In *Scott v. Cingular Wireless*, the court found that class-wide arbitration waivers effectively deny customers a forum in which to vindicate their protected consumer rights.[57] The court articulated a rule that declared class-wide waivers as unconscionable where: (1) many customers of the same company have the same or similar complaint; and (2) each consumer is damaged a small amount.[58] In articulating the rationale for the rule, the Court relied heavily upon the reasons used by the California Supreme Court in crafting the *Discover Bank* rule.[59]

Due to the close relationship between the *Scott* and *Discover Bank* rules, U.S. district courts that have evaluated Washington's unconscionability rule, post-*AT&T Mobility*, have found little distinction between the two.[60] The U.S. District Court for the Northern District of California, in *In re Apple*, found that the FAA preempted the *Scott* rule particularly because that rule was "based on *Discover Bank*."[61] The U.S. District Court for the Western District of Washington similarly agreed that *AT&T Mobility* dismissed the public policy concerns over small-dollar legal proceedings that motivated both the *Discover Bank* and *Scott* decisions.[62]

6. Oregon

The Oregon Court of Appeals briefly articulated the unconscionability of class waivers in arbitration clauses in *Vasquez-Lopez v. Beneficial Oregon Inc*., where an arbitration rider on a home loan agreement waived the borrower's right to proceed as a class in any disputes against the creditors. [63] In finding the waiver unconscionable and unenforceable, the court discussed the waiver's impact on consumers bringing small-dollar claims.[64] The court stated that "the class

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[53] *Id.*

[54] *Id.* (citing Litman v. Cellco P'ship, 655 F.3d 225, 229 n.5 (3d Cir. 2011)).

[55] Id.

[56] Scott v. Cingular Wireless, 161 P.3d 1000, 1009 (Wash. 2007) (en banc).

[57] *Id.*

[58] *Id.*

[59] *Id.* at 1006–07 (noting class arbitration is "often the only meaningful type of redress available for small but widespread injuries" and denying that procedure exculpates defendant's fraudulent conduct).

[60] Adams v. AT&T Mobility, LLC, 816 F. Supp. 2d 1077, 1088 (W.D. Wash. 2011); *In re* Apple, No. C-10-02553 RMW, 2011 U.S. Dist. LEXIS 78276, at *13 (N.D. Cal. Jul. 19, 2011).

[61] *In re Apple*, 2011 U.S. Dist. LEXIS 78276, at *13 (applying Washington law).

[62] *Adams*, 816 F. Supp. 2d at 1088.

[63] Vasquez-Lopez v. Beneficial Or. Inc., 152 P.3d 940, 949–51 (Or. Ct. App. 2007).

[64] *Id.* at 951.

action ban is unilateral in effect and, more significantly, it gives the defendant a virtual license to commit, with impunity, millions of dollars' worth of small-scale fraud."[65] While not wholly adopting the *Discover Bank* rule, the Court noted that it agreed with the California Supreme Court in *Discover Bank* that "class-wide arbitrations are workable and appropriate in some cases."[66]

The U.S. District Court for the District of Oregon reviewed the *Vasquez-Lopez* holding in light of *AT&T Mobility* to find that the FAA preempted the decision in *Willis v. Debt Care, USA, Inc*.[67] In *Willis*, the court stated that *Vasquez-Lopez* rule was the "functional equivalent of the *Discover Card* [sic] rule by mandating the availability of class arbitration for consumer protection claims."[68] This close relation meant that, despite the class action procedure being the only way the Willis's could effectively recover damages in the case, the FAA preempted the *Vasquez-Lopez* rule.[69]

B. States That Rule Class-wide Arbitration Waivers Unconscionable But Have Yet to Consider *AT&T Mobility*.

The majority of states that declare class-wide arbitration waivers unconscionable have yet to address the issue through case law. To a large extent, the rules articulated by these states rely on some modicum of public policy rationale to justify striking down class-wide arbitration waivers. Common elements include the lack of competent representation for individuals attempting to dispute small-dollar claims, the adhesive nature of the contract, and the desire to hold corporations accountable for potentially fraudulent action. If *AT&T Mobility* is read and applied broadly, as it has been thus far by federal courts, state laws relying on these elements would receive the same harsh scrutiny as the *Discover Bank* rule and would likely not be spared by the FAA § 2 savings provision. Further, the FAA would likely also preempt rules in states such as New Jersey that attempted to walk the fine line by applying unconscionability rules equally to both arbitration and litigation class waivers.

1. States in the First Circuit

In Massachusetts, the U.S. Court of Appeals for the First Circuit, in *Kristian v. Comcast Corp.*, applied Massachusetts state unconscionability principles to a class waiver.[70] The plaintiffs in *Kristian* sued Comcast under state and federal antitrust laws. The plaintiffs attacked the validity of the class action waiver when their suit was moved to mandatory arbitration as required under the cable television service agreement.[71]

The court's discussion focused primarily on the unconscionability of the class action waiver as it related to the rights granted by federal antitrust statutes. The court, however, noted an unconscionability analysis under Massachusetts state law would be analogous to its application of

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[65] *Id.*
[66] *Id.* at 950 (quoting *Discover Bank*, 113 P.3d at 1116.).
[67] Willis v. Debt Care, USA, Inc., No. 3:11-cv-430-ST, 2011 WL 7121456, at *6-8 (D. Or. Oct. 24, 2011).
[68] *Id.* at *6.
[69] *Id.* at *8.
[70] Kristian v. Comcast Corp., 446 F.3d 25, 63–64 (1st Cir. 2006).
[71] *Id.* at 37.

federal antitrust laws.[72] Indeed, part of the rationale for striking down the class waiver was that it prevented the plaintiffs from vindicating their state and federally-granted *statutory rights*.[73] In finding the class waiver unconscionable, the court emphasized the difficulty an individual plaintiff would face when seeking to arbitrate a dispute involving small-dollar claims.[74] The relatively low damages available to an individual plaintiff, when compared with the weighty financial burden required to pursue a claim, would be "so prohibitive as to deter the bringing of claims" at all.[75] The court further found that the unconscionability of the class waiver, particularly in an antitrust context, made the general mandatory arbitration provision unenforceable.[76]

Although the *Kristian* case centers primarily on the statutory antitrust rights of consumers, the rule articulated by the First Circuit arguably still applies to Massachusetts's unconscionability law. The court relied heavily on the public policy grounds of balancing the cost of arbitration with the potential recovery in small-dollar claims in its decision to find the waiver unconscionable under Massachusetts law. This rationale is analogous to that articulated by the California Supreme Court in *Discover Bank*, which the U.S. Supreme Court roundly rejected in *AT&T Mobility*. As such, the *Kristian* holding, to the extent it is based on Massachusetts law, would likely be preempted by the FAA despite its additional reliance on federal antitrust law.[77]

2. States in the Fourth Circuit

The North Carolina Supreme Court held class-wide waivers in arbitration clauses unconscionable in the plurality decision in *Tillman v. Commercial Credit Loans, Inc.*[78] In *Tillman*, the Court noted that the class waiver provision in an adhesive mortgage contract could be a factor evaluated by a court within the greater unconscionability analysis.[79] The Court based its rationale for the holding on the unavailability of effective counsel in small-dollar individual arbitrations, as well as the lopsided benefit a class waiver gives to lenders.[80]

The *Tillman* rule could potentially be distinguished from similar rules in other states. In particular, the court noted that the class waiver, taken alone, may not be sufficient to render the arbitration clause in an adhesive contract unconscionable.[81] In holding the arbitration clause

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[72] *Id.* at 63–64 ("As a practical matter, there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis."); *see also* Skirchak v. Dynamics Reas. Corp., 432 F. Supp. 2d 175, 181 (D. Mass. 2006) (finding class arbitration waiver unconscionable under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2011)).

[73] *Kristian*, 446 F.3d at 29.

[74] *Id.* at 59.

[75] *Id.* at 55.

[76] *Id.* at 59.

[77] The U.S. Court of Appeals for the Second Circuit has recently sought to confine *AT&T Mobility* to rules that do not rely on federal statutory rights to require the availability of class arbitration. *In re* Am. Express Merchs. Litig., 667 F.3d 204, 213-14 (2d Cir. 2012) (distinguishing *AT&T Mobility* as pertaining only to judicially-crafted unconscionability rules disfavoring class action waivers and not applicable to cases relying on federal, statute-based, antitrust rights).

[78] Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 373 (N.C. 2008).

[79] *Id.*

[80] *Id.*

[81] *Id.*

unconscionable, the Court also based its decision on the presence of a "loser-pays all" provision and the right for a loser to seek expensive, *de novo* appeal from the initial arbitration decision.[82] A court evaluating whether the FAA preempts *Tillman* may note this distinction from *Discover Bank*. Given *AT&T Mobility*'s hostility towards the public policy rationale articulated in *Tillman*, however, this distinction may not be sufficient to save *Tillman* from FAA preemption.[83]

West Virginia was an early proponent of striking class-wide arbitration waivers, as established in *State ex rel. Dunlap v. Berger*.[84] In *Berger*, the West Virginia Supreme Court addressed a class-wide arbitration waiver in a purchasing and finance agreement between jewelry distributers and their customers.[85] Along with a prohibition on punitive damages, the Court declared the class waiver in the contract of adhesion to be unconscionable.[86] The Court emphasized the small recovery amount involved in the dispute and its effect on a customer's ability to find effective counsel to prosecute their claim.[87] Without the ability to pursue class actions, the Court reasoned that aggrieved customers would be unable to vindicate their protected consumer rights.[88] The rule articulated by the West Virginia Supreme Court in *Berger*, along with the public policy emphasis behind it, would seem to be analogous to the *Discover Bank* rule, and thus squarely within the preemptive reach of the FAA.[89]

3. States in the Sixth Circuit

Michigan originally recognized an inherent unconscionability in class waivers in *Lozada v. Dale Baker Oldsmobile, Inc.*[90] Although the U.S. District Court for the Western District of Michigan primarily evaluated the class waiver at issue under federal statutory requirements—the court also found that class waivers were unconscionable under Michigan consumer protection laws.[91] The court focused on Congress's intent to protect borrowers in the federal Truth in Lending Act (TILA), holding that the statute required the availability of class arbitration.[92] The court also stated that the class action waiver in the arbitration clause would also violate the Michigan Consumer Protection Act, which expressly permits class actions for aggrieved consumers.[93] Since the court's analysis under Michigan law is devoid of any public policy rationale and is based on express statutory authorization, the holding may not be subject to FAA preemption in the same manner as *Discover Bank*. The absence of any specific unconscionability

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[82] *Id.* at 372.

[83] The U.S. District Court for the Western District of North Carolina discussed *Tillman*'s holding in the post-*AT&T Mobility* era, however, the Court did not address class arbitration waivers as a factor of substantive unconscionability, instead preferring to end its analysis after finding procedural unconscionability. Klopfer v. Queens Gap Mountain, LLC, No. 1:10cv155, 2011 U.S. Dist. LEXIS 105097, at *16–22 (W.D.N.C. 2011).

[84] State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 280 (W. Va. 2002).

[85] *Id.* at 268.

[86] *Id.* at 280.

[87] *Id.* at 278–79.

[88] *Id.* at 279.

[89] *Compare id.* at 278–80, *with* Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

[90] Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000).

[91] *Id.* (citing the Michigan Consumer Protection Act, MICH. COMP. LAWS § 445.911 (2011)).

[92] *Id.* at 1104–05 (citing Johnson v. Tele-Cash, Inc., 82 F. Supp. 2d 264, 270 (D. Del. 1999) (holding that inherent conflict existed between TILA right to class action and arbitration clause and refusing to enforce)).

[93] *Id.* at 1105; *see* MICH. COMP. LAWS § 445.911(3).

test under Michigan public policy would lead to difficulty for a court reviewing *AT&T Mobility*'s effect on *Lozada*.

The Kentucky Supreme Court held the class action waiver in an arbitration clause unconscionable in 2010 in *Schnuerle v. Insight Communications Co.*[94] The *Schnuerle* case involved an internet service agreement with an arbitration clause that waived class actions in both litigation and arbitration.[95] The court found the service agreement was a contract of adhesion and articulated the economic need to allow customers to proceed in class actions over small-dollar disputes (whether that be arbitration or litigation).[96] The court was also persuaded by other states that barred class action waivers, including California in *Discover Bank*, and held that "the absolute ban upon class action litigation is unenforceable in this case, and in like cases, as exculpatory, substantively unconscionable, and contrary to public policy."[97]

The Kentucky Supreme Court stripped the class action waiver provision from the contract, but the court upheld the rest of the arbitration provision.[98] Strong state interests favoring arbitration compelled the court to remand the case for binding arbitration, which could proceed on a class-wide basis.[99] Although the court's action distinguishes this case from *Discover Bank*, it likely will not save the court's rule from preemption by the FAA. The court's holding allowed the general arbitration provision to survive, but it had the effect of compelling class-wide arbitration on the parties. This action, and the public policy grounds upon which it was based, still conflicts with the U.S. Supreme Court's criticism of laws which require class-wide arbitration as an *ex post* option for small-dollar plaintiffs.

The Ohio Court of Appeals addressed class arbitration waivers under the state's consumer protection laws in *Schwartz v. Alltel Corp.*[100] In *Schwartz*, the plaintiff-consumer signed a cellular service contract containing a class arbitration waiver and a waiver of attorney fees.[101] The court found the cellular agreement was a contract of adhesion, and that the combination of the class waiver and the attorney fee waiver was substantively unconscionable.[102] In particular, the court believed that the class waiver "directly hinder[ed] the consumer protection purposes of the" Ohio Consumer Sales Protection Act.[103] The court reasoned that requiring individual arbitration was not cost-effective and would be of little use in ending abusive corporate practices like the one at issue in the litigation.[104]

The *Schwartz* opinion is short on the court's rationale for finding the unconscionability of the class waiver. The Court's discussion of the inefficient cost of pursuing individual arbitration, however, indicates a concern for the ability of consumers to bring suits for small-dollar claims. As the U.S. Supreme Court articulated in *AT&T Mobility*, a consumer contract of adhesion involving small-dollar claims would almost always trigger the *Discover Bank* rule requiring class-

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[94] Schnuerle v. Insight, Nos. 2008-SC-000789-DG, 2009-SC-000390-DG, 2010 WL 5129850, at *6 (Ky. Dec. 16, 2010), *reh'g granted*, ___S.W.3d___ (Aug. 25, 2011).

[95] *Id.* at *1.

[96] *Id.* at *5.

[97] *Schnuerle*, 2010 WL 5129850, at *6–7.

[98] *Id.* at *8.

[99] *Id.* at *11.

[100] Schwartz v. Alltel Corp., No. 86810, 2006 WL 2243649, at *1 (Ohio App. 2006); *see* Ohio Consumer Sales Protection Act, OHIO REV. CODE ANN. §§ 1345.01–.99 (West 2011).

[101] *Schwartz*, 2006 WL 2243649, at *2.

[102] *Id.* at *4-5.

[103] *Id.* at *4.

[104] *Id.* at *5 (citing Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980)).

wide arbitration.[105] Similarly, the *Schwartz* holding would have the same effect of providing de facto class arbitration in almost all consumer disputes. Although the holding did not state that the class waiver, on its own, would be unconscionable–similar to North Carolina's *Tillman* holding–when viewed after AT&T Mobility, the FAA would likely preempt *Schwartz*.

4. States in the Seventh Circuit

The Illinois Supreme Court established its rule for the unconscionability of class waivers in *Kinkel v. Cingular Wireless LLC* when it reviewed the arbitration clause of a cellular service agreement.[106] The court determined that the overall arbitration provision was unconscionable and unenforceable because: (1) it was a contract of adhesion; (2) it waived a consumer's right to class actions; (3) it did not reveal the cost of arbitration; and (4) it contained a liquidated damages clause (the penalty at issue over early termination fees).[107] The court relied heavily on the plaintiff's argument that the cost of arbitrating her small-dollar claim against Cingular individually would generally be greater than any recovery she could receive if she won in arbitration.[108] Additionally, the court believed that the service agreement's failure to disclose the costs for a consumer to pursue the arbitration would further preclude customers from vindicating their rights.[109] Like the Kentucky Supreme Court in *Schnuerle*, the Illinois Supreme Court stripped the offending class waiver provision from the contract and enforced the remainder of the arbitration agreement.[110]

Like *Tillman* and *Schwartz*, the *Kinkel* case singled out class waiver as one of several elements that made the arbitration clause unconscionable. Although the Illinois Supreme Court may not have considered the class waiver, in and of itself, unconscionable, the court's emphasis on the need for class-wide arbitration in small-dollar claims is inherently a public policy argument. *AT&T Mobility* expressly stated that the FAA would preempt state unconscionability rules that were based on matters of "unrelated" public policy that favored plaintiffs in small-dollar claims.[111]

5. States in the Eighth Circuit

The Missouri Court of Appeals, in *Whitney v. Alltell Communications, Inc.*, evaluated a class waiver in a cellular phone service agreement and determined that the arbitration clause's class waiver was unconscionable because it restricted a consumer's rights under the Missouri Merchandising Practices Act. [112] In its holding, the court considered the class waiver as one

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[105] AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1750 (2011).

[106] Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 262 (Ill. 2006).

[107] *Id.* at 274–75.

[108] *Id.* at 268.

[109] *Id.*

[110] *Id.* at 278.

[111] AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1753 (2011). In *Valentine v. Wideopen West Fin., LLC*, No. 09C07653, 2012 WL 1021809, at *4–6 (N.D. Ill. Mar. 26, 2012), the court examined plaintiff's unconscionability arguments in light of *AT&T Mobility*, but upheld the arbitration agreement containing a class waiver because plaintiff had failed to present sufficient evidence to show the denial of class procedures would be prohibitive.

[112] Whitney v. Alltell Commc'ns, Inc., 173 S.W.3d 300, 313–14 (Mo. Ct. App. 2005) (citing MO. REV. STAT. §§ 407.010–.130 (2011)).

factor, in addition to provisions that limited the defendant's liability and required plaintiff to bear the costs of arbitration up-front, in holding the arbitration clause unconscionable.[113] When analyzing the combined effect of these restrictive contractual provisions, the Court was particularly concerned with the prohibitive effect they would have on small-dollar claims.[114] The Court stated that "the costs would be so prohibitively expensive as to preclude, for all practical purposes, an aggrieved party from seeking redress for a violation of the Merchandising Practices Act."[115]

The Missouri Court of Appeals later evaluated the unconscionability of class waivers in adhesive contracts head-on in *Woods v. QC Financial Services, Inc.*[116] The *Woods* case dealt with a payday loan agreement containing a class arbitration waiver.[117] The Court of Appeals looked to both New Jersey's *Muhammad* rule and California's *Discover Bank* rule to expressly hold that class waivers in contracts of adhesion are unconscionable.[118] In doing so, the Court's holding adopted the three-pronged *Discover Bank* rule as applicable to Missouri contract law.[119]

The Missouri Supreme Court adopted the *Whitney* and *Woods* holdings in *Brewer v. Missouri Title Loans, Inc.* in 2010, striking the class waiver in the arbitration clause as unconscionable and ordering class arbitration to proceed.[120] The defendant in *Brewer* requested certiorari from the U.S. Supreme Court, which promptly remanded the case back to the Missouri Supreme Court to be decided in light of *AT&T Mobility*.[121] Based on Missouri's wholesale adoption of the *Discover Bank* rule in *Woods*, the Missouri Supreme Court will almost certainly have to reverse its holding in *Brewer* and order arbitration with the class waiver intact.[122]

6. States in the Ninth Circuit

In *Cooper v. QC Financial Services, Inc.*, the U.S. District Court for the District of Arizona applied Arizona law to hold a class waiver in a payday loan agreement unconscionable.[123] The customer alleged QC Financial assessed "fees" on her payday loan, which eventually accrued to almost three times the principal of her loan.[124] In a lengthy discussion of the need for class actions in both litigation and arbitration, the court emphasized the necessity of class arbitration for disputes involving small recoveries.[125] In particular, the court

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[113] *Id.* at 309–10.

[114] *Id.* at 313.

[115] *Id.* at 314.

[116] Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90, 99 (Mo. Ct. App. 2008).

[117] *Id.* at 92–93.

[118] *Id.* at 99.

[119] Id.

[120] Brewer v. Mo. Title Loans, Inc., 323 S.W.3d 18, 23–24 (Mo. 2010) (en banc), *cert. granted, vacated, remanded by* 131 S. Ct. 2875 (2011), *aff'd on other grounds*, No. SC90647, 2012 WL 716878, at *7–10 (Mo. Mar. 6, 2012) (en banc).

[121] *Brewer*, 131 S. Ct. 2875.

[122] Just recently, the Missouri Supreme Court reconsidered the case and reaffirmed its holding that the arbitration clause as a whole was unconscionable, however, it reversed its decision to strip the class waiver from the clause. *Brewer*, 2012 WL 716878, at *10. This recent decision demonstrates a state court's willingness to apply *AT&T Mobility* narrowly to uphold class waiver provisions, yet still reach the same finding of unconscionability through alternate provisions in the arbitration clause.

[123] Cooper v. QC Fin. Servs., Inc., 503 F. Supp. 2d 1266, 1286–90 (D. Ariz. 2007).

[124] *Id.* at 1270.

[125] *Id.* at 1286.

believed the class waiver in the arbitration clause made it almost impossible for a customer to find an attorney for small-dollar claims, thus effectively "immun[izing] a defendant from scrutiny and accountability for its business practices."[126] The court looked to the *Discover Bank* rule in neighboring California and found the situation analogous to the case *sub judice*. Persuaded by *Discover Bank*'s rationale, the court wholly adopted the *Discover Bank* rule and held the class waiver unconscionable and unenforceable.[127] Arizona's wholesale adoption of *Discover Bank* means that the FAA would almost certainly preempt *Cooper*'s holding in Arizona.

The Nevada Supreme Court adopted a rule barring class waivers in arbitration clauses just before *AT&T Mobility* in *Picardi v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*.[128] In *Picardi*, the court found that the class waiver in a car sales contract was unconscionable as against state public policy favoring the availability of class actions.[129] The court looked to other jurisdictions that bar class waivers, including California, and found that the strong public policy of Nevada supported allowing class procedures for individual consumers with valid but small claims.[130] Since the *Picardi* court was relies heavily on rules in other states that have already been preempted by the FAA in the wake of AT&T Mobility, it is likely that the *Picardi* rule would suffer the same fate if challenged.

7. States in the Tenth Circuit

The New Mexico Supreme Court established a decidedly pro-consumer rule when it evaluated the unconscionability of class waivers in *Fiser v. Dell Computer Corp*., where the plaintiff agreed to the Dell website's "terms and conditions" when he purchased a computer online. [131] The "terms and conditions" included a binding class arbitration waiver, which the plaintiff challenged in his claim that Dell engaged in false advertising.[132] The New Mexico Supreme Court delivered a lengthy discussion of the state's strong public policy favoring the availability of class actions for injured consumers, particularly in small-dollar claims.[133] The court stated that "the class action functions as a gatekeeper to relief when the cost of bringing a single claim is greater than the damages alleged" in small-dollar disputes.[134] The court then invalidated the class waiver as substantively unconscionable and against New Mexico public policy.[135] Unlike similar rules articulated by other states, the court believed that class waivers were so "overwhelmingly" unconscionable that the court did not even need to determine whether the "terms and conditions" at issue was considered an adhesive contract.[136]

The New Mexico Supreme Court's rule in *Fiser* was tantamount to a blanket requirement for class-wide arbitration in any consumer contract that could involve small-dollar claims. This

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[126] *Id.* at 1288–89 (citing Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005)).

[127] *Id.* at 1290.

[128] Picardi v. Eighth Judicial Dist. Court of State, *ex rel.* Cty. of Clark, 251 P.3d 723, 728 (Nev. 2011).

[129] *Id.* at 727.

[130] *Id.* at 727–28.

[131] Fiser v. Dell Computer Corp., 188 P.3d 1215, 1221 (N.M. 2008); *see also* Felts v. CLK Mgmt., Inc., 254 P.3d 124, 139 (N.M. Ct. App. 2011) (final case before *AT&T Mobility* to apply use *Fiser* to strike class action waiver in arbitration clause).

[132] *Id.*

[133] *Id.* at 1219 (citing numerous New Mexico consumer protection statutes that grant class action relief).

[134] *Fiser*, 188 P.3d at 1220.

[135] *Id.* at 1221.

[136] *Id.*

rule goes much further than *Discover Bank*, which provides three prongs that must be met, one of which is that the contract be adhesive.[137] Given the U.S. Supreme Court's aversion to the relatively more narrowly-tailored *Discover Bank* rule, the broader *Fiser* rule would almost certainly fall prey to FAA preemption under *AT&T Mobility*.

8. States in the Eleventh Circuit

The Alabama Supreme Court tackled the unconscionability of class arbitration waivers early in 2002 in *Leonard v. Terminix International Co., L.P.*[138] In *Leonard*, the plaintiffs brought suit against Terminix for charging them yearly renewal fees while failing to conduct the yearly inspections in violation of both the agreement and Alabama consumer statues.[139] In examining the class waiver in the arbitration clause, the court emphasized the disproportionately small recovery available to a plaintiff prosecuting small-dollar claims when compared to the costs of arbitration.[140] The court also highlighted how this disproportionate balance led to a dearth of attorneys who would be willing to represent a plaintiff in an individual arbitration.[141] The court found the class waiver was unconscionable because the Terminix agreement was a contract of adhesion, which restricted the plaintiff to a forum where the expense of pursuing a claim far exceeded the amount in controversy.[142] Due to the public policy rationale behind the rule, and the likelihood that it is even more broadly applicable to class waivers than the *Discover Bank* rule, the FAA would likely preempt this rule under *AT&T Mobility*.

IV. CONCLUSION

From the case law to date, federal courts have been very active in using the U.S. Supreme Court's holding in *AT&T Mobility* to strike down state rules against class-wide arbitration bans. The Circuit Courts of Appeals decisions of *Litman* and *Cruz*, in particular, articulate the breadth of the *AT&T Mobility* decision. Since almost all the states that have found class arbitration waivers unconscionable have relied on the same state public policy rationale of *Discover Bank*, it seems that the majority of these state laws would be subject to FAA preemption.

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[137] *See* Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

[138] Leonard v. Terminix Int'l Co., L.P., 854 So. 2d 529, 538 (Ala. 2002).

[139] *Id.* at 532; ALA. CODE § 2-28-9 (2011).

[140] *Leonard*, 854 So. 2d at 537 ("the impracticality of pursuing a claim for a small amount of money at a cost in excess of the value of the claim is just as much an obstacle to the wealthiest member of society as it is to a pauper.").

[141] *Id.*

[142] *Id.* at 539.