ARTICLES

THE THIRD ARBITRATION TRILOGY: *STOLT-NIELSEN, RENT-A-CENTER, CONCEPCION* AND THE FUTURE OF AMERICAN ARBITRATION

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INTRODUCTION

When it comes to agreements for binding arbitration, this will be remembered as a time of intense, significant activity by the United States Supreme Court – a period in which a closely divided Court decided a series of important cases implicating key issues of law and policy. Legal historians and observers of arbitration will compare this period with the early 1960s, which saw the publication of the groundbreaking *Steelworkers* Trilogy,[1] and the mid-1980s,

[1] The "*Steelworker's* Trilogy" consists of three Supreme Court cases: *United Steelworkers v. American Manufacturing Co*., 363 U.S. 564 (1960), *United Steelworkers*

when a second trio of Court decisions[2] ushered in an era of pro-arbitration jurisprudence characterized by expansive interpretations of the Federal Arbitration Act ("FAA").[3] Now, for the third time, a triad of key precedents represents a milestone in the modern history of American arbitration. What is different on this occasion, however, is the degree of controversy provoked by the Court's decisions, and the resultant momentum for countermeasures by other branches of government.

The three decisions examined in this article – and the Court majority's muscular wielding of "revealed" federal arbitration precepts – are being closely scrutinized and analyzed from all sides. These decisions implicate critical conclusions about the respective domains of courts of law and arbitration tribunals regarding so-called "gateway" determinations surrounding the enforcement of arbitration agreements and the contracts of which they are a part. They address the complex interplay between federal substantive law focusing on questions of arbitrability, a body of law defined and expanded by the Court under the FAA, and the law of the states. They bring into play competing judicial philosophies of contractual assent, as well as contrasting views about the balance between policies promoting the autonomy of contracting parties and judicial policing of overreaching in standardized contracts between corporations and individuals.

The latest pronouncements of the Supreme Court reflect the increasingly extreme pro-arbitration slant of recent decades and etch in sharp relief the fault lines that divide the factions of the Court and the broader American political landscape.[4] The Court's current jurisprudence may be seen as establishing and

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v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), and *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); s*ee also* R.W. Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 STANFORD L. REV. 235, 235 n.1 (1961) (contemporaneous publication referring to the series of cases as "Steelworker's trilogy").

[2] The second arbitration trilogy consists of *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp*., 460 U.S. 1, 24 (1983), *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). *See* Linda Hirschman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1306-07 (1985).

[3] During the 1980s, the Supreme Court, reinterpreting congressional intent, found that the FAA created a broad national policy favoring arbitration when parties choose it. In a number of cases, the Court emphasized that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). The Court reasoned that the arbitral forum provided distinct advantages for many parties: "[Arbitration] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 628. *See generally* Hirschman, *supra* note 2 (discussing the broad reach of the FAA resulting from decades of pro-arbitration Supreme Court jurisprudence).

[4] As a legal realist I embrace in general outline the perspective described by Prof. Bruhl in his insightful article on judicial manipulation of arbitration doctrine and the

expanding a "second tier" of the substantive law of arbitrability under the FAA first given shape and substance in the 1980s.[5] It expresses a national policy that vastly expands the power of companies to impose and control arbitration procedures while tying the hands of state legislatures and courts.[6] Its perceived lack of nuance serves as a flashpoint for special concerns associated with boilerplate provisions directing consumers and employees into arbitration. To those promoting national legislation or regulation outlawing or severely limiting predispute arbitration agreements in consumer, employment and other classes of adhesion contracts, it is a virtual throwing down of the gauntlet.

Part I of this article discusses *Stolt-Nielsen S.A.* v. *AnimalFeeds International*,[7] in which the Court, against the backdrop of an international commercial contract scheme and an unusual procedural scenario, draws upon the wellspring of divined "federal substantive law" under the FAA to pronounce limits on the ability of arbitrators – or courts – to promote public policies supporting class actions. Many understood *Stolt-Nielsen,* correctly, as a portent of the Court's eventual curtailment of state-law-based policies against enforcement of contractual waivers of the ability to participate in a class action when coupled with an agreement to arbitrate.[8]

Part II explores the Court's decision in *Rent-A-Center, West* v. *Jackson,*[9] in which public policies promoting enforcement of arbitration agreements effectively trump the authority of courts to deny or limit the enforcement of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" – or, more precisely, to police arbitration agreements for unconscionability.[10] Once again, the Court majority "discerns" new Federal substantive law surrounding the FAA. It employs a unique variation on the principle that arbitration agreements are separable from the contracts of which they are a part, aggressively interprets Court precedents transferring from courts to arbitrators authority to resolve enforceability issues, and segregates the determination that a contract has been "made" in a formalistic sense from consideration of defenses to its enforceability and validity.[11]

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cause-and-effect relationships of courts, legislatures and other groups within a dynamic system. *See generally* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law,* 83 N.Y.U. L. REV. 1420 (2008).

[5] Hirschman, *supra* note 2, at 1322-24, 1329-53.

[6] *See generally id.* at 1353-78.

[7] 130 S. Ct. 1758 (2010).

[8] *See, e.g.*, Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1106-09 (2011); Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. ON DISP. RESOL. 1, 45 & n.199 (2011).

[9] 130 S. Ct. 2772 (2010).

[10] Perry v. Thomas, 482 U.S. 483, 489 (1987).

[11] *See infra* text accompanying notes 242-76.

Part III examines *AT&T Mobility LLC* v. *Concepcion*,[12] the Court's second foray along the interface between pro-arbitration policies under the FAA and the countervailing, limiting force of the unconscionability doctrine. Yet again, a majority finds pro-arbitration federal policy circumscribes judicial authority to police arbitration agreements under state law. In this case, the result is to enforce a term in the arbitration agreement waiving the consumer's right to bring a contractual claim as part of a class action.[13]

Part IV explores the dynamic political response to the extreme, non-nuanced pro-arbitration position developed in modern Court jurisprudence. After many years in which Congressional inaction has provided a vacuum giving maximum play to the Court's expansive interpretations of the FAA, Congress and the Executive have begun to move forcefully across a broad front to outlaw predispute arbitration agreements in various kinds of contracts. However, these responses have also tended to suffer from overbreadth, lack of nuance, or a reliable empirical grounding.

Part V places the Court's recent jurisprudence and countervailing responses against the backdrop of present and evolving legal standards governing domestic and international arbitration around the globe. It concludes that while the Court's largely unmitigated pro-arbitration stance resonates with general principles supporting arbitration as an alternative to court litigation in international commerce, it is fundamentally out of line with the broad run of national laws limiting or regulating the use of arbitration in the contracts for consumer goods and services, or in individual employment contracts. At the same time, it appears that while some countries have imposed outright prohibitions on the use of predispute arbitration agreements in consumer and employment contracts, others have taken more moderate approaches, or eschewed omnibus statutes in favor of laws addressing specific kinds of consumer contracts.

Part VI calls for carefully crafted legislation or administrative regulations limiting or regulating the use of arbitration agreements in consumer and employment contracts. It suggests that process choices should be informed by dispassionate consideration of the systemic costs and benefits of various public and private approaches to consumer and employment disputes including alternatives such as binding arbitration under federal statutory due process guidelines, regulated binding arbitration (as employed in the securities investment arena); arbitration processes that preserve a consumer's right to proceed to trial (as employed under lemon laws); and public tribunals. These process options should be evaluated and compared for each of several discrete contractual settings, with proper attention to the different dynamics at play in the respective relationships

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[12] 131 S. Ct. 1740 (2011).

[13] Each decision in the Trilogy springs from a contractual framework that is in one or more respects *sui generis*. It is possible that the unique circumstances attracted the attention of justices seeking an appropriate strategic foundation upon which to limit judicial policing under the doctrine of unconscionability. *See infra* text accompanying notes 31-32, 214, 287-291.

and dispute patterns. They should, moreover, reflect the new opportunities afforded by electronic communication and online dispute resolution ("ODR"). Finally, any effective solutions must address broader access to justice issues, including the proper role of and framework for class actions.

I. *STOLT-NIELSEN S.A.* v. *ANIMALFEEDS INTERNATIONAL*: ENHANCING THE PREEMPTIVE EFFECT OF FEDERAL ARBITRATION LAW

All three decisions in the Third Arbitration Trilogy embody an abiding tension between competing bodies of doctrine. On the one hand there is the U.S. Supreme Court's staunch, expansive pro-arbitration jurisprudence under the Federal Arbitration Act – case law interpreting and expanding the umbrella of the FAA and the associated penumbra of "substantive federal law." On the other hand is countervailing law and policy limiting predispute arbitration agreements in "contracts of adhesion"[14] – non-negotiated standardized contracts involving many millions of individual employees and consumers.[15] Although *Stolt-Nielsen S.A.* v. *AnimalFeeds International*[16] involves commercial parties and falls outside the realm of adhesion contracts, the decision is nevertheless relevant to the broader discussion.

A. *Background: The Preemptive Effect of the FAA and State Defenses to Enforceability*

In the Second Arbitration Trilogy of the mid-1980s, the Supreme Court declared the FAA to be a source of "federal substantive law of arbitrability."[17] An

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[14] *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay on Reconstruction*, 96 HARV. L. REV. 1173, 1265-66 (1983) (discussing elements of adhesion contracts), discussed *infra* note 66.

[15] Arbitration agreements in individual contracts of employment may affect as many as 15 to 25% of employees, making individual employment arbitration "a more widespread system for governing employment relations than collective bargaining and labor arbitration." Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPL. RTS. & EMPLOY. POL'Y J. 405, 411 (2007). Although the potential number of consumer contracts including arbitration agreements is difficult to estimate, they are widely used in credit card agreements, of which there were almost 177 million in the U.S. in 2008. Federal Reserve Bank of Boston, *The Survey of Consumer Payment Choice* (Jan. 2010). Arbitration has also been utilized in debt collection cases. In New York City alone, about 320,000 debt collection cases were filed in 2006. *See* The Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor* 3 (Oct. 2007), *available at* www.urbanjustices.org/pdf/publications/CDP_Debt_Weight.pdf.

[16] 130 S. Ct. 1758 (2010).

[17] In *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983) the Court stated, "Section 2 is a congressional declaration of a liberal federal

evocation of Congress' power under the Commerce Clause of the U.S. Constitution,[18] the FAA comes into play whenever arbitration agreements arise in the context of transactions involving interstate commerce – a truly broad mandate.[19] By identifying the FAA as a source of federal substantive law governing issues of arbitrability, the Supreme Court established its applicability in state as well as federal courts,[20] as well as its power to preempt contrary state law under the Supremacy Clause of the U.S. Constitution.[21] In *Southland Corp.* v. *Keating,*[22] the Court held that FAA § 2[23] preempted a provision of the California Franchise Investment Law that California courts had interpreted to require judicial consideration (as opposed to arbitration) of claims arising under that statute. The Court explained, "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."[24] Further, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[25] In the years since *Southland* the Court has repeatedly asserted strong pro-arbitration policies under the FAA to enforce arbitration of a wide spectrum of claims and controversies under federal and state statutes,[26] confounding the efforts of state

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policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."

[18] Perry v. Thomas, 482 U.S. 483, 490 (1987) ("The Federal Arbitration Act . . . embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause").

[19] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-78 (1995).

[20] Southland Corp. v. Keating, 465 U.S. 1, 11-12 (1984).

[21] U.S. Const., Art. VI, cl. 2; *Perry*, 482 U.S. at 489-92.

[22] 465 U.S. 1 (1984).

[23] 9 U.S.C. § 2 (2011) ("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").

[24] *Keating*, 465 U.S. at 10.

[25] *Id*. at 16.

[26] In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 616, 640 (1985), the Court ruled that claims under the Sherman Antitrust Act were arbitrable under the FAA. The Court reasoned that the arbitral forum provided distinct advantages for many parties: "[Arbitration] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 628. Two years later the Court held that statutory claims arising under the Racketeer Influenced and Corrupt Organizations Act (RICO) are subject to mandatory arbitration. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (finding no basis for

legislatures to prohibit or limit the enforceability of arbitration agreements in transactions involving interstate commerce.[27] In contrast to the traditional, highly skeptical view of arbitration as a surrogate for trial embraced in earlier decisions,[28] modern Court decisions rigorously adhere to the concept of arbitration as a facially acceptable substitute for a public tribunal. In the words of the Court, "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[29]

As interpreted by the Court, the FAA § 2's "clear federal policy" required arbitration of disputes falling within the ambit of the statute, save "upon such grounds as exist at law or in equity for the revocation of any contract."[30] As we will see, in recent decisions the Court has used the vehicle of federal substantive arbitration law to severely limit the purview of judicial oversight under § 2 and related provisions of the FAA.

B. *History of the Case*

Stolt-Nielsen S.A. v. *AnimalFeeds International*[31] involved commercial parties unquestionably outside the realm of "adhesive" contracts, and, even more

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concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims and concluding that a RICO claim can be effectively vindicated in an arbitral forum). *McMahon* also held that claims under the Securities Act of 1934 are subject to binding arbitration, rejecting the reasoning of *Wilko v. Swan*, 346 U.S. 427, 438 (1953), which held that claims arising under the Securities Act of 1933 were not subject to binding arbitration. Not surprisingly, the Court overruled *Wilko* two years later in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 26 (1991), supporting the arbitrability of statutory employment discrimination claims, narrowed the so-called "public policy" limitation even further. These developments raised increasing concerns among some employee and consumer advocates. *See, e.g.*, Julius Getman, *Was Harry Schulman Right?: The Development of Arbitration in Labor Disputes*, 81 ST. JOHN'S L. REV. 15, 25 (2007) ("The arbitration process to which the court deferred in *Gilmer* was a long way from the voluntary, mutually developed grievance system that gave birth to the Trilogy").

[27] *See, e.g.*, Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687-88 (1996) (enforcing arbitration agreement in franchise contract, holding FAA preemptive of Montana state law purporting to regulate the form of arbitration agreements); Bruhl, *supra* note 4, at 1426-32 (describing Court-directed expansion of FAA).

[28] *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 435-38 (1953).

[29] *Mitsubishi*, 473 U.S. at 628. More recently the Court observed that "[t]he decision to resolve [statutory claims relating to employment discrimination] 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 court in the first instance." 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1459 (2009).

[30] Perry v. Thomas, 482 U.S. 483, 489 (1987).

[31] 130 S. Ct. 1758 (2010).

curiously, a post-dispute, one-off submission to arbitration.[32] AnimalFeeds shipped goods under a standard "charter party" contract that contained an arbitration clause.[33] AnimalFeeds subsequently brought a class-action law suit against Stolt-Nielsen SA and other shipping companies on the basis that they were engaged in an illegal price-fixing conspiracy.[34] The suit was consolidated with similar suits brought by other charterers, including one in which the Second Circuit overturned a district court ruling that the charterers' actions were not subject to arbitration.[35] The parties subsequently agreed that as a consequence of these orders, they were required to arbitrate.[36] AnimalFeeds then served Stolt-Nielsen and the other defendants with a demand for class arbitration.[37] The parties entered into a supplemental agreement to submit the question of class arbitration to a panel of three arbitrators who were to address the question under the American Arbitration Association's Supplementary Rules for Class Arbitrations (which were developed in the wake of the Court's earlier decision in *Green Tree Financial Corp.* v. *Bazzle*[38]).[39] The parties stipulated that the arbitration clause was "silent" with respect to class arbitration.[40] After hearing arguments and evidence, including expert testimony on customs and usage in the maritime trade, the arbitration panel ruled that the language in the charter party permitted AnimalFeeds to proceed with "class arbitration."[41] The panel found it persuasive that, post-*Bazzle*, other arbitrators had construed "'a wide variety of clauses in a wide variety of settings as allowing for class arbitration.'"[42]

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[32] *Id.* at 1764-65.

[33] *Id.*

[34] *Id.* The litigation had begun with a number of suits brought after the defendant shippers were found by a Justice Department investigation to have engaged in an illegal conspiracy to fix prices. *See* Sherman Kahn, *Developments in Arbitration: Arbitration at the United States Supreme Court – October Term 2009*, N.Y. DISP. RESOL. LAW., Fall 2010, at 12, 13, *available at* http://www.mofo.com/files/Uploads/Images/Developments-in-Arbitration-US-Supreme-Court-October-Term-2009.pdf.

[35] *Stolt-Nielsen*, 130 S. Ct. at 1765. *See* JLM Indus., v. Stolt-Nielsen, S.A., 387 F.3d 163, 183 (2004).

[36] *Stolt-Nielsen*, 130 S. Ct. at 1765.

[37] *Id.*

[38] 539 U.S. 444 (2003). *See* Alan Morrison, *Summary of Proceedings, Symposium on The Future of Arbitration,* George Washington University School of Law (Mar. 17-18, 2011) at 6-7 (on file with author) (summarizing development of class-action arbitration in the wake of *Bazzle* and discussing pros and cons). *See also* Alan Scott Rau, *Arbitral Power and the Limits of Contract*: *The New Triology*, *infra* in this issue at 435, 438-42 (providing a background discussion of *Bazzle* and its implications).

[39] *Stolt-Nielsen*, 130 S. Ct. at 1765.

[40] *Id.* Furthermore, counsel for AnimalFeeds told the arbitration panel that "'[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue.'" *Id.* at 1766. *See* Rau, *supra* not 38, at 455-57 (expansively exploring the meaning of the stipulation regarding the "silence" of the agreements).

[41] *Id.* at 1766.

[42] *Id.*

Moreover, the defendants had failed to show an "inten[t] to preclude class arbitration."[43]

The arbitrators stayed the arbitration proceeding to allow the parties to seek judicial review.[44] The defendants then filed a petition in district court to vacate the panel's determination under §10(a)(4) of the FAA (authorizing a court to vacate an award on motion "where the arbitrators exceeded their powers").[45] The district court vacated the award on the basis that the arbitrators' decision was made in "manifest disregard" of the law since they failed to address the question of choice of law prior to rendering their decision.[46] AnimalFeeds appealed to the Second Circuit, which reversed, holding that although the "manifest disregard" standard had indeed survived the Supreme Court's decision in *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*,[47] as a "'judicial gloss'" on the statutory grounds for vacatur provided by the FAA, the arbitrators' decision was not in "manifest disregard" of federal maritime law or New York law, since in neither case was there legal authority establishing a rule against class arbitration.[48]

C. *The Court's Decision: Grounded in Federal Substantive Law*

The Supreme Court granted certiorari, heard arguments and rendered a decision reversing the judgment of the Second Circuit. A five-member majority comprised of Justices Alito, Kennedy, Roberts, Scalia and Thomas joined in an opinion crafted by Justice Alito. The thrust of the majority opinion is to shun the

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[43] *Id.*

[44] *Id.*

[45] *Id.*; *see* 9 U.S.C. § 10(a)(4) (2009).

[46] *Stolt-Nielsen*, 130 S. Ct. at 1766; Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 435 F. Supp. 2d 382, 384-85 (S.D.N.Y. 2006).

[47] 552 U.S. 576 (2008). In *Hall Street*, Justice Souter's opinion, joined by five other justices, declared that the grounds for judicial review of arbitration awards set forth in §§ 10-11 of the FAA are the exclusive sources of judicial review under that statute. *Id.* at 590. In reaching this conclusion, the Court majority spoke to the much-cited dictum in a 1953 decision, *Wilko v. Swan*, 346 U.S. 427 (1953), and declined to read its reference "manifest disregard of the law" as creating an independent, judicially declared basis for vacatur outside the precise terms of FAA §§ 10–11. *Hall Street*, 552 U.S. at 584-85. The high court did not, however, deal a death blow to "manifest disregard" under the FAA, since a lower court may read the decision as authorizing such inquiries under the specific terms of the FAA. *Id.* The Court was not clear about whether there is still room for "manifest disregard" under the specific terms of the FAA, notably § 10(a)(4). *Id.* The Court briefly noted, without comment, that "some courts have thought[] 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4)" and cited the Ninth Circuit's decision in *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 540 U.S. 1098 (2004). *Id*. In the wake of *Hall Street*, some courts have continued to apply the principle with or without reference to *Hall Street.* Other courts interpreted the *Hall Street* decision as eliminating the principle in cases under the FAA.

[48] *Stolt-Nielsen*, 130 S. Ct. at 1766; Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85, 97-98 (2d Cir. 2008).

rationale of the *Bazzle* plurality – which had characterized the question of whether class arbitration is appropriate as a matter of "procedure" growing out of the dispute.[49] Instead, the majority grounds its decision on Supreme Court "precedents [under the FAA] emphasizing the consensual basis of arbitration."[50] The majority thus brings into play the body of substantive law of arbitrability that has grown up around the FAA in the last quarter-century – and which preempts contrary state law.[51] It explains that "[w]hile the interpretation of an arbitration agreement is generally a matter of state law . . . the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'"[52] The contractual foundation of arbitration facilitates party choices – including "who will resolve specific disputes," and "*with whom* they choose to arbitrate."[53] Here, where the parties' agreement was silent as to the issue of class-action arbitration – and, indeed, had stipulated that there was "no agreement" on the matter – there could be no basis upon which to authorize class arbitration. Explained the Court:

> [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.[54]

Such a result could not be inferred "solely from the fact of the parties' agreement to arbitrate" because class-action arbitration "changes the nature of arbitration" in various ways: (1) the arbitrator is charged with resolving not just a single dispute, "but instead resolves many disputes between hundreds or . . . thousands of parties"; (2) the "presumption of privacy and confidentiality" is lost; (3) the arbitrator's award "adjudicates the rights of absent parties"; and (4) the commercial stakes are particularly significant, as in class-action litigation.[55]

Thus, the majority concludes that, *as a matter of federal law*, there can be no class-action arbitration when the parties have stipulated there is "no agreement" on the matter.[56] The present decision arguably fits more squarely than *Bazzle* within the general body of American precedents involving multi-party conflict and

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[49] *See Stolt-Nielsen*, 130 S. Ct. at 1770, 1772; Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451-53 (2003). *See* Rau, *supra* note 38, at 453 n. 63 (discussing the ways that the court's decision in *Stolt-Nielson* undercut the *Bazzle* decision).

[50] *Stolt-Nielsen*, 130 S. Ct. at 1776.

[51] *See supra* text accompanying notes 17-23.

[52] *Stolt-Nielsen*, 130 S. Ct. at 1773 (quoting Volt Info. Scis. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

[53] *Stolt-Nielsen*, 130 S. Ct. at 1774.

[54] *Id.* at 1776. *See* Rau, *supra* note 38, at 457-58 (discussing the implications of the lack of any "meeting of the minds" between the parties because of their silence on the issue).

[55] *Id.* at 1775-76.

[56] *See id.* at 1776.

multiple arbitration agreements, traditionally involving commercial transactions.[57] The majority of U.S. courts that considered the question prior to *Bazzle* took it upon themselves to address issues relating to the consolidated arbitration of multi-party disputes involving multiple contracts and multiple arbitration agreements, and characterized the key issue as one of consent.[58]

D. *Stolt-Nielsen as Reflective of International Forum Selection Policies*

Although the Court did not address the issue, its decision in *Stolt-Nielsen* is in line with the body of precedents reflecting strong receptiveness to arbitration provisions as a species of forum selection clauses in international contracts.[59] Richard Nagareda argues that the Court's downplaying of state policies supporting class action and its characterization of the "fundamental changes" that class-wide arbitration would bring is consistent with prevailing international practice.[60] U.S.-style class actions are "anomalous" among global regimes; the concept of an opt-out class proceeding is distinctly at odds with civil-law precepts

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[57] *See* IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, IV FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS & REMEDIES UNDER THE FEDERAL ARBITRATION ACT §40.1.4 (1994 & 1999 Supp.) (discussing case law under the FAA respecting multi-party disputes, most of which holds that, absent express agreement, an arbitrator does not have authority to order consolidated hearings).

[58] *See* Gov't of United Kingdom of Great Britain & Northern Ireland v. Boeing Co., 998 F.2d 68, 73-74 (2d Cir. 1993) (quoting Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991) ("'[A] court is not permitted to interfere with private arbitration arrangements in order to impose its own view of speed and economy'. . . If contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are a party.")); Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp., 935 F.2d 1019, 1026-27 (9th Cir. 1991) (holding that arbitrator does not have authority to add new parties to arbitration proceedings without the consent of all parties); Hotel Rest. Emps. and Bartenders Int'l Union, AFL-CIO v. Michelson's Food Svcs., 545 F.2d 1248, 1253 (9th Cir. 1976) (holding that arbitrators do not have the authority to expand an action into a class action). *See generally* MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 57, Ch. 33. The *Stolt-Nielsen* majority's decision clearly seeks to undermine *Bazzle* – which, the majority concludes, failed to yield a majority decision on any of the questions presented. *Bazzle* was hardly a model of clarity or comfort for anyone; counsel for financial services companies as well as consumer counsel have roundly criticized the result. *See, e.g.*, Brief for Petitioner at 21-23, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (noting risks of class-wide arbitration, given the potentially broad consequences of a class-wide arbitration award and limited judicial review of awards). One wonders whether Alito and company regard the post-*Bazzle* establishment of procedures to facilitate class-action arbitration as a great deal of sound and fury ultimately signifying nothing.

[59] *See* Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). *See generally* Nagareda, *supra* note 8.

[60] Nagareda, *supra* note 8, at 1099-1104.

that require affirmative consent to disposition of claimant's rights.[61] The *Stolt-Nielsen* holding thus avoids potential issues of other nations' public policy applicable to the recognition and enforcement of arbitration awards under the New York Convention,[62] and "effectively eases what otherwise would be potential for tension between the obligation of other nations to recognize and enforce arbitral awards under the New York Convention and the principles that those same nations would use to recognize and enforce judgments in litigation."[63]

E. *Implications for Adhesion and "Class Action Waiver" Scenarios*

There is, however, a very different way of looking at *Stolt-Nielsen*, and that involves its potential implications for judicial treatment of so-called "waiver of class action" clauses featured in predispute arbitration agreements in many consumer and employment contracts.[64] Among the "grounds . . . at law or in equity" recognized by the Court is the doctrine of unconscionability.[65] The defense of unconscionability has been the centerpiece of widespread efforts to avoid arbitration in recent years, usually in the context of standardized agreements for employment or consumer goods or services that exhibit certain characteristics

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[61] *Id.* at 1102.

[62] *Id.* at 1103; *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, [hereinafter New York Convention], *available at* http://www.uncitral.org/pdf/1958NYConvention.pdf.

[63] Nagareda, *supra* note 8, at 1103. For a well-considered contrary view, see 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, 1083-91 (2009).

[64] *See generally* Alexander J. Casey, *Arbitration Nation: Wireless Service Providers and Class Arbitration Waivers*, 6 WASHINGTON J. LAW, TECH. & ARTS 15 (2010); Yongdam Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, With Emphasis on Class Arbitration/Arbitration Waivers*, 31 WHITTIER L. REV. 665 (2010); Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361 (2010); William H. Baker, *Class Action Arbitration*, 10 CARDOZO J. OF CONFLICT RESOL. 335 (2009); Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers*, 12 J. OF CONSUMER & COMM'L L. 151, 154 (2009) (discussing the recent "attack" on consumer arbitration by consumer advocates and the "widely criticized" "additional problem . . . that an arbitration clause may preclude the use of the class actions device"); Heather Bromfield, *The Denial of Relief: The Enforcement of Class Action Waivers in Arbitration Agreements*, 43 U.C. DAVIS L. REV. 315 (2009); Diana M. Link & Richard A. Bales, *Waiving Rights Goodbye: Class Action Waivers in Arbitration Agreements After* Stolt-Nielsen v. AnimalFeeds International, 11 PEPP. DISP. RESOL. L.J. 275 (2011), *available at* http://ssrn.com/abstract=1685297.

[65] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 682 (1996) ("Generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements without contravening [FAA] § 2"). (emphasis added) *See also supra* text accompanying notes 14-25; *infra* text accompanying notes 170-211.

of contracts of adhesion.[66] Where a party is found to lack "a meaningful opportunity" to bargain, resulting in "unfairly one-sided" terms,[67] a federal or state court may employ state principles of unconscionability to deny enforcement to all or part of an arbitration agreement, or reform the provision.[68] Among the substantive grounds supporting unconscionability defenses, contractual waivers of the right to participate in a class action are among the most common.[69] They have also produced conflicting rulings by courts.[70] Again, much – including both the unconscionability determination and the relief granted – hinges on the applicable state law.[71] It is fair to say that class-action waivers have become the single most contentious issue surrounding consumer and employment arbitration agreements.[72]

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[66] The leading commentary on adhesion contracts remains Rakoff, *supra* note 14. Professor Rakoff enumerates several identifying elements of contracts of adhesion, to wit: (1) "…a printed form that contains many terms and clearly purports to be a contract"; (2) a form drafted by one party to the transaction; (3) "[t]he drafting party participates in numerous transactions of the type represented…"; (4) the form is presented with the representation that "the drafting party will enter into the transaction only on the terms contained in the document"; (5) after dickering over whatever terms are open to bargaining, the adhering party signs the document; (6) "[t]he adhering party enters into few transactions of the type represented by the form"; (7) the principle obligation of the adhering party is to pay money. *Id*. at 1176-80.

[67] *See* discussion *infra* text accompanying notes 170-73.

[68] *See, e.g*., Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1219-21 (9th Cir. 2008) (applying Washington state law); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893-95 (9th Cir. 2002) (applying New York state law); Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 369-70, 372-73 (N.C. 2008); Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 680-90 (Cal. 2000). *See also infra* text accompanying notes 174-83.

[69] *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 630-36 (2010).

[70] *Id.* at 634. *See, e.g.*, Homa v. Am. Express Co., 558 F.3d 225, 229-32 (3d Cir. 2009) (class-action waiver in credit card agreement unconscionable); Chalk v. T-Mobile USA, Inc., 560 F.3d 1087, 1096-98 (9th Cir. 2009) (class-action waiver made entire arbitration clause unconscionable since waiver provision was "not severable"); Laster v. AT&T Mobility, LLC, 584 F.3d 849, 854-56, 857-59 (9th Cir. 2009) (class-action waiver made arbitration clause unconscionable; FAA did not expressly or impliedly preempt California law governing unconscionability); Kaneff v. Del. Title Loans, Inc. 587 F.3d 616, 624-25 (3d Cir. 2009) (arbitration clause in car loan agreement requiring debtor to arbitrate all disputes but allowing lender to repossess through court channels or self-help, containing class-action waiver, provision for sharing of costs, and filing fee was not unconscionable under state law); Cicle v. Chase Bank, 583 F.3d 549, 555-56 (8th Cir. 2009) (arbitration clause in credit card agreement containing waiver of class action not unconscionable under Missouri law).

[71] *See supra* note 68-70.

[72] Opponents of class-action waivers argue that class actions (1) "facilitate legal redress where individuals wouldn't pursue claims on their own"; (2) make it more likely that widespread civil rights violations will be recognized and addressed; (3) lessen the fear

The Court's decision in *Stolt-Nielsen,* while not a direct assault on the breastworks of unconscionability and class-action waiver doctrine, nonetheless laid the siege lines. Though Justice Alito's opinion stops short of "decid[ing] what contractual basis may support a finding that the parties agreed to authorize class-action arbitration,"[73] it was perceived by some as a clear signal of the Court's lack of receptiveness to concerns about the impact of arbitration provisions on plaintiffs' ability to bring class actions – especially since the question may be decided not on the basis of state law and policy, but on that penumbra of federal substantive law that the Court has found emanating from the FAA. While, as noted above, the Court has repeatedly taken the position that federal law is so supportive of agreements to arbitrate all kinds of civil disputes that it displaces state law that stands in the way of maximal enforcement,[74] *Stolt-Nielsen* appears to go further. Alito's opinion presages a "second tier" of substantive arbitrability law under the FAA – a body of law that not only affirmatively enforces agreements to arbitrate, but sets federal boundaries regarding the nature and scope of consent to arbitrate. The Alito decision was taken by some as a hint that the Court is prepared to remove the state law- and policy-based underpinnings for decisions directing parties to "class action arbitration" in the absence of specific contract language providing for such procedures (language which is highly unlikely to appear in any agreement[75]). Some even thought the Court majority might be laying the groundwork to preempt

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of personal retaliation in the employment context; (4) pressure legislators to enact reforms; (5) prevent companies from engaging in civil rights violations as "an acceptable cost of doing business." Morrison, *supra* note 38, at 3. In addition, class actions often lead to settlements, saving "enormous time and money for all involved." *Id.* at 8. They also point out that arbitration agreements in adhesion contracts are not subjects of true consent, and that valuable procedural rights may be lost in private processes. *Id.* at 3, 6. Moreover, "sweetheart settlements" between claimants and defendants may be more likely in arbitration than in public litigation, and the rights of absent third parties may be adversely affected without their knowledge. *Id.* at 7-8.

Proponents of class-action waivers associated with arbitration agreements argue that (1) in many cases, claims of individual consumers or employees are not amenable to class action treatment, and without the option for arbitration they may not have an effective remedy; and (2) arbitration agreements often come with "attractive incentives," such as better rates or financing. *Id.* at 2. They also reason that in many cases individuals will achieve superior results by making individual claims. *Id.* at 3. Moreover, some representatives of financial services organizations have stated that if their clients lacked the ability to include class-action waivers, they would forego binding arbitration entirely. *Id.* at 3, 9.

[73] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1776 n.10 (2010).

[74] *See supra* text accompanying notes 17-30.

[75] Nagareda, *supra* note 8, at 1109 n.174 ("[F]aced with the choice of a class action in court and class arbitration, [corporate] defendants' oft-noted move is to opt for the proverbial devil-you-know").

state precedents deeming contractual provisions purporting to waive class-based relief in arbitration unconscionable.[76]

The latter concerns, of course, are sharply focused on the context of standardized contracts of adhesion, while *Stolt-Nielsen* involved arms-length bargaining between sophisticated parties.[77] Alito alludes to this in a footnote criticizing the arbitration panel for relying on "cited arbitration awards," "none of [which] involved a contract between sophisticated business entities."[78] Justice Ginsburg took note of this qualification, concluding that the Court "apparently spare[d]" contracts of adhesion from a requirement that consent to class arbitration be expressed affirmatively.[79] Ginsburg and the dissenting justices, moreover, sought to read the Court's holding as requiring "a contractual basis for concluding that the parties agreed" to submit disputes to class arbitration, but not necessarily express assent."[80]

After *Stolt-Nielsen*, there was room for surmise about how the Court would handle the class-action issue in an adhesion contract setting. It was conceivable that a moderate judge might enable a majority of the Court to reason that the "consensual dictates" of the FAA give way in any respect to the moderating realities of mass contracting, where additional concerns regarding the realities of assent come into play.[81]

There was also the question of the interplay between *Stolt-Nielsen* and concerns about the vindication of statutory rights that have prompted some courts to deny enforcement to class-action waivers. After *Stolt-Nielsen* the Supreme Court summarily vacated and remanded for reconsideration the decision of the

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[76] This would indeed occur in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011). *See infra* Part III.

[77] *See Stolt-Nielsen*, 130 S. Ct. at 1764-65.

[78] *Id.* at 1768 n.4.

[79] *Id.* at 1783 (Ginsburg, J., dissenting).

[80] *Id.*

[81] *See* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROB. 55, 72-73 (2004) (surveying wide range of consumer arbitration agreements and concluding that while few arbitration clauses "reflect the type of egregious self-dealing that has been identified in publicized cases," there are causes for concern in discovery limitations and other terms, and little basis to conclude consumers make informed decisions regarding arbitration). *See also* Alderman, *supra* note 64, at 154 (quoting a recent dissenting opinion in a Florida arbitration decision: "What we have begun to see is that virtually all consumer transactions, no matter the size or type, now contain an arbitration clause. And with every reinforcing decision, these clauses become ever more brazenly loaded to the detriment of the consumer . . . Most consumers can't read them, won't read them, don't understand them, don't understand their implication and can't afford counsel to help them out."); Baker, *supra* note 64, at 352 (reviewing recent cases addressing class-action arbitration and noting the "special considerations" facing consumer contracts "where the consumers had no real opportunity to negotiate or change the clauses").

Second Circuit Court of Appeals in *American Express Co.* v. *Italian Colors Restaurant*.[82] As in *Stolt-Nielsen*, the dispute in *American Express* involved commercial parties. A putative class of merchants who accepted American Express's payment card alleged that American Express had breached antitrust law in its dealings with the class.[83] However, many of the merchants were small businesses with individual claims not exceeding $5,000.[84] Unlike the arbitration clause in *Stolt-Nielsen*, the clause in question in *American Express* did not specifically allocate arbitrability decisions to the arbitrator. The Second Circuit – with then-Judge Sotomayor on the panel – ruled that the question of enforceability of class-action waiver provisions in arbitration was for the court, rather than the arbitrator, and that enforcing the waiver provision would equate to granting American Express *de facto* immunity from federal antitrust liability by precluding the plaintiffs' only reasonable means of recovery given their disparate bargaining power.[85] Because the contract in question in *American Express* bore some of the earmarks of a contract of adhesion,[86] there was considerable interest in the Second Circuit's rehearing in the wake of *Stolt-Nielsen*.

On remand ("*American Express II*"), the Second Circuit once again refused to enforce the class-action waiver in the American Express contracts.[87] It rejected American Express' argument that in light of *Stolt-Nielsen*, courts could not invalidate an agreement because there was no provision for class procedures.[88] Evaluating the question as one relating to the "vindication of [federal] statutory rights . . . under the federal substantive law of arbitrability," the Second Circuit observed the Supreme Court has recognized "that the class action device is the only economically rational 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."[89] The court found, as a matter of law, that the plaintiffs had provided sufficient proof to meet the burden of showing that individual arbitration would be prohibitively expensive, "effectively depriving plaintiffs of the statutory protections of the antitrust laws."[90] Thus, the class-action waiver in the American Express agreement was unenforceable. Because *Stolt-Nielsen* "plainly precludes . . . class-

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[82] Italian Colors Rest. v. Am. Express Travel Related Servs. Co., 554 F.3d 300 (2d Cir. 2009), *vacated and remanded sub. nom.* American Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010).

[83] *Id.* at 305-08.

[84] *Id.* at 308.

[85] *Id*. at 310-11, 319-20.

[86] *See supra* note 66.

[87] In re American Express Merchants' Litigation, 634 F.3d 187 (2d Cir. 2011).

[88] *Id.* at 193-94.

[89] *Id.* at 194.

[90] *Id*. at 197-98. The court relied on *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) ("where 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").

wide arbitration" in the absence of agreement, the appropriate approach was to remand the matter to the district court to permit American Express to withdraw its motion to compel arbitration, allowing class-wide proceedings in court.[91]

Since the Second Circuit's pronouncement in the *American Express* case, however, the Supreme Court in *AT & T Mobility LLC* v. *Concepcion*[92] upheld the enforceability of a class-action waiver in a consumer arbitration agreement. The potential impact of *Concepcion* on arbitration in adhesion settings, including the *American Express* scenario, will be considered below.[93]

F. *Stolt-Nielsen, Judicial Vacatur of Awards, and Manifest Disregard*

Because of the Court's consistent penchant for enforcing arbitration agreements, increasing attention has been paid to the degree of scrutiny given by courts to arbitration awards in the course of ruling on motions to vacate. In this regard, one final element of *Stolt-Nielsen* bears comment – the rare spectacle of the nation's high court directing vacatur of a commercial arbitration award.[94] Although, as in *Hall Street*,[95] the Court declined to give clear direction on the status of the doctrine of "manifest disregard of the law," the majority nevertheless decided that if such a standard indeed exists, it was met![96] The arbitration panel failed to consider what body of law governed the issue of class arbitration, but instead rested its decision on general public policies supporting the concept.[97] Such an approach, said the Court, ignored the FAA's preemptive consensual foundation – the requirement that no person can be required to arbitrate except as prescribed by agreement.[98] The arbitrators' failure to recognize and adhere to these basic principles was an act in excess of their powers, amounting to "manifest disregard" of fundamental FAA precepts.[99] (Justice Ginsburg's dissent, joined by Justices Stevens and Breyer, questioned not only the level of scrutiny applied by the majority but, moreover, the ripeness of the matter for judicial action.[100])

Clearly, we have not seen the last of manifest disregard, which the Second Circuit believes lingers as "judicial gloss" on the FAA's stipulated vacatur

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[91] *Id.* at 199-200.

[92] 131 S. Ct. 1740 (2011). *See generally* Part III *infra*.

[93] *See infra* text accompanying notes 356-444.

[94] The Court did so in *Commonwealth Coatings Corp. v. Casualty Co.*, 393 U.S. 145 (1968), and in so doing mightily reinforced the perceived breadth of the concept of "evident partiality." That doctrine gave rise to one of the more popular bases for motions to vacate awards and, thereby, an extensive progeny of case decisions on conflict of interest and disclosure. *See* MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 57, at §40.1.4.

[95] Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008).

[96] *Stolt-Nielsen*, 130 S. Ct. at 1768 n.3 (2010).

[97] *Id.* at 1767-70.

[98] *Id.* at 1775.

[99] *Id.* at 1776.

[100] *See id.* at 1777 (Ginsburg, J., dissenting).

grounds.[101] This is because the Supreme Court failed in *Hall Street* to clearly delineate what role, if any, "manifest disregard of the law" continues to play under the specific terms of the FAA, most notably § 10(a)(4). The Court briefly noted that "some courts have thought . . . 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4)"[102] – but stopped short of providing guidance on the appropriateness of such thinking or how either section might underpin judicial scrutiny of the legal basis of an award. Some courts interpreted *Hall Street* as eliminating the principle in cases under the FAA,[103] while the Second Circuit and others have continued to apply the principle with or without reference to *Hall Street*.[104] Now, *Stolt-Nielsen* suggests, "manifest disregard," whatever it is, may still exist! The grey areas are particularly intriguing with respect to § 10(a)(4), which supports judicial vacatur of an award "where the arbitrators exceeded their powers." Although *Hall Street* came down strongly against extra-statutory contractual bases for vacatur, might what the Second Circuit terms "judicial gloss" permit parties to give form and content to the boundaries of arbitrators' authority and what constitutes "exceeding their powers" under § 10(a)(4)? Might, for example, parties trigger judicial review of errors of law by describing a failure to faithfully observe and apply particular law as in excess of the arbitrator's

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[101] *See supra* notes 47-48 and accompanying text.

[102] Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 585 (2008) (citing Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 997 (9th Cir. 2003)).

[103] *See, e.g.*, Ramos-Santiago v. UPS, 524 F.3d 120, 124 n.3 (1st Cir. 2008) ("manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA]") (dicta); Robert Lewis Rosen Assocs. v. Webb, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008) (finding manifest disregard doctrine no longer good law and vacatur was limited to grounds stated in the FAA); Supreme Oil Co. v. Abondolo, 568 F. Supp. 2d 401, 406 (S.D.N.Y. 2008) (holding manifest disregard of law is not ground for vacatur under the FAA after *Hall Street Associates*).

[104] *See, e.g.*, Lagstein v. Certain Underwriters at Lloyd's, London, 607 F.3d 634, 641 n.5 (9th Cir. 2010) (arbitrators do not "exceed their powers" when they merely misinterpret or incorrectly apply the governing law; the award must be "completely irrational" or show a "manifest disregard of the law"); UMass Mem'l Med. Ctr., Inc. v. United Food & Commercial Workers' Union, 527 F.3d 1, 5-6 (1st Cir. 2008) (courts still retain "inherent powers outside" the FAA to vacate arbitral awards, including situations in which the arbitrator acts in disregard of law). In a number of recent cases courts have considered challenges based on manifest disregard without reference to *Hall Street*. *See, e.g.*, Grigsby & Assocs. v. M Secs. Inv., Inc., 2008 WL 2959730 at *2-4 (S.D. Fla. July 30, 2008) (without discussing *Hall Street Associates*, confirming an arbitration award after concluding it did not manifestly disregard the law and was "not arbitrary and capricious"); Hicks v. The Cadle Co., 355 Fed. App'x 186, 196-97 (D. Col. 2008) (without discussing *Hall Street*, partially vacating an award on the basis of manifest disregard); Remote Solution Co. v. FGH Liquidating Corp., 568 F. Supp. 2d 534, 543-45 (D. Del. 2008) (without discussing *Hall Street*, the court confirmed an award, finding no manifest disregard of law in award of attorneys' fees pursuant to a contractual provision).

powers?[105] While it is highly doubtful that the *Stolt-Nielsen* majority actively contemplated, or relishes, the prospect, there is no doubt that hopeful attorneys will seize on the wisp of a possibility of wedging a foot in the door of vacatur. Although, as in the past, very few awards will actually be overturned on grounds of "manifest disregard,"[106] the Court's failure to effectively put the matter to bed will continue to reduce certainty and generate additional transaction costs respecting arbitration awards.[107]

Meanwhile, another recent decision of the Second Circuit embraces a potentially significant limitation on the holding in *Stolt-Nielsen* while at the same time reinforcing the principle of limited judicial review of arbitration awards. In *Jock* v. *Sterling Jewelers Inc.*,[108] a case involving a divided Second Circuit panel reversed a district court order vacating a partial final award by an arbitrator that had found that class-wide arbitration of statutory employment discrimination claims was permissible despite the absence of an express agreement for class-wide arbitration. The district court had concluded that, "in light of *Stolt-Nielsen*, . . . the arbitrator's construction of the [dispute resolution] agreements as permitting class arbitration was in excess of her powers."[109] The court of appeals majority disagreed, reasoning that the issue of class arbitration was "squarely presented" to the arbitrator, who acted within her authority in construing the adhesive agreement to manifest an intent to allow for class arbitration.[110] According to the appellate

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[105] The Court in *Hall Street* did not specifically address this possibility, which would by definition involve judicial activity under the existing terms of the FAA and not supplementary terms such as those the Court explicitly proscribed. On the other hand, such an approach seems contrary to *Hall Street*'s declaration of "a national policy [under the FAA] favoring . . . just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Assocs.*, 552 U.S at 588. *See* Thomas J. Stipanowich, *Expanded Review of Awards:* Hall Street *and* Cable Connection, *in* 2010 ANNUAL REPORT OF THE SECTION OF PUBLIC UTILITY, COMMUNICATIONS, AND TRANSPORTATION LAW (2010) (describing current possibilities for expanded judicial scrutiny of arbitration awards, and other alternatives).

[106] Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 24, 25 fig.5 (summarizing data indicating only about four percent of motions to vacate based on "manifest disregard" result in vacatur).

[107] The majority also borrowed, for the first time in a commercial arbitration decision by the Court, and somewhat anachronistically, the maxim from the collective bargaining realm that "'[i]t is only when [an] arbitrator strays from interpretation and application of the agreement and effectively "dispense[s] his own brand of industrial justice" that his decision may be unenforceable.'" *Stolt-Nielsen S.A.*, 130 S. Ct. at 1767. This principle of labor arbitration must now be regarded as a part of the law surrounding FAA § 10(a)(4).

[108] 646 F.3d 113 (2d Cir. 2011).

[109] Jock v. Sterling Jewelers Inc., 725 F. Supp. 2d 444, 448 (S.D.N.Y. 2010).

[110] *Jock*, 646 F.3d at 124. The court of appeals observed that the arbitrator had "construed the absence of an express prohibition on class claims against the contract's drafter, Sterling." *Id.* at 117. Given the circumstances of non-negotiated, imposed terms and applicable Ohio law (required by the terms of the agreement), it was "incumbent upon Sterling to ensure that all material terms, especially those adverse to the employee, were

court, *Stolt-Nielsen* did not hold that the intent to authorize class-action arbitration must be stated expressly in the agreement, but might be implied from the circumstances.[111] In second-guessing the arbitrator's construction of the contract, the district court had improperly engaged in substantive review of the award.

It remains to be seen whether *Jock* v. *Sterling Jewelers* is viable precedent under recent Supreme Court decisions.[112] In any event, its importance is likely to be practically diminished in light of *AT&T Mobility* v. *Concepcion*'s holding on class-action waiver.[113]

II. *RENT-A-CENTER, WEST, INC. v. JACKSON*: REPLACING THE GATEKEEPER

Rent-A-Center, West, Inc. v. *Jackson*[114] involves the critical nexus of three important bodies of doctrine in the law of arbitration. One is based on the principle, first enunciated by the Court in 1967, that executory arbitration agreements are separable from the contracts of which they are a part for the purposes of enforcement – thereby permitting arbitrators to address defenses to the validity or enforceability of the larger contract.[115] A second stream of case law surrounds the enforceability of agreements giving arbitrators authority to address issues associated with the scope of arbitrable issues or the existence, validity or enforceability of the arbitration agreement itself.[116] The third body of doctrine is the substantive state law of unconscionability which has come into play in numerous federal and state court decisions as the primary judicially declared

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clearly expressed." *Id.* To read silence as prohibiting class arbitration "'would impermissibly insert a term for the benefit of one of the parties that it has chosen to omit from its own contract.'" *Id.* Since the agreement gave the arbitrator "'power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction,'" the arbitrator concluded that merely agreeing to the contractual dispute resolution process did not amount to a waiver of the employee's right to participate in collective action. *Id.*

[111] *Id.*. at 113.

[112] In a forceful dissent, Judge Winter argued, among other things, that the case is "the arbitration counterpart" to *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), in which the Supreme Court struck down a company-wide gender discrimination claim based on a statistical study finding overall disparities in pay and promotions in a variety of localities, subject to decisions by local executives. *Jock*, 646 F.3d at 127-28 (Winter, J., dissenting). Winter also interprets *Stolt-Nielsen* to prohibit inferences of an implied agreement to class arbitration from a failure to preclude class arbitration. *Id.* at 128-30. He also states that the subject of agreements to collective proceedings are subsumed by federal law, and that any reference to state (in this case, Ohio) law is inappropriate. *Id.* at 130-32.

[113] *See infra* text accompanying note 395.

[114] 130 S. Ct. 2772 (2010).

[115] *See infra* text accompanying notes 118-45.

[116] *See infra* text accompanying notes 146-67.

limit on the enforceability of agreements to arbitrate, habitually in the realm of adhesion contracts.[117] The Court's disposition of those elements in *Rent-A-Center* will undoubtedly have huge practical ramifications for those bound by arbitration agreements of all kinds.

A. *Background of the Case: Three Bodies of Doctrine*

1. *Prima Paint and Separability*

Section 2 of the FAA states that written contracts to arbitrate are: "…valid, irrevocable, and enforceable . . . except on such grounds as exist at law or in equity for the revocation of any contract."[118] This section expressly makes predispute arbitration agreements (like agreements to submit existing disputes) enforceable and puts arbitration contracts on equal footing with other types of contracts,[119] but also makes clear that parties can raise standard contractual defenses to challenge the validity of an arbitration agreement.[120] Consideration of such defenses is a "gateway" issue that courts are called upon to address, along with questions about the presence of appropriate written language of agreement and "scope issues" (that is, whether a controversy falls within the scope of that agreement).[121] The FAA implements this basic "substantive rule" of enforcement by permitting parties to apply to a federal court for a stay of the trial of arbitrable issues under § 3 or a motion to compel arbitration under § 4.

The precise boundaries of courts' "gateway" role in considering contractual defenses to arbitration agreements, and the respective purviews of courts and arbitrators under the FAA, were at issue in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*[122] Prima Paint purchased Flood & Conklin's ("F&C") paint business and entered into a consulting agreement with the chairman of F&C.[123] Soon Prima Paint stopped making payments under the agreements, charging that F&C had breached both agreements by fraudulently representing that it was

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[117] *See infra* text accompanying notes 168-209.

[118] The Section states in full:

> 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. 9 U.S.C. § 2 (1947).

[119] *See, e.g.*, Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 474 (1989).

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

[121] *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-404, 414 (1967).

[122] 388 U.S. 395 (1967).

[123] *Id.* at 397.

solvent when it intended to file for bankruptcy.[124] F&C served a notice of intent to arbitrate.[125] Prima Paint subsequently filed a lawsuit in the federal court in New York seeking to rescind the consulting agreement as fraudulently induced.[126] Prima Paint argued that since the arbitration agreement must rise or fall with the rest of the contract, its fraud defense must be addressed by a court of law.[127] The Supreme Court, however, reached a contrary conclusion and upheld the dismissal of Prima Paint's appeal from a grant of F&C's motion to compel arbitration.[128] The Court ruled that under the broad terms of the parties' agreement to arbitrate, the arbitrators and not a court of law should resolve the question of fraudulent inducement.[129] The Court's decision – founded on the principle that the arbitration clause should be considered separately from the underlying contract for the purpose of enforcement – has become one of the cornerstones of modern arbitration law. Although this approach could result in the seeming paradox of arbitrators ruling that the contract that gave rise to their own jurisdiction was the fruit of fraud, and therefore invalid, the doctrine of separability (or severability) was – and continues to be – justified on the ground that the vitality of arbitration clauses will be undermined by allowing parties to waylay the process through front-end challenges to the whole contract.[130] Only where the challenge is aimed directly at the arbitration provision itself is there a place for judicial intervention at the "gateway"; otherwise, the issue of the contract's validity is for the arbitrator in the first instance.

In addition to becoming part of arbitration doctrine under the FAA, this rationale has proven persuasive in the arena of international arbitration, where the

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[124] *Id.* at 398.

[125] *Id.*

[126] *Id.*

[127] *See id.* at 398.

[128] *Id.* at 407.

[129] *Id.* at 402-04.

[130] The Court found this conclusion "explicit" under § 4 of the FAA, under which federal courts are directed to compel arbitration upon proof that "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue" – a provision that reinforced the limited nature of front-end judicial "gatekeeping" and promoted the parties' presumed desire for early resort to arbitration:

> [I]f the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the "making" of the agreement to arbitrate – the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally . . . We hold, therefore, that . . . a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts. *Id.* at 403-04.

principle of separability is broadly established.[131] It is also widely embraced under the arbitration law of various U.S. states,[132] and was expressly recognized in the Revised Uniform Arbitration Act.[133]

The continuing vitality – and potential reach – of the separability principle under the FAA was made evident in *Buckeye Check Cashing, Inc.* v. *Cardegna*,[134] a decision involving a broad-form arbitration provision in a standardized consumer lending contract. The case was brought as a putative class action in Florida state court against Buckeye, a check-cashing service; the plaintiffs alleged that the defendant had charged usurious interest rates and that its standard deferred-payment agreement violated various Florida lending and consumer-protection laws, rendering it criminal on its face.[135] Buckeye filed a motion to compel arbitration under the broad arbitration provision in its contract.[136] The trial court denied the motion, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void *ab initio*.[137] This decision was reversed by an appellate court but reinstated by the Florida Supreme Court, which concluded that "to enforce an agreement to arbitrate in a contract challenged as unlawful '"could breathe life into a contract that not only violates state law, but also is criminal in nature…."'[138] The Court granted certiorari and, in a 7-1 decision (with one abstention), reversed the Florida Court. Writing for the majority, Justice Scalia reasoned that the severability principle of *Prima Paint* was now applicable in state as well as federal court actions subject to the FAA under the Court's holding in *Southland Corp.* v. *Keating*,[139] which recognized FAA § 2

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[131] *See* U.N. Comm'n on Int'l Trade Law [UNCITRAL], UNCITRAL Model Law on International Commercial Arbitration, Art. 16(1) (2008), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[132] *See, e.g.*, Old Republic Ins. Co. v. Lanier, 644 So. 2d 1258 (Ala. 1994); U.S. Insulation, Inc. v. Hilro Constr. Co., 705 P.2d 490 (Ariz. Ct. App. 1985); Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 673 P.2d 251 (Cal. 1983); Hercules & Co. v. Shama Rest. Corp., 613 A.2d 916 (D.C. 1992); Brown v. KFC Nat'l Mgmt. Co., 921 P.2d 146 (Haw. 1996); Quirk v. Data Terminal Sys., Inc., 400 N.E.2d 858 (Mass. 1980); Weinrott v. Carp, 298 N.E.2d 42 (N.Y. 1973); Weiss v. Voice/Fax Corp., 640 N.E.2d 875 (Ohio Ct. App. 1994); Jackson Mills, Inc. v. BT Capital Corp., 440 S.E.2d 877 (S.C. 1994); South Carolina Pub. Serv. Auth. v. Great W. Coal, Inc., 437 S.E.2d 22 (S.C. 1993); Gerwell v. Moran, 10 S.W.3d 28 (Tex. App. 1999); Schneider, Inc. v. Research-Cottrell, Inc., 474 F. Supp. 1179 (W.D. Pa. 1979) (applying Pennsylvania law); New Process Steel Corp. v. Titan Indus. Corp., 555 F. Supp. 1018 (S.D. Tex. 1983) (applying Texas law); Pinkis v. Network Cinema Corp., 512 P.2d 751 (Wash. Ct. App. 1973).

[133] *See* UNIF. ARBITRATION ACT § 6(c) & cmt.4 (amended 2000), 7 U.L.A. 25, 27-28 (2009).

[134] 546 U.S. 440 (2006).

[135] *Id.* at 443.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 443.

[139] 465 U.S. 1 (1984).

as a source of federal substantive arbitration law which was "applicable in state and federal courts."[140] Because the challenge to the present agreement did not target the arbitration provisions, there was no room for judicial intervention at the "gateway" under the FAA, and the issues he challenged should therefore be initially considered by an arbitrator, not a court.[141] It was irrelevant, concluded Scalia, that Florida public policy and contract law might refuse to sever or salvage "parts of a contract found illegal and void under Florida law;" in *Southland*, the Court ruled that state law "could [not] bar enforcement of § 2, even in the context of state-law claims brought in state court."[142] Moreover, *Prima Paint* failed to distinguish between defenses making contracts voidable and those rendering contracts illegal or void – all defenses were for the arbitrator in the first instance unless directed specifically at the agreement to arbitrate.[143]

Although the separability doctrine has attained broad acceptance domestically and internationally in the arena of commercial contracts, *Buckeye*'s projection of *Prima Paint* into the realm of non-negotiated mass consumer credit contracts and illegality on the face of an agreement raised concerns that the separability principle vouchsafed to arbitrators too much authority to police illegal behavior and provided companies with a mechanism for effectively avoiding the courthouse.[144] While judicial review of an arbitrator's decision is theoretically available at the post-award stage, as a practical matter its potency is significantly diminished as a result of the timing and, even more, by the narrow bases for vacatur of award under the FAA.[145]

2. *Contractual Allocation of "Gateway" Decisions*

Although the separability doctrine significantly diminished the "gateway" role of courts under the FAA, courts still serve as "gatekeepers" to make determinations relating to the arbitration agreement itself. The kinds of questions they may be called upon to address are (1) questions regarding the existence or validity of an arbitration agreement, as where a party claims to have been deceived as to the true nature or content of an arbitration agreement or raises other contractual defenses to its enforcement;[146] and (2) questions about whether or not

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[140] *Id.* at 12.

[141] *Buckeye Check Cashing, Inc.*, 546 U.S. at 445-46.

[142] *Id*.

[143] *Id.*

[144] *See* Stephen J. Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing, Inc. v. Cardegna, 8 NEV. L.J. 107 (2007) (advocating repeal of the separability doctrine).

[145] *See* Cross, *supra* note 8; 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 955-58 (2009).

[146] *See* Rent-A-Ctr., W., Inc. v. Jackson, 130 S. Ct. 2772 (2010); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

a particular dispute falls within the scope of an arbitration provision.[147] As it happens, however, both categories of questions have themselves been deemed to be arbitrable in certain circumstances under U.S. and other law.[148]

In fact, agreements to delegate "gateway" functions to arbitrators are ubiquitous in business contracts. Concerns about delays and inefficiencies caused by front-end resort to court prompted drafters to give arbitrators authority to resolve not only disputes relating to the contract of which the arbitration provision is a part, but also (1) defenses aimed at the existence, validity or enforceability of the arbitration provision itself; or (2) issues respecting the scope of its application. Clauses addressing "*Kompetenz-Kompetenz*" (the authority of arbitrators to address their own competence to hear certain controversies under an arbitration agreement) are a standard feature of international commercial arbitration rules.[149] Virtually all of the leading procedures for commercial – that is, business-to-business – arbitration in the United States include language that purports to give arbitrators plenary authority over all issues, including those surrounding the enforceability of the arbitration agreement and other arbitrability issues.[150]

Of course, "[t]here is . . . almost inescapable circularity" to provisions that grant arbitrators authority to address questions about the existence or validity of the very arbitration agreement from which they derive their power.[151] As Gary Born explains, "in these circumstances" any authority devolving upon an arbitration tribunal must spring from national or international law.[152] Internationally, such authority may be found under the European Convention, the UNCITRAL Model Law, and, impliedly, under the New York Convention.[153]

Although the FAA contains no express provisions addressing the possibility of allocating "gateway" functions to arbitrators, Supreme Court decisions have addressed the issue. One critical precedent is *AT&T Technologies, Inc.* v. *Communications Workers of America*,[154] a case involving a dispute over

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[147] *See* Chevron U.S.A., Inc. v. Consolidated Edison Co., 872 F.2d 534, 537 (2d Cir. 1989); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

[148] *See generally* BORN, *supra* note 145, at 851-1001 (discussing the doctrine of "competence-competence" ("*Kompetenz-Kompetenz*") under international law and the laws of the U.S. and other countries).

[149] *See id*. at 869-70.

[150] For example, the American Arbitration Association (AAA) Commercial Arbitration Rules state, "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R-7(a) (June 1, 2009), *available at* http://www.adr.org/sp.asp?id=22440.

[151] BORN, *supra* note 145, at 870.

[152] *Id.*

[153] *Id.*

[154] 475 U.S. 643 (1986).

interpretation of the breadth of application of an arbitration provision in a collective bargaining agreement under the Taft-Hartley Act.[155] The Court explained:

> [W]hether a[n] . . . agreement creates a duty for the parties to arbitrate the particular grievance . . . is undeniably an issue for judicial determination. . . . Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.[156]

In *First Options of Chicago v. Kaplan*,[157] a unanimous Court embraced this dictum from the labor arbitration arena as the foundation for a standard for judicial enforcement of agreements to submit what it characterized as "arbitrability" issues to arbitration under the FAA. Unlike *AT&T Technologies*, which involved who should decide a question of the breadth of a concededly valid agreement to arbitrate, *First Options* was concerned with who should decide whether the defendant investors had actually assented to an arbitration agreement with a stock trade-clearing firm.[158] In order for the question to be directed to the arbitrator, reasoned Justice Breyer's opinion, there would need to be a finding of the parties' objective intent to arbitrate arbitrability.[159] However, because an agreement of this kind would empower arbitrators to address issues that parties might reasonably expect a judge to decide,[160] it was appropriate to require an

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[155] 29 U.S.C. §185(a) (2006).

[156] *AT&T*, 475 U.S. at 649. The Court went on to conclude, however, that courts should construe arbitration agreements broadly, and resolve doubts "in favor of coverage." 475 U.S. at 650 (citing Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).

[157] 514 U.S. 938 (1995).

[158] *Id.* at 944-45.

[159] *Id.* at 944-45.

[160] "Giving the arbitrators that power . . . might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* at 945. Breyer continues:

> In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" – for in respect to this latter question the law reverses the presumption …

Id. at 944-45 (emphasis in original).

With respect to the pro-arbitration presumption that applies to a court's determination of whether a particular dispute is arbitrable, the Court cites *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("'[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'") (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). Breyer explains:

> The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration . . . one can understand why the law would insist upon

enhanced burden of proof in the form of "clear and unmistakable" evidence that the parties agreed to arbitrate arbitrability.[161]

The Court proceeded to find no such evidence in the case before it. Had the decision been otherwise, however, the arbitrator's decision would have been accorded significant deference. Justice Breyer made clear that once a judgment is made that parties have committed questions of arbitrability to the arbitrator:

> [T]he court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that the parties have agreed to arbitrate . . . [T]he court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.[162]

First Options has been the subject of considerable commentary, much of it critical.[163] Particular concerns have been raised about the Court's use of the vague term "arbitrability" and its appropriation of dictum from labor precedents that involved questions of scope under concededly valid arbitration agreements in support of a decision involving the question of the very existence of a valid agreement.[164] Some courts have continued to insist that challenges to existence, validity or enforceability must be reserved for judicial determination,[165] since, as explained by the Third Circuit, "a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction[, i]f the parties never entered into it."[166] But a growing number of courts applied the dictum of *First Options* to enforce "clear and unmistakable" provisions empowering arbitrators to address questions of the existence, validity or enforceability of arbitration agreements, not just issues of scope.[167] Although this produces a desirable

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> clarity before concluding that the parties did *not* want to arbitrate a related matter. . . . On the other hand, the former question – the "who (primarily) should decide arbitrability" question – is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers . . .

First Options, 514 U.S. at 945 (emphasis in original).

[161] *First Options*, 514 U.S. at 944 (quoting *AT&T*, 475 U.S. at 649).

[162] *Id*. at 943 (citing *AT&T*, 475 U.S. at 649; *Warrior*, 363 U.S. at 583 n.7).

[163] *See, e.g.*, Steven H. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues:* First Options v. Kaplan *Revisited*, 20 AM. REV. INT'L ARB. 159 (2009); Cross, *supra* note 8, at 27-32, 55-63. *See generally* BORN, *supra* note 145, at 914 n.327 (citing numerous articles).

[164] *See e.g.*, Reisberg, *supra*, note 163, at 159-60; Cross, *supra* note 8, at 60-63.

[165] *See, e.g.*, China Minmetals Materials Import & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 287 (3d Cir. 2003); Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 591 (7th Cir. 2001).

[166] *China Minmetals*, 334 F.3d at 288.

[167] *See, e.g.*, Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1331-2 (11th Cir. 2005); Contec Corp. v. Remote Solution Co. Ltd., 398 F.3d 205, 208 (2d Cir. 2005); and other cases cited at Jackson v. Rent-A-Center W., Inc. 581 F.3d 912,

outcome in the broad run of commercial contracts, and even though the great majority of arbitrators undoubtedly perform competently and in good faith, it raises significant potential concerns on the part of advocates for consumers and employees who find themselves subject to boilerplate arbitration provisions prepared by a company lawyer. It requires little imagination to appreciate that an agreement consigning virtually all legal and factual issues to arbitrators, including challenges aimed at the very source of their authority, is a singularly effective way of making arbitration a procedural black box, hermetically sealed from court intrusion.

3. *Unconscionability*

Unconscionability is the key doctrine used by courts to address due process concerns growing out of arbitration agreements in contracts of "adhesion."[168] The doctrine evolved as a means of permitting courts to police contracts for "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party."[169] Proving unconscionability normally requires a showing of circumstances indicating an "adhesive" bargain (so-called "procedural unconscionability") as well as unfair contract terms ("substantive unconscionability").[170] As formulated in Article 2 of the Uniform Commercial Code and the Restatement (Second) of Contracts, unconscionability affords courts

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917 (9th Cir. 2008), discussed *infra* at text accompanying notes 225-30. *See generally* Cross, *supra* note 8, at 31 n.136 (citing authority), 55-60 (discussing cases).

[168] *See generally* Bruhl, *supra* note 4 (describing Court-directed expansion of FAA); 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).

[169] RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) states:

> d. *Weakness in the bargaining process*. 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. Factors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

[170] *See generally* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18:9 (4th ed. 1993 & Supp. 2010).

considerable discretion in tailoring appropriate remedies – from invalidating a contract to narrow blue-penciling.[171]

Until fairly recently, judicial decisions grounded on unconscionability doctrine were few and far between.[172] With the expanded use of binding arbitration provisions in consumer and employment contracts, however, unconscionability doctrine came into vogue as a means of curtailing perceived abuses of corporate power aimed at denying fundamentally fair procedures to other parties in contracts of adhesion.[173] Unconscionability has been a relatively important mode[174] of judicially challenging the enforceability of arbitration agreements containing unilateral arbitration clauses,[175] limitations of remedies,[176] class-action waivers,[177] confidential arbitration requirements,[178] and fee-splitting and

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[171] *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result"); U.C.C. § 2-302(1) (2003) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result").

[172] *See, e.g.*, Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 610 (2009); Bruhl, *supra* note 4, at 1439-42.

[173] Stempel, *supra* note 168, at 803-07; Bruhl, *supra* note 4, at 1440 fig.1; Cross, *supra* note 8, at 9-10 n.28 (challenges to the enforceability of arbitration agreements based on unconscionability defenses tend to represent 14 to 18% of all arbitration cases).

[174] It has been estimated that around 40% of unconscionability defenses to arbitration agreements have met with success in recent years. Cross, *supra* note 8, at 10 n.30.

[175] *See, e.g.*, Nagrampa v. Mailcoups, Inc., 469 F.3d 1257, 1285-86 (9th Cir. 2006) (holding unconscionable, for lack of mutuality, clause requiring employee to arbitrate claims but allowing employer to bring judicial action); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689-94 (Cal. 2000) (finding arbitration clause unconscionable where it required employees but not employer to arbitrate claims and limited employees' potential damages but not employer's); Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 372-73 (N.C. 2008) (holding arbitration clause unconscionable because lender had managed to avoid ever arbitrating a claim against a borrower, while clause required borrowers to arbitrate claims against lender).

[176] *See, e.g.*, Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) (affirming, without giving reasons, lower court's holding that limitation of remedies was unconscionable); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 (9th Cir. 2002) (holding unconscionable "asymmetry [that] is compounded by the fact that the agreement limits the relief available to employees").

[177] *See, e.g.*, Skirchak v. Dynamics Research Corp., 508 F.3d 49, 59-60 (1st Cir. 2007) (holding class waiver unconscionable because it would "result in oppression and unfair surprise to the disadvantaged party"); *Ting*, 319 F.3d at 1150 (holding class waiver unconscionable because one-sided); Hall v. AT&T Mobility LLC, 608 F. Supp. 2d 592, 603-04 (D.N.J. 2009) (finding arbitration provisions unconscionable because likely amounts of

"loser pays" schemes.[179] While some courts have employed unconscionability to strike down entire arbitration agreements, others have taken a "surgical" approach, excising or reforming problematic provisions and sustaining the arbitration agreement.[180] Predictably, the courts of some states, notably California, have been considerably more energetic in developing unconscionability doctrine than others.[181]

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individual recovery were small and company was effectively immunized "from claims that would be suitable for class action resolution"); *Tillman*, 655 S.E.2d at 373 (holding that class waiver, together with other provisions in arbitration agreement, rendered agreement unconscionable; the class waiver "contribute[d] to the financial inaccessibility of the arbitral forum" and "contribute[d] to the one-sidedness of the clause because the right to join claims and pursue class actions would benefit only borrowers"); Scott v. Cingular Wireless, 161 P.3d 1000, 1004 (Wash. 2007) (recognizing that majority of jurisdictions uphold class-action waivers but citing cases from 15 jurisdictions holding that class-action waivers in arbitration agreements were substantively unconscionable); Vasquez-Lopez v. Beneficial Oregon, Inc., 152 P.3d 940, 951 (Or. Ct. App. 2007) (holding class waiver unconscionable because it was "unilateral in effect and . . . gives defendant a virtual license to commit, with impunity, millions of dollars' worth of small-scale fraud").

[178] *See, e.g.*, *Ting*, 319 F.3d at 1151-52 (finding provision requiring that arbitration remain confidential unconscionable because it prevents "accumulat[ion] of a body of knowledge on a particular company" that could mitigate repeat player effect). *Cf.* Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1180-83 (Ohio Ct. App. 2004) (holding secrecy clause violates public policy, which "may be distinguished from a finding of unconscionability," but hinges on similar concerns about repeat player effect and loss of information to the public).

[179] *See, e.g.*, *Ting*, 319 F.3d at 1151 (holding requirement that customers split arbitration fees with corporation unconscionable because "some complainants would . . . face prohibitive arbitration costs, effectively deterring them from vindicating their statutory rights"); *Tillman*, 655 S.E.2d at 371-72 (holding arbitration clause requiring loser to pay costs unconscionable where plaintiffs "live paycheck to paycheck" and "simply do not have the resources to risk facing these kinds of fees"); *Vasquez-Lopez*, 152 P.3d at 951-52 (holding cost-sharing provision unconscionable because it makes cost of bringing an action prohibitive).

[180] *Compare Armendariz*, 6 P.3d at 695-99 (declining to sever unconscionable clauses from arbitration agreement because unconscionability "permeated"), *and Nagrampa*, 469 F.3d at 1293 (striking down entire arbitration agreement because it had "multiple defects [that] indicate a systematic effort to impose arbitration . . . as an inferior forum"), *and Tillman*, 655 S.E.2d at 373-74 (declining to sever unconscionable provisions because "this particular arbitration clause . . . does not allow for meaningful redress of grievances"), *with Skirchak*, 508 F.3d at 63 (severing unconscionable clause and upholding rest of arbitration agreement because both parties wanted this remedy), *and Ting*, 319 F.3d at 1152 (holding unconscionable provisions of arbitration agreement invalid but an unconscionable aspect "revived").

[181] California courts have employed unconscionability to deny enforcement to arbitration agreements on numerous occasions. In the seminal decision of *Armendariz,* 6 P.3d 669, the California Supreme Court used unconscionability doctrine as the basis for considering what procedural protections would be essential requisites for the arbitration of statutory discrimination claims under an employment agreement. Such elements included

Significantly, before this year the U.S. Supreme Court has never applied, or specifically addressed in a holding, the doctrine of unconscionability or similar policy grounds in the arbitration context. Aside from general hortatory dicta, it has avoided pronouncements singling out arbitration provisions in "adhesion" contracts for special treatment.

The Court has stated repeatedly that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract,'"[182] and has enumerated unconscionability as among the "generally applicable contract defenses" that may invalidate an arbitration agreement.[183] On the other hand, the Court has never actually affirmed the denial or limited enforcement of an arbitration agreement on such grounds. Regardless of the transactional setting, the votes of a majority of justices have regularly been mustered in support of the presumption that binding arbitration is an effective surrogate for public judicial resolution of statute-based claims as well as actions at common law in the absence of clear and specific evidence to the contrary.[184] In

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an independent and impartial arbitrator, an opportunity for the employee to have adequate discovery, limits on the cost of arbitration, remedies akin to those available in court, a written decision allowing limited judicial review, and procedural "bilaterality." Because not all of these requirements were met, the court struck down the entire agreement as unconscionable. Some commentators have been highly critical of California courts' use of unconscionability. *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).

On the other hand, other commentators have expressed well-supported concerns about courts' "overly formalistic and efficiency-focused" responses to such defenses, causing consumers to "face an uncertain and limited likelihood of success in challenging arbitration clauses in courts." Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 127-33 (2010).

[182] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) (quoting *Mitsubishi*, 473 U.S. 614).

[183] *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (Arbitration agreements "may be invalidated by 'generally applicable contract defenses, such as fraud, duress or unconscionability'"); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 555-56 (1995) (Stevens, J., dissenting) ("[A]n arbitration clause may be invalid without violating the FAA if . . . the provision is unconscionable").

[184] In *Gilmer*, 500 U.S. 20, the Court upheld a motion to compel arbitration of an employee's Age Discrimination in Employment Claims. It reasoned that there was no proof that arbitration would be any less suitable than litigation in furthering the social policies underlying the ADEA. Among other things, the Court "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." *Id.* at 30 (quoting *Mitsubishi*, 473 U.S. at 634). There was, continued the Court, no indication that limitations on discovery would present a problem in the present context any more than in other statute-based actions the Court had found to be arbitrable, such as RICO and

the same vein, Court majorities have repeatedly postponed a ruling on a contested issue where the matter might be deferred to initial consideration by the arbitrator(s).[185] In such cases the practical result is to put off judicial consideration until after arbitration hearings, at which time the relevant issues will be addressed within the relatively narrow confines of the statutory grounds for vacatur of

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antitrust claims. Moreover, "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred . . . [and] it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief." *Id.* at 32 (citing Nicholson v. CPC Int'l Inc., 877 F.2d 221, 241 (3rd Cir. 1989) (Becker, J., dissenting)).

Finally, the Court observed that unequal bargaining power between employers and employees was in itself "not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." The Court concluded:

> [Courts] should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds "for the revocation of any contract." [quoting *Mitsubishi*, 473 U.S. at 627] There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.

Id. at 33.

See also Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 92 (2000) (mere supposition about overly burdensome arbitration costs is not sufficient reason to invalidate an arbitration agreement).

[185] Consider *PacifiCare Health Sys, Inc. v. Book*, 538 U.S. 401 (2003), involving an action by physicians against managed-health-care organizations (HMOs), on the basis, *inter alia,* of alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). The defendant HMOs' motion to compel arbitration of the RICO claims was denied by the district court on the ground that the arbitration clauses in the parties' agreements prohibited awards of "punitive damages," thereby denying the arbitrator authority to provide meaningful relief in the form of treble damages under RICO and rendering the arbitration agreement unenforceable as to those claims. The Eleventh Circuit affirmed. The Supreme Court reversed on the basis that it was unclear whether the arbitration provisions actually prevented arbitrators from awarding treble damages under RICO, since statutory treble damages provisions may play different roles and, in particular, RICO's treble-damages provision is remedial in nature. It was therefore not clear whether the parties intended the term "punitive" to encompass claims for treble damages under RICO. Because the Court did not know how the arbitrator would construe the limit on punitive damages, it would be premature for the Court to address them, and the proper course was to compel arbitration and leave the matter initially to the arbitrator. *Cf. Mitsubishi*, 473 U.S. at 638 ("Having permitted the arbitration [of antitrust claims] to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed").

award.[186] These and other realities raise legitimate concerns about the Court's willingness to embrace unconscionability doctrine to any meaningful degree.[187]

Even while unconscionability doctrine has come to play the primary role in policing arbitration provisions in contracts of adhesion under the FAA, given the preemptive effect of that statute on attempts to regulate arbitration through state legislation, there has lingered the possibility that a Court majority might be mustered in favor of using preemption to dramatically narrow the role of unconscionability. A critical note of warning may be found in dicta in *Perry* v. *Thomas*,[188] a decision in which the Court held that an arbitration agreement in an employment contract was enforceable under the FAA. The Court, in an opinion by Justice Marshall, found that the federal substantive law of arbitrability preempted a section of the California Labor Code providing that wage collection actions "may be maintained 'without regard to the existence of any private agreement to arbitrate.'"[189] Although the Court declined to address the employee's claim that the arbitration agreement was "an unconscionable, unenforceable contract of adhesion," a matter not considered below, it took pains to address the "choice-of-law issue that arises when . . . [such] arguments are asserted."[190] In such cases, explained the Court, FAA § 2 offers a "touchstone for choosing between state law principles and the principles of federal common law envisioned by the [FAA]."[191]

> [Section 2 directs that a]n agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of any contract." Thus, a state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue

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[186] *See* Federal Arbitration Act, 9 U.S.C. § 10 (2009), which states:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) 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.

See Hall St. Assocs., 552 U.S. at 584 (holding that FAA § 10 provides the exclusive grounds for vacatur).

[187] *See infra* text accompanying notes 262-76.

[188] 482 U.S. 483 (1987).

[189] CAL. LAB. CODE § 229 (West 1971).

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

[191] *Id.*

> does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. *Nor may a court 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 we hold today the state legislature cannot.*[192]

Although this language had not since been brought forth by the Court to quash federal or state court decisions relying on state unconscionability doctrine to strike down or reform arbitration agreements, it was clearly aimed at judicial decisions that regulate arbitration agreements *qua* arbitration agreements – that is, that focus on elements of arbitration agreements that are not present in contract provisions generally. Although it is possible to imagine a scenario in which an arbitration provision is struck down on unconscionability grounds applicable to contracts generally (as where, to use an extreme example, a party is physically forced to assent to an arbitration agreement), nearly all unconscionability defenses implicate concerns about specific substantive terms of the arbitration agreement: arbitrator selection, discovery and other administrative procedures, situs of hearings, costs and fees, remedies, and the like.[193] These are mostly, aspects of arbitration that bear no relationship to contracts generally, with one important exception – agreements that affect procedure or remedies in litigation or other forms of dispute resolution).[194] Put another way, unconscionability doctrine is uniquely important, and most heavily employed by federal or state courts, in the arbitration context because arbitration is a substitute for going to court, and thus has unique potential impact, direct or indirect, on all kinds of contractual obligations, rights and remedies.

Binding arbitration agreements in standardized contracts are seldom the subject of negotiation or of knowledgeable assent[195] (indeed, it is probably fair to

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[192] *Id*. (citations omitted, emphasis supplied).

[193] *See supra* text accompanying notes 173-179.

[194] There may, of course, be certain kinds of substantive elements that appear in an arbitration agreement that would be unconscionable whether or not an arbitration agreement is present. One possible example would be a purported waiver of punitive damages in an employment or consumer contract. *See* Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1 (1997).

[195] *See* 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 (1997) ("[I]f all the firms in the market impose the same terms, shopping is impossible. . . . Because form terms are often peripheral to the core of the transaction, the cost of fully understanding most form terms reasonably appears, at the time of contracting, to outweigh the benefit. Meaningful understanding of a form term should be recognized as including the ability to make an informed judgment about its value. With an arbitration clause, this would include some awareness not only of the procedural distinctions between arbitration and litigation, but also of any systemic disparity in outcomes generated by the two procedures . . . In sum, individual contract adherents are in no position to alter the menu of form contract terms presented by the market.").

assume that the majority of *lawyers* still lack all but the barest understanding of arbitration law and practice),[196] and while arbitration offers potential advantages to employees and consumers,[197] there is also the possibility that arbitration will fall short of offering fundamental fairness in various ways.[198] In the 1990s, a series of initiatives by public and private entities sought to address the most common concerns and develop minimum standards of due process for consumer and employment arbitration,[199] but private "community" regulation, or self-regulation, is not alone sufficient to address the problem.[200] Not so long ago, alleged material conflicts of interest in a major provider of consumer credit arbitration services caused a state attorney general to take decisive action.[201]

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[196] *See* Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. Rev. 831, 834 (2001).

[197] *See* Edna Sussman, et al., *Comments to the Consumer Financial Protection Bureau in Connection with Its Review of Arbitration for Consumer Financial Products or Services, New York State Bar Association Dispute Resolution Section (2011)*, 12 CARDOZO J. CONFLICT RESOL. 491, 496-98 (2011) (describing features and potential benefits of binding arbitration to businesses, consumers).

[198] *See* Stipanowich, *supra* note 196, at 836-37, 888; Schwartz, *supra* note 195, at 40-53.

[199] *See, e.g.*, TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, EMPLOYMENT DUE PROCESS PROTOCOLS (1995), *available at* http://www.adr.org/sp.asp?id=28535; NAT'L CONSUMER DISPUTES ADVISORY COMM., CONSUMER DUE PROCESS PROTOCOLS (1997), *available at* http://www.adr.org/sp.asp?id=22019; COMM'N ON HEALTH CARE DISPUTE RESOLUTION, HEALTHCARE DUE PROCESS PROTOCOLS (1998), *available at* http://www.adr.org/sp.asp?id=28633; THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MGMT. RELATIONS: FINAL REPORT (1994), *available at* http://www.newunionism.net/library/workplace%20democracy/US%20Dunlop%20Commission%20-%20On%20the%20Future%20of%20Worker-Management%20Relations%20-%201995.pdf.

[200] *See* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 371-72, 417-27 (2004).

[201] The Minnesota Attorney General accused the National Arbitration Forum (NAF), a Minnesota-based organization that specializes in and focuses on consumer debt actions, of violating state consumer fraud, deceptive trade practices, and false advertising laws by hiding financial connections to collection agencies and credit card companies. NAF had handled more than 214,000 collection claims in 2006, 60% of which were filed by law firms with ties to the collection industry. The NAF denied the allegations. In the summer of 2009 NAF ceased its consumer arbitration program as part of a settlement. Under the settlement, the NAF could continue to arbitrate certain types of claims performed under supervision of government entities or non-government organizations (e.g., Internet domain name, cargo, personal injury protection suits, etc.). *Firm Agrees to End Role in Arbitrating Card Debt*, N.Y. TIMES, July 20, 2009, at B8. In August 2009, Bank of America Corporation said that it would stop requiring that disputes with its credit card holders and banking and lending customers be settled by binding arbitration. Joshua Freed, *Bank of America drops arbitration requirement*, SEATTLE TIMES, Aug. 13, 2009, *available at* http://seattletimes.nwsource.com/html/businesstechnology/2009657887_apusbankofamericaarbitration.html?Synd ication=bondheads.

The Supreme Court's own decision in *Shearson/American Express, Inc.* v. *McMahon*[202] enforcing arbitration of investor claims under § 10(b) of the Securities Exchange Act was underpinned by the expectation that the Securities and Exchange Commission ("SEC") would employ "expansive power to ensure the adequacy of the arbitration procedures employed by [securities self-regulatory organizations] . . . [and to] 'oversee and regulate the rules.'"[203] The SEC, with the assistance of its advisory body, the Securities Industry Conference on Arbitration ("SICA"), has actively supervised ongoing debate and discussion among investor advocates, the Financial Industry Regulatory Association ("FINRA"), and other industry representatives, encouraging the continuing evolution of procedures that address public as well as private concerns.[204] Importantly, the ongoing oversight and dialogue has proven critical in the development of a continuing series of pro-consumer modifications in securities arbitration procedures.[205] *McMahon* reflects the Court's acknowledgment of the need for outside regulation of consumer arbitration, but the model remains one-of-a-kind; the Court has not sought to extend it to other arenas of consumer or employment arbitration.

In the broader realm of consumer and employment arbitration, especially given the extensive preemption of state legislative regulation by the FAA, effective judicial oversight is necessary to address various forms of overreaching. Fraud,[206] the covenant of good faith and fair dealing,[207] and the doctrine of reasonable expectations[208] have all been employed by state and federal courts in

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[202] 482 U.S. 220 (1987).

[203] *Id*. at 233.

[204] *See* Constantine N. Katsoris, *Securities Arbitrators Do Not Grow on Trees*, 14 FORDHAM J. CORP. & FIN. L. 49, 54-58 (2008); Constantine N. Katsoris, *Roadmap to Securities ADR*, 11 FORDHAM J. CORP. & FIN. L. 413, 420-24 (2006); Stipanowich, *supra* note 196, at 900-01.

[205] LINDA D. FIENBERG & KENNETH L. ANDRICHIK, NASD DISPUTE RESOLUTION, THE ARBITRATION POLICY TASK FORCE REPORT – A REPORT CARD (2007), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p036466.pdf (reporting developments regarding forum independence, financing and administration; disclosures to investors; arbitrator selection, quality and training; discovery; mediation; simplified and standard case rules; punitive damages; and other matters).

[206] *See* Engalla v. Permanente Med. Group, Inc., 938 P.2d 903 (Cal. 1997).

[207] *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).

[208] *See, e.g.*, *Engalla*, 938 P.2d at 922 (holding that medical group may not compel arbitration where it administers own arbitration program, fraudulently misrepresents speed of arbitrator selection process, and forces delays); Broemmer v. Abortion Serv. of Phoenix, 840 P.2d 1013, 1017 (Ariz. 1992) (refusing to enforce agreement in "adhesion contract" where drafter inserted potentially self-serving term requiring sole arbitrator of medical malpractice claims to be licensed medical doctor); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995) (discussing procedural limitations of arbitration in treating consumer disputes with banks and lenders); 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*

invalidating or reforming arbitration agreements. Unconscionability, however, remains the most versatile tool available to courts,[209] as well as the primary engine for promoting fairness and transparency in arbitration provisions in adhesion contracts.

B. *History of the Case*

In *Rent-A-Center, West, Inc.* v. *Jackson*,[210] the Court confronted the question whether courts retain any authority to address a defense of unconscionability aimed at the arbitration provision in an employment contract when the agreement itself purports to assign sole responsibility for such decisions to the arbitrator. As is often the case, the majority opinion contained a surprise: while the *First Options* line of cases on delegation of gatekeeping functions was clearly in play, the majority also found a novel way to draw in the *Prima Paint* separability doctrine.

Jackson sued his former employer, Rent-A-Center ("RAC"), for race discrimination and retaliation; he alleged that he had been repeatedly passed over for promotions due to his race, and was terminated in retaliation for complaining.[211] At the time of his employment as an account manager, Jackson and RAC executed a free-standing, four-page Mutual Agreement to Arbitrate that provided for "arbitration of all claims or controversies . . . past, present, or future."[212] It also stated:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.[213]

When RAC sought to compel arbitration pursuant to the clause, Jackson argued that the arbitration agreement was itself unenforceable on grounds of

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Concerns, 72 TUL. L. REV. 1 (1997) (discussing due process concerns with arbitration under employment and consumer contracts).

[209] *See generally* Bruhl, *supra* note 4 (as the Supreme Court has shut off most other means of resisting arbitration, state unconscionability doctrine has become an attractive and successful tool for striking down arbitration agreements).

[210] 130 S. Ct. 2772 (2010).

[211] Jackson v. Rent-A-Ctr., No. 03:07-CV-0050-LRH (RAM), 2007 WL 7030394, at *1 (D. Nev. June 7, 2007).

[212] *Id.*.

[213] *Id.* Extensive, free-standing arbitration agreements appear to be increasingly common in the employment sphere. To the extent that this approach draws the attention of employees to the arbitration agreement and the procedural implications of the process, it is a positive development. Of course, most employees need advice from legal counsel to fully understand the process. (The author is sometimes asked to review and comment on employment arbitration agreements.) There is, moreover, the problem of freedom of choice – which may be more ephemeral than real.

unconscionability, and should be struck down by the court.[214] The district court, however, granted the employer's motion to compel arbitration.[215] Citing the *First Options* line of cases, the court concluded that the agreement to arbitrate "clearly and unmistakably" gave the arbitrator exclusive authority to decide whether the arbitration agreement was enforceable.[216] Surprisingly, the district court also made reference to the separability doctrine, citing *Buckeye Check Cashing, Inc.* v. *Cardegna*[217] for the proposition that "where the contract agreeing to arbitrate is challenged as a whole, it is for the arbitrator to decide the validity of the agreement."[218] This is, strictly speaking, a misquotation of *Buckeye* and misapplication (or at least a novel extension) of the separability principle, which calls upon courts to permit arbitrators empowered by broad-form arbitration clauses to address defenses to the contract of which the arbitration provision is a part (as opposed to defenses to the arbitration provision itself).[219] The arguable conceptual analogy is as follows: in the instant contract the provision granting the arbitrator exclusive authority respecting disputes about the "interpretation, applicability, enforceability or formation of [the arbitration agreement]" bears the same relationship to the arbitration agreement as a whole that the typical predispute (executory) arbitration agreement bears to a contract of which it is a part. This rough analogy was not lost on the Supreme Court majority, which would embrace the same logic;[220] the dissent would reject the analogy.[221]

The district court supported its decision with the conclusion that, even if the court were to have examined Jackson's assertion of unconscionability on the merits, the argument would probably fail for lack of evidence under applicable state law.[222] Like many states, Nevada requires an agreement to be "both procedurally and substantively unconscionable" – that is, combining (1) circumstances where a "party lacks a meaningful opportunity to agree to the terms because of unequal bargaining power or because the effect of the agreement is not readily understandable" with (2) "terms which are unfairly one-sided."[223] Jackson's assertion that the plaintiff might "have to unfairly pay burdensome arbitration costs" was, the court concluded, a mere supposition that would not be substantively unconscionable and would be insufficient to invalidate an agreement.[224]

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[214] *Id.* at *2.

[215] *Id.* at *3.

[216] *Id.* at *2 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (2002)).

[217] *Id.* (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444-45 (2006)).

[218] *Id*.

[219] *See supra* text accompanying notes 118-45.

[220] *See infra* text accompanying notes 241-49.

[221] *See* Rent-A-Ctr., W., Inc v. Jackson 130 S. Ct. 2771, 2781-88 (2010) (Stevens, J., dissenting).

[222] Jackson v. Rent-A-Ctr., W., Inc., No. 03:07-CV-0050-LRH(RAM), 2007 WL 7030394, at *2 (D. Nev. June 7, 2007).

[223] *Id.* (quoting D.R. Horton, Inc. v. Green, 120 Nev. 549, 553-54 (Nev. 2004)).

[224] *Id.* at *3 (citing Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 92 (2000)). The court believed this conclusion was reinforced by the fact that the arbitration agreement

In a 2-1 decision, a panel of the Ninth Circuit reversed,[225] holding the FAA requires that, where a party explicitly challenges an arbitration clause on the basis of unconscionability, a court and not an arbitrator must first address the question. This is true, said the appellate court, even where the agreement's express terms delegate that determination to the arbitrator(s).[226] Although the separability principle of *Prima Paint* and *Buckeye* gives arbitrators the authority to address challenges to the validity of the parties' contract as a whole, the court explained, "when a party specifically challenges the validity of arbitration provisions within a larger contract, apart from the validity of the contract as a whole, a court decides the threshold question of the enforceability of the arbitration provisions."[227] Before compelling arbitration under FAA § 4, a court must be "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."[228] With respect to provisions that purport to give arbitrators the authority to decide arbitrability questions, *First Options* requires "clear and unmistakable evidence" of agreement.[229]

Which brings us to the nub of the appellate majority's decision – the nature of the evidence to be considered by a court in determining that an agreement to arbitrate arbitrability is "clear and unmistakable." It may be necessary, the majority reasoned, for a court to look beyond seemingly clear and unambiguous language of agreement to ascertain whether a party's assent was *meaningful*. In the instant case,

> Jackson [the employee] does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator. What he does dispute, however, is that he *meaningfully agreed* to the terms of the Agreement to Arbitrate, which he contends is procedurally and substantively unconscionable. Jackson argues that, in light of the parties' unequal bargaining power, the fact that the Agreement was presented as a non-negotiable condition of his employment, and the absence of any meaningful opportunity to modify the terms of the Agreement, he did not *meaningfully assent* to the Agreement.[230]

"expressly contained a clause allowing the apportionment of costs to be altered in the event the law require[d] a different allocation of costs to make the [a]greement enforceable." *Id.* The district court did not address two other arguments made by Jackson regarding substantive unconscionability – namely, that (1) the provisions of the agreement required arbitration of claims the employee was likely to bring, but not the claims that the employer was likely to bring and (2) limitations on discovery in the arbitration agreement were one-sided and unfair. *See infra* text accompanying note 236.

[225] Jackson v. Rent-A-Ctr. W., Inc., 581 F.3d 912, 919 (9th Cir. 2008).

[226] *Id.* at 919-20.

[227] *Id.* at 915.

[228] *Id*. at 916 (quoting Federal Arbitration Act, 9 U.S.C.A. § 4 (2000)).

[229] *Id*. (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).

[230] *Id.* at 917 (emphasis added).

First Options and other Supreme Court precedents require arbitration contracts to be enforced in accordance with "ordinary state-law principles that govern the enforcement of contracts,"[231] and the FAA was designed, among other things, to put arbitration agreements "upon the same footing as other contracts."[232] It would be inconsistent with these tenets to say "that where arbitration provisions – unlike other contractual provisions – are concerned, clear contractual language is enforceable *per se*."[233] Therefore, "where a party specifically challenges arbitration provisions as unconscionable and hence invalid," a court should have the ability to look behind the language.[234] The appellate panel proceeded to uphold the district court's determination that the cost provision in the instant arbitration agreement was not unconscionable, since Jackson presented no evidence indicating that the costs of arbitration would actually be prohibitive.[235] However, it directed further hearings on two other issues of substantive unconscionability raised by Jackson – specifically, that the arbitration agreement's coverage and discovery terms "were one-sided and unfairly favored the [e]mployer."[236]

In dissent, Circuit Judge Hall emphasized that as arbitration agreements go, Jackson's was relatively favorable and lacked key elements of adhesion.[237] Jackson's allegations that the agreement was a non-negotiable condition of employment appeared to be contradicted by the agreement itself, and his substantive complaints about the agreement were "thinner than most."[238] Such "bare allegations," he argued, should not give cause for a judicial mini-trial on unconscionability, especially since the contract "clearly and unmistakably" assigns such issues to the arbitrator. Hall concluded that the majority's decision

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[231] *Id*. (quoting *First Options*, 514 U.S. at 944).

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

[233] *Id.* (emphasis added).

[234] *Id*. at 918-19. The court distinguished a number of decisions which enforced provisions for the arbitration of arbitrability in the context of "agreements between sophisticated commercial entities." *Id*. at 917-18. It cited with approval *Awuah v. Coverall North America, Inc*., 554 F.3d 7 (1st Cir. 2009), a case involving an action by a class of franchisees against a corporation for fraud, misrepresentation, breach of contract and violations of various labor laws. In that case the First Circuit ruled that a party challenging a provision empowering arbitrators to rule on arbitrability issues "is entitled to have a court determine whether 'the arbitration remedy is illusory.'" *Id*. at 13. The concern, the court explained,

> was not with unconscionability – essentially a fairness issue – but more narrowly with whether the arbitration regime here is structured so as to prevent a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses. *Id*.

[235] *Jackson*, 581 F.3d at 919.

[236] *Id*. at 920.

[237] *See id.* (Hall, J., dissenting).

[238] *See id.* (Hall, J., dissenting) (citing Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1267 (9th Cir. 2006) (en banc)).

was an inappropriate expansion of *First Options* and other cited precedents, and, for circumstances where parties appear to have agreed to arbitrate arbitrability, proposed a more limited "gateway" role for district courts in policing unconscionability and related concerns,

> perhaps permitting courts to remain attuned to "well-supported" claims of unconscionability or the potential that arbitration might be illusory, while still resolving "any doubts" as to what the parties agreed in favor of arbitration.[239]

C. *The Court's Decision: Once More to the Fount of Federal Substantive Law*

The Supreme Court granted certiorari and heard arguments in the case; the result was, once again, a 5-4 decision reversing the judgment of the court of appeals.[240] Writing for the majority, Justice Scalia spurned the logic of the Ninth Circuit majority respecting the *First Options* line of cases and embraced the district court's extension of *Prima Paint* separability principles. Tapping once again the increasingly deep well of substantive arbitration law under the FAA, Scalia's opinion makes clear that where a contract "clearly and unmistakably" delegates gateway questions to arbitrators, unconscionability challenges must be focused *on the delegation provision alone*.[241]

Scalia begins by singling out for separate consideration two provisions in the parties' lengthy agreement to arbitrate, both of which purport "to settle by arbitration a controversy" as described by FAA § 2: (1) the basic provision calling for arbitration of "'past, present or future' disputes arising out of [the employment contract]" and (2) the provision delegating "gateway" issues to the arbitrator ("[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement.")[242] The controversy at issue is the alleged unconscionability of the agreement, and the provision Rent-A-Center seeks to enforce is the second, "delegation" provision. Such a provision is readily enforceable under the *First Options* line of cases.[243] Furthermore, explains Scalia,

> [it] is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. . . . [It] is valid under § 2 "save upon such grounds as exist at law or in equity for the revocation of any contract."[244]

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[239] *Id.* at 921-22 (citing *Awuah*, 554 F.3d at 13). Judge Hall pointed out that in the *Awuah* decision favorably cited by the majority, the First Circuit insisted that a litigant meet a "high burden" to show that arbitration was "truly illusory." *Id*.

[240] *See* Rent-A-Ctr., W., Inc. v. Jackson, 130 S. Ct. 2772 (2010).

[241] *Id.* at 2775-77.

[242] *Id.* at 2777 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

[243] *See id.* at 2777-79.

[244] *Id.* at 2777-78.

While the parties' intent to arbitrate arbitrability issues must be established by "clear and unmistakable evidence," this is an "'interpretive rule' based on an assumption about parties' expectations." [245] It does not, Scalia insists, embrace questions of *validity* (including alleged unconscionability) which are the province of FAA § 2. Scalia and the Court majority thereby reject the Ninth Circuit's conclusion that unconscionability is inextricably intertwined with proof of intent under *First Options* and progeny.

Scalia instead employs the doctrine of severability (separability) to determine the allocation of functions between courts and arbitrators in the presence of a provision delegating "gateway" provisions to arbitrators. To paraphrase Scalia's argument, a special provision empowering arbitrators to address issues relating to arbitrability, including the enforceability of the arbitration agreement, operates within an arbitration agreement in a manner directly analogous to the operation of a standard arbitration provision that provides for resolution of all disputes arising under or relating to the contract within which it is contained.[246] Under *Prima Paint* and progeny, therefore, defenses to the whole agreement should normally be addressed by the arbitrators, but courts (under FAA § 2 or the implementing sections FAA § 3 or § 4) should address defenses specifically aimed at the validity of the agreement to arbitrate (in this case, the delegation provision).[247] Scalia insists that there is no reason why "delegation" clauses cannot be severed from the remainder of arbitration agreements in the same way that arbitration provisions are severed from the remainder of the contract within which they are contained – the rule should be the same under § 2.[248] Henceforth, the Court majority's expansive application of the severability doctrine will be a "matter of substantive federal arbitration law" and not state law under the FAA.[249]

Unfortunately for him, Jackson's unconscionability challenge was to the whole arbitration agreement, and not just the delegation provision.[250] His assertions regarding substantive unconscionability were focused on the kinds of claims subject to the arbitration agreement: arbitration costs and discovery. None bore any relation to the agreement to let arbitrators determine arbitrability,[251] and were therefore irrelevant to the enforceability of the delegation clause under § 2.

Justice Stevens' dissent on behalf of four members of the Court took strong issue with the majority's "breezy assertion" that arbitration agreements could be treated analogously to other kinds of contracts in applying *Prima Paint* severability doctrine. The latter, Stevens explains, is "akin to a pleading standard" that parties must follow to trigger a court's consideration of the validity of an

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[245] *Id.* at 2777 n.1 (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002)).

[246] *Id.* at 2778.

[247] *Id.*

[248] *Id.* at 2779.

[249] *Id.* at 2777 n.1.

[250] *Id.* at 2780.

[251] *Id.*

arbitration clause.[252] The court's usual function as gatekeeper of arbitrability issues is taken over by arbitrators only when the arbitration agreement "clearly and unmistakably" evinces the parties' mutual intent to re-allocate that function.[253] To Stevens and the dissent, like the Ninth Circuit majority, a determination of the parties' intent must take into account whether an agreement is unconscionable, since unconscionability implicates questions of meaningful choice and assent.[254]

To Stevens, the majority's employment of severability doctrine *within* an agreement to arbitrate – described as "a new layer of severability – something akin to Russian nesting dolls"[255] was wholly inconsistent with prior precedent, which categorically reserved general challenges to the making of an arbitration agreement to courts. It takes the always-controversial doctrine of *Prima Paint* too far.[256] Severability as originally defined by that decision was justified on the basis that to permit a court to invalidate an arbitration agreement on the basis of defects in the "container" contract would defeat the "national policy favoring arbitration."[257] Severing the delegation clause, however, could not be said to achieve similar policy goals, since it would do no more than determine who addresses gateway issues.[258]

In *Rent-A-Center*, neither the majority nor the dissent offers pristine logic in favor of their respective positions. Scalia's attempt – in a footnote – to dispose summarily of the Ninth Circuit's and dissent's argument that a defenses based on unconscionability are relvant to the question of parties' "clear and unmistakable" intent to arbitrate arbitrability issues, falls short. It is clear that concerns about judicial determinations of unconscionability are virtually always bound up in concerns about the practical realities of assent in mass contracting, and the relative lack of information and leverage possessed by adhering parties. On the other hand, neither the Ninth Circuit nor the dissenting Justices squarely address the impact of a provision specifically delegating arbitrability to arbitrators, nor do

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[252] *Id.* at 2784 (Stevens, J., dissenting).

[253] *Id.*

[254] *Id.* Justice Stevens quotes the RESTATEMENT (SECOND) OF CONTRACTS §208, comment d (1979):

> 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 asset to the unfair terms.

Id.

In a footnote, Stevens acknowledged that some of employee Jackson's arguments might be directed not to the enforceability of the arbitration agreement as a whole but rather to individual contract terms, and might be properly for the arbitrator. *Id*. at 2784 n.7.

[255] *Id.* at 2786.

[256] *Id.*

[257] *Id.* at 2787-88.

[258] *Id.*

they clearly explain why this should not call for a more nuanced judicial consideration of unconscionability-based arguments.

D. *Implications of Rent-A-Center*

Within the wide purview of the FAA, the practical significance of *Rent-A-Center* is great. The "projection" of clauses delegating to arbitrators authority to address the validity and enforceability of the arbitration agreement, rendered relatively ironclad by the Court majority's aggressive interpretation of past precedents, into the realm of mass contracts is especially troubling. The Court has availed itself of the vastly malleable and expandable concept of federal arbitration law to dramatically limit lower courts' use of their most effective tools for policing overreaching in arbitration agreements, notably unconscionability. The concept of "separability" and the related notion that arbitrators may be empowered to decide their own jurisdiction, are inconsistent with general concepts of contract interpretation, but nevertheless enjoy wide application in the world of commercial arbitration because they support the independence and autonomy of those systems from courts.[259] Where the same concepts are employed in the context of adhesion contracts, however, they arguably strike at the very heart of the FAA scheme itself. Testifying in favor of the FAA as a mechanism for overcoming historical judicial resistance to enforcing predispute arbitration agreements, Julius Henry Cohen explained the rationale for judicial control of gateway determinations under the FAA § 4:

> [T]he fundamental reason for [judicial resistance was that] people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them . . . And that is still true to a certain extent . . .
>
> [Therefore a]t the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, *is protected by the provision of the law which requires the court to examine into the merits of such a claim.*[260]

From now on, the presence of clear "delegation" language in arbitration agreements will mean that the judicial "gatekeeper" role is limited to consideration of defenses specifically aimed at the delegation provision itself. Thus, in the presence of a delegation provision (which will, needless to say, become ubiquitous in employment and consumer contracts), it will be necessary for a party seeking to avoid arbitration to demonstrate that the arbitrator selection mechanism should not be enforced due to duress, fraud, unconscionability, or

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[259] *See* James M. Gaitis, Rent-A-Center, West, Inc. v. Jackson *and the Ongoing Assault on Party Autonomy*, *available at* http://www.karlbayer.com/blog/?p=9732.

[260] David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act,* 96 VA. L. REV. IN BRIEF 1, 5-6 (2010), *available at* http://www.virginialawreview.org/inbrief/2010/04/02/horton.pdf.

another valid contract defense.[261] A party seeking to avoid arbitration will not be able to bring before a court any of a litany of concerns about other elements of the arbitration agreement – those relating to costs, discovery, nature and location of hearings, form of award, kinds of remedies, etc. – unless they can be shown to have an impact on the validity of the delegation provision.

This approach significantly circumscribes the judicial policing function and places even greater responsibilities on the shoulders of private arbitrators who may be called upon to address a variety of fairness issues. Judicial intervention in the arbitration process will be largely confined to post-award procedures under the limited grounds set forth in the FAA or analogous state arbitration statutes – grounds which, as a general principle, prohibit courts from inquiring into the merits of arbitral decision-making and accord arbitrator discretion significant deference.[262]

Furthermore, the Court has given us no indication of what kind of circumstances might justify denial of enforcement of an "omnibus" clause delegating gateway decisions to arbitrators. Would a majority of the justices support the non-enforcement of a term in an adhesion contract giving a corporation unilateral control over the selection of arbitrators, or the creation of a list of acceptable arbitrators? What if there are demonstrable conflicts of interest on the part of arbitrators or administrative bodies helping with selection? The Court has yet to offer a tangible assurance of its willingness to support unconscionability doctrine – or any approach that limits the substantive terms of an ostensible arbitration agreement – in a meaningful way. A justice committed to maximal enforcement of arbitration provisions may be unwilling to assume prejudice to an employee or a consumer in the absence of strong proof. Adhering parties may have no choice but to wait until after an award has been rendered and seek vacatur on one of the limited procedural grounds of FAA § 10.[263] As we will see, the Court's subsequent decision in *AT&T Mobility LLC* v. *Concepcion* – and Justice Thomas' concurrence – only enhances these concerns.[264]

This state of affairs may be acceptable – even highly desirable – in most forms of business-to-business arbitration. Moreover, it may be that many, most, or even the great majority of arbitrators will exercise their expanded authority in a way that is fair to employees or to consumers. The latter's advocates may nevertheless reasonably see *Rent-A-Center* as a dramatic narrowing of the potential range of protection against the threat of procedural abuse under arbitration agreements.[265]

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[261] *See* Raquel A. Rodriguez & B. Ted Howes, Rent-A-Center, Inc. v. Jackson – *Who Is The Proper 'Gatekeeper' of Arbitrability? Divided Supreme Court Reverses Ninth Circuit in* Rent-A-Center, West, Inc. v. Jackson, 25 INT'L ARB. REP. 1 (July 2010) (litigant challenging a delegation provision "must specifically allege that the delegation provision itself is fraudulent, the subject of undue influence or duress, or unconscionable").

[262] *See supra* note 145 and accompanying text.

[263] *See supra* note 186.

[264] *See infra* Part III.

[265] *See* Schmitz, *supra* note 181, at 143 (reviewing recent empirical research and noting that while "there is evidence that companies do not necessarily use market power to

Such advocates could draw no comfort from *Granite Rock Co.* v. *International Brotherhood of Teamsters*,[266] published right after *Rent-A-Center*, which restates and reinforces the formalistic approach of that decision. The Court, in a decision authored by Justice Thomas,[267] cites *First Options* and *Rent-A-Center* in the course of instructing lower courts regarding the "proper framework" for handling of arbitrability issues under federal statutes:[268]

> Under that framework, a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. Where there is no provision validly committing them to an arbitrator, these issues typically concern the scope of the arbitration clause and its enforceability. In addition, these issues always include whether the clause was agreed to, and may include whether that agreement was formed.[269]

Thomas' "framework" appears to consciously distinguish questions involving "the scope of an arbitration clause or its enforceability," which he indicates may be delegated to arbitrators by appropriate ("clear and unmistakable") agreement, from questions about whether the clause was agreed to, or when it was formed. In this way Thomas in *Granite Rock*, like Scalia in *Rent-A-Center*, appears to be conceptually separating questions of bare, formal assent, which are inescapably for the courts, from questions about the enforceability or validity of the arbitration agreement, which may be delegated to arbitrators (and again, are very likely to be so allocated in future standardized contracts of adhesion).

Thomas also reminds us that even the "presumption of arbitrability," which reflects the FAA's "commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts,'"[270] is subject to the principle of assent that is the foundation of arbitration. "Nor," Thomas' opinion continues, "have we held that courts may use policy considerations as a substitute for party agreement."[271]

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impose onerous arbitration clauses, and consumers often fare well in arbitration, . . . some companies do use arbitration to consumers' disadvantage").

[266] 130 S. Ct. 2847 (2010).

[267] In a 7-2 decision the Court overturned yet another Ninth Circuit decision involving arbitration – this in the setting of a labor/management dispute. The Court held that a dispute over a collective bargaining agreement's ratification date was a matter for the district court, not an arbitrator, to resolve.

[268] Although the decision involves a collective bargaining agreement, Thomas freely mixes labor and FAA precedents.

[269] *Granite Rock Co.*, 130 S. Ct. at 2856 (internal citations omitted).

[270] *Id.* at 2859.

[271] *Id.*

On one level, *Granite Rock* may be read as nothing more than affirmation of the "bedrock" principle of assent – and the court's traditional gateway role in policing assent – that is at the heart of the FAA. Seen in the context of current Court jurisprudence, however, the announced framework and cautionary dictum on policy appear to reflect the Court's self-described commitment to enforcing arbitration agreements according to their formal, literal terms, unfiltered by other policies except and to the extent divined by the Court in its reading of the FAA and the seemingly inexhaustible wellspring of "federal substantive law."[272]

Henceforth, we should expect broad delegation provisions such as that in *Rent-A-Center* to be ubiquitous in consumer and employment contracts. When the FAA applies, the ability of courts to police arbitration agreements in adhesion contracts will be dramatically limited. It will be for arbitrators, not courts, to address the validity and enforceability of any and all terms of an arbitration agreement other than, generally speaking, terms that affect their own appointment, independence or impartiality. Arbitrator decisions on process issues will be subject to limited review under the narrow standards of FAA § 10.[273] The stream of jurisprudence – centered on the doctrine of unconscionability – that established meaningful due process standards for arbitration under adhesion contracts – will be greatly attenuated if not effectively stemmed. The kind of judicial intervention that produced the very modifications to AT&T Mobility's arbitration agreement, and at issue in *Concepcion*,[274] will be significantly reduced. The procedural due process standards envisioned by "community" bodies, including the Dunlop Commission and the respective groups that produced the Due Process Protocols,[275] will be less likely to be observed or achieved in practice. Instead of the regulated, relatively transparent environment established by *Shearson/ American Express* v. *McMahon*,[276] which set in motion a process of continuing, supervised procedural evolution for the benefit of securities investors, *Rent-A-Center* presents us with the model of a hermetically sealed black box.

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[272] Criticizing Scalia's rationale in *Rent-A-Center* (and the general trend of recent decisions by the Court), one thoughtful observer of arbitration concluded:

> The Court's resolution . . . illustrates the conservative majority's willingness to purport to base its decisions on the precepts of party autonomy when it suits the majority's ideological objective and to disregard those same precepts when the majority's ideological objective so requires.

James M. Gaitis, *supra* note 259.

[273] *See supra* note 186.

[274] *See infra* text accompanying notes 282-287.

[275] *See* COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS (1994) (commonly referred to as the Dunlop Report); DUE PROCESS PROTOCOLS, *supra* note 199.

[276] 482 U.S. 220 (1987).

III. *AT&T MOBILITY LLC v. CONCEPCION*:[277] UP PREEMPTION, DOWN UNCONSCIONABILITY

The final decision in the third arbitration trilogy is the most controversial of the triad, and potentially the most far-reaching. The Supreme Court confronted yet another question regarding the relationship between the substantive law of arbitrability under the FAA and state unconscionability doctrine – namely, the enforceability of contractual provisions purporting to waive class actions in favor of one-on-one arbitration between consumers and providers of wireless services. The "class waiver" issue is the single most contentious issue surrounding arbitration provisions in adhesion contracts and a primary stimulus for attempts at Congressional reform.[278] Such waivers have become commonplace in, or alongside, arbitration agreements in standardized consumer and employment contracts, and there has been a significant split of authority among courts that have considered the enforceability of these provisions,[279] with most courts denying enforcement to such provisions or recognizing significant limits on such provisions.[280] For some time, and especially since the Court's decision in *Stolt-Nielsen* declined to embrace "class arbitration" in the absence of clear agreement, the bench and bar have been awaiting the Court's resolution of the class-waiver clause. Now, the metaphorical "other shoe" has dropped.

In granting certiorari in *AT&T Mobility LLC* v. *Concepcion*, the Court once again picked a decidedly "one-off" scenario as the setting for its decision – most probably with an artful eye to the desired (and eventual) result. The subject arbitration agreement, which had been modified with several seemingly consumer-friendly terms in response to earlier judicial decisions, offered an unusually strong potential counterweight to concerns about overreaching in adhesion contracts. Yet again, the Court chose a Ninth Circuit decision.[281]

A. *History of the Case*

The case arose as a putative class action by customers of AT&T Mobility ("ATTM")(previously Cingular), a wireless telephone service provider, alleging that the provider's offer of a free phone to anyone was fraudulent since the price charged by the company included sales tax on the full retail value of each

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[277] 131 S. Ct. 1740 (2011).

[278] *See, e.g.*, Casey, *supra* note 64; Li, *supra* note 64; McGill, *supra* note 64; Baker, *supra* note 64; Alderman, *supra* note 64, at 154 (discussing the recent "attack" on consumer arbitration by consumer advocates and the "widely criticized" "additional problem . . . that an arbitration clause may preclude the use of the class actions device"); Bromfield, *supra* note 64.

[279] *See* Link & Bales, *supra* note 64, at 7-19.

[280] *Id*.

[281] Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009).

phone.[282] The contract contained an arbitration agreement that provided that "no Arbitrator has the authority to . . . order consolidation or class arbitration," though either party had the choice of bringing an action in small claims court.[283] In the wake of various court rulings denying enforceability to class-action waiver provisions and certain other terms under California Law, ATTM substantially revised its arbitration agreement to include, among other things, the following provisions:

1. If the arbitrator issues an award in favor of a California customer that is greater than "[ATTM]'s last written settlement offer made before an arbitrator was selected" but less than $7,500, ATTM will pay the customer $7,500 rather than the smaller arbitral award. (The "Premium")
2. If the arbitrator awards a customer more than ATTM's last written settlement offer, then "ATTM will . . . pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that [the customer's] attorney reasonably accrues for investigating, preparing, and pursuing [his] claim in arbitration."[284]

Although the Ninth Circuit held the previous version of the class-action waiver unconscionable under California law,[285] ATTM filed a motion to compel the *Concepcion* plaintiffs to arbitrate as individuals under the modified language above, which ATTM argued was "substantively distinct" from the prior agreement.[286] The plaintiffs opposed the motion on the grounds that the arbitration agreement was unconscionable under California law because it forbade class-wide procedures.[287]

The district court engaged in a thoroughgoing analysis of the ATTM waiver language and related terms in the modified agreement to arbitrate under California unconscionability law.[288] Because California law required proof of some degree of procedural unconscionability ("oppression or unfair surprise due to unequal bargaining power") as well as substantive unconscionability ("overly harsh and

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[282] Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 WL 5216255 (S.D. Cal. August 11, 2008) (unreported opinion).

[283] *Id*. at *2.

[284] *Id.* The modified agreement also provided that ATTM would not seek attorneys' fees and expenses upon prevailing in arbitration, and provided that "[p]unitive damages may be awarded to the same extent such damages would be available in court." *Id*. at *3.

[285] Shroyer v. New Cingular Wireless Servs., 498 F.3d 976 (9th Cir. 2007).

[286] *Laster*, 2008 WL 5216255, at *5.

[287] *Id.* at *6.

[288] *Id.* at *7-14. The court rejected the plaintiffs' (customers') contention that the modified terms, which were more favorable to customers than the prior language, were ineffective, finding support for enforcement of the modified agreement under federal and California law. *Id.* at *6-7.

one-sided results"),[289] the court was bound to address both elements. It employed the comprehensive three-part test established by the California Supreme Court in *Discover Bank* v. *Superior Court*[290] for the purpose of determining whether a class action waiver in a consumer contract was unconscionable:

> (1) whether the agreement is a consumer contract of adhesion drafted by a party of superior bargaining power; (2) whether the agreement occurs in a setting in which disputes between the contracting parties predictably involve small amounts of damages and (3) whether 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.[291]

The *Discover Bank* test was founded upon the notion that where damages to individual consumers are relatively small and few customers will make the effort to assert their rights individually, class-action waivers in consumer contracts may operate to virtually immunize companies who "'wrongfully exact[] a dollar from each of millions of customers."[292]

The district court concluded that the ATTM contract was a contract of adhesion, though "on the low end of the spectrum of procedural unconscionability" because the circumstances surrounding the bargain were not egregious. The original arbitration agreement was presented to customers at the time of purchase, rather than in a subsequent mailer; the subsequent amendments to the agreement made the terms more favorable.[293]

Under ATTM's original arbitration agreement, the circumstances also involved "predictably small amounts of damages:" in the Concepcions' case, $30 – the wrongfully charged sales tax on the retail price of two cellular phones. Even with ATTM's commitment to pay arbitration costs, "the expenditure of time, effort and emotional resources to pursue arbitration outweighed the miniscule benefits of arbitration."[294] ATTM's modified terms, however, offered arbitrating customers the incentive of an award of $7,500 (a "Premium") if the arbitrator

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[289] The court explained that "California courts apply[] a sliding scale, so that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.* at *7.

[290] 113 P.3d 1100 (Cal. 2005).

[291] *Laster*, 2008 WL 5216255, at *8 (citing *Discover Bank*, 113 P.3d at 1110).

[292] *Id.* The California Supreme Court found that such "exculpatory clauses" violated California Code § 1668, which provides: "All contracts which have as their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." CAL. CIV. CODE § 1668 (West 2010); *Discover Bank*, 113 P.3d at 1110.

[293] *Laster*, 2008 WL 5216255, at *9.

[294] *Id.* at *10.

awarded more than ATTM's last settlement offer before arbitrator appointment.[295] The district court reasoned that if the prospect of having to pay the $7,500 Premium induces ATTM to make the customer whole through a simple and informal claims process, it has "served a noble purpose."[296] Where the informal process fails, moreover, the Premium acts as inducement to customers to pursue individual arbitration.[297] In light of the "unrebutted class action statistics" that show the few consumers who actually submit claims receive only "pennies on the dollar," the district court concluded that reasonable consumers might well prefer to pursue ATTM's alternative mechanism.[298]

There was, however, a final consideration – the allegation that ATTM deliberately cheated many consumers out of small sums of money – and the related concern about deterring future wrongdoing.[299] ATTM argued that the incentive provided by the $7,500 premium (as well as the provision for payment of double attorney fees) was "'likely to facilitate the development of a market for fair settlement.'"[300] While acknowledging that such a market might have a deterrent effect on alleged wrongdoing, the district court observed that ATTM had submitted no proof that its revamped claims system had indeed encouraged the development of such a "market."[301] Though the revised arbitration provision also contemplated potential awards of punitive damages, the court concluded that under limits established by the U.S. Supreme Court on ratios between punitive and compensatory damages such awards in individual arbitrations might not provide an effective deterrent "substitute" for class actions.[302] In light of California's stated policy supporting class actions, the district court concluded that plaintiffs had met their burden of establishing that the modified arbitration provision was unconscionable, and ATTM's motion to compel arbitration was denied.[303]

On appeal, a Ninth Circuit panel unanimously affirmed the district court's decision.[304] Reviewing the denial of the motion to compel *de novo*, the appellate court found that the plaintiff had established all three "prongs" of the *Discover Bank* test.[305] Moreover, ATTM's "premium payment" provision did not overcome the problem of "predictably small claims" since ATTM could avoid the whole issue of premium payment by simply paying the damages sought.[306] Therefore

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[295] *Id.*
[296] *Id.* at *11.
[297] *Id.*
[298] *Id.* at *11-12.
[299] *Id.* at *12-13.
[300] *Id*. at *13.
[301] *Id.*
[302] *Id.*
[303] *Id.* The district court also declined, on the basis of its earlier decision, to conclude that the FAA preempted a determination that the provision was unconscionable under California law. *Id.*
[304] *See* Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009).
[305] *Id.* at 854-55.
[306] *Id.* at 855-56.

neither the $7,500 premium nor other provisions of the modified arbitration agreement (punitive damages, customer attorney fees) offered a true incentive to arbitrate, nor did they offset the exculpatory effect of the class-action waiver.[307]

The appellate court next determined that the invalidation of the waiver provision as unconscionable under California law was not preempted by the FAA, which bars courts from applying state laws aimed specifically at barring or limiting the enforcement of arbitration agreements, instead of putting arbitration agreements on the same footing as other contracts[308] (or, in other words, denying them enforcement solely "upon such grounds as exist at law or in equity for the revocation of any contract").[309] Citing its earlier reasoning in *Shroyer* v. *New Cingular Wireless Services, Inc.*,[310] the Ninth Circuit panel found that unconscionability is a generally applicable contract defense, and that the application of the doctrine in the context of class-action waiver provisions in arbitration agreements was simply an application of the general principle that "if a contract clause is, in practice, exculpatory, as long as there is any degree of procedural unconscionability, the element of substantial unconscionability is generally adequate, as a matter of Law."[311] Moreover, application of California's unconscionability regime did not stand as an obstacle to the FAA's purposes and objectives of placing arbitration agreements on the same footing as any other contract and promoting the efficient and expeditious resolution of claims.[312]

B. *The Court's Decision: A Body Blow to Class Actions and to Unconscionability*

The Supreme Court's holding in *Concepcion* should have surprised no one. The same five-member majority that reversed the Ninth Circuit's decision in *Rent-A-Center* – Chief Justice Roberts and Justices Kennedy, Scalia, Thomas and Alito, did so again. Four justices joined an opinion by Justice Scalia; Justice Thomas wrote a concurring opinion. The dissent by Justice Breyer was joined by Justices Ginsburg, Sotomayor and Kagan.

What many may have failed to anticipate is the sweep of the majority's disposition. Scalia's rationale aims straight at the heart of the doctrine of unconscionability and state policies against exculpation as they affect the substantive terms of arbitration agreements – or, more precisely, the terms included in adhesive consumer contracts by corporations. As in *Rent-A-Center*,[313] Scalia portrays the central policy of the FAA as enforcing the arbitration agreements as written. It preempts any state law or policy, whether announced by

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[307] *Id*..
[308] *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).
[309] *Laster*, 584 F.3d at 857-59.
[310] 498 F.3d 976, 987-90 (9th Cir. 2007).
[311] *Laster*, 584 F.3d at 857.
[312] *Id*. at 857-59.
[313] 130 S. Ct. 2772 (2010).

legislatures or courts, that aim specifically to limit the enforceability of arbitration agreements, or "that derive their meaning from the fact that an agreement to arbitrate is at issue."[314] Such "discriminatory" laws and policies, he states, are not the kinds of grounds "at law or in equity for the revocation of any contract" that are permissible defenses to arbitration agreements under FAA § 2.[315] California's *Discover Bank* rule on class-action waivers in arbitration, Scalia concludes, operates to bar or limit arbitration provisions in a discrete manner, as opposed to putting arbitration agreements "on the exact same footing" as other species of contract.[316] It must therefore be preempted by the FAA.

The Concepcions argued that the *Discover Bank* rule, grounded in California unconscionability doctrine as well as policies against contractual exculpation, did not discriminate against arbitration since California's anti-exculpatory prohibition applied to collective-action waivers relating to litigation as well as arbitration.[317] Hearkening back to Justice Marshall's reflection on behalf of the Court in a footnote in *Perry* v. *Thomas*,[318] however, Scalia observes that "the FAA's preemptive effect might extend even to grounds traditionally thought to exist 'at law or in equity for the revocation of any contract'" such as duress or unconscionability if the application of the defense hinged "on the uniqueness of an agreement to arbitrate."[319]

Scalia proceeds to expand with vigor upon Marshall's vague dictum. He considers the example of a case in which a consumer arbitration agreement is found unconscionable, or improperly exculpatory of a company, on the ground that it fails to provide for judicially monitored discovery.[320] While there might be rational policy arguments to support both judicial conclusions, and while both the general principle of unconscionability and the general policy against exculpation are potentially applicable to any kind of contract, Scalia reasons that such judicial action "would have a disproportionate impact on arbitration agreements" even though it could conceivably apply to agreements respecting litigation as well.[321] Such would also be the case with rules labeling as unconscionable a failure to comply with the Federal Rules of Evidence or to disallow a jury – procedures he describes as clearly incompatible with arbitration.[322] To Scalia, California's *Discover Bank* rule limiting waivers of collective action, like the examples offered

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[314] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (citing Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Perry v. Thomas, 482 U.S 483, 492-93 n.9 (1987)).

[315] *Concepcion*, 131 S. Ct. at 1746-48.

[316] *See id.* at 1745, 1747; Ware, *supra* note 144, at 111 n.33.

[317] *Concepcion*, 131 S. Ct. at 1746 (citing America Online, Inc. v. Superior Ct, 108 Cal. Rptr. 2d 699, 711-13 (Ct. App. 2001) (California prohibits waivers of class litigation as well as class arbitration)).

[318] *See supra* text accompanying notes 190-96.

[319] *Concepion*, 131 S. Ct. at 1747 (quoting *Perry* 482 U.S. 492-93 n.9).

[320] *Concepcion*, 131 S. Ct. at 1747.

[321] *Id*.

[322] *Id.*

by the Concepcions, "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[323]

According to Scalia and the majority, the "fundamental attributes" of arbitration are "efficient, streamlined procedures tailored to the type of dispute."[324] Encouragement of "efficient and speedy dispute resolution," they assert, is as much a goal of the FAA as enforcement of private agreements to arbitrate.[325] The *Discover Bank* rule, by permitting consumers to demand class-wide (or "collective-action") arbitration in certain circumstances, undermines this goal.[326] Scalia observes that in *Stolt-Nielsen* the Court's determination that silence could not be interpreted as assent to class arbitration was underpinned by the notion that there are fundamental differences between "bilateral arbitration" and class-wide arbitration."[327] First, the shift would eliminate the main advantage of arbitration – speedy process – in favor of a slower, costlier and more procedurally complex process – a point underscored by reference to statistics on standard and class-action arbitrations.[328] Second, class-wide arbitration involves procedural formalities akin to court-supervised class actions – something "unlikely" to have been in the contemplation of Congress in passing the FAA.[329] Finally, class-wide arbitration involves enhanced risk to corporate defendants, who may be sanguine about the prospects of submitting large numbers of individual claims to the relatively informal private adjudication, but who are leery about having high stakes cases decided through a process without effective appellate review.[330] All in all, class-wide arbitration "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law."[331]

Justice Thomas' concurrence explicitly posits what may be read between the lines of Scalia's opinion: that the only appropriate legal defenses to arbitration agreements under FAA § 2 are those which go to the making of an agreement, and not its substantive terms.[332] He would not include policy-based defenses, such as

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[323] *Id.* Scalia might have drawn an analogy between California's judicially stated policy of denying enforcement to provisions purporting to waive class actions in favor of one-on-one arbitration and the scenario that gave rise to the Court's seminal decision in *Southland. Corp. v. Keating.* In that case, the provision in the California Franchise Investment Law that forbade waiver of any of the protections or remedial provisions of the statute was interpreted by the California Court to prohibit arbitration of statutory claims. *Keating*, 465 U.S. at 5. The Supreme Court ruled that such an application of the anti-waiver language was preempted by the FAA. *Id.* at 10. *See supra* text accompanying notes 22-25.

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

[325] *Id.* (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

[326] *Id*. at 1750.

[327] *Id*. at 1750-52.

[328] *Id*. at 1751.

[329] *Id*.

[330] *Id*. at 1752.

[331] *Id*. at 1753.

[332] *Id*. (Thomas, J., concurring).

unconscionability, that hinge on the fairness of the agreement as made and not on the circumstances surrounding the bargain.[333] Thomas would appear to wholly reject the notion that substantive terms are relevant to determinations of enforceability, save in those situations in which the terms are facially so unfair "as to raise the presumption of fraud in their inception."[334]

Breyer's opinion on behalf of the four dissenting justices finds no grounds for FAA preemption of California law describing grounds for refusing to enforce "class action waivers."[335] According to Breyer, the California Court's interpretation of general statutory requirements as making certain class-action waivers in consumer contracts exculpatory and unconscionable under California law represents "application of a more general [unconscionability] principle" to specific circumstances.[336] Because the rule "applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements,"[337] it puts arbitration agreements on the same footing with some other contracts and "cannot fairly be characterized as a targeted attack on arbitration."[338]

Breyer disputes the majority's contentions that *Discover Bank* was an "obstacle" to a fundamental objective of the FAA.[339] Unlike the examples posed by Scalia – involving judicially imposed court-supervised discovery, adherence to the Federal Rules of Evidence, or a jury – Breyer insists that class arbitration is "consistent" with the use of arbitration.[340] He argues that nothing in present practice or the history of the FAA supports such a conclusion; indeed, the class-action device may be a more efficient option than thousands of separate proceedings for individual consumers.[341] More pertinently, class arbitrations may be more efficient than class actions in court.[342] Moreover, there is no empirical basis for the argument that arbitration is unsuitable for high stakes cases, or that parties are unwilling to commit them to the process.[343] Yet efficiency is not necessarily the controlling consideration, insist Breyer and the dissent. Generally

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[333] *Id*.

[334] *Id*. at 1755 (quoting Hume v. United States, 132 U.S. 406, 411, 414 (1889)).

[335] *Id*. at 1756 (Breyer, J., dissenting).

[336] *Id.* at 1757.

[337] *Id*. (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1112 (Cal. 2005)). Indeed, in deciding *Discover Bank*, the source of the challenged California common-law rule regarding class-action waivers in arbitration agreements, the California Court relied on another decision, *America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699 (Cal Ct. App. 2001) (striking down a class-action waiver in a contract *without* an arbitration provision). *Discover Bank*, 113 P.3d at 1006-07. *See supra* text accompanying note 308.

[338] *Concepcion*, 131 S. Ct. at 1758-59 (Breyer, J., dissenting).

[339] *Id*. at 1758.

[340] *Id*. Breyer supports his statement with examples of the use of class arbitration and a reference to the amicus brief of the American Arbitration Association in *Stolt-Nielsen*. *Id.*

[341] *Id.* at 1759.

[342] *Id.* at 1760.

[343] *Id.*

applicable contract defenses will often have a tendency to slow down the dispute resolution process, but states may nevertheless impose them as they see fit. Breyer asks, "If California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?"[344]

Class arbitrations also offer "countervailing advantages," insists Breyer.[345] Consolidated proceedings may be necessary to effectively pursue small claims on behalf of consumers, and "nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims"[346] due to the transaction costs associated with individual actions. In the final analysis, asks Breyer, why is the weighing of the pros and cons of class proceedings not left to the judgment of the State of California?[347]

Moreover, the majority's insistence that the FAA prohibits limitations on state rules that enhance the complexity of arbitration are without precedent.[348] Indeed, remarks Breyer, prior Court decisions have authorized complex or extended procedures.[349] Never before, however, has the Court struck down a state rule that has treated arbitration agreements in a manner consistent with other kinds of proceedings.[350] He implies that by "'immuniz[ing] an arbitration agreement from judicial challenge on grounds applicable to all other contracts," the majority "elevate[s] it over other forms of contract."[351]

Breyer and the dissent conclude with a pointed observation about their conservative colleagues' departure from bedrock principles of federalism. In establishing a basis for judicial recognition of contractual defenses under FAA § 2, "Congress retained for the States an important role incident to agreements to arbitrate."[352] In so doing, "Congress reiterated a basic federal idea that has long informed the nature of this Nation's laws."[353] Respect for the States as "independent sovereigns" is a part of the federal ideal – recognition of which "should lead us to uphold California's law, not to strike it down."[354]

The Supreme Court wasted no time in exploiting *Concepcion*. Since its publication the Court reversed a number of lower court decisions denying

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[344] *Id.*
[345] *Id.*
[346] *Id.* at 1761.
[347] *Id.*
[348] *Id.*
[349] *Id.*
[350] *Id.*
[351] *Id.* (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967)).
[352] *Id.* at 1762.
[353] *Id.*
[354] *Id.*

enforcement to class-action waivers and remanding the decisions for reconsideration in light of *Concepcion*.[355]

C. *Implications of Concepcion*

1. *Inhibition of Judicial Policing of Substantive Provisions in Arbitration Agreements; Elevation of Efficiency and Economy in Disregard of the Principle of Fundamental Fairness*

In the wake of *Concepcion*, one wonders what if anything is left of the doctrine of unconscionability in the realm of arbitration agreements. Coupled with *Rent-A-Center*, *Concepcion* appears to have dramatically diminished the potential scope of this primary tool for judicial policing of overreaching.

The lynchpin of Scalia's rationale is that under the FAA neither unconscionability nor any state law regulating exculpatory contract provisions can operate in a way that relies "on the uniqueness of an agreement to arbitrate."[356] Yet the suggestion that the *Discover Bank* rule is discriminatory in its operation in the context of arbitration provisions is belied by the fact that in deciding *Discover Bank*, the California Court relied heavily on *America Online, Inc.* v. *Superior Court*,[357] a decision denying enforcement to a contractual waiver of class action in

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[355] *See* Affiliated Computer Servs. v. Fensterstock, 131 S. Ct. 2989 (2011); Sonic Auto. v. Watts, 131 S. Ct. 2872 (2011); Litman et al. v. Cellco P'ship, 131 S. Ct. 2873 (2011); Missouri Title Loans Inc. v. Brewer, 131 S. Ct. 2875 (2011). *See infra* text accompanying note 395 (discussing action of Second Circuit on remand in *Fenstersock v. Educ. Fin. Partners*, 426 Fed. App'x 14 (2d Cir. 2011).

The Supreme Court granted certiorari in another case concerning arbitration under standardized contracts of adhesion, *CompuCredit Corp. v. Greenwood*, 131 S. Ct. 2874 (2011). In the decision under review, the Ninth Circuit held that Congress intended to proscribe mandatory arbitration of claims by consumers against "credit repair organizations" (organizations providing services aimed at improving any consumer's credit record, credit history, or credit rating under the Credit Repair Organizations Act (CROA)). Greenwood v. CompuCredit Corp, 615 F.3d 1204, 1205 (9th Cir. 2010). The CROA prohibits unfair or deceptive practices by credit repair organizations and provides consumers with certain special contract rights or remedies. *See id.* at 1207-08. It also requires credit repair organizations to make certain pre-agreement disclosures to consumers, including the "right to sue" for violations of the CROA. *Id.* at 1208. Moreover, the CROA includes a provision providing that "'[a]ny waiver by any consumer of any protection provided by or any right of the consumer under'" the CROA "'shall be treated as void'" and "'may not be enforced by any Federal or State court or any other person.'" *Id.* at 1208. The Ninth Circuit in *CompuCredit* ruled the CROA's anti-waiver and other provisions to preclude arbitrability of CROA claims, creating a conflict with decisions of the Third and Eleventh Circuit Courts of Appeals. *Id.* at 1211. Given the Court's strong propensity to support arbitration agreements, it is probable that at least five justices will vote to strike down the Ninth Circuit decision.

[356] *See Concepcion*, 131 S. Ct. at 1747.

[357] 108 Cal. Rptr. 2d 699 (Ct. App. 2001).

a consumer contract *without* an arbitration clause. The case involved a subscription agreement that included Virginia forum-selection and choice-of-law clauses. Because Virginia does not permit consumer class actions, the court reasoned that the provisions were the "functional equivalent of a contractual waiver" of the right to bring a class action.[358] The court concluded that the effective denial of class-wide remedies would "substantially diminish the rights of California residents"[359] and denied enforcement to the "waiver," thereby paving the way for a class-action suit in court. Analogous decisions involving non-arbitration contexts have been reached by a number of courts,[360] and *Discover Bank* has itself been relied upon as a precedent in decisions striking down class-action waivers in contracts without arbitration clauses.[361] As the Washington Supreme Court explained, in circumstances such as these, "[t]he arbitration clause is irrelevant to the unconscionability"[362]; exculpatory clauses "do not change their character merely because they are found within a clause labeled 'Arbitration.'"[363]

Something more, then, is necessary for Scalia to establish a facially rational argument that *Discover Bank* operates more harshly in the context of arbitration agreements than in contracts without such agreements. Scalia's inspiration is to augment his initial argument by reading the FAA to enforce arbitration agreements for the purpose of promoting "efficient, streamlined procedures tailored to the type of dispute."[364] Scalia denies effect to California law establishing grounds for finding class-action waivers unconscionable primarily on the basis that the law undermines efficiency and expedition in arbitration agreements.[365] Such judicial activity, he insists, would be just as inappropriate under the FAA as state laws striking down arbitration agreements failing to

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[358] *Id.* at 702.

[359] *Id.* at 708. The court discussed several benefits of class-wide proceedings, including the "protection of unwary consumers from being duped by unscrupulous sellers" and the impracticability of individual actions where "the amount of individual recovery would be insufficient to justify bringing a separate action," thereby permitting an "unscrupulous seller [to] retain[] the benefits of its wrongful conduct." *Id.* at 712. The court emphasized that "salutary" effects of class actions such as deterrence and "curtailing illegitimate competition" would be lost if the class-action waiver was enforced. *Id.*

[360] *See, e.g.*, America Online, Inc. v. Pasieka, 870 So.2d 170, 171-72 (Fla. Ct. App. 2004); Williams v. America Online, No. 00-0962, 2001 WL 135825, at *3 (Mass. Super. Ct. Feb. 8, 2001); Dix v. ICT Group, Inc., 161 P.3d 1016 (Wash. 2007) (decided on the same day that the court issued a decision striking down a class-action ban in an arbitration clause, *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007)).

[361] *See, e.g.*, In re Yahoo! Litig., 251 F.R.D. 459 (C.D. Cal. 2008); Order Denying Motion to Dismiss First Amended Complaint at 8, Elhilu v. Quiznos Franchising Co., No. 06-CV-07855, (C.D. Cal. Apr. 3, 2008).

[362] *Scott*, 161 P.3d at 1008.

[363] *Id.*

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

[365] *Id.* at 1747.

provide for judicially supervised discovery and application of rules of evidence (both of which are far-fetched and, surely, unprecedented scenarios).[366]

Conspicuously missing from Scalia's opinion is any reference to what must surely be another foundational principle of the FAA – the requirement of *fundamental fairness* in contract-based arbitration proceedings. This is a principle that permeates the broad body of jurisprudence under the FAA, playing a central role in many judicial decisions fleshing out the bare bones of that statute.[367] Such concerns are implicit in *Commonwealth Coatings Corp.* v. *Continental Cas. Co.*,[368] in which the Court decreed that an arbitrator's failure to disclose a significant business relationship mandated vacatur of award on grounds of evident partiality.[369] They are explicit in *Shearson/American Express, Inc.* v. *McMahon*,[370] in which the Court's decision to enforce arbitration agreements in securities brokerage agreements was grounded in part on active supervision of the process by the Securities & Exchange Commission.[371]

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[366] *Id.*

[367] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that discovery procedures in NYSE arbitration were sufficient to give a fair opportunity to be heard in an employment discrimination claim); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (noting that while arbitration was particularly effective in vindicating parties' contractual claims because of the practical experience of the arbitrator, that same experience made the arbitrator inadequate to fairly adjudicate a Title VII claim); McDonald v. City of West Branch, Mich., 466 U.S. 284 (1984) (holding that an arbitration decision may be admitted into evidence in a §1983 action, subject to consideration of the following factors: (1) "the existence of provisions in the collective-bargaining agreement that conform substantially with [the statute or constitution]," (2) "the degree of procedural fairness in the arbitral forum," (3) "adequacy of the record with respect to the issue [in the judicial proceeding]," and (4) "the special competence of particular arbitrators"); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) (holding that the NASD arbitrator, because of his experience with the NASD rules, was in a better position to "secure a fair and expeditious resolution" of the controversy regarding the interpretation of the NASD's time limitation rule and therefore the arbitrator not the Court should make the determination).

[368] 393 U.S. 145 (1968).

[369] In finding that the award should be vacated despite no actual finding of fraud or bias on the part of the arbitrator, the Court found the undisclosed financial connections to the prevailing party to be a "manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case." *Commonwealth Coatings*, 393 U.S. at 147-48.

[370] 482 U.S. 220 (1987).

[371] The Court noted that it had previously found in *Wilko v. Swan* that § 12(2) claims "require[d] the exercise of judicial direction to fairly assure their effectiveness." *Shearson/Am. Express, Inc*, 482 U.S. at 228 (internal quotations omitted). It went on to hold that the *Wilko* decision was made at a time before the SEC had significant oversight of the arbitration process. *Id*. at 233. Citing the SEC's "expansive power to ensure the adequacy of the arbitration procedures employed by the SROs" under the Exchange Act,

Although, unfortunately, the FAA does not expressly state its objects or underlying principles, the arbitration statutes of some other leading common-law jurisdictions do so – and make clear that fairness is a prime object of arbitration law. The U.K. Arbitration Act 1996 states among its general principles that "the object of arbitration is to *obtain the fair resolution of disputes by an impartial tribunal* without unnecessary delay or expense."[372] Australia's new Model Law similarly provides, "The paramount object of this Act is to *facilitate the fair and final resolution* of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense."[373]

In arbitration, the principle of fundamental fairness is inextricably intertwined with other aims of the process – a reality widely reflected in practice. Experience has shown that parties bargaining at arm's length and with a modicum of parity use choice-making in arbitration many different ways.[374] As their choices make clear, parties' expectations of fairness and efficiency is virtually always tempered by concerns about due process. In recent years, moreover, as arbitration has assumed more and more of the caseload of courts, the predominant forms of arbitration under popular administrative procedures have taken on more of the characteristics of litigation, including dramatically expanded pre-hearing discovery.[375] In some cases parties go so far as to provide for discovery in accordance with the Federal Rules of Civil Procedure![376] In a similar vein, some commercial arbitration agreements call for observance of judicial rules of evidence.[377] The trend toward mimicking litigation procedures is so pronounced that it has inspired several national and international initiatives to give users of

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the *Shearson* Court found it unnecessary to extend the scope of *Wilko* beyond its application to the Securities Act. *Id*.

[372] Arbitration Act 1996, § 1(a) (U.K.) (emphasis added).

[373] Australian Commercial Arbitration Act 2010 (NSW) s 1 (emphasis added).

[374] Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation" (Symposium Keynote Presentation)*, 7 DEPAUL BUS. & COM. L.J. 401 (2009) [hereinafter Stipanowich, *Arbitration and Choice*].

[375] A recent RAND survey of U.S. corporate counsel regarding domestic B2B arbitration attitudes and practices found that "many believe that arbitration is becoming increasingly akin to litigation, requiring substantial time in protracted pre-hearing efforts for discovery and money to pay for outside counsel and arbitrator(s)." Douglas Shontz et al., *Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel*, *in* RAND INSTITUTE FOR CIVIL JUSTICE REPORT 7 (2011). *See, e.g.*, COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION (Thomas J. Stipanowich et al., eds., 2010). *See also* Thomas J. Stipanowich, *Arbitration: The "New Litigation*," 2010 U. ILL. L. REV. 1 (2010) [hereinafter Stipanowich, *New Litigation*] (analyzing current trends affecting perception and practice in commercial arbitration); Stipanowich, *Arbitration and Choice*, *supra* note 374.

[376] The author can attest to this from repeated personal experiences as an arbitrator.

[377] Again, the author can attest to this from recent personal experience.

arbitration tools to recapture greater measures of efficiency and economy.[378] None of these initiatives, however, embrace the notion that users would seek to achieve such aims at the cost of fundamental fairness to the parties.[379]

In contractual settings where parties are not bargaining at arm's length, concerns about fairness necessitate something more than unaided negotiation, and some degree of supervision by courts or regulatory agencies is essential. Tellingly, the evolution of the practice of securities arbitration under the supervision of the Securities & Exchange Commission also reflects an inherent tension between, and an effort to balance, efficiency, economy and procedural fairness. The ongoing debates on process issues under the auspices of the SEC-supervised Securities Industry Conference on Arbitration and advisory bodies associated with FINRA have produced an ongoing series of procedural reforms that have promoted greater fairness and choice for investors in the course of arbitration.[380] These include more discovery, expanded remedies, and greater choice among arbitrators.[381]

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[378] *See, e.g.*, COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, *supra* note 375. *See also* Stipanowich, *New Litigation*, *supra* note 375.

[379] *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, NATIONAL ACADEMY OF ARBITRATORS (May 19, 1995), *available at* http://naarb.org/protocol.asp.

[380] The SEC and SICA commissioned a number of empirical studies. Their efforts include attempts to identify trends in the actual outcomes of securities arbitration as well as reports on participants' perceptions of fairness. The reports on the perception of fairness found that participants were primarily concerned with pro-industry biases among arbitrators and not specific undisclosed conflicts of interest. *See* Michael Perino, *Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations* (Nov. 4, 2002), *available at* http://www.sec.gov/pdf/arbconflict.pdf; Jill I. Gross, *Perceptions of Fairness in Securities Arbitration: An Empirical Study* (Feb. 6, 2008), *available at* http://digitalcommons.pace.edu/lawfaculty/478. Empirical studies of actual arbitration awards have shown that consumer claimant win rates have declined since 1999, in particular against larger brokerage firms, and that when an award was given it represented a smaller percentage than the amount claimed. Richard A. Voytas Jr., *Empirical Evidence of Worsening Conditions for the Investor in Securities Arbitration*, SEC. ARB. COMMENTATOR, June 2002, at 7; Edward S. O'Neal, *Mandatory Arbitration of Securities Disputes: A Statistical Analysis of How Claimants Fare*, *available at* http://www.slcg.com (click "research" then click "Mandatory Arbitration of Securities Disputes"). In response to these studies and the constant criticism from investor advocates that the system is fundamentally unfair, the Securities Industry and Financial Markets Association ("SIFMA") produced a white paper in 2007 on the securities arbitration process. SIFMA, WHITE PAPER ON ARBITRATION IN THE SECURITIES INDUSTRY (2007), *available at* www.sifma.org/WorkArea/DownloadAsset.aspx?id=21334. The primary purpose of the white paper was to highlight the "timely, cost-effective, and fair results" delivered by securities arbitration over the past thirty years. *Id.* at cover. In discussing the perceived fairness of the process SIFMA

Similarly, broad-based efforts bringing together institutional providers, public interest advocates and business interests have repeatedly recognized the importance of establishing minimum due process standards protecting parties to adhesion contracts.[382] Responsible providers of arbitration services have taken steps to ensure they and those who use their services meet those standards in practice.[383]

Contrast these realities with the *Concepcion* majority's single-minded insistence that courts may do nothing that inhibits efficiency and economy in "adhesion arbitration," and that such "adhesion arbitration" provisions be vigorously enforced as they appear in print or online. Such blinkered zealotry raises the legitimate concern about what if any inhibition of due process in an adhesive consumer or employment contract would justify judicial intervention. While one cannot imagine a court declaring an arbitration agreement unconscionable because it does not provide for judicially supervised (that is, court-supervised) discovery, courts have found an outright denial of discovery to be unconscionable.[384] Some courts have reached similar conclusions about provisions denying remedies that might be available in court, such as punitive

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emphasizes that parties to securities arbitration are, among other things, more likely to see their claim decided on the merits after a full factual discovery. *Id.* at 31-48.

[381] In January of 2007 the SEC approved a major overhaul of the Arbitration Rules, including explicitly incorporating motion practice into the Arbitration Rules, and detailing a broad scope of presumptively discoverable documents. Order Approving Proposed Rule Change and Amendments, SEC Release No. 34-55158 (Jan. 24, 2007), *available at* http://www.sec.gov/rules/sro/nasd/2007/34-55158.pdf. In January 2011, FINRA announced the SEC had approved its proposal to change the rules to allow investors to strike all industry arbitrator names from the arbitrator list and proceed with an all public panel. News Release, FINRA, SEC Approves FINRA Proposal to Give Investors Permanent Option of All Public Arbitration Panels (Feb. 1, 2011), *available at* http://www.finra.org/Newsroom/NewsReleases/2011/P122877. This comes after FINRA changed the requirements in 2004 for how an individual qualifies for the public or industry panel of arbitrators, stiffening the requirements for transitioning from the industry panel to the public panel. *See* News Release, FINRA, SEC Approves NASD Arbitrator Classification Rule Changes (June 25, 2004), *available at* http://www.finra.org/Newsroom/NewsReleases/2004/p002807.

[382] *See* DUE PROCESS PROTOCOLS, *supra* note 199.

[383] *See* American Arbitration Association, AAA CONSUMER PROCEDURES, http://www.adr.org/consumer_arbitration (last visited Dec. 9, 2011); American Arbitration Association, AAA EMPLOYMENT RULES, http://www.adr.org/employment (last visited Dec. 9, 2011); JAMS, EMPLOYMENT ARBITRATION RULES & PROCEDURES, http://www.jamsadr.com/rules-employment-arbitration/ (last visited Dec. 9, 2011); DUE PROCESS PROTOCOLS, *supra* note 199.

[384] *See, e.g.*, Fitz v. NRC Corp., 113 Cal. Rptr. 3d 88, 97-99, 102-05 (Ct. App. 2004) (holding that curtailment of discovery imposed by the arbitration agreement was inadequate to permit the fair vindication of rights in an arbitral forum and hence the agreement was procedurally and substantially unconscionable).

damages,[385] as well as terms that attempt to deny the right to counsel,[386] to share information regarding the proceeding,[387] or to appeal an award.[388] Under the majority's narrowly tailored standard under the FAA, any or all of these judicial actions might be prohibited as undermining the "unique features" of arbitration or the aims of procedural efficiency and economy.[389]

If unconscionability doctrine now operates with special force in the arbitration setting, it is because arbitration agreements are different from virtually any other kind of contract. By establishing an alternative, out-of-court forum for

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[385] *See, e.g.*, Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 143-45 (Ct. App. 1997) (arbitration agreement held unconscionable because it denied or limited the recovery of remedies which would have remained available through litigation); Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (holding that an arbitration agreement excluding class-action, declaratory, and injunctive remedies which would be otherwise available through state statute did so impermissibly and thus was substantively unconscionable).

[386] *See, e.g.*, Rembert v. Ryan's Family Steak Houses, Inc., 596 N.W.2d 208, 230 (Mich. Ct. App. 1999) (the court established several factors – including clear notice, right to counsel, reasonable discovery, fair hearing, and a neutral arbiter – to determine the fairness and enforceability of arbitration agreements); *see also* Volpe v. Cortez, 792 N.Y.S.2d 536, 536-37 (App. Div. 2005) (holding that an arbitration agreement conditioned on the waiving of patient rights to counsel violated statutory requirements and hence was invalid); Maciejewski v. Alpha Sys. Lab, Inc., 87 Cal. Rptr. 2d 390, 394-95 (Ct. App. 1999) (arbitration agreements failing to include the right of each party to independent counsel may be held unconscionable).

[387] *See, e.g.*, Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078-79 (9th Cir. 2007) (holding a confidentiality clause of an arbitration agreement unconscionable because it limited the ability of claimaints to pursue their claims and interview witnesses); Ting v. AT&T, 319 F.3d 1126, 1151-52 (9th Cir. 2003) (holding that an arbitration agreement confidentiality clause was substantively unconscionable). *But see* Caley v. Gulfstream Aerospace Corp., 428 F.3d. 1359, 1378 (11th Cir. 2005) (holding that although an arbitration agreement included a confidentiality clause preventing the dissemination of the arbitration transcripts or the arbitrator's award, the clause was not so offensive as to render the agreement invalid); Iberia Credit Bureau, Inc., v. Cingular Wireless LLC, 379 F.3d 159, 175 (5th Cir. 2004) (holding that, under Louisiana state law, the confidentiality clause of an arbitration agreement was not facially unconscionable).

[388] *See, e.g.*, Hoeft v. MVL Group, Inc., 343 F.3d 57, 63 (2d Cir. 2003) (arbitration agreements must assume at least a limited right to judicial review); MACTEC, Inc., v. Gorelick, 427 F.3d 821, 827-30 (10th Cir. 2005) (holding that although arbitration agreements denying judicial review of a court's decision to enforce an arbitration award are valid, those arbitration agreements which seek to prevent any judicial review of that award altogether remain impermissible); Van Duren v. Rzasa-Ormes, 926 A.2d 372, 380-82 (N.J. Super. Ct. App. Div. 2007) (noting that arbitration agreements which completely preclude judicial review are void as contrary to public policy); Barsness v. Scott, 126 S.W.3d 232, 237-38 (Tex. App. 2003) (under Texas law, an arbitration agreement award remains judicially reviewable despite a waiver of such appeal contained within that arbitration agreement).

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

adjudication of disputes, arbitration agreements have a potential material impact on virtually every term of the contract and all of the parties' rights and responsibilities under the contract. The concerns, moreover, that consumers and employees raise about arbitration are nearly always based upon contractual provisions that make arbitration less protective of their rights than corresponding judicial procedures, and courts have tended to use the baseline of court process as a rough measuring stick for unconscionability determinations.[390] An FAA jurisprudence founded on the "uniqueness" of arbitration and emphasizing efficiency and economy without any consideration of fundamental fairness runs directly counter to this approach, and undermines courts' (and states') primary remaining tool for protection of the interests of consumers and employees.

Such concerns are strongly reinforced by Justice Thomas' concurring opinion, in which he posits that no state contract defense to an arbitration agreement is valid unless it addresses the circumstances surrounding the making of the agreement and not its substantive terms.[391] His candid conclusions reflect a highly formalistic concept of contracting processes, a total rejection of a judicial role in the policing of substantive fairness, and apparent ignorance of the practical realities surrounding mass contracting and dispute resolution.

There is an extraordinary paradox between this way of thinking and the majority's willingness to "find" that arbitration is an inherently unreliable method for resolving disputes involving an entire class of claimants because of lack of judicial oversight when the stakes are high for corporations.[392] If this is so, why is arbitration presumptively satisfactory for final resolution of disputes in arbitration of an employment dispute that may entail equally high stakes for an individual? Why, for example, did the Court in *Gilmer* entertain every presumption regarding the fairness in operation of arbitration under an agreement controlled by the FAA, despite the possibility that an adverse arbitration award might result in the loss of an individual's livelihood?[393]

The potential impact of *Concepcion* is greatly magnified by the Court's holding in *Rent-A-Center*, which will undoubtedly encourage widespread use of omnibus delegation clauses in adhesion arbitration agreements.[394]

2. *Impact on Class Actions and Consolidated Proceedings*

Another significant implication of *Concepcion* is its impact on class actions and the ability of individuals to consolidate claims for the purpose of vindication. While the specific, highly tailored remedial provision in *Concepcion* may actually put individual consumers – at least those who pursue their remedies – in a better position than relief obtained through class-wide proceedings, it is unclear just how

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[390] *See* Stipanowich, *New Litigation*, *supra* note 375, at 38.
[391] *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring).
[392] *Id.* at 1752; *see supra* text accompanying notes 320-31.
[393] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30-33 (1991).
[394] *See supra* text accompanying notes 259-276.

far the Court might go in validating the concept of class-action waivers in connection with arbitration agreements. It is clear, however, that the mechanism of class actions will be dramatically attenuated within the ambit of contractual relationships.[395] The holding in *Concepcion* makes it clear that by incorporating a class-action waiver within the scope of an arbitration provision, it is possible for companies to avoid not only class-wide arbitration but also class actions in court.

The Court majority's insistence that class actions and arbitration are inherently inconsistent because class action "changes the nature of arbitration" is as troubling as its failure to acknowledge that the goals of economy and efficiency in arbitration must be tempered by fairness concerns. The notion that arbitration is simply incompatible with large and complex cases flies directly in the face of numerous statements by the Court in furtherance of the expansion of arbitration into a virtual all-purpose civil court surrogate.[396] It is, likewise, at odds with the notion that arbitration processes include "a wide variety of processes, both bilateral and multilateral."[397] In the commercial world, there are numerous examples of arbitration procedures that specifically contemplate multi-party proceedings.[398] Though the majority's conclusion that "class arbitration, to the extent it is manufactured by [state law] rather than consensual, is inconsistent with

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[395] *Concepcion*, 131 S. Ct. at 1750. In *Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011), the Supreme Court vacated and remanded a Second Circuit decision denying enforcement to a class-action waiver provision and an arbitration agreement on the basis of *Discover Bank*. On remand, the Second Circuit concluded that under *Concepcion* "the *Discover Bank* rationale was no longer viable" and remanded the matter to the district court to address other arbitrability issues. Fensterstock v. Educ. Finance Partners, 426 Fed. App'x 14, 15 (2d Cir. 2011). It is significant that the circuit court did not pause to address any possible distinction between the terms of the arbitration provision at issue in *Concepcion* and that in *Fensterstock*. The latter did not, by the way, include remedial terms such as those that distinguished *Concepcion*.

[396] *See*, *e.g.*, Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985) ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators"); *Gilmer*, 500 U.S. at 21 ("This Court declines to indulge his speculation that the parties and the arbitral body will not retain competent, conscientious, and impartial arbitrators").

A federal district court in California recently granted a motion to compel arbitration on an individual basis in a pending putative class-action suit based on *Concepcion* despite the absence of an express waiver of the right to class-wide proceedings. *In re* Cal. Title Ins. Antitrust Litig., No. 08-01341, 2011 WL 2566449, at *5 (N.D. Cal. June 27, 2011). The court held that under *Stolt-Nielsen*, there was no basis for a court to direct class arbitration in the absence of a contractual agreement. *Id.* at *3.

[397] 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) (manuscript at 3), *available at* http://ssrn.com/abstract=1791928.

[398] *See* AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTAL RULES FOR CLASS ARBITRATION, (OCT. 8, 2003), *available at* http://www.adr.org/sp.asp?id=21936 (last visited Dec. 9, 2011).

the FAA"[399] resonates with earlier federal court precedents refusing to consolidate arbitration hearings in multi-party disputes in the absence of evidence of specific intent,[400] it is also true that a number of states have passed legislation authorizing courts to consolidate multiple arbitration proceedings in a single proceeding even in the absence of specific agreements to consolidate, so long as there is no contractual prohibition on the process and certain other factors are present.[401]

All that said, it must be conceded that many companies, faced with the possibility of class-wide arbitration with consumers or employees, would sooner take their chances in court.[402] The Court majority could have accommodated these concerns as well as those of consumers by embracing the approach taken by the Ninth Circuit and striking down the arbitration provision, paving the way for a class action in court. Had there been a class-action waiver without the arbitration provision, that would presumably have been the result.[403] Given the Court's other recent decisions respecting class actions, of course, it is far from certain that the Court will deny enforcement to such waivers outside the arbitration realm.[404]

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[399] *Concepcion*, 131 S. Ct. at 1751.

[400] *See supra* note 58 and accompanying text.

[401] *See*, *e.g.*, CAL. CIV. PROC. CODE §1281.3 (West 2011); UNIF. ARBITRATION ACT § 10 (2000), 7 U.L.A. 40 (2009). The California provision is another subsection of the same statutory provision underpinning the Supreme Court's decision in *Volt Info. Scis, Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989), where the Court upheld a state court's grant of a motion to stay arbitration under California Civil Procedure Code §1281.2(c), which allows such a stay pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it. The Court concluded that by specifying that the contract would be governed by "the law of the place where the project is located," the choice-of-law clause incorporated the California rules of arbitration, including §1281.2(c), into the parties' arbitration agreement, and therefore state law was not pre-empted by the FAA, even though the contract involved interstate commerce. *Volt*, 489 U.S. at 472.

[402] *See supra* note 72.

[403] *See supra* text accompanying note 361 and cases cited therein.

[404] *See*, *e.g.*, Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011). Should it wish to enforce such waivers generally, it is possible that the Court might build upon its own recent decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010). *See generally* Nagareda, *supra* note 8. In *Shady Grove,* the Court held that Rule 23 of the Federal Rules of Civil Procedure displaces a section of the New York Civil Practice Law limiting the use of class actions in actions to recover statutory damages. 130 S. Ct. at 1431. Significantly, notes Professor Nagareda, the Court ruled that the imposition of federal class-action law did not violate the Rules Enabling Act, which prohibits the Court from imposing rules that "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(a)-(b). Nagareda, *supra* note 8, at 1071. As explained by Justice Scalia, "The likelihood that some (even many) plaintiffs will be induced to sue by the availability of a class action is just the sort of 'incidental effect[]' we have long held does not violate [the Rules Enabling Act]." *Shady Grove,* 130 S. Ct. at 1443, *quoted in* Nagareda, *supra* note 8, at 1072. Conversely, Professor Nagareda suggests,

However, one must assume that after *Concepcion* such waivers will be more routinely enforced within the ambit of arbitration provisions, which will be widely embraced for this specific purpose.[405] Thus, although *Concepcion* arose in the context of an arbitration agreement, its jurisprudential policy implications are much broader. It remains a possibility that the Court would deny enforcement to a class-action waiver in an arbitration agreement that is shown to effectively shield sellers of consumer products or services from liability,[406] but it is unclear where such lines would be drawn.

The Court's resolution of the class-action question in *Concepcion*, an exercise in federal/state preemption, stands in stark contrast to a recent decision of the Supreme Court of Canada. Like the United States, Canada has been wrestling with the question of the interplay between policies supporting the enforceability of arbitration agreements and legislation supporting class actions. When in 2007 the Canadian Court decided in *Dell Computer Corp.* v. *Union des Consommateurs*[407] that national pro-arbitration policy prevailed over the protection of consumers' rights, the decision gave rise to a wave of criticism similar to that expressed in the United States.[408]

> If a state law policy *against* the confronting of a defendant with the full force of class-wide deterrence beyond the plaintiff's individual claim . . . cannot govern in a federal court class action controlled by Rule 23, then a state law policy running the opposite way – a state policy in *favor* of a deterrent punch beyond that of mere joinder . . . likewise cannot govern such an action.

Nagareda, *supra* note 8, at 1121 (emphasis added).

[405] *See*, *e.g.*, Johnson v. West Suburban Bank, 225 F.3d 366, 377-79 (3d Cir. 2000); Walther v. Sovereign Bank, 872 A.2d 735, 758 (Md. 2005).

[406] *See* John C. Peirce & Mark C. Darrell, *Can Arbitration Agreements Really Bar Class Actions? How Will Lower Courts Interpret* AT&T Mobility v. Concepcion? 50 INFRASTRUCTURE 1, 9 (Spring 2011).

[407] [2007] 2 S.C.R. 801(Can.).

[408] For a detailed account of the *Dell* case and other related decisions, *see* Geneviève Saumier, *Consumer Arbitration in the Evolving Canadian Landscape*, 113 PENN ST. L. REV. 1203 (2009). *See also* Jonnette Watson Hamilton, *Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?*, 51 MCGILL L.J. 693 (2006). As Saumier explained:

> The present legal landscape for consumer arbitration across Canada can be fairly described as chaotic. There appears to be a significant divergence of judicial opinion on the question of policy regarding pre-dispute mandatory arbitration clauses in consumer contracts, particularly as these clauses interact with procedures for collective judicial action. The fracture . . . appears to be . . . vertical, i.e. between trial and appellate court judges in the three most populous and economically significant provinces and the nine judges sitting at the Supreme Court of Canada. The pro-arbitration stance espoused by the latter court in all matters, from commercial to consumer disputes . . . seems to have met serious resistance from inferior courts.

Saumier, *supra*, at 1221-22.

In *Seidel* v. *TELUS Communications Inc.*,[409] the Canadian Court took up a challenge to an arbitration clause in a cell phone contract similar to that in *Concepcion*.[410] Seidel challenged TELUS Mobility's practice of charging customers based upon when a call begins to ring as opposed to when the other party picks up the line.[411] She brought her claim as a putative class action in the Supreme Court of British Columbia alleging "deceptive and unconscionable practices" in violation of the Trade Practices Act[412] ("TPA") and British Columbia's Business Practices and Consumer Protection Act[413] ("BPCPA").[414]

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[409] [2011] 329 D.L.R. (4th) 577 (Can.).

[410] The TELUS contract provides as follows:

> 15. ARBITRATION: Any Claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise and whether pre-existing, present or future – except for the collection from you of any amount by TELUS Mobility) arising out of or relating to: (a) this agreement; (b) a phone or the service; (c) oral or written statements, or advertisements or promotions relating to this agreement or service or (d) the relationships which result from this agreement (including relationships with third parties who are not parties to this agreement), (each, a "Claim") will be referred to and determined by private and confidential mediation before a single mediator chosen by the parties and at their joint cost. Should the parties after mediation in good faith fail to reach a settlement, the issue between them shall then be determined by private, confidential and binding arbitration by the same person originally chosen as mediator. Either party may commence court proceedings to enforce the arbitration result when an arbitration decision shall have been rendered and thirty (30) days have passed from the date of such decision. By so agreeing, you waive any right you may have to commence or participate in any class action against TELUS Mobility related to any Claim and, where applicable, you hereby agree to opt out of any class proceeding against TELUS Mobility otherwise commenced….

Id. at ¶ 13.

[411] *Id.* at ¶ 10.

[412] R.S.B.C., c. 457, ss. 3, 4(3)(b); 4(3)(e) (Can.). Subsequent to this action the Trade Practices Act was repealed.

[413] S.B.C., c. 2 s. 9. (Can.).

[414] *Seidel*, [2011] 329 D.L.R. (4th) at 10. The BPCPA defines unconscionable acts or practices as including the following:

> (a) That the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
> (b) That the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
> (c) That, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtained by similar consumers;
> (d) That, at the time the consumer transaction was entered into, there was reasonable probability of full payment of the total price by the consumer;

TELUS Mobility moved to stay class certification proceedings and to enforce the arbitration agreement.[415] Seidel responded that enforcing the arbitration clause amounted to a waiver of her substantive rights under the BPCPA.[416] Section 171 of the BPCPA provides a private cause of action for damages for an individual harmed under the act. Section 172 establishes an equitable "public" right of action for declaratory judgment or an injunction; anyone may seek these remedies to address a violation of the act. Seidel claimed that the terms of the BPCPA, which forbid waivers of "rights, benefits or protections" afforded under the Act,[417] voided the arbitration agreement and allowed her to continue with her current action pursuing class certification. After considering the purposes and policies of the BPCPA and the Commercial Arbitration Act, the Canadian Court concluded that the arbitration agreement could not be enforced to prevent assertion of the §172 "public" right of action in court.[418] It explained:

> "private, confidential and binding arbitration" will almost certainly inhibit rather than promote wide publicity (and thus deterrence) of deceptive and/or unconscionable commercial conduct. It is clearly open to a legislature to utilize private consumers as effective enforcement partners operating independently of the formal enforcement bureaucracy and to conclude that the most effective form is not a "private and confidential" alternative dispute resolution behind closed doors, but very public and well-publicized proceedings in a court of law.[419]

(e) That the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;

(f) A prescribed circumstance.

[415] *Seidel*, [2011] 329 D.L.R. (4th) at 10. The Commercial Arbitration Act, R.S.B.C. c. 55 (1996) provides that where a party to an arbitration agreement commences legal proceedings against another party to the agreement the courts are required to stay the proceedings and commence arbitration unless the arbitration agreement "is void, inoperative or incapable of being performed."

[416] *Id*.

[417] *Id.* "[A]ny waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act." S.B.C. c.2, s.3 (2004).

[418] "To the extent Ms. Seidel's complaints shelter under s. 172 of the BPCPA (and only to that extent), they cannot be waived by an arbitration clause and her court action may continue, in my opinion. As to her alternative complaints, whether under other sections of the BPCPA, the now repealed Trade Practice Act, R.S.B.C. 1996, c. 457 or at common law, the TELUS arbitration clause is valid and enforceable." *Seidel*, [2011] 329 D.L.R. (4th) at 24.

[419] *Id.* The Court goes further to emphasize its point by noting that the "usual rationale for private arbitration" namely the confidentiality of the proceedings, and the prevention of a harmful precedent are antithical to the purposes of the BPCPA which is primarily used as a vehicle for consumer protection and therefore needs the publicity and precedent-making value of a court of law. *Id.* at 38. This is an interesting contrast to the U.S. Supreme Court's approach in *Concepcion*, where public policy is specifically frowned

To be sure, in making its determination the Canadian Court did not have to grapple with the long interpretive history that accompanies the FAA. At the same time, its decision provides a different and useful lens through which to see the balancing of public policies.[420]

3. *Concepcion and Federalism*

The *Concepcion* majority dramatically expanded the preemptive scope of the FAA by declaring that the savings clause in FAA § 2 "preserves generally applicable contract defenses, [but not] . . . state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives,"[421] notably economical and efficient dispute resolution.[422] Within the broad realm of interstate commerce, the Court commensurately diminished the ability of states, through their legislatures, courts, or executives, to define or to regulate arbitration agreements and limited their ability to protect consumers, employees or other classes subject to overreaching in private contracts. It is an extraordinary augmentation of the central power at the expense of states, especially given the widely accepted understanding that the last quarter century of FAA jurisprudence has gone well beyond the intent of the FAA's drafters.[423]

Enforcement of contractual class waiver provisions in tandem with an arbitration agreement, even with modifications such as those at issue in

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upon as a reason for invalidating an arbitration agreement. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011).

In interpreting the effect the class-action waiver clause had on Seidel's right to seek certification for her § 172 cause of action, the Court specifically avoided the issue of whether the class-action waiver was, in and of itself, unconscionable conduct impermissible under the statute. *Seidel*, [2011] 329 D.L.R. (4th) at 34. Instead it found that the class-action waiver clause was an integral part of the arbitration clause, and, since the clause was held invalid as to the § 172 cause of action, the class-action waiver fell as well. The Court upheld the arbitration clause as to all of Seidel's other causes of action, including a private claim for damages under §171 of the BPCPA.

[420] After *Concepcion*, there still remain issues respecting the interplay between the pro-arbitration policies of the FAA and other national legislation promoting class actions in court. *See infra* text accompanying notes 434-43 (discussing Chen-Oster v. Goldman, Sachs & Co., No.10 Civ. 6950 (LBS) (JCF), 2011 WL 2671813 (S.D.N.Y. July 7, 2011)).

[421] For a discussion of the Court's reliance on an earlier precedent based on a statutory construction rule in lieu of pure obstacle preemption doctrine, *see* Philip J. Loree, Jr., *Saving the Savings Clause: The Supreme Court Eases Business's Arbitration Worries – and Redefines the FAA*, 29 ALTERNATIVES TO HIGH COST LITIG. 115, 117 (2011).

[422] *Id.*

[423] *See* Neal Troum, *Drawing a Line after* AT&T Mobility*: How Far Does the FAA Reach into State Contract Regulation?*, 29 ALTERNATIVES TO HIGH COST LITIG. 129, 133 (2011) ("*AT&T Mobility* is important because it portends a seismic shift in power away from the states, and their ability to create the rules that govern contracts, to the courts, and their ability under the FAA to inject themselves into the states' domain").

Concepcion, will dramatically curtail or even eliminate the option of class-wide actions in disputes arising out of standardized contracts.[424] Judicial intervention in the arbitration process will be largely confined to post-award procedures under the limited grounds set forth in the FAA or analogous state arbitration statutes – grounds which, as a general principle, prohibit courts from inquiring into the merits of arbitral decision-making and accord arbitrator discretion significant deference.[425]

But consumer and employee advocates may, like Frederick Douglass after *Dred Scott* v. *Sandford*,[426] have reason to say their "hopes were never brighter than now."[427] *Concepcion*, like *Rent-A-Center* and *Stolt-Nielsen*, is by no means the end of the debate over arbitration policy and practice in the United States.

Lower courts are searching for wiggle room. In the first published California appellate court decision addressing the impact of *Concepcion* on employment suits,[428] the Second District Court of Appeal upheld a trial court ruling that a class-action waiver in an employment agreement would not prohibit workers from pursuing a representative action under the California Private Attorney General Act of 2004,[429] because *Concepcion* did not apply to such actions.[430] The appellate court remanded the case to the trial court to determine whether to sever the unenforceable portion of the arbitration agreement or to deny enforcement to the entire arbitration agreement.[431] Meanwhile, one New Jersey appellate court ruled that, in spite of *Concepcion*, binding arbitration agreements in consumer contracts that bar class action suits may be denied judicial enforcement if they are not sufficiently clear and precise.[432]

Of potentially even greater consequence is the impact of *Concepcion* on precedents such as the Second Circuit's decision in *In re American Express Merchants' Litigation*, ("*American Express II*"). [433] The issue came up in *Chen-*

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[424] *See supra* text accompanying note 395.

[425] BORN, *supra* note 145, at 100 and accompanying text.

[426] 60 U.S. 393 (1857).

[427] *See* Frederick Douglass, Speech on the Dred Scott Decision (May 1857), *available at* http://www.teaching americanhistory.org/library/index.asp?document=772.

[428] Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854 (Ct. App. 2011).

[429] *See* CAL. LABOR CODE §§ 2698-99.5 (West 2004) (allowing suits to recover civil penalties for violations of the Labor Code by aggrieved employee on own behalf and that of current or former employees).

[430] *Brown*, 128 Cal. Rptr. 3d at 856.

[431] *Id.* at 864-65. Although there is reason to believe the decision will eventually be set aside, as one defense attorney concludes, it "muddies the water" regarding the interplay of federal and state law under *Concepcion.* Laura Ernde, *Plaintiffs May Have Found a Way Around Concepcion*, L.A. DAILY J., July 14, 2011 (quoting attorney Richard Simmons of Sheppard Mullin Richter & Hampton LLP).

[432] NAACP of Camden Cty. East v. Foulke Mgmt. Corp., 24 A.3d 777 (N.J. Super. App. Div. 2011).

[433] 634 F.3d 187 (2d Cir. 2011); discussed *supra* text accompanying notes 82-91. *See* Peirce & Darrell, *supra* note 406, at 10 (expressing strong support for the Supreme

Oster v. *Goldman, Sachs & Co.*,[434] in which a federal magistrate found *Concepcion* inapplicable in a gender discrimination case under Title VII of the Civil Rights Act of 1964.[435] The case involved a putative class action by employees of Goldman, Sachs who alleged that the company had engaged in a pattern of gender discrimination against female professionals in the organization in violation of Title VII.[436] Goldman, Sachs moved to stay the suit with respect to one representative plaintiff and to compel arbitration of her individual claims, but the court denied the motion on the basis of the Second Circuit's decision in *American Express II*, which held that the federal substantive law of arbitrability under the FAA precludes enforcement of arbitration agreements that prevent effective vindication of a substantive federal statutory right.[437] The district court found that plaintiff's assertions of a "pattern or practice" of discrimination raised a substantive right under Title VII, which could only be asserted on a class basis.[438] The right could not be vindicated in arbitration because, under *Stolt-Nielsen*,[439] the silence of the arbitration agreement respecting class action forbade class-wide proceedings in arbitration.[440] In the instant ruling, the court denied the employer's motion for reconsideration, brought in the wake of *Concepcion*.[441] The court distinguished *Concepcion* on the basis that that case involved the preemption of state-law rules that were viewed as an obstacle to the objectives of the FAA, while the present case involved "whether the FAA's objectives are . . . paramount when, as here, rights created by a competing federal statute are infringed by an agreement to arbitrate."[442] The court proceeded to find that *Concepcion* had not changed the law in the Second Circuit with respect to this issue,[443] and denied Goldman, Sach's motion for reconsideration.

A more fundamental challenge to recent Supreme Court arbitration jurisprudence, however, is represented by the intensified efforts of the other branches of government to outlaw or regulate predispute arbitration agreements in consumer, employment and other categories of contracts.[444] As explained in Part IV, these efforts have already led to the passage of laws and regulations

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Court's decision in *Concepcion* and suggesting that it repudiate decisions like *American Express II*).

[434] No.10 Civ. 6950 (LBS) (JCF), 2011 WL 2671813, at *1 (S.D.N.Y.July 7, 2011).

[435] 42 U.S.C. §2000.

[436] *Chen-Oster*, 2011 WL 2671813, at *1.

[437] Chen-Oster v. Goldman, Sachs & Co., 785 F. Supp. 2d 394, 406 (S.D.N.Y. 2011). *See supra* text accompanying notes 84-85.

[438] *Id.* at 408-10.

[439] 130 S. Ct. 1758 (2010).

[440] *Id.* at 1776.

[441] *Chen-Oster*, 2011 WL 2671813, at *1.

[442] *Id.* at *3.

[443] *Id.* at *5.

[444] *Beware the Fine Print*, N.Y. TIMES, June 26, 2010, *available at* http://www.nytimes.com/2010/06/27/opinion/27sun2.html?_r=1&ref=supreme_court.

significantly limiting the role of arbitration in some employment and consumer settings;[445] more are on the table.

IV. THE REACTION: RESPONSES OF CONGRESS AND THE EXECUTIVE TO SUPREME COURT JURISPRUDENCE

A. *Mounting Reform Efforts*

For many years the Supreme Court has pursued a course of maximal enforcement of predispute arbitration agreements across virtually the whole spectrum of civil claims and controversies, including arbitration agreements in standardized contracts of adhesion. It has done so in full recognition of the ability of Congress to enact contrary legislation, and has drawn attention to Congressional inaction in the course of giving full play to the discerned penumbra of "federal substantive law" surrounding the FAA.[446]

Now, Congress – and the Executive Branch – have taken responsive steps reflecting less sanguine views of the operation of arbitration provisions. These initiatives mirror the other side of the debate, championed by some consumer and employee advocates and academics, which focuses on real or potential abuses of private justice. The complaints mounted significantly in recent years with the publication of a Public Citizen report documenting the unfortunate experiences of individuals in consumer arbitration,[447] the much-publicized plight of a young Halliburton employee, Jamie L. Jones, whose company sought to require her to arbitrate claims related to an alleged rape,[448] and the Minnesota Attorney

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[445] *See infra* text accompanying notes 453-66, 492-504.

[446] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Nagareda, *supra* note 8.

[447] PUBLIC CITIZEN REPORT, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf. The report has been the subject of substantial criticism. *See infra* note 598.

[448] The story of alleged rape victim Jones and her claims against Halliburton Co. engendered substantial media coverage. *See*, *e.g.*, Wade Goodwyn, *Rape Case Highlights Arbitration Debate* (June 9, 2009), http://www.npr.org/templates/story/story.php?storyId=105153315. In 2007 Ms. Jones sued her former employer, Halliburton/KBR, claiming that she had been gang-raped by seven co-workers shortly after arriving for work in Iraq. Halliburton moved to compel arbitration of Ms. Jones' claims under her arbitration agreement, but the district court denied the motion. Jones v. Halliburton Co., 625 F. Supp. 2d 339 (S.D. Tex. 2008). Hallibuton appealed. The Fifth Circuit held that Ms. Jones' claims for assault and battery, intentional infliction of emotional distress, negligent hiring, retention and supervision of employees involved in a sexual assault, and false imprisonment were beyond the scope of Jones' arbitration agreement. Jones v. Halliburton Co., 538 F.3d 228 (5th Cir. 2009). In July, 2011, a federal jury denied Jones' rape allegations and found that the employer did not commit fraud in inducing her to enter into the employment contract. *See Texas: Jury Rejects Assertion of Rape Against Military Contractor in Iraq*, N.Y. TIMES, July 8, 2011, *available at* http://www.nytimes.com/2011/07/09/us/09brfs-Kbr.html.

General's allegations of fraud against a provider of consumer credit card arbitration services.[449] The same concerns have stimulated regular proposals in Congress to limit or regulate predispute arbitration agreements. These efforts reached a crescendo in the wake of the 2008 election and again during the period in which the Court decided the Arbitration Trilogy.

Between 2009 and 2011, Congress proposed numerous acts limiting the enforceability of predispute arbitration agreements.[450] These included attempts to

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[449] Joshua Freed, *Bank of America Drops Arbitration Requirement*, SEATTLE TIMES, Aug. 13, 2009, *available at* http://seattletimes.nwsource.com/html/businesstechnology/2009657887_apusbankofamericaarbitration.html?syndication=bondheads; *Firm Agrees to End Role in Arbitrating Card Debt*, N.Y. TIMES, July 19, 2009, *available at* http://www.nytimes.com/2009/07/20/business/20credit.html.

[450] Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (invalidating predispute arbitration agreements in the consumer, employment, franchise, and civil rights context); Consumer Fairness Act of 2009, H.R. 991, 111th Cong. (2009) (invalidating predispute arbitration agreements in the consumer context); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011) (invalidating predispute arbitration agreements in the consumer, employment, and civil rights context); Non-Federal Employee Whistleblower Protection Act of 2011, S. 241, 112th Cong. (2011) (invalidating mandatory arbitration agreements in connection with Whistleblower protection statutes); Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011, S. 1099, 112th Cong. (2011) (requiring that a Court supervise the payment of damages even in the case of arbitration awards); Fair Arbitration Act of 2011, S. 1186, 112th Cong. (2011) (establishing procedures for arbitration clauses and contracts relating to the form arbitration clauses have within an agreement to arbitrate); Foreclosure Prevention and Sound Mortgage Servicing Act of 2011, H.R. 1567, 112th Cong. (2011) (preventing lender from requiring borrower to agree to arbitration as part of a loan modification or loss mitigation activities); Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10 (2011) (requiring that any contractor paid in excess of $1,000,000 agree not to enter into a predispute arbitration agreement with any employees or independent contractors); Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009) (establishing Consumer Financial Protection Bureau with ability to limit use of predispute arbitration agreements); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009) (invalidating predispute arbitration agreements between long-term care facilities and the elderly); Labor Relations First Contract Negotiations Act of 2009, H.R. 243, 111th Cong. (2009) (requiring arbitration of initial contract disputes); Payday Loan Reform Act of 2009, H.R. 1214, 111th Cong. (2009) (listing mandatory unfair arbitration clause as illegal element of loan contract); Predatory Mortgage Lending Practices Reduction Act, H.R. 2108, 111th Cong. (2009) (invalidating all consumer predispute arbitration agreements); Rape Victims Act of 2009, S. 2915, 111th Cong. (2009) (invalidating all predispute arbitration agreements where the tort alleged was rape); Service Members Access to Justice Act of 2009, H.R. 1474, 111th Cong. (2009) (invalidating predispute arbitration agreements under USERRA); Taxpayer Abuse Prevention Act, S. 585, 111th Cong. (2009) (invalidating predispute arbitration agreement in contract between lendor and lendee in anticipation of income tax return).

It is worth noting that many of the anti-arbitration provisions covered in these acts would fall under the protected categories listed in the Arbitration Fairness Act of 2009.

limit the enforcement of arbitration agreements in very specific categories, such as the Rape Victims Act of 2009,[451] which would prevent employers, engaged in interstate commerce, from enforcing otherwise valid predispute arbitration agreements where the employee's suit alleges rape, and the Fairness in Nursing Home Arbitration Act, [452] which would invalidate all predispute arbitration agreements between long-term care facilities and their residents.

Several relevant bills became law. The 2010 Department of Defense Appropriations Act ("Defense Act"), was signed by President Obama in late 2009. Section 8116 of the Act,[453] also known as the Franken Amendment, prohibits federal contractors who receive funds under the Act for contracts in excess of $1,000,000 from requiring their employees or independent contractors to arbitrate "claims involving Title VII of the civil rights act or any tort arising out of alleged sexual assault or harassment."[454] The same prohibition applies to federal defense subcontractors on subcontracts valued at more than $1,000,000[455]; prime contractors must obtain contractual commitments from subcontractors that they will not enter into nor enforce any arbitration agreement as to the specified legal claims.[456] Senator Franken's amendment was a reaction to the public furor over *Jones* v. *Halliburton Co.*,[457] and the general debate over predispute arbitration

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Also, a number of the proposed restrictions on lending practices are already covered in the recently passed Consumer Protection Act. *See infra* text accompanying notes 459-66.

[451] Rape Victims Act of 2009, S. 2915, 111th Cong. (2009).

[452] Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009).

[453] *See* Department of Defense Appropriations Act, Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454 (West 2010) (codified as amended at 50 U.S.CA. 8102, 125 Stat. 38, 79 (West 2011) (codified as amended at 50 U.S.C.A.§ 415a-3 (2011)).

[454] John J. Roddy, *Emerging Perspectives on the Fundamental Fairness of Mandatory Arbitration Coupled with Class Action Bans*, 789 PLI/Corp 1105, 1126 (Apr. 8-9, 2010). According to another Practicing Law Institute contributor, Zachary D. Fasman, "The Department of Defense has limited the application of this clause to companies that hold the defense contracts in question, as opposed to parents, subsidiaries and related corporate entities." Zachary D. Fasman, *The New Developments in Employment Class Actions*, 833 PLI/LIT 575, 705 (Sep. 27-28, 2010).

[455] The interim rule states that this prohibition only extends to subcontractor employees and independent contractors actually working on the subcontract. *See* Nixon Peabody, *Employment Law Alert, Franken Amendment's Prohibition on Mandatory Employment Arbitration Agreements No Laughing Matter For Defense Contractors* (June 1, 2010), http://www.nixonpeabody.com/publications_detail3.asp?ID=3334#ref1.

[456] *See* Ted Olsen, *No Joke: Franken Amendment Restricts Defense Contractors' Use of Arbitration Agreements,* SHERMAN & HOWARD (Jan. 5, 2010), http://www.sah.com/NewsAndEvents/View/FAD68D49-5056-9125-63DB9D4D769D0B6A/.

[457] *See supra* note 448. Senator Franken said that he was "'inspired by the courageous story'" of Jamie Leigh Jones. Ilyse W. Schuman & Henry D. Lederman, *Defense Appropriations Bill Restricts Federal Defense Contractors' Use of Arbitration Agreements*, LITTLER (Dec. 24, 2009), http://www.littler.com/publication-press/publication/defense-appropriations-bill-restricts-federal-defense-contractors%E2%80%99-use. The amendment may also have been motivated by *14 Penn Plaza LLC* v. *Pyett*, 129 S.

agreements in employment and consumer contracts.[458] Its solution to the problem of predispute arbitration agreements is categorical and complete – within its scope, a draconian counterpart to the Supreme Court's jurisprudence.

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Consumer Protection Act")[459] has the potential to effect sweeping reforms with regard to mandatory binding predispute arbitration agreements in the broad arenas of consumer finance and investment. Signed into law by President Obama on July 21, 2010, the Consumer Protection Act contains several different provisions that aim to restrict or to consider possible restrictions in the use of predispute arbitration agreements.[460] Under the provisions of §748(n)(1-2) and §922, the Act provides special protections and incentives to whistleblowers.[461] An employee cannot waive his right to a judicial forum regarding a dispute that arises under the whistleblower protection section of the act.[462] This prevents an employer covered under the section from forcing arbitration of the issue of whether a particular employee qualifies for the extensive enumerated protections listed under the section.[463] Section 1414 amends the Truth in Lending Act to provide that no mortgage lender may include a predispute arbitration clause in its loan agreements.[464]

Ct. 1456, 1474 (2009), holding "that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law." *See* Kathleen M. McKenna, *Litigation Strategy: Arbitration, Mediation, & Settlement*, 833 PLI/LIT 733, 750 (Sep. 27-28, 2010).

[458] *See* Donald R. Philbin, Jr. & Audrey Lynn Maness, *Still Litigating Arbitration in the Fifth Circuit, But Less Often*, 42 TEX. TECH. L. REV. 551, 555 (2010); Michael Fox, *Franken Rape Amendment in Final Defense Bill: A Pre-Cursor to the Arbitration Fairness Act Takes Another Step* (Dec. 17, 2009), *available at* http://humancapitalleague.com/Home/743.

The Senate voted along party lines; all but nine Republican senators voted against the amendment. *See* Roddy, *Emerging Perspectives*, *supra* note 454, at 1126.

[459] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat 1376 (2010) (codified as amended at numerous sections, including 7 U.S.C.A. § 26 (West 2011)) ("Consumer Protection Act").

[460] The exception is a provision relating to reinsurance agreements and the rights and duties of the ceding insurer. Under §531(b)(1) the state law of the state that is not the domicile state of the ceding insurer is preempted if it restricts or eliminates the insurer's rights to contractual arbitration.

[461] S*ee* 7 U.S.C.A. § 26(n) (West 2011) (codifying §748(n)(1-2)); 15 U.S.C.A. § 78u-6 (codifying § 922).

[462] *Id.*

[463] Section 748(n) adds a whistleblower protection section to the Commodities Exchange Act (7 U.S.C. § 1 et seq.) and amends Title 18's pre-existing whistleblower protection section.

[464] S*ee* 15 U.S.C.A. § 1639c (West 2011) (codifying §1414). *Compare* 15 U.S.C.A. § 1639c (West 2011) (Consumer Protection Act, § 1414(e)), *with* 50 U.S.C.A. § 415a-3 (West 2010) (Department of Defense Appropriations Act, 2010) (noting the absence and presence of a prohibition on the enforcement of existing predispute agreements).

The Consumer Protection Act is largely concerned with regulation of the newly established Consumer Financial Protections Bureau ("CFPB"). Section 1057 provides general whistleblower protection to all employees of companies and individuals who fall under the auspices of the CFPB,[465] and, furthermore, that "no pre-dispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section."[466]

B. *The Evolving Arbitration Fairness Act*

Of all the recent or proposed enactments, however, the most sweeping was the Arbitration Fairness Act ("AFA"), which was originally proposed in 2007[467] and again in 2009.[468] The Arbitration Fairness Act of 2011[469] is its third major iteration. Ever since the AFA was first introduced it has stimulated considerable debate among lawyers and scholars.[470] All versions of the AFA sought to limit the enforceability of predispute arbitration agreements in certain settings, but the 2011 bills are less expansive than their predecessors.

1. *Earlier Versions of the AFA*

The Arbitration Fairness Act of 2009 was aimed at preventing the use and enforcement of predispute arbitration agreements in all consumer, employment, and franchise contracts, and with respect to claims regarding disputes under statutes protecting civil rights.

The House Bill (H.R. 1020)[471] proposed to amend §2 of the FAA to provide that:

> (b) No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of –
> (1) an employment, consumer, or franchise dispute; or
> (2) a dispute arising under any statute intended to protect civil rights.
>
> (c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether

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[465] *See* 12 U.S.C.A. § 5567 (West 2011) (codifying § 1057).

[466] *Id.*

[467] Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007).

[468] Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

[469] Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011).

[470] *See* Alan Cooper, *Congress is Mulling "Arbitration Fairness Act": U.S. Chamber, Business Groups Are Incensed*, VA. LAWYERS WEEKLY, Mar. 1, 2010; Shirley M. Hufstedler & William H. Webster, *Arbitration under Siege*, NAT'L L.J. (Sept. 20, 2010), *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202472117839 &slreturn =1&hbxlogin=1.

[471] Arbitration Fairness Act of 2009, *supra* note 468.

the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

(d) Nothing in this chapter shall apply to any arbitration provision in a collective bargaining agreement.[472]

The Senate version of the bill was very similar, but proposed to incorporate modifications to the FAA within a separate new section.[473] Both bills outlawed predispute arbitration agreements respecting employment, consumer, franchise, or statutory civil rights disputes.[474]

Both 2009 bills were improvements over the vague language of the 2007 version, which provided for the non-enforceability of disputes under "any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power."[475] The failure to provide a more specific definition for the classes of affected statutes (affecting "civil rights") created a grey area of non-enforceability that could have been exploited by parties seeking

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[472] *Id*. § 4.

[473] Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 3(a) (2009). Validity and enforceability

(a) In General. Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute.

(b) Applicability.

(1) In general. An issue as to whether this chapter applies to an arbitration agreement shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

(2) Collective bargaining agreements. Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.

[474] Both the House and Senate versions include exclusions for collective bargaining, although the Senate version provides that even in a collective bargaining situation an employee cannot waive any statutory or constitutional rights (an apparent effort to reverse *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1474 (2009), holding "that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law").

Another major difference in the two bills is that the Senate version creates a new, discrete section in the FAA, whereas, the House bill acts as an amendment to § 2.

[475] Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 4 (2007).

to avoid or to delay the commencement of arbitration, undermining conventional expectations regarding arbitration's efficiency and economy of process.

This effect was dramatically compounded by a clause providing that "the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator . . . ."[476] In the House version of the AFA this provision applied to any kind of arbitration agreement, without regard to the parties' sophistication or the way in which the parties struck an agreement to arbitrate. The practical result was to deny enforcement to provisions, now ubiquitous in domestic and international commercial arbitration procedures that promote efficiency by vouchsafing enforcement and "jurisdictional" questions to arbitrators. The impact of this provision was rendered far greater by a materially ambiguous provision that gave courts initial authority to address not only "challenges [of] the arbitration agreement specifically," but also challenges to the arbitration provision "in conjunction with other terms of the contract containing such agreement."[477] This provision undermined the separability principle first enunciated in *Prima Paint*[478] treating predispute arbitration agreements as separable from the contracts of which they are a part for the purpose of assessing their enforceability under the terms of the FAA. While such a limitation may be appropriate in the context of certain categories of contracts that are normally adhesive, such as employment or consumer contracts, it is wholly inconsistent with expectations in the typical business-to-business setting.[479] Professor Emmanuel Gaillard warned that the act "pos[ed] a serious threat to the promotion of efficient international dispute resolution and of the United States as a friendly place to arbitrate."[480]

A final concern raised by the 2009 version of the AFA was its categorical prohibition of arbitration agreements in franchise agreements. While many countries have outlawed or restricted the use of predispute arbitration agreements in consumer or employment contracts, research has revealed no statutory prohibitions or regulations respecting arbitration provisions in franchise agreements anywhere else in the world with the exception of Puerto Rico.[481]

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[476] *Id.* § 4(c).

[477] *Id.*

[478] *See supra* text accompanying notes 118-33.

[479] *See* Stipanowich, *New Litigation*, *supra* note 375 at 35-49 (discussing the potential "spillover" effect of this legislation). There are also energetic responses occurring at the state level. Recently, the New York State Legislature began considering a bill to amend New York arbitration law to strike down any arbitration award "where the arbitrator has been affiliated in any way with any party to the arbitration, or any of its subsidiaries and affiliates . . ." *See* N.Y. State Assembly Bill A7002A-2011; N.Y. State Senate Bill S. 5798-2011.

[480] Emmanuel Gaillard, *International Arbitration Law*, N.Y.L.J. April 22, 2008, at 3.

[481] Even in Puerto Rico, however, there is no outright prohibition on such agreements. The Puerto Rico Dealers' Contracts Act requires that a court, before enforcing an arbitration provision in a franchise contract, determine that the provision "was subscribed freely and voluntarily by both parties." P.R. LAWS ANN. tit. 10, § 278b-3 (1964).

Thus, where arbitration is readily available to private parties as a mean of resolving disputes, no distinction is made with respect to arbitration agreements contained in franchise contracts.

Neither the 2007 nor the 2009 versions of the AFA was enacted into law.

2. *Arbitration Fairness Act of 2011*

The AFA was re-introduced in identical Senate[482] and House[483] versions in May 2011, in the wake of the Court's decision in *Concepcion*. The revised bills reflect a further tightening of the legislation to address various concerns associated with earlier drafts, including:

(a) more moderate findings focused on concerns about predispute arbitration agreements affecting consumer and employment disputes, and Supreme Court decisions which "have changed the meaning of the [FAA] so that it now extends to consumer disputes and employment disputes";[484]

(b) the creation of a new part of the FAA denying the validity or enforceability of predispute arbitration agreements requiring arbitration of employment, consumer or civil rights disputes;[485]

Moreover, the law creates a rebuttable presumption that any arbitration provision in a franchise contract "was included or subscribed at the request of the principal or grantor" and "is an adhesion contract to be interpreted and made effective as such." *Getting the Deal Through*, FRANCHISE IN 33 JURISDICTIONS WORLDWIDE, 2009 – Puerto Rico Chapter at 150.

[482] Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011).

[483] Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011).

[484] The findings state:

> The Congress finds the following:
>
> (1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.
>
> (2) A series of decisions by the Supreme Court of the United States have changed the meaning of the Act so that it now extends to consumer disputes and employment disputes.
>
> (3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.
>
> (4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.
>
> (5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.

S. 987 § 2.

[485] IN GENERAL – Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.

Id. § 402(a).

(c) specific definitions of relevant terms, including "employment dispute,"[486] "consumer dispute,"[487] "civil rights dispute,"[488] and "predispute arbitration agreement."[489]

The 2011 bills contain no reference to franchise agreements, a major bone of contention under prior versions.[490] They continue to omit controversial language from the 2007 drafts outlawing provisions authorizing arbitrators to address "gateway" issues relating to the validity or enforceability of arbitration agreements which would have had a significant "spillover" effect on commercial arbitration.[491]

C. *The Regulatory Approach: The Wall-Street Reform and Consumer Protection Act*

A framework for more thoughtful and discrete consideration of the operation of arbitration agreements in consumer settings may have been established under certain provisions of the previously mentioned Consumer

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[486] the term "employment dispute" means a dispute between an employer and employee arising out of

the relationship of employer and employee as defined in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203).

Id. § 401(3).

[487] The term "consumer dispute" means a dispute between an individual who seeks or acquires real or personal property, services (including services relating to securities and other investments), money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit.

Id. § 401(2).

[488] The term "civil rights dispute" means a dispute –

(A) arising under –

(i) the Constitution of the United States or the constitution of a State; or

(ii) a Federal or State statute that prohibits discrimination on the basis of race, sex, disability, religion, national origin, or any invidious basis in education, employment, credit, housing, public accommodations and facilities, voting, or program funded or conducted by the Federal Government or State government, including any statute enforced by the Civil Rights division of the Department of Justice and any statute enumerated in section 62(e) of the Internal Revenue Code of 1986 (relating to unlawful discrimination); and

(B) in which at least 1 party alleging a violation of the Constitution of the United States, a State constitution, or a statute prohibiting discrimination is an individual.

Id. § 401(1).

[489] The term "predispute arbitration agreement" means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

Id. § 401(4).

[490] *See supra* text accompanying note 481.

[491] *See supra* text accompanying note 471-80.

Protection Act.[492] Instead of an outright prohibition on predispute arbitration agreements, the Act may permit a process of deliberate investigation, reflection and debate about the role of arbitration in specific settings – something that is generally missing in legislative initiatives surrounding arbitration.[493] Section 1028 of the Act gives the Consumer Financial Protection Bureau ("CFPB") broad power to regulate all predispute arbitration contracts in the area of consumer financial products and services.[494] The CFPB is directed to study and prepare a report to Congress on the use of predispute arbitration agreements "in connection with the offering or providing of consumer financial products or services."[495] If deemed to be in the public interest, it "may prohibit or impose conditions or limitations on the use" of such agreements."[496] Section 921 provides the Securities and Exchange Commission ("SEC") with the same power with regard to securities products and services.[497]

It is hard to predict at this point what, if any, recommendations will result from the CFPB and SEC studies. Especially in the realm of securities arbitration, complaints about the system are balanced and perhaps outweighed by the track record of programs that have been overseen by the SEC and related entities such

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[492] *See supra* text accompanying note 466.

[493] *See* remarks of Amy Schmitz, in *Penn State Dickinson School of Law Yearbook on Arbitration & Mediation Symposium* (Feb. 16, 2011) (Notes on file with author).

[494] 12 U.S.C. § 5518 (2011) (codifying § 1028). Consumer Protection Act § 1028 (now 12 U.S.C. § 5518) provides:

> (a) STUDY AND REPORT. – The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.
>
> (b) FURTHER AUTHORITY. - The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).
>
> (c) LIMITATION. - The authority described in subsection (b) may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen.

The CFPB was inspired by the work of Harvard bankruptcy professor Elizabeth Warren, who helped build the agency and hire staff as a consultant to President Obama. Drake Bennett & Carter Dougherty, *Elizabeth Warren's Dream Becomes a Real Agency She May Never Get to Lead*, BLOOMBERG NEWS, July 7, 2011, *available at* http://www.bloomberg.com/news/2011-07-07/elizabeth-warren-s-dream-becomes-a-consumer-bureau-she-may-never-lead.html.

[495] 12 U.S.C. § 5518(a) (Consumer Protection Act § 1028(a)).

[496] *Id.* § 5518(b).

[497] 15 U.S.C. § 78o (codifying § 921).

as the Securities Industry Conference on Arbitration.[498] Moreover, the passage of the new bill may have encouraged the Financial Industry Regulatory Authority ("FINRA") to announce a new regulatory proposal to make permanent its pilot "all-public" arbitrator program.[499] Now, investors have the opportunity to appoint a panel of three arbitrators, none of whom have affiliations with the securities industry; the requirement of a single "industry" arbitrator – long a focus of complaints by investor advocates – will be eliminated.[500]

One would hope that, whatever their outcome, the CFPB and SEC processes represent a full and fair consideration of the costs and benefits of different procedural options. This may not have happened in connection with another recent determination by a regulatory agency, the Federal Deposit Insurance Corporation ("FDIC"). The FDIC just adopted a rule banning predispute arbitration agreements in retail foreign exchange transactions between smaller investors (both individuals and small business) and "state nonmember banks" – entities for which the FDIC is the primary U.S. regulator.[501] About two months before, the FDIC had issued a proposed Notice of Rulemaking prohibiting such agreements and placing certain restrictions on post-dispute arbitration agreements.[502] The accompanying FDIC commentary suggested that the FDIC's posture was motivated by the Congressional concerns toward arbitration reflected in the Dodd-Frank financial reform, even though the latter did not apply to retail foreign exchange transactions.[503] Having received no feedback on its proposed limitations during the comment period, the FDIC approved the proposed rule.[504]

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[498] *See supra* notes 202-05 and accompanying text. According to a recent letter to Congress by a business coalition assembled by the U.S. Chamber of Commerce:

> Approximately 70 percent of consumer cases arbitrated last year through the Financial Industry Regulatory Authority ("FINRA") resulted in a recovery for the investor. Studies show that investors fare at least as well in arbitration as in court (if not better), and receive their recoveries in far less time. In fact, many recent FINRA arbitrations have resulted in awards and settlements in the millions of dollars.

Letter from the Undersigned Members of the Coalition to Preserve Arbitration Opposing the Anti-Arbitration Provisions in S. 3217, the "Restoring American Financial Stability Act of 2010" (April 22, 2010), *available at* http://www.uschamber.com/issues/letters/2010/letter-undersigned-members-coalition-preserve-arbitration-opposing-anti-arbitrat.

[499] *See* News Release, FINRA, FINRA Proposes to Permanently Give Investors the Option of All-Public Arbitration Panels (Sept. 28, 2010), *available at* http://www.finra.org/Newsroom/NewsReleases/2010/P122178.

[500] *See id.*

[501] 12 C.F.R. § 349.16 (2011) ("No FDIC-supervised insured depository institution may enter into any agreement or understanding with a retail forex customer in which the customer agrees, prior to the time a claim or grievance arises, to submit such claim or grievance to any settlement procedure").

[502] Retail Foreign Exchange Transactions, 76 Fed. Reg. 28,358 (proposed May 17, 2011) (to be codified at 12 C.F.R. pt. 349).

[503] *Id.*

[504] *See* 12 C.F.R. pt. 349 (2011).

V. OTHER COUNTRIES' LEGAL TREATMENT OF ARBITRATION AGREEMENTS BETWEEN PARTIES TO ADHESION CONTRACTS INVOLVING EMPLOYEES AND CONSUMERS

As the U.S. Supreme Court dramatically limits judicial oversight of arbitration agreements in contracts of adhesion, fostering countervailing responses by the other branches of the U.S. government, it is appropriate to place these developments against the backdrop of legislative or judicial responses to the same concerns in other parts of the world.[505] The Court's continuing promotion of arbitration falls in line with the expansive "unfettered market" approach to the international economic order that was widely embraced in the wake of World War II.[506] In the Third Arbitration Trilogy, the U.S. Supreme Court boldly expanded the preemptive effect of the FAA. It limited the purview of judicial policing of unconscionable arbitration agreements under the FAA through enforcement of a delegation clause situating nearly all gatekeeping functions in the hands of the arbitrator – save defenses relating directly to the delegation clause itself,[507] struck at the foundation of unconscionability defenses under state law, and made arbitration agreements a ready springboard for corporations to contract their way out of class actions.[508]

The proposition that arbitrators have authority to resolve issues relating to their own jurisdiction is generally uncontroversial in the international arena.[509] In

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[505] *See generally* Jean R. Sternlight, *Is the U.S. out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002); Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C.J. INT'L L. & COM. REG. 357 (2003); Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341 (2007); BORN, *supra* note 145, at 817-29; SÉBASTIEN BESSON & JEAN-FRANCOIS POUDRET, DROIT COMPARÉ DE L'ARBITRAGE INTERNATIONAL ¶ 366 (2002). *See also* Dirk Otto & Omaia Elwan, *Article V(2)*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 345, 360-61 (Herbert Kronke et al. eds., 2010) ("With regard to arbitration agreements, states may either prohibit the arbitration of certain consumer disputes entirely or require a specific and separate written arbitration agreement that is designed to effectively inform customers that they are about to waive recourse to state courts").

[506] John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order*, 36 INT'L ORG. 379 (1982); DANI RODRIK, UNITED NATIONS DEVELOPMENT PROGRAMME, THE GLOBAL GOVERNANCE OF TRADE: AS IF DEVELOPMENT REALLY MATTERED 14 (July 2001).

[507] *See supra* Part II.

[508] *See supra* Part III.

[509] Arbitration Act 1996, § 30 (U.K.); UNCITRAL MODEL LAW, Art. 16; NOUVEAU CODE DE PROCEDURE CIVILE [N.C.P.C.], Art. 1466 (Fr.); ICC RULES, Art. 6(2); LCIA RULES, Art. 23. For further discussion on this issue, *see* William Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?, ICCA CONGRESS SERIES NO. 13 at 55 (2006), Virginie Colaiuta, *The Similarity*

many jurisdictions globally, moreover, the concept of class action does not exist, although its equivalent may be achieved by way of multi-party arbitrations or through a body acting as a representative for a class of people who have been affected by the same issue.[510]

On the other hand, the vast majority of non-U.S. jurisdictions have taken steps to protect consumers and employees,[511] including jurisdictions with strong pro-arbitration policies. The protection is usually achieved by proscribing predispute arbitration agreements in consumer and employment contracts, or by placing conditions or limitations on such agreements.[512] In many cases, courts have applied statutory or common-law standards for policing fairness in a manner akin to the approaches of many lower federal and state courts in the United States.[513]

Thus, the U.S. Supreme Court's arbitration jurisprudence makes the U.S. less protective of the procedural rights of consumers and employees than almost any other jurisdiction in the world. In the words of one commentator:

> Despite the U.S. . . . [Court's] statements to the contrary, one might be tempted to conclude that there is evidence of convergence in most western legal systems *against* the enforcement of pre-dispute mandatory arbitration clauses in consumer contracts and in favor of the maintenance of consumers' access to state courts for the resolution of their disputes. To do so might involve concluding that the current situation in the U.S. . . . is an anomaly flowing from a specific statutory instrument particular to American federal law.[514]

This may explain why it appears companies in the U.S. are more likely than those in other countries to incorporate predispute arbitration agreements in adhesion contracts.[515] Although international legal treatment of consumer and employment arbitration is attracting increasing attention among U.S. scholars[516] and a number

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of Aims in the American and French Legal Systems With Respect to Arbitrators' Powers to Determine Their Jurisdiction, *in id.* at 154.

[510] Various jurisdictions differ greatly on this point, but most differ procedurally from the classic notion of class actions as found in U.S. law. *See* Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321 (2001); Harald Koch, *Non-Class Group Litigation under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355 (2001).

[511] It is this distinction in the definition of the term "commercial" that has led to consumer and employment protections being stronger in countries outside of the U.S., as most jurisdictions outside the U.S. consider such relationships to be non-commercial, whereas, in the U.S., they are still considered commercial. *See* BORN, *supra* note 145, at 262-64. *See also* Karen Stewart & Joseph Matthews, Comment, *Online Arbitration of Cross-Border Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1136 (2002).

[512] BORN, *supra* note 145, at 817-29.

[513] *See id.* at 820.

[514] Saumier, *supra* note 408, at 1226.

[515] *See* Sternlight, *supra* note 505, at 850.

[516] *See generally id*. at 844-53. *See also* Drahozal & Friel, *supra* note 505, at 362-73; Rogers, *supra* note 505, at 360-83; Saumier, *supra* note 408, at 1222-26.

of nations have passed pertinent legislation, relevant case law is relatively scarce in other countries.[517] What is clear is that the arbitration laws of other countries tend to be more protective of consumers and employees than U.S. law, although the form and scope of those protections varies.

A. *Protecting Consumers*

1. *The European Union*

a. *European Union legislation*

Arbitration agreements in consumer contracts are treated in the EU's Directive on Unfair Terms in Consumer Contracts.[518] The Directive calls upon Member States to enact national legislation denying any binding effect on consumers to unfair terms used in consumer contracts.[519] The Directive provides the following definition of unfair contractual terms:

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[517] "While one might infer . . . that mandatory consumer arbitration has received a great deal of attention in Europe, this is untrue. Rather, because the practice apparently is presumed to be impermissible, it is rarely discussed." Sternlight *supra* note 505, at 848.

[518] Council Directive 93/13, Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 (EEC). Council Directive 93/13, Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 (EEC). More recently, the European Commission has proposed two new initiatives, a Directive on Alternative Dispute Resolution and a Regulation on Online Dispute Resolution, aimed at making it easier for consumers to secure redress in the Single Market. *See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Alternative dispute resolution for consumer disputes in the Single Market*, at 4, COM (2011) 791/2. The Directive on Alternative Dispute Resolution ensures that all disputes between a consumer and trader arising from the sale of goods or provision of services can be submitted to an Alternative Dispute Resolution ("ADR") entity. *See Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)*, at 4, COM (2011) 793/2. The Directive holds Member States responsible for ensuring that the ADR entities function properly and that the principles of impartiality, transparency, effectiveness and fairness are upheld. *Id.* at 12. The Regulation on Online Dispute Resolution establishes a European online dispute resolution platform in the form of an interactive website, "offering a single point of entry to consumers and traders seeking to resolve disputes out-of-court which have arisen from a cross-border e-commerce transaction." *See Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR)*, at 8, COM (2011) 794/2. The interactive website will allow consumers and traders to submit electronic complaints in all official EU languages and its use will be free of charge. *Id.*

[519] *Id.* Art. 6(1), at 31 ("Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms").

> 1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
> 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.[520]

Further, the Annex to the Directive provides a list of terms which "may be regarded as unfair," citing at (q):

> terms which have the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, *particularly by requiring the consumer to take disputes exclusively to arbitration* not covered by legal provisions …[521]

The Directive thus polices terrain covered by the common law of unconscionability in the U.S., but its application must be raised *sua sponte* by courts. In *Elisa María Mostaza Claro* v. *Centro Móvil Milenium SL*,[522] the European Court of Justice indicated that the court of a Member State is obliged to consider independently whether or not the Directive had been breached. In another decision, *Asturcom Telecommunicaciones SL* v. *Maria Cristina Rodriguez Nogueira*,[523] it described the Directive as a matter of public policy for all EU Member States, thus requiring "more stringent *sua sponte* scrutiny of arbitral awards against consumers."[524] As a result, according to some, "[a]rbitration as a

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[520] *Id.* Art. 3, at 31.

[521] *Id.* Art. 3(3)(1)(q), Annex, at 33 (emphasis added). The phrase "arbitration not covered by legal provisions" is regarded as poor drafting, but it is generally accepted to mean that any ADR system which restricts a consumer's ability to go to court, is required to provide legal safeguards similar to those found in a court system. *See* Morrison & Forrester, LLP, *Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce*, OECD.ORG, 8 (April 2000), *available at* http://www.oecd.org/dataoecd/1/35/1879741.pdf. In the UK, it has been held to mean those arbitrations that are covered by a statutory scheme. Zealander & Zealander v. Laing Homes, [2000] 2 T.C.L.R. 724.

[522] Case C-168/05, Elisa María Mostaza Claro v. Centro Móvil Milenium SL, 2006 E.C.R. I-10421. For further commentary on this case, *see* Bernd Ulrich Graf & Arthur E. Appleton, *Elisa María Mostaza Claro v. Centro Móvil Milenium: EU Consumer Law as a Defense Against Arbitral Awards – ECJ Case C-168/05*, 25 ASA BULL. 48 (2007).

[523] Case C-40/08, Asturcom Telecommunicaciones SL v. Maria Cristina Rodriguez Nogueira, 2009 E.C.R. I-09579. For further commentary on this case, *see* Bernd Ulrich Graf & Arthur E. Appleton, *ECJ Case C 40/08* Asturcom – *EU Unfair Terms Law Confirmed as a Matter of Public Policy*, 28 ASA BULL. 413 (2010).

[524] Graf & Appleton, *supra* note 523, at 417.

means of dispute resolution in [business to consumer] relationships with an EU based consumer is losing its attractiveness."[525]

The approach of the EU Directive represents a striking counterpoint to *Rent-A-Center* and *Concepcion,* which dramatically curtail the judicial oversight of arbitration agreements under the FAA[526] as well as other U.S. Supreme Court cases placing the onus of proving unfairness squarely on consumers or employees challenging arbitration.[527]

b. *European Union Member States' legislation and case law*

Some EU jurisdictions outlaw the arbitration of disputes arising out of consumer contracts altogether.[528] For example, the laws of France,[529] Lithuania,[530] Poland,[531] and Luxembourg,[532] provide, expressly or impliedly, that arbitration agreements in consumer contracts may not be enforced against unwilling consumers.[533] Some other countries limit enforcement of arbitration agreements in specific kinds of consumer contracts.[534]

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[525] *Id.*

[526] *See supra* Parts II and III.

[527] *See supra* Parts II and III.

[528] Otto & Elwan, *supra* note 505, at 360; BORN, *supra* note 145, at 263.

[529] Article 2061 of the Civil Code states that only those matters that are "commercial" in nature or contracts between two professionals may be arbitrable, thereby impliedly precluding consumer contracts from being arbitrable. The relationship of this article to Article 132 al. 5 of the Code of Consumer Contracts suggests that this rule is a mandatory rule of France. For further discussion, *see* Philippe Fouchard, *La laborieuse réforme de la clause compromissoire par la loi du 15 mai 2001*, 2001 REV. ARB. 397. *See also* Yves Derains & Laurence Kiffer, *France (2010)***,** in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1 (Jan Paulsson ed., Supplement No. 58, March 2010).

[530] Vilija Vaitkute Pavan & Jurgita Petkute, *Lithuania (2010)*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 8 (Jan Paulsson ed., Supplement No. 60, July 2010) ("disputes arising from consumer agreements … may not be submitted to arbitration").

[531] In Poland, the Civil Code outlaws arbitration in disputes arising from consumer contracts in Article 3852(23). It is presumed that the arbitration agreement is unfair and thus void, unless it is proven to be individually negotiated by the consumer. Habil Tadeusz Szurski & Andrzej W. Wiśniewski, *Poland*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1 (Jan Paulsson ed., Supplement No. 46, Aug. 2006).

[532] Law of 25 August 1983 on consumers' protection. Arts. 2-13(e); Cour Supérieure de Justice, October 30, 1962, Pas. lux. XIX, 28; *see* Ernest Arendt & Théa Harles-Walch, *Luxembourg*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 18-20 (Jan Paulsson ed., Supplement No. 18, Sept. 1994).

[533] The laws of some Member States authorize consumer arbitration pursuant to post-dispute agreement. *See, e.g.*, §6 LAG OM SKILJEFÖRFARANDE [Arbitration Act] (SFS 1999:116) (Swed.); Ch. 12 §1(d)(1) KONSUMENTSKYDDSLAG [Consumer Protection Act], 1978, (Fin.); SCHIEDSRECHTS-ÄNDERUNGSGESETZ [ShieldsRAG] [Arbitration Act], 2006, §617(1) (Austria) ("Arbitration agreements between an entrepreneur and a consumer may only be validly concluded for disputes that have already arisen").

[534] Section 1030 of Germany's Code of Civil Procedure indicates that contracts relating to property rental cannot be arbitrated. *See* ZIVILPROZESSORDNUNG [ZPO]

Legislation in some other Member States permits limited enforcement of predispute arbitration agreements involving consumers, subject to court oversight. The English Arbitration Act, for example, declares consumer arbitration agreements invalid if they are "unfair" – a standard which, like unconscionability, entails inquiry into the substantive fairness of arbitration provisions as well as their history and provenance.[535] In order to prevent consumers from incurring disproportionately high transaction costs for smaller claims, the law decrees arbitration agreements unfair as to such matters. When larger amounts are in dispute, it is for the courts to address issues of fairness respecting arbitration agreements.[536]

Some EU Member States establish formal requirements for predispute arbitration agreements.[537] Other laws limit the choice of situs for consumer arbitration.[538]

2. *Protections Afforded by Laws of Other Countries*

Various jurisdictions outside the EU also prohibit arbitration of disputes arising out of consumer contracts.[539] The laws of Japan[540] and Brazil[541] provide,

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§1030 (Ger.); Art. 27 (2) of the Act on Investment Funds (Switz.); Art. 487(1) of the Latvian CPL outlawing arbitration of rental disputes or disputes involving immovable property; MIETRECHTSGESETZ [Landlord and Tenant Act] (Austria); WOHNUNGSGEMEINNÜTZIGKEITSGESETZ [Non-profit Housing Act] (Austria); Bulgarian Civil Procedure Code, Art. 19(1) on Outlawing Arbitrations in Disputes Concerning Immovable Property.

[535] Arbitration Act, 1996, c. 23, §§ 89-91 (U.K.). *See* BORN, *supra* note 145, at 826 & n.1320 (citing cases interpreting English law).

[536] *See infra* text accompanying notes 549-51 (discussing English jurisprudence).

[537] ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] §1030 (Ger.); Arbitration Act 2006, §§ 617-18 (Austria); Latvian Consumer Rights Protection Law, 1999, No. 104/105.

[538] For instance, the Swiss Law on Private International Law denotes that if the arbitration agreement prescribes that a Swiss consumer must resolve a dispute outside of its own jurisdiction, the consumer has the right to rescind that agreement. BORN, *supra* note 145, at 126 n.757.

[539] Otto & Elwan, *supra* note 505, at 360; BORN, *supra* note 145, at 263.

[540] Chusai Ho Arbitration Law, No. 138 of 2003, supplementary provision Art. 3 (Japan).

[541] D.J.R.J, Ap. Civ. No. 2004.002.23288/008, Agravo de Instrumento, March 22, 2005, Geza Otvos et al. v. Brascan Imobiliária Incorporações S/A (Braz.). *See* Carlos Nehring Netto, *Brazil (2008)*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 12 (Jan Paulsson, ed., Supplement No. 51, 2008). *See also* Fernando Eduardo Serec, Antonio Marzagão Barbuto Neto & Eduardo Rabelo Kent Coes, *Latin Lawyer Reference – Brazil*, LATINLAWYER.COM, *available at* www.latinlawyer.com/reference/article/40150/brazil (last visited July 20, 2011): "There is a lot of debate over the arbitrability of consumer disputes. The Brazilian Arbitration act sets forth in its Article 4.2, specific rules for consumer cases as follows: 'The arbitration clause shall not be deemed to have efficacy unless the adherent takes the initiative to initiate arbitration

expressly or impliedly, that arbitration agreements in consumer contracts may not be enforced against unwilling consumers. Other jurisdictions have enacted similar legislation respecting specific kinds of consumer contracts,[542] such as insurance contracts,[543] and residential building contracts.[544] Some jurisdictions, such as New Zealand,[545] while proscribing predispute arbitration agreements in consumer contracts, recognize the enforceability of post-dispute agreements to arbitrate consumer disputes. The Canadian Province of Quebec amended its Consumer Protection Act in 2002 to prohibit "[a]ny stipulation that obliges the consumer to refer a dispute to arbitration;" post-dispute agreements, however, are permissible.[546] The Province of Ontario has followed a similar path.[547]

Some countries have legislated formal requirements for consumer arbitration agreements. The New Zealand Arbitration Act, for example, requires that predispute arbitration agreements in consumer contracts be evidenced by a separate integration that indicates the arbitration provision was separately negotiated.[548]

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proceedings or agrees expressly to its initiation as long as it is in writing or in an attached document or in bold, with a signature or endorsement made specially for this clause.' On the other hand, the Consumer Protection Act, in its Article 51, item VII, establishes that any clauses in a consumer agreement providing for arbitration as a compulsory means of dispute resolution are null and void."

[542] Michael Hwang & Lawrence G. S. Boo et al., *Singapore*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 13-14 (Jan Paulsson, ed., Supplement No. 41, July 2004) ("It is generally accepted that issues which may have public interest elements may not be arbitrable, e.g., . . . consumer protection"). *See* M. Sornarajah, *Refusal of Enforcement by Courts of Secondary Jurisdiction*, 3 SINARB 2 (1995).

[543] Australian law renders predispute arbitration agreements found in insurance contracts completely void. Insurance Contracts Act 1984 (Cth) s. 43 (Austl.); Insurance Act 27 of 1943 § 63 (S. Afr.) (stating that the insured may always have recourse to judicial mechanisms).

[544] *See* Home Building Act 1991 (Cth) s. 7(c) (Austl.).

[545] Section 11 of the 1996 New Zealand Arbitration Act specifically states that the arbitration agreement must have been entered into *after* the dispute has arisen to be enforceable. Arbitration Act 1996 §11 (N.Z.), *available at* http://www.legislation.govt.nz/act/public/1996/0099/latest/whole.html#dlm403277.

[546] Consumer Protection Act, § 11, R.S.Q. 2002 c. P-40.1 (Can.), *available at* http://www.canlii.org/en/qc/laws/stat/ rsq-c-p-40.1/latest/rsq-c-p-40.1.html.

[547] Ontario's Consumer Protection Act provides that "any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act." Consumer Protection Act, S.O. 2002, c. 30, Sch. A, s. (7)(2) (Can.).

[548] *See supra* note 545.

3. *Judicial Policing*

Precedents from two other leading common-law countries, the United Kingdom and Canada, illustrate that where courts are left with discretion to interpret and apply laws governing arbitration, they have the ability to scrutinize arbitration agreements and protect consumers in ways that may effectively be prevented under the FAA as interpreted in the Third Arbitration Trilogy.

In England, prior to the enactment of the 1996 Arbitration Act, the 1988 Consumer Arbitration Agreements Act simply outlawed the arbitration of disputes arising out of consumer contracts.[549] Since the Arbitration Act and the 1999 Regulations on Unfair Terms in Consumer Contracts came into force, however, English courts have had the opportunity to interpret and apply these standards in a few cases. In the case of *Mylcrist Builders Ltd* v. *Buck*,[550] a contractor was hired by a consumer to build an extension to her bungalow. The agreement was on the contractor's standard terms and conditions, which included an arbitration clause. A dispute arose between the parties as to whether certain sums were included in the agreed price, leading the contractor to initiate arbitration proceedings pursuant to the contract. The consumer refused to participate in the proceedings and the contractor unilaterally appointed a sole arbitrator who found against the consumer, holding that she was liable to pay over £5000 under the contract and an additional £6000 in respect of the claimant's costs and the arbitrator's fees. The contractor then sought to enforce the award, leading to the decision of Ramsey J. who held that the applicable principles were as follows:

> (1) A term is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith.
>
> (2) There is "significant imbalance" if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour.
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> . . .
>
> (4) The requirement of good faith is one of fair and open dealing in which: (a) openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer; (b) fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor . . . The supplier should deal fairly and equitably with the consumer.

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[549] Consumer Arbitration Agreements Act, 1988, § 1 (U.K.), *available at* http://www.whub.org.uk/HMCoroners /PDF/CoronersAct.pdf.

[550] [2008] EWHC 2172 (Eng.).

Applying these principles to the case at hand, Judge Ramsey found that by including the arbitration clause in his standard terms the contractor did take advantage of the situation, "albeit unconsciously," that the arbitration clause had not been properly drawn to the consumer's attention at the time of the contract, and that the significance of the arbitrator's fees compared to the amount in dispute constituted a further element of imbalance to the detriment of the consumer. It was therefore held that the arbitration clause was unfair and not binding on the consumer.[551]

In Canada, the question of the arbitrability of consumer disputes has been the subject of a number of important cases over the past decade. Several provincial courts have dealt with arguments of unconscionability in relation to the arbitration agreements in dispute[552] and legislation has recently been enacted in Quebec and Ontario outlawing arbitration agreements in consumer contracts.[553] As previously noted, moreover, the Canadian Supreme Court recently determined that in some cases pro-arbitration policies must give way to other statutory aims.[554]

4. *Distinguishing Between Domestic and International Arbitration*

While strictly regulating resort to arbitration in consumer (and employment) contracts, most Western jurisdictions reviewed above pursue at the same time an active pro-international arbitration policy. Moreover, with the continuing development of international commerce, especially on-line, arbitration for consumer contracts is appearing as a solution to the difficulties inherent in litigation of international disputes in courts, leading to the introduction of international soft-law instruments advocating the use of ADR to resolve these types of disputes.[555]

However, this more recent policy development has so far failed to transform into national hard-law instruments and the main issue remains the compatibility of

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[551] The UK Office of Fair Trading ("OFT") "has effected changes in consumer contract terms through implementation of the [1996 Arbitration] Act. The OFT consistently has required businesses either to delete predispute binding arbitration clauses altogether or to give consumers the options to arbitrate after a dispute arises." Drahozal & Friel, *supra* note 505, at 372-73.

[552] *See* Hamilton, *supra* note 408. While unconscionability arguments have generally been rejected by Canadian courts, *see also* BORN, *supra* note 145, at 730-31, unconscionability principles are likely to come into play to address real inequities. Hamilton, *supra* note 408, at 732.

[553] *See supra* notes 546-47 and accompanying text.

[554] *See supra* notes 409-20 and accompanying text.

[555] *See* OECD Council, *Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce* (1999); OECD Council, *Recommendation on Consumer Dispute Resolution and Redress* (2007). The Recommendations contemplate a variety of dispute resolution mechanisms, including procedures with binding determinations by a third party, but do not elaborate on the proposed contractual framework for such procedures. *See* McGill, *supra* note 64, at 371.

laws proscribing or limiting arbitration agreements in consumer contracts with Article II of the New York Convention, which requires that agreements to arbitrate be subject to the same rules of validity as other categories of contracts.[556] In some jurisdictions, such laws may not be deemed applicable to international or cross-border consumer contracts.[557] Swedish law, for instance, which provides for the nonarbitrability of various consumer disputes includes an express proviso that the exception does not apply where contrary to Sweden's international obligations, potentially including the New York Convention.[558]

French law distinguishes between domestic and international arbitration. In the case of an international arbitration agreement, the principle of competence-competence prevents the national courts from deciding upon the validity of the arbitration clause (except when the clause is "manifestly invalid") and the arbitrability of the dispute, delegating such power to the arbitral tribunal.[559] Therefore, the courts will not apply either Article 2061 of the Civil Code, which prohibits arbitrations involving non-professionals[560] or the legal provisions protecting consumers.[561] It will therefore be for the arbitral tribunal to decide whether the customer is bound by the arbitration agreement according to the law applicable to the merits of the dispute and its decision will be subject to review by the French courts at the enforcement or annulment stage.[562]

The English analysis set out above also applies to domestic consumer arbitrations (that is to say, arbitrations seated in England and Wales). Where a tribunal in an arbitration seated outside of the United Kingdom gives an award that a party wishes to enforce in England or Wales, the only grounds on which recognition of the award could be refused would be those stated in Article V of the New York Convention. When enforcing a New York Convention award, an

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[556] *See* BORN, *supra* note 145, at 827.

[557] France, Switzerland, Luxembourg, and Austria are notable examples. *See* Barbara Helene Steindl, *Learned Lawyers Attest: It Is Advantageous To Be Right in (an Austrian Court)*, 27 J. INT'L ARB. 427 (2010); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 12, 2010, Bull. civ. I, No. 09-11872 (Fr.), ("la cour d'appel, retenant le caractère international de la clause d'arbitrage, valable sans condition de commercialité, l'article 2061 du code civil étant sans application dans l'ordre international, a, à bon droit, renvoyé les parties à mieux se pourvoir"); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 25, 2010, Bull. civ. I, No. 09-12126 (Fr.).

[558] Arbitration Act (SFS 1999: 116), § 6 (Swed.). *See* BORN, *supra* note 145, at 825.

[559] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 12, 2010, Bull. civ. I, No. 09-11872 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., March 30, 2004, Bull. civ. I, No. 02-12259 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 21 1997, Bull. civ. I, No. 95-11429 (Fr.).

[560] *See supra* note 532 and accompanying text.

[561] Because these are international mandatory rules of public policy, the arbitral tribunal itself is bound to apply them. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 21 1997, Bull. civ. I, No. 95-11429 (Fr.).

[562] *See supra* note 532.

English court will have no particular reference to the fact that the arbitration involved a "consumer" unless that is of legal relevance under the law of the seat of the arbitration.

The conflict with the New York Convention therefore remains only a potential one so far. Should it materialize in the future, it will be interesting to see how the courts intervene to police these conflicts and arbitration agreements included in international contracts.

For the EU in general, given that the European Court of Justice has taken the position that the Directive on Unfair Contract Terms "must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy,"[563] the Directive may be treated as an internationally mandatory rule of law that takes precedence over any foreign laws that would normally govern contractual issues.[564] Because the Directive does not outlaw consumer arbitration agreements categorically but rather encourages active judicial scrutiny, it is seemingly consistent with the requirement of the Convention that agreements to arbitrate be subject to the same rules of validity as other categories of contract.

B. *Protecting Employees*

Reflecting the strong pro-worker tradition prevalent among civil-law countries, EU directives offer affirmative protections for individuals who claim to have suffered discrimination in the workplace. These directives prescribe that Member States must ensure that the individual claiming to be the victim of such treatment has access to judicial or administrative redress[565] – in clear contrast to the stance of the U.S. Supreme Court in its application of the FAA. Moreover, Brussels I Regulation 44/2001 ensures that employees are given the choice of bringing a claim in their own State courts, or in the State in which the employer is based.[566]

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[563] Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira, [2009] C-40/08 (E.C.J.), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0040:EN:HTML.

[564] *See generally* Jan Kleinheisterkamp, *The Impact of Mandatory Laws on the Enforceability of Arbitration Agreements*, 3 WORLD ARB. & MED. REV. 91 (2009). It is possible, therefore, that an arbitration agreement in a consumer contract involving a customer domiciled in the EU that contravenes the terms of the Directive might be deemed ineffective or invalid under Article II(3) of the New York Convention. *See id.* This might be true even in states such as France where, in order for an award to be set aside based on public policy grounds, there has to be a flagrant violation of public policy. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 4, 2008, Bull. civ. I, No. 06-15320.

[565] Council Directive 2000/43, Art. 7(1), 2000 O.J. (L 180) 22, 25 (EC); Council Directive 2000/78, Art. 9(1), 2000 O.J. (L 303) 16, 20 (EC).

[566] Council Regulation 44/2001, Art. 19, 2001 O.J. (L 12) 1, 7 (EC). *See also id.*, Art. 20(1) ("An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled").

More jurisdictions deny enforcement to arbitration agreements in employment contracts than in consumer contracts.[567] This includes many EU jurisdictions, including Italy,[568] France,[569] Germany, [570] Hungary,[571] Spain,[572] England,[573] and Belgium,[574] among others,[575] as well as more recent member states such as Bulgaria,[576] Latvia[577] and Lithuania.[578] This stance reflects, among other things, the perception that employment disputes often implicate fundamental human rights.[579] Other countries prohibiting arbitration of disputes arising out of employment contracts include Switzerland,[580] Chile,[581] and Libya.[582]

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[567] *See* Otto & Elwan, *supra* note 505, at 355.

[568] Codice civile [C.c.], Art. 806 (It.). *See also* Maria Letizia Patania, *Arbitration in Italy*, *in* CMS GUIDE TO ARBITRATION § 1.4, http://cms-arbitration.com/wiki/index.php?title=Italy#ARBITRATION_IN_ITALY (last visited Dec. 10, 2011). *See* Cross, *supra* note 8, at 38 & n.166.

[569] *See* Yves Derains & Laurence Kiffer, *France (2010)*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1-88 (Jan Paulsson ed., Supplement No. 58, March 2010). *See also* Cross, *supra* note 8, at 37-38.

[570] ARBEITSGERICHTSGESETZ [AbrGG] [Labor Court Act], July 2, 1979, BGBl. I at 856, §§ 2 and 4 (Ger.). *See also* Cross, *supra* note 8, at 38 & n.172.

[571] Peter Mittak & Milan Kohlrusz, *Arbitration in Hungary*, *in* CMS GUIDE TO ARBITRATION § 1.2, http://cms-arbitration.com/wiki/index.php?title=Hungary#ARBITRATION_IN_HUNGARY (last visited Dec. 10, 2011). *See* Cross, *supra* note 8, at 38 & n.169.

[572] *See* Bernardo M. Cremades, *Spain*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 7 (Jan Paulsson ed., Supplement No. 41, July 2004) ("Employment arbitration is specifically excluded from the scope of the Act (Art. 1(4)) Law)").

[573] Employment Rights Act, 1996, c. 18, § 203(1)(b) (U.K.) ("Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports – to preclude a person from bringing any proceedings under this Act before an employment tribunal").

[574] CODE JUDICIAIRE [C.JUD.] Art. 1678(2) (Belg.). *See also* Marie Canivet, *Arbitration in Belgium*, *Cited* in Cross, *supra* note 8, at 38 n.165.

[575] *See* Sternlight, *supra* note 505, at 848-50; Cross, *supra* note 8, at 37-38.

[576] Civil Procedural Code, Art. 19(1) (Bulg.), *available at* http://www.vks.bg/english/vksen_p04_02.htm. *See also* Kostadin Sirleshtov & Pavlin Stoyanoff, *Arbitration in Bulgaria*, *in* CMS GUIDE TO ARBITRATION § 1.4, http://cms-arbitration.com/wiki/index.php?title=Bulgaria#ARBITRATION_IN_BULGARIA (last visited Dec. 10, 2011).

[577] Civil Procedure Law, Art. 487(7) (Lat.) (disputes may not be referred to arbitration that are "between employees and employers if the dispute has arisen when entering into, amending, terminating or implementing an employment contract").

[578] Civil Procedure Law, Art. 487(7) (Lat.). *See* Pavan & Petkute, *supra* note 530, at 8.

[579] European attorneys generally agree that mandatory employment arbitration would not be upheld, "based on article VI of the European Convention for the Protection of Human Rights and Fundamental Freedoms." Sternlight, *supra* note 505, at 849.

[580] Bundesgericht [Bger][Federal Supreme Court] June 28, 2010, Case 4A_71/2010 (Switz.).

[581] In Chile arbitrating disputes arising from employment contracts is specifically considered to be contrary to public policy. Andrés L. Jana, *Chile*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 14 (Jan Paulsson ed., Supplement No. 59,

As with consumer contracts, some national laws outlaw disputes arising from certain forms of employment contracts from being arbitrable. Costa Rican legislation, for instance, holds that any arbitration clause in a government/public employment contract is void.[583] Germany outlaws arbitration in all employment disputes except those under the statutory regulation of the Code of Employment Law ("*Arbeitsgerichtsgesetz*").[584] In Israel, specific disputes, such as those regarding the severance payments of employees, as well as other personal rights that a person may have during the time of his employment are considered non-arbitrable.[585] Brazil outlaws arbitration in labor disputes where social or collective rights and interests are issues in the dispute.[586] The employment law of a number of countries makes it clear that only post-dispute arbitration agreements are enforceable.[587]

In the UK, specialized courts known as employment tribunals have sole jurisdiction to resolve individual claims stemming from statutory rights.[588]

May 2010) ("Disputes arising under the Labor Code are also excluded from arbitration, due to the public order aspects of labor issues and the prohibition on waiving labor rights"). In Chile, while normal employer/employee disputes are not arbitrable, those involving collective bargaining are. *Id. at* 15.

[582] Civil Procedure Code, Art. 740 (Libya). *See* Khaled Kadiki, *Libya*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 3 (Jan Paulsson ed., Supplement No. 15, 1993).

[583] Marcela Filloy Zerr, *Costa Rica*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 10 (Jan Paulsson ed., Supplement No. 54, 2009) (labor disputes in the public sector are non-arbitrable).

[584] *See* Rolf Trittmann et al., Part II – Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter II – Arbitration Agreement, § 1030 – Arbitrability, *in* ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 122 (Karl-Heinz Böckstiegel et al. eds., 2008).

[585] Smadar Ottolenghi, *Israel*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 5 (Jan Paulsson ed., Supplement No. 2, 1984).

[586] Netto, *supra* note 541, at 41.

[587] *See, e.g.*, SCHIEDSRECHTS-ÄNDERUNGSGESETZ [SchiedsRAG] [Austrian Arbitration Act] 2006, BUNDEGESTZBLATT I [BGBL I] No. 7/2006, § 618; Polish Code of Civil Procedure, Art. 1164 (2005), *available at* http://cms-arbitration.com/wiki/index.php?title=Poland#CONDUCT_OF_ARBITRATION_PROCEEDINGS; CODE JUDICIAIRE [C.JUD.] Art. 1678(2) (Belg.), English translation *available at* http://www.cepani.be/en/Default.aspx? PId=859; Arbitration Law, No. 138 of 2003, Art. 4 of Suppl. Provisions (Japan), English translation *available at* http://www.kantei.go.jp/foreign/ policy/sihou/arbitrationlaw.pdf. Although legislation does not denote this in Brazil, it has been held that in employment disputes, an arbitration agreement can only be entered into after the dispute and termination of the employment contract. T.S.T. Case n. RR – 259/2008-075-03-00, Nov. 11, 2009 (Braz.).

[588] Paul Salvatore et al., *International Trends in Employment Dispute Resolution – Counsel's Perspectives*, *in* WORLDS OF WORK: EMPLOYMENT DISPUTE RESOLUTION SYSTEMS ACROSS THE GLOBE, Fitzwilliam College, Cambridge, July 21, 2011, at 9-10. *See also* Joanna Blackburn, *New and Challenging Developments for UK Employment*

Usually, a tribunal is a three-person panel made up of an employment lawyer and two "lay members."

As is the case with consumer legislation, different treatment may be accorded to arbitration provisions in international contracts. After some hesitation in the past,[589] due to France's policy of advancing arbitration at an international level, the French Cour de Cassation has decided that, although predispute arbitration agreements are valid in international employment contracts, such agreements to arbitrate will not be enforced against the employee when he has initiated court proceedings.[590] Austria, Switzerland, and other countries on the continent also maintain a distinction between rules applying to domestic cases and those that are international.[591]

C. *A Cautionary Note*

While it seems fair to say that court jurisprudence has made the United States a relative outlier with respect to limits on the enforcement of predispute consumer and employment arbitration agreements, it is also appropriate to consider the

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Lawyers and Their Clients, *in* NAVIGATING EMPLOYMENT LAW IN EUROPE LEADING LAWYERS ON DRAFTING EMPLOYMENT AGREEMENTS, UNDERSTANDING RECENT LEGISLATION, AND WORKING WITH LOCAL AUTHORITIES (2011), *available at* 2011 WL 5053657, at *5.

[589] Cour d'Appel, Grenoble, Sept. 13, 1993, 1994 REV. ARB. 337. *See* Karim Youssef, *P*, *Art. I Fundamental Observations and Applicable Law*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 47–68 (Loukas Mistelis & Stavros Brekoulakis eds., 2009).

[590] Cour de cassation [Cass.] [supreme court for judicial matters] soc., June 28, 2005, Bull. civ. V, No. 03-45042 (Fr.): "[Attendu] que la clause compromissoire insérée dans un contrat de travail international pour tout litige concernant ce contrat n'est pas opposable au salarié qui a saisi régulièrement la juridiction compétente en vertu des règles applicables, peu important la loi régissant le contrat de travail"; *see also* Cour de cassation [Cass.] [supreme court for judicial matters] soc., October 9, 2001, Bull. civ. V, No. 99-43288 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] soc., May 4, 1999, Bull. civ. V, No.97-41860 (Fr.).

[591] In Austria, issues of arbitration of employment related/consumer related disputes are distinctly a matter of public policy in domestic disputes. *See* SCHIEDSRECHTS-ÄNDERUNGSGESETZ 2006 [ARBITRATION ACT] BUNDESGESETZBLATT [BGBL] NO. 7-2006. *See also* Maria Theresa Trofaier & Daniela Karollus Bruner, *Arbitration in Austria*, *in* CMS GUIDE TO ARBITRATION § 1.11, http://cms-arbitration.com/wiki/index.php?title=Austria#ARBITRATION_IN_AUSTRIA (last visited Dec. 10, 2011). In Switzerland, the Federal Private International Law governs international arbitrations while the newly enacted Federal Swiss Code of Civil Procedure governs domestic arbitrations. Domitille Baizeau & Andree Brunschweiler, *Switzerland: What Does the New Domestic Arbitration Regime Teach Us?*, GLOBAL ARB. REV., Aug. 3, 2011, *available at* http://www.lalive.ch/data/publications/GAR_Article_(domestic_arbitration).pdf. Under the new Swiss Code of Civil Procedure, parties can opt out of the domestic regime in favor of the Federal Private International Law. *Id.*

unique features of the U.S. justice system in considering appropriate frameworks for the resolution of consumer and employment disputes. Among other things, our extensive system of discovery and the broad right to jury trial contribute to higher costs and delays for individuals as well as companies.[592] For this reason, any analysis of future options must begin with a careful evaluation of the efficacy of public as well as private adjudication processes.[593]

VI. CONSIDERING THE FUTURE OF ARBITRATION IN THE CONTEXT OF A BROADER DIALOGUE REGARDING CONSUMER AND EMPLOYMENT DISPUTES

A. *Seeking a Broader and Deeper Picture of Consumer and Employment Dispute Resolution*

In the highly politicized struggle over employment and consumer arbitration, expectations regarding the future of arbitration law and policy shift dramatically with the variable political climate in Washington. In the risks and uncertainties that confront all sides in this debate, inveterate optimists may see the potential for thoughtful, dispassionate consideration of the operation of arbitration agreements in these arenas, and the broader concerns and realities at play in consumer and employment dispute resolution. For example, current regulatory initiatives focused on arbitration provisions in consumer financial services contracts and agreements between securities investors and brokers[594] might create an opportunity to make policy decisions about the relative costs and benefits of binding arbitration for consumers on the basis of reliable qualitative and quantitative empirical data. There are, however, a number of obstacles in the way of accomplishing this goal.

Underlying today's debate is a fundamental disagreement about the ability of binding arbitration to provide justice for consumers and employees,[595] a debate that in some respects reflects the larger political divide. Although there is a growing body of empirical research on arbitration in employment and consumer settings,[596] proponents and opponents of arbitration both find empirical support

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[592] *See* Sussman et al., *supra* note 197, at 502.

[593] *See infra* text accompanying notes 609-10, 616-17, 627-28.

[594] *See supra* text accompanying notes 492-97.

[595] *See generally* Morrison, *supra* note 38 (summarizing facilitated discussion of issues surrounding use of arbitration agreements in adhesion contracts involving consumers and employees).

[596] *Compare* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUDIES 843 (2004) (surveying empirical studies of the operation of arbitration in consumer and employment settings as of several years ago), *and* Sussman et al., *supra* note 197, at 520-25 (current listing of empirical studies to date).

for their positions.[597] Some studies may be flawed by polemic,[598] others offer considerable room for interpretation,[599] and no single study, however carefully constructed, has offered a complete picture.[600]

If we are ever to bridge the gap in understanding and perception, we must find a way to address a number of tough realities. First, there is the difficulty of obtaining sufficient reliable data on largely private arbitration processes.[601] Second, there is a growing and shared recognition that data harvested in one specific context is of little or no relevance to other scenarios, and that empirical research must take account of a variety of contextual factors including the transactional setting;[602] the status or identity of disputants (such as employees);[603] the role of counsel in dispute resolution;[604] the rules governing arbitration[605] and

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[597] *See, e.g.*, Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 848-49 (summarizing differing conclusions from data on costs).

[598] *See* Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051 (2009) (extensively critiquing the analysis and conclusions of the 2007 Public Citizen report entitled, "The Arbitration Trap: How Credit Card Companies Ensnare Consumers"). *See also* Drahozal & Zyontz, *supra* note 597, at 919-27 (summarizing various studies of consumer arbitration and related criticisms).

[599] *See* Drahozal & Zyontz, *supra* note 597, at 919-27 (summarizing studies of consumer arbitration and related criticisms).

[600] *See* Morrison, *supra* note 38 (making references to various empirical data, raising questions about data). *See also* Schmitz, *supra* note 181, at 118 (lack of empirical data regarding consumer arbitration makes policymaking difficult); Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77 (Winter 2011) (noting several limitations on data in comparison of debt collection arbitration under AAA auspices and in some court settings); Alexander J.S. Colvin, *An Empirical Study of Arbitration: Case Outcomes and Processes,* 8 J. OF EMPIR. L. STUD. 1, 3 (Mar. 2011) (noting that AAA data may not be representative of employment arbitration under other rules, administration).

[601] *See* Cal. Disp. Resol. Inst., *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure* (Aug. 2004), *available at* http://www.mediate.com/cdri/ cdri_print_aug_6.pdf (noting that "[i]n general, inconsistencies, ambiguities and the lack of reported data in some areas limit this study's utility for the purpose of informing policy"); Colvin, *supra* note 600, at 3-4 (discussing missing data in arbitration provider records).

[602] *See* Cole & Blankley, *supra* note 598, at 1063 (stating that data from arbitration of debt collection cases should only be used to draw conclusions about arbitration in those kinds of cases and not other types of consumer arbitration).

[603] *See* Colvin, *supra* note 600, at 9-11 (discussing relationship between arbitration experience and employee salary levels). *See also* Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 WAKE FOREST L. REV. 185 (Summer 2011) (comparing results in arbitration and litigation of racial harassment cases).

[604] *See* Sussman et al., *supra* note 197, at 515-16 (noting that economic downturn may have caused more individuals to appear in adjudication *pro se* and encouraging policymakers to consider concerns relating to unrepresented consumers in court and in

their provenance;[606] as well as the quality of administration or regulation by the arbitral institution (AAA, FINRA, etc.),[607] if any. As one scholar concludes, the nature and performance of arbitration procedures in different settings presents a very complex picture, making it impossible to "draw confident conclusions about the effect of invalidating wide swaths of arbitration agreements."[608]

Third, we cannot simply examine and evaluate arbitration in isolation, but must compare its operation to the "default option," going to court.[609] Critically, a recent Federal Trade Commission study examining the need for changes in the debt collection system concluded "that neither litigation nor arbitration currently provides adequate protection for consumers."[610]

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arbitration). *See also* Drahozal & Zyontz, *supra* note 597, at 903-07 (comparing recoveries, recovery rate of claimants with and without attorneys in AAA consumer arbitration); Colvin, *supra* note 600, at 16-17 (discussing self-representation versus representation by counsel in employment arbitration).

[605] *See generally* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience,* 67 LAW & CONTEMP. PROB. 55 (Winter/Spring 2004) (comparing and contrasting various terms of arbitration agreements and incorporated procedures in different consumer contracts; describing wide variation in terms, including scope of discovery, if any, and remedies).

[606] *See* Colvin, *supra* note 600, at 5,7 (noting earlier studies that indicate employee win rates may be higher in cases based on individually negotiated agreements, as compared to "employer-promulgated procedures"). The innovative qualitative research on consumer contracting processes by Amy Schmitz, which challenges traditional formalistic notions of contractual assent, is of particular value. *See generally* Schmitz, *supra* note 181.

[607] *See* Drahozal & Zyontz, *supra* note 597, at 846 (stating that their study of data from AAA-administered consumer arbitration cannot be taken as representative of arbitration under the rules and administration of other providers). *See id.* at 853-54 (noting that National Arbitration Forum caseload consisted almost exclusively of debt collection cases, which involve extremely high win rates for creditors, contrary to other kinds of consumer disputes).

[608] Peter B. Rutledge, *Arbitration Reform: What We Know and What We Need to Know,* 10 CARDOZO J. CONFLICT RESOL. 579, 584 (2009).

[609] *See generally* Drahozal & Zyontz, *supra* note 597 (comparing experiences of consumers and businesses in AAA-administered arbitration of debt collection cases, and in court); Colvin, *supra* note 600, at 4-6 (discussing comparisons between arbitration and litigation of employment cases). *See also* Sussman et al., *supra* note 197, at 498 ("Arbitration results alone without . . . a comparison [to litigation] signify nothing and cannot be a basis for evaluating the process"); Drahozal & Zyontz, *supra* note 597, at 846 (noting need for a "baseline for comparison").

[610] *See* Sussman et al., *supra* note 197, at 500, *quoting* Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change – A Workshop Report* iii (2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf. The entire FTC Report may be found at Federal Trade Commission, Repairing a Broken system: Protecting Consumers in Debt Collection Litigation and Arbitration (2010), *available at* http://www.ftc.gov/05/2010/07/debtcollectionreport.pdf. *See* Rutledge, *supra* note 608, at

Fourth, there is difficulty in identifying appropriate parameters for measuring and comparing the operation of arbitration, including process costs,[611] time to resolution of the dispute,[612] outcomes,[613] and user perceptions.[614] In some circumstances "outcomes" may require measurement by qualitative as well as quantitative means.[615]

Fifth, comparisons between adjudicative processes must factor in the potential impact of pretrial dismissals, which are much more likely in court than in arbitration,[616] and defaults.[617] Sixth, there is the much-discussed but little-understood "repeat player" dynamic, which has gripped academic imaginations

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581 (discussing need for comparative approach, since "[i]t is of little value to criticize arbitration if individuals would be worse off without it").

[611] A complete analysis of comparative process costs should address direct and indirect process costs to individual consumers or employees, businesses, and the court system. *See* Sussman et al., *supra* note 197, at 493 n.1 (listing questions to be addressed regarding economic impact, costs of different process choices in resolution of consumer finance disputes).

[612] *See* Drahozal & Zyontz, *supra* note 597, at 892-96 (data from AAA consumer arbitration reinforces general impression that arbitration is "a relatively quick form of dispute resolution"); Colvin, *supra* note 600, at 8-9.

[613] *See, e.g.*, Drahozal & Zyontz, *supra* note 597, at 852-57 (noting that while studies normally look at the "win rate" in arbitration, there are various views about what constitutes a "win" for a consumer or business). Among other things, it may be difficult to identify a precise amount claimed, to compare that number to the amount awarded, and the meaning of a particular percentage recovery. *Id.* at 873-77, 916. *See also* Edward S. O'Neal & Daniel R. Solin, *Mandatory Arbitration of Securities Disputes – A Statistical Analysis of How Claimants Fare* (2007), *available at* http://smartestinvestmentbook.com/pdf/061307%20Securities%20Arbitration%20Outcome%20Report%20FINAL.pdf ("win rates rates and percent of amount claimed that was awarded is an inaccurate and misleading basis" to assess fairness of securities arbitration); Colvin, *supra* note 600, at 4-8.

[614] *See generally* Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349 (2008) (extensive survey of investor perspectives of securities arbitration).

[615] *See* Chew, *supra* note 603 (quantitative and qualitative analysis of arbitration and litigation of racial harassment disputes) In her study, Professor Chew notes "striking" similarities between arbitral and judicial decision-making in racial harassment cases, but also concludes that claimants performed more poorly in arbitration. While carefully reserving final conclusions pending further research, she urges employees to be cautious about arbitration, observing that arbitrators are not chosen through "carefully crafted public vetting" but in "more idiosyncratic and less transparent ways." *Id.* at 208.

[616] *See* Cole & Blankley, *supra* note 598, at 1055-56 (arguing that pretrial dismissal of an opponent's case should be described statistically as a "win"); Colvin, *supra* note 600, at 6 (noting that "[d]ifferent patterns of prehearing settlement may affect the distribution of cases heard in each system"); Schmitz, *supra* note 181, at 139.

[617] *See* Cole & Blankley, *supra* note 598, at 1064 (noting great difference between cases that are actively pursued and those in which there is a defaulting respondent).

for a number of years but which may be more complex and multi-faceted than previously posited.[618]

Moreover, even extensive empirical data on the comparative performance of binding arbitration and litigation processes do not cover all the possibilities. As discussed below, these include arbitration under mandated due process standards,[619] agency-regulated arbitration,[620] and arbitration with the option to continue to trial.[621] There are also the immense opportunities for efficient, economical and potentially more transparent dispute resolution afforded by the revolution in information technology.[622] Finally, we have yet to mention the real elephant in the room, and the primary "hot button" of the recent debate over predispute arbitration agreements: the proper role of and procedural framework for class or collective action in our justice system.[623] When all is said and done, of course, there remains the question whether any amount of data will be sufficient to produce a consensus, or to overcome the "commitment bias"[624] of scholars and advocates who have long adhered to particular positions.

Good decision-making about process choices must begin with careful, distanced reflection on what we need to know and how we get it.[625] The inquiry

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[618] *See* Drahozal & Zyontz, *supra* note 597, at 857-62, 908-16 (discussing possible grounds for repeat player effect and implications of studies, including their own analysis of AAA consumer data); Colvin, *supra* note 600, at 11-16 (nuanced discussion of repeat player dynamic in employment arbitration). *See also* Cole & Blankley, *supra* note 598, at 1079 (arguing that National Arbitration Forum data does not support a finding of "repeat player" bias against consumers).

[619] *See infra* text accompanying notes 629-47.

[620] *See infra* text accompanying notes 648-53.

[621] *See infra* text accompanying notes 654-57.

[622] *See infra* text accompanying notes 664-68.

[623] *See infra* text accompanying notes 669-73.

[624] Once we make a choice or take a position, especially in writing, we feel pressure to behave consistently with that commitment and justify our earlier decision. We may be selective in the way we interpret all the information we get afterwards, using some of it to reinforce in our minds our initial commitment or undermine an opposing position. *See generally* ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 57-113 (2007).

[625] A starting point for collective, constructive dialogue was The Consumer Arbitration Study Group, an ad hoc group brought together by the governing council of the ABA Section of Dispute Resolution to "talk about interests and options to ensure that consumers have reasonable access to effective and affordable dispute resolution process" and inform the Section as to any role it might play in assisting to resolve related issues. The group was convened in a facilitated, private gathering in January, 2010 in Washington, D.C. The author was one of the co-facilitators along with Professor Lisa Bingham. The results of the group dialogue are posted on the Section's website. AMERICAN BAR ASSOCIATION SECTION OF DISPUTE RESOLUTION, REPORT OF THE CONSUMER ARBITRATION STUDY GROUP (Jan. 15-16, 2010, Washington, D.C.) [hereinafter ABA CONSUMER STUDY GROUP REPORT]. Proposed guidance for inquiry of

should be framed to enable us to move well beyond the virtually meaningless "arbitration is good/arbitration is bad" dichotomy to look at the capabilities, limitations and real costs of different process choices as played out in the dynamics of *different* contractual settings.[626] Since Dodd-Frank decreed that regulatory bodies should examine arbitration in the context of different consumer finance transactions and of securities brokerage disputes,[627] transactional scenarios within these arenas are obvious starting points. Given proper time, space, and technology, we would want to answer questions like these in each context:

(1) What are the essential elements (measured in terms of process costs, cycle time, due process, and outcomes) of a satisfactory system of justice for consumers?
(2) Arbitration
    a. Are there forms of binding arbitration that meet the criteria in (1)?
    b. To the extent they do not, is it possible to meet these criteria through enhanced statutory standards for judicial oversight, regulation by a public body, or other means?
    c. What are the transaction costs associated with ensuring that arbitration meets the criteria in (1), and how are they/should they be borne?
(3) The courts
    a. How well do court procedures meet the criteria in (1)?
    b. To the extent they do not, is it possible to conform court procedures to these criteria?
    c. What are the transaction costs associated with providing court procedures that meet these criteria?
(4) Are there other cost-beneficial process options (administrative hearing procedures, other "hybrid" processes) to satisfy the criteria in (1)?
(5) To what extent might other approaches, employed alongside or in advance of binding adjudication (customer service desks, hotlines, mediation, etc.), contribute to effective management of conflict?[628]
(6) To what extent might the effective use of online dispute resolution ("ODR") affect the foregoing calculi?
(7) What is the proper role of and framework for consolidated/class actions?

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the Consumer Financial Protection Bureau respecting the arbitration of consumer financial disputes may be found in Sussman et al., *supra* note 197.

[626] *See* Rutledge, *supra* note 608, at 580 (advocating dialogue that moves beyond polar extremes to seek common ground).

[627] *See supra* text accompanying notes 492-97.

[628] *See* ABA CONSUMER STUDY GROUP REPORT, *supra* note 625, at 8-9, 12-15 (describing a wide range of potential approaches to various kinds of consumer conflict).

B. *Evaluating Other Process Options*

In general terms, what kinds of options to traditional binding arbitration and court litigation might be worth exploring and comparing in a systematic investigation? Here, briefly, are some possibilities suggested by existing models, each of which merits closer analysis.

1. *Statutory Due Process Standards for Arbitration*

Although proponents of binding arbitration point to its potential benefits to consumers and employees, these are often overshadowed in the public discourse by concerns about the potential for abuse in unregulated private processes.[629] If binding arbitration is to continue to be employed in the realm of consumer and employment disputes, some method must be found to ensure that arbitration processes are reasonably attractive and perceptibly just.[630] Because "consent" to boilerplate arbitration agreements in adhesion contracts is not often knowing, intelligent and voluntary, it is not possible to depend wholly upon unsupervised bargaining to ensure just processes. [631] Within the context of current binding arbitration processes, there are data that suggest procedures subject to administration pursuant to minimum procedural due process guidelines may enhance experiences and outcomes for consumers[632] and employees.[633] Such standards were first developed as "due process protocols" under collective, quasi-public auspices in the 1990s,[634] and were subsequently adopted in the form of procedural rules by the American Arbitration Association,[635] inspiring the

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[629] *See id*. at 12-13 (discussing positive and negative consumer, business and third-party views of arbitration).

[630] *See* Morrison, *supra* note 38, at 13.

[631] *See id.* at 15.

[632] *See generally* Drahozal & Zyontz, *supra* note 597, at 102-04 (favorably comparing experience of consumers in AAA-administered debt collection arbitration to experiences of consumers in court).

[633] *See supra* note 199 and accompanying text. *See also* Chew, *supra* note 603, at 205-07 (noting that AAA's Model Employment Arbitration Rules tend to mimic court procedures in various ways, and arbitrators tend to cite legal principles and interpret these principles in ways similar to judges).

[634] *See supra* notes 199 and accompanying text. *See* Sussman et al., *supra* note 197, at 505-07.

[635] *See* American Arbitration Association, *AAA Consumer Procedures*, *available at* http://www.adr.org/consumer_arbitration (last visited Aug. 28, 2011). *See also* American Arbitration Association, *Consumer Due Process Protocol*, *available at* http://www.adr.org/sp.asp?id=22019 (last visited Dec. 9, 2011). The AAA recently developed another protocol focused specifically on debt collection cases. National Task Force on the Arbitration of Consumer Debt Collection Disputes, *Consumer Debt Collection Due Process Protocol Statement of Principles* (Oct. 2010), *available at* http://www.adr.org/si.asp?id= 6248. *See* Sussman et al., *supra* note 197, at 505-07.

adoption of similar standards by organizations such as JAMS.[636] Although the existing models are all privately administered and have legal effect only as elements of the agreement to arbitrate,[637] some have proposed incorporating due process guidelines in the Federal Arbitration Act as a minimum standard for the governance of consumer and employment arbitration.[638]

If predispute binding arbitration agreements will continue to be enforced in consumer or employment settings, statutory due process standards offer some potential advantages. One complaint about today's primary judicial policing tool, the doctrine of unconscionability, stems from its imprecision and the vast degree of discretion it affords courts in its application.[639] Statutory due process

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[636] *See* JAMS, *Policy on Employment Arbitration Minimum Standard Procedural Fairness* (July 15, 2009), *available at* http://www.jamsadr.com/employment-minimum-standards.

[637] *See* Colvin, *supra* note 600, at 2 (noting that the AAA may be "unrepresentative [of providers] in its willingness to sign onto and monitor compliance with due process protocols on arbitration").

[638] *See* Schmitz, *supra* note 181, at 117, 165 (calling for Protocol elements to be transformed into "legislative musts"). One proposed model aimed at establishing due process guidelines for employment arbitration is among the alternative concepts now being discussed by concerned individuals and groups. The National Academy of Arbitrators, a professional association of leading North American labor and employment arbitrators, has proposed one set of standards to govern arbitration under individual employment contracts. Under the proposed standard:

- Employees must have the right to be represented by persons of their own choosing;
- the time limit within which the claim must be brought is no less than the time limit applicable to the law under which the claim arises;
- the parties must have access to prehearing discovery adequate for the disposition of the claim but not be excessive or abusive;
- group or class claims are allowed when that is reasonably necessary for the vindication of the rights at stake;
- the arbitrator is mutually selected by the parties or is designated by a neutral agency and the arbitrator must disclose any conflict of interest;
- the hearing is held at a location and time that will reasonably accommodate the employee's ability to be present and participate;
- the fees and expenses of the arbitrator are borne by the employer except for a filing fee not to exceed that for a civil action in federal court;
- the arbitrator has the authority to award all relief, legal and equitable, that would be available in civil litigation under applicable law; and
- the arbitrator must provide a written opinion and award, with findings of fact and conclusions of law, applying the same standards as would a court.

Theodore J. St. Antoine, *The Moral Dimension of Employment Dispute Resolution*, *in* WORLDS OF WORK: EMPLOYMENT DISPUTE RESOLUTION SYSTEMS ACROSS THE GLOBE, St. John's University School of Law Center for Labor and Employment Law, Fitzwilliam College, University of Cambridge, July 21, 2011, 11-12 (draft on file with author).

[639] Some critics see courts in some states, such as California, as going too far in their employment of unconscionability doctrine. *See supra* note 181 and accompanying text.

standards would provide much more extensive, uniform guidance for judicial policing of arbitration agreements and alleviate to some degree the problems identified with unconscionability doctrine. By amending the FAA to incorporate a set of standards operating as a floor for protection of consumers and employees, lawmakers could overcome the dramatic limitations placed on regulation of adhesion contracts under the rubric of federal preemption.[640] There would, however, still be a role for courts in fleshing out the standards in application to specific factual settings. Moreover, one would expect that arbitral discretion would still come into play regarding issues like the precise extent of discovery.

Should this approach be considered, a key issue will be whether due process standards should incorporate a provision limiting the use of class-action waivers.[641] Given the fact that advocates appear to prefer handling class actions in court rather than in arbitration,[642] such a standard might carve out an exception to the enforceability of arbitration agreements and enable certain collective actions to proceed in court.[643] In that event, of course, businesses whose sole purpose in choosing arbitration was to avoid class actions would presumably eschew the process entirely in favor of litigation.

Another "due process" element that should be considered is a mechanism for the independent administration of arbitration processes. This element, which was recognized and embodied in the original *Consumer Due Process Protocol*,[644] may be an important step to ensure practical enforcement of any set of standards.[645] Moreover, in order to ensure sufficient transparency in consumer and employment systems, it may be necessary to require provider organizations to provide data on such programs.[646] Another possibility might be a registration requirement for provider organizations supporting consumer or employment arbitration, or more extensive regulation.[647]

Others fear that as applied, unconscionability law is not sufficient to protect federal statutory law from being undermined in arbitration. *See* Morrison, *supra* note 38, at 10.

[640] *See* Morrison, *supra* note 38, at 10.

[641] *See supra* text accompanying notes 69-72.

[642] *See supra* note 72.

[643] This is the approach of the model standards proposed by members of the National Academy of Arbitrators. *See supra* note 638. Also, FINRA securities arbitration rules exclude class actions from the scope of the arbitration requirement. FINRA ARBITRATION RULES 12204 (2010), *available at* http://finra.complinet.com/en/display/display_main.html? rbid=2403&element_id=4110.

[644] CONSUMER DUE PROCESS PROTOCOL, *supra* note 199.

[645] *See* Colvin, *supra* note 600, at 21 (expressing concern about businesses seeking out service providers that do not enforce due process standards).

[646] *See supra* note 601 and accompanying text.

[647] *See generally* Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*, 62 BAYLOR L. REV. 178, 235-43 (2010) (discussing provider regulation in "OArb").

2. *Regulated Arbitration*

Regulated securities arbitration suggests another model to be considered if predispute arbitration agreements will still be enforced.[648] The history of the evolution of securities arbitration under the auspices of securities self-regulatory organizations ("SROs") – now integrated under the auspices of the Financial Industry Regulatory Authority ("FINRA") – demonstrates how a framework that combines active agency oversight of rulemaking and administration with ongoing active debate between advocates for investors and brokerage companies can engender a dynamic process that promotes greater fairness and response to change. Over the last two decades the system has undergone procedural reforms affecting every aspect of the arbitration process, and offers a relatively efficient and economical framework for resolving investor claims.[649]

While extensive recent studies of securities arbitration raise questions about investor claimants' success rates[650] and perceptions,[651] the system continues to evolve under SEC supervision.[652] Such regulation, does, however, entail significant costs, much of which today is borne by the securities industry.[653]

3. *Arbitration Giving Individuals the Option to Continue to Trial*

In the days before the Supreme Court broadly embraced binding arbitration for consumer disputes, the dominant model of consumer arbitration may have been the kind available under lemon laws.[654] Lemon laws vary in detail, but all

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[648] *See supra* notes 203-05 and accompanying text.

[649] *See supra* note 205 and accompanying text. As summarized in discussions at a recent symposium:

> [U]nder SEC approved rules for securities arbitration, arbitration clauses must [be featured in investor contracts in such a manner] that customers can recognize and read them. Customers also have the right to arbitrate where they live or work, and the rules allow for the award of attorney fees and punitive damages, to compensate for the high cost of the legal process. In the securities context, dismissals prior to hearings are rare. Investors are far more likely to get their day in court in securities arbitration than they are in traditional litigation, and it's faster and less expensive because the industry pays most of the costs.

Morrison, *supra* note 38, at 15-16.

[650] *See* O'Neal & Solin, *supra* note 613.

[651] *See* Gross & Black, *supra* note 614 (investors tend to have negative impressions of securities arbitration).

[652] *See id.* at 354, 400-01 (concluding that, despite negative impressions of investors, securities arbitration is a generally better method of adjudication of investor-broker disputes than litigation).

[653] *See* FINRA, *2010 Year in Review and Annual Financial Report*, FINRA.ORG (2010), *available at* http://www.finra.org/web/groups/corporate/@corp/@about/@ar/documents/corporate/p123836.pdf.

[654] *See* JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE AND LAW 691-94 (2d ed. 2010).

are aimed at an abbreviated, speedy, out-of-court remedy for disgruntled buyers with some level of state supervision. Under the Massachusetts New Car Lemon Law,[655] for example, a buyer may file for arbitration within 18 months of taking delivery of a new car. The arbitrators, appointed by the Secretary of Consumer Affairs, must render a decision within 45 days of the consumer's demand for arbitration. If the consumer loses, the consumer may still sue in court. If the manufacturer loses, it must grant a refund, replace the car, or appeal to superior court; the latter appeal must be accompanied by a bond in the full amount of the arbitration award plus $2,500 attorney's fees. If the court decides the "manufacturer did not have any reasonable basis for its appeal or that the appeal was frivolous" then the court is to double the amount of the arbitration award.

An analogous attempt by the federal government to encourage the use of ADR in the consumer setting can be seen in the Magnuson-Moss Warranty Act, enacted in 1975 in response to increasing consumer protection concerns.[656] The Act allows warrantors to require that consumers enter into alternative dispute resolution if a dispute arises, but it specifies that the ADR be non-binding, and that the consumer be able to assert claims in court if ADR is unsuccessful.

Although these kinds of procedures do not ensure finality, they preserve the right to trial and, in so doing, avoid the necessity of producing an effective full-blown substitute for court trial.[657] Therefore, these procedures are the essence of simplicity, rough-and-ready, and well suited to the subject matter. Whether they are suitable for other kinds of consumer or employment disputes is a subject for further inquiry.

4. *Public Tribunals*

For most U.S. citizens, going to court is the implicit measuring stick for adjudication,[658] and binding arbitration procedures and outcomes are constantly assessed against this normative standard. But as reflected in an FTC study some years ago on consumer debt collection, there is no guarantee that sending individuals back to the court system does them a favor.[659] The relatively high cost and lengthy cycle time of litigation have created access to justice concerns for many users, including major businesses.[660] Of course, these burdens tend to fall particularly acutely on individual consumers and employees, who may (according to some sources) have great difficulty bringing a single small or even a medium-

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[655] Mass. Gen. Laws, ch. 90, § 7N1/2 (2009).

[656] 15 U.S.C. §§2301-12 (2004).

[657] *See* FOLBERG ET AL., *supra* note 654, at 693-95.

[658] *See* ABA CONSUMER STUDY GROUP REPORT, *supra* note 625, at 9-10 (discussing perceived strengths of the courts and the public justice system).

[659] *See supra* note 610 and accompanying text.

[660] *See* ABA CONSUMER STUDY GROUP REPORT, *supra* note 625, at 10 (discussing perceived problems with the courts); William C. Vickrey, Joseph L. Dunn & J. Clark Kelso, *Access to Justice: A Broader Perspective*, 42 LOY. L.A. L. REV. 1147 (2009).

sized case to court.[661] The problems are alleviated to a degree by small claims courts and by the vehicle of class action, but many cases fall beyond the ambit of either. Meanwhile, budget shortfalls are exacerbating docketing problems in some court systems.[662]

A study co-sponsored by the American College of Trial Lawyers recently called for a move beyond the "one-size-fits-all" approach to litigation, and some such approach may be necessary in order to effectively accommodate the broad range of consumer and employment disputes in courts. Another conceivable solution would be the establishment of public consumer tribunals or administrative employment tribunals such as those that exist in some other countries.[663]

C. *Special Considerations: ODR and Class Actions*

In assessing current process choices, two important factors deserve special mention. One is a source of tremendous opportunity to "change the game" in terms of cost-saving and efficiency; the other, a major potential sticking point.

Although we are only beginning to understand its possibilities and pitfalls, the rapidly developing world of electronic communications offers a completely new way of imagining consumer conflict resolution.[664] Transparency and understanding may be promoted by online access to information about process choices through interactive, user-friendly platforms.[665] Virtual hearings are a way of overcoming time and distance and reducing the very real costs of adjudication, whether public or private.[666] A new Online Dispute Resolution Working Group of the United Nations Commission on International Trade Law ("UNCITRAL") is exploring the creation of standards for the online resolution of cross-border

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[661] *See* Sussman et al., *supra* note 197, at 510-15.

[662] McNichol, Elizabeth, Phil Oliff & Nicholas Johnson, *States Continue to Feel Recession's Impact* (June 17, 2011), *available at* http://www.cbpp.org/cms/?fa=view&id=711. *See also* ABA CONSUMER STUDY GROUP REPORT, *supra* note 625, at 10 ("courts are overloaded, understaffed and underfunded"); Remarks of David Larson, *in Penn State Dickinson School of Law Yearbook on Arbitration & Mediation Symposium* (Feb. 16, 2011) (Notes on file with author) [hereinafter *Penn State Symposium*].

[663] *See supra* note 588 and accompanying text (discussing Employment Tribunals in the UK).

[664] *See generally* Schmitz, *supra* note 647 (discussing opportunities and concerns raised by the development of "OArb").

[665] *See id.* at 234.

[666] *See* Administrative Conference of the United States, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion* (June 16-17, 2011), *available at* http://www.acus.gov/wp-content/uploads/downloads/2011/05/Proposed-Recommendation-Video-Hearings-5-18-2011.pdf. *See also* Schmitz, *supra* note 647, at 200-02; remarks of David Larson, in *Penn State Symposium*, *supra* note 662; remarks of Robert Davidson, *in id*.

e-commerce disputes, including business-to-consumer disputes.[667] An important element of the discussion is the creation of a "global case database" available to participants worldwide, and, possibly, a system of universal service represented by a single logo or "trustmark."[668]

At the same time, no discussion of arbitration or other process choices, public or private, can ignore the abiding issue of class actions, the policies supporting their use to vindicate the rights of consumers and employees, among others,[669] and the concerns that have motivated businesses to promote enforcement of contractual waivers of the right to sue on behalf of a class.[670] In the arena of consumer and employment arbitration, class-action waivers have been the primary point of contention between business and consumer/employee advocates.[671] In the field of consumer financial services, moreover, the avoidance of class actions are often the primary motivating factor supporting the use of arbitration provisions; there is evidence that, but for the ability to avoid class-wide suits, financial institutions would sooner take their chances in court.[672] Though it is far more than an "arbitration issue,"[673] the struggle over the role of class actions is a key element in determining the future role of arbitration and the contours of the broader landscape of civil justice.

CONCLUSION

In a recent paper on the resolution of employment disputes, one highly regarded scholar spoke of the moral imperative for sovereign states to ensure that dispute resolution processes are fundamentally fair. He concluded that "[t]o give maximum scope to individual autonomy, the morally optimal solution is a privately negotiated dispute resolution process whose fairness and effectiveness are subject to the state's oversight and enforcement."[674]

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[667] Colin Rule & Vikki Rogers, *Building a Global System for Resolving High-Volume, Low-Value Cases,* 29 ALTERNATIVES TO HIGH COST LITIG. 135 (July/Aug. 2011).

[668] *Id.* at 136. *See also* Schmitz, *supra* note 647, at 237-43 (discussing the concept of a trustmark system).

[669] *See supra* note 72.

[670] *See id.*

[671] *See id.* and accompanying text.

[672] *Id.*

[673] *See* remarks of Michael Foreman, *in Penn State Symposium*, *supra* note 662 (observing that *Stolt-Nielsen* and *Concepcion* were "not really" about arbitration issues, but about class action).

[674] Dispute resolution systems have a moral foundation, as attested by ancient thinkers, the world's great religions, and modern philosophers. Such systems are based on a recognition of the dignity and worth of every human being. The state must provide all workers certain substantive rights and the means of enforcing those rights. To give maximum scope to individual autonomy, the morally optimal solution is a privately negotiated dispute resolution process whose fairness and effectiveness are subject to the state's oversight and enforcement. When the parties

The U.S. Supreme Court's arbitration jurisprudence under the FAA, an extended exercise in shoring up the bulwarks of private, binding dispute resolution in furtherance of the presumed intent of contracting parties, moves us away from, not toward, a "morally optimal solution."[675] Its staunchest adherents may insist that the Court's actions are necessary to effectively promote pro-arbitration policies under the FAA (announced and repeatedly reinforced by the Court since the mid-1980s) while ensuring that lower courts be measured and precise in the handling of countervailing defenses. Now, however, it should be apparent that in its zeal to further its evolving vision of the FAA the Court has eliminated key safeguards aimed at ensuring fundamental fairness to consumers and employees in arbitration. The Court's most recent decisions have placed dramatic new limits on judicial oversight of arbitration agreements, making the U.S. a relative "outlier" among global sovereigns.[676]

The Court's relative inflexibility is a significant contributor to legislation aimed at dramatically restricting the use of predispute arbitration agreements.[677] Unfortunately, these legislative responses, like the Court's decisions, lack a solid empirical foundation. As with the Court's jurisprudence, there is no guarantee that they will produce the best possible solution for employees and consumers.

Good decisions about the public or private resolution of employment and consumer disputes depend upon a commitment to obtain and act upon better information about the operation of specific forms of arbitration in specific transactional settings, along with comparative data respecting court processes.[678] Recent empirical scholarship has moved us closer to this goal, but much remains to be done.

In assessing process options, policymakers should consider the potential future role of statutory due process standards for arbitration, regulated arbitration, and arbitration that gives individuals the option of proceeding to court. Special attention should be given to the opportunities afforded by online dispute resolution ("ODR"). Finally, effective policymaking in these arenas cannot ignore the primary hot-button issue, the role of class or collective action.

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have unequal bargaining power, as is generally true of employers and employees, the state must ensure due process protections for workers.

St. Antoine, *supra* note 638, at 1.

[675] *See supra* Parts I-III.

[676] *See supra* Part V.

[677] *See supra* Part IV.

[678] *See supra* Part VI.