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The New Judicial Hostility to Arbitration:
Unconscionability and Agreements to Arbitrate

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Arbitration is a voluntary method of alternative dispute resolution that is used to settle contract and related disputes, including disputes between private parties arising under statutes. The use of arbitration has been burgeoning in recent years. In 2002, for example, the American Arbitration Association (“AAA”), only one of the many providers of arbitration services to disputants, handled 230,255 cases.¹ Arbitration, however, is controversial when used to settle employment and consumer disputes.² Critics call such arbitration “mandatory arbitration” because agreements to arbitrate often are contained in adhesion contracts that, the critics say, leave the employee or consumer no choice but to

¹ Am. Arbitration Ass’n., A Brief Overview of the American Arbitration Association, <http://www.adr.org/overview> (last visited Sept. 22, 2005).

² See, e.g., Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225 (1998); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996); Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695; Samuel Estreicher, *Predispute Agreements To Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); Symposium, *Mandatory Arbitration*, 67 LAW & CONTEMP. PROBS. 1 (2004); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999); Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331 (1996).

agree to arbitration.³ The critics apparently believe that arbitration provides second-class resolutions of such disputes to the prejudice of employees and consumers. Many advocate that arbitration should be banned or limited in these cases, leaving a party free to resort to litigation despite its agreement to arbitrate.⁴

Many courts appear to be among the critics despite proclamations by the United States Supreme Court that there is a statutorily-based federal policy – applicable throughout the full range of the Commerce Clause, in state and federal courts alike – favoring arbitration. In many cases, mostly decided since 2000, these courts refuse to enforce arbitration agreements by finding them unconscionable under state contract law.⁵ They give a wide range of reasons for such a conclusion. The net effect of these decisions

³ See, e.g., Michael D. Donovan & David A. Searles, *Preserving Judicial Recourse for Consumers: How To Combat Overreaching Arbitration Clauses*, 10 LOY. CONSUMER L. REV. 269, 278-79 (1998); Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1601-02 (2005); *Mandatory Arbitration*, *supra* note 2; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632 n.1 (2005).

⁴ E.g., Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 161-66 (2004); Schwartz, *supra* note 3, at 125-32.

⁵ Instead of relying on the unconscionability doctrine, some courts have used other contract law doctrines. E.g., *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 383-84 (6th Cir. 2005) (mutual assent lacking); *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013, 1016-17 (Ariz. 1992) (reasonable expectations under an adhesion contract preclude enforcement of arbitration agreement); *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656, 661-62 (Md. 2003) (lack of mutuality precludes enforcement of arbitration clause); *cf. GreenPoint Credit, LLC v. Reynolds*, 151 S.W.3d 868, 875 (Mo. Ct. App. 2004) (reasonable expectations regarding mutuality of exception to arbitration agreement preclude enforcement to the extent not mutual).

is to provide unprecedented judicial review of arbitration agreements for judicially-perceived reasonableness or fairness, not *unconscionability*.⁶

This Article's thesis is that these courts have gone too far, often failing to follow the applicable law as enunciated in federal pre-emption cases by the United States Supreme Court or as encompassed by state contract law. It affirms that there are cases in which an arbitration agreement should not be enforced because it is unconscionable under generally applicable state contract law. It suggests, however, that many judicial refusals to enforce are based on clearly erroneous reasons. It is hard to resist the conclusion that many courts are hostile to arbitration,⁷ as were courts until passage of the United States Arbitration Act in 1925 (generally known as the "Federal Arbitration Act" or "FAA").⁸ According to the Supreme Court, the point of that legislation was to end judicial hostility.⁹ The Supreme Court has found in the FAA a strong federal policy favoring arbitration. It has held that state laws contrary to this policy are pre-empted.

⁶ See *infra* text accompanying note 102.

⁷ One court wrote: "The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming to the body politic." *Knepp v. Credit Acceptance Corp. (In re Knepp)*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999) (Sledge, J.).

⁸ 9 U.S.C. §§ 1-16 (2000). This Article will refer to this statute as the "FAA."

⁹ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989). Counterpart state legislation has the same effect. For example, the precursor to the Federal Arbitration Act was an arbitration statute enacted in New York in 1920. New York Arbitration Law, ch. 275, 1920 N.Y. Laws 803 (codified as amended at N.Y. C.P.L.R. § 7501 (McKinney 1998)) (cited in Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 *Baylor L. Rev.* 753, 755 n.7 (2004)). See REVISED UNIF. ARBITRATION ACT (2000).

Part I of this Article sketches the basics of arbitration law and practice and traces the development of the federal policy favoring arbitration – to establish a basis for evaluating contemporary judicial decisions. Part II examines the justification for the policy favoring arbitration and the reasons contracting parties may prefer arbitration. Part III evaluates the reasons courts give for finding arbitration agreements in employment and consumer contexts unconscionable and therefore unenforceable. The conclusion is that many courts make many clearly erroneous decisions, including decisions that are or should be pre-empted, manifesting a new judicial hostility to arbitration.

I. Arbitration Law and Practice

A. The Arbitration Process

Arbitration is a matter of contract: There can be no valid arbitration without the disputing parties' agreement.¹⁰ Most often, the parties agree to arbitrate as part of a “container contract” providing for a substantive exchange and containing an arbitration clause. These agreements are known as “pre-dispute” arbitration agreements.¹¹ When concluding pre-dispute agreements, however, the parties – or at least the weaker party – may not think about the kinds of disputes that may arise or the procedures to be employed to settle them. For employees and consumers, even reading a pre-dispute arbitration

¹⁰ FAA § 10(a).

¹¹ Occasionally, the parties conclude a stand-alone arbitration agreement after a dispute has arisen. These agreements are known as “submission” agreements or “post-dispute” agreements. Almost no one criticizes post-dispute agreements because they are concluded with awareness of the nature of the dispute and of the relevant arbitration process. See Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207, 218-20 (2004).

clause – which is rare – may not produce much understanding.¹² Lawyers representing such parties usually are not involved at this stage.

In the typical cases considered for this Article, a dispute arises between an employee or consumer, on one hand, and an employer or retail seller, on the other. The weaker party – one of the former – is the one aggrieved by an alleged breach of contract or a violation of a statute applicable in a contractual relationship. The weaker party files a lawsuit in a court. At least in federal court, the stronger party files motions under the FAA to compel arbitration and to stay litigation.¹³ Following argument, and a factual hearing in some cases, the court denies these motions, thereby refusing to enforce the arbitration agreement. A lawsuit presumably follows.

When the court enforces the arbitration agreement, the claimant may file a “demand” for arbitration – in most cases with an arbitration services provider such as the AAA, as set forth in the agreement and the service provider’s rules.¹⁴ The respondent will receive a copy of the demand and file an answer.¹⁵ The parties will proceed to select their arbitrator or arbitrators, who need not be lawyers but may be experts in the relevant

¹² *Id.*

¹³ FAA §§ 3-4.

¹⁴ *E.g.*, Am. Arbitration Ass’n, Supplementary Procedures for Consumer-Related Disputes, Rule C-2(a) (effective Sept. 15, 2005), <http://www.adr.org/sp.asp?id=22014> [hereinafter AAA Supplementary Procedures]; Am. Arbitration Ass’n, National Rules for the Resolution of Employment Disputes, Rule 4b(i) (effective Sept. 15, 2005), www.adr.org/sp.asp?id=22075 [hereinafter AAA National Rules].

¹⁵ *E.g.*, AAA Supplementary Procedures, *supra* note 14, at Rule C-2(c); AAA National Rules, *supra* note 14, at Rule 4b(ii).

field.¹⁶ If the parties cannot agree, the service provider or a court will appoint the arbitrator.¹⁷ The arbitrator, after hearing the parties, will adopt a procedure for the arbitration, in accordance with the arbitration agreement. In a case with large stakes, he or she may decide upon requests from the parties, require discovery as appears appropriate in the case, receive pre-trial summaries of the parties' cases, and conduct a hearing on the merits.¹⁸ Following the hearing, the arbitrator may or may not receive post-hearing submissions. He will decide the case and issue an award. A victorious party can move a court to confirm the award and enter it as a judgment of the court.¹⁹ It then must be recognized and enforced the same extent as would be a judicial judgment. In all cases, the arbitration is governed primarily by the arbitration agreement and any arbitration rules incorporated therein. The costs of the arbitration, including the arbitrator's fee, are borne by the parties, as agreed in the arbitration agreement or as the arbitrator may decide.²⁰

Arbitrations greatly vary from one to another. When the stakes are small, the arbitration will be brief and simple, taking only a few hours, by telephone or in person, short-circuiting the extensive procedures employed in litigation (outside of small claims

¹⁶ Though arbitration tribunals may consist of one or more arbitrators, this Article will encompass in "arbitrator" tribunals with more than one member.

¹⁷ FAA § 5; *e.g.*, AAA Supplementary Procedures, *supra* note 14, at Rule C-4; AAA National Rules, *supra* note 14, at Rule 12b.

¹⁸ Am. Arbitration Ass'n, Commercial Arbitration Rules, Rules R-1, R-20 to -35 (effective Sept. 15, 2005), <http://www.adr.org/sp.asp?id=22440> [hereinafter AAA Commercial Arbitration Rules].

¹⁹ FAA §§ 9-10, 13.

²⁰ AAA Commercial Arbitration Rules, *supra* note 18, at Rule R-50.

court). Even when the stakes are large, the arbitration will be tailored to the dispute. Generally speaking, claims will not be dismissed nor summary judgment granted prior to a hearing on the merits. There may be little or no discovery or discovery limited to documents only. A hearing on the merits dispenses with the rules of evidence. There is no jury in arbitration.²¹

If something goes seriously wrong in the arbitration process, there is a judicial remedy. Courts may be called on to confirm an award.²² The losing party may seek to vacate the award.²³ The FAA specifies the grounds for vacating an award. They are:

- (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.²⁴

²¹ It has long been held that, by agreeing to arbitrate, a party implicitly waives its right to a jury trial. *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1187 (Cal. 1976). *See generally* Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (2004).

²² FAA § 9.

²³ *Id.* § 10.

²⁴ *Id.*

In some jurisdictions, an award may be vacated, in addition, when the arbitrator manifestly disregarded the law.²⁵ Vacating an award, however, is unusual; it is not the result of a robust appeal.

B. The Old Judicial Hostility

Recourse to arbitration was common in medieval England and seems to have been favored by the courts. In 1608, however, Lord Coke's influential dictum in *Vynior's Case*²⁶ began a trend toward judicial disfavor, at least with respect to the enforceability of pre-dispute arbitration agreements. In that case, Robert Vynior brought an action in debt against William Wilde on a bond of twenty pounds. Wilde's commitment under the bond was to observe and perform the arbitral award of a named arbitrator who had the authority by the parties' agreement "to rule, order, adjudge, arbitrate, and finally determine all Matters, Suits, Controversies, Debates, Grievs and Contentions" as described. Coke gave judgment on the bond for Vynior, but in dicta observed that a party could countermand his obligation to arbitrate. He reasoned, oddly, that to decide otherwise would be to make "not countermandable, which is by the law and of its own nature countermandable."²⁷ He also analogized the arbitration agreement to powers of attorney or the provisions of a last will and testament, which were and are revocable.

Hostility to arbitration agreements evolved from *Vynior's Case* into a contest between arbitration and the judiciary. In 1749, a plaintiff brought an action on an

²⁵ *E.g.*, *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002); *see First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942-43 (1995).

²⁶ 8 Co. Rep. 80a.

insurance policy and the defendant defended on the basis of the arbitration clause in the policy. The court gave judgment for the plaintiff because “the agreement of the parties [to arbitrate] cannot oust this court” of jurisdiction.²⁸ The idea that an agreement to arbitrate ousts the courts of jurisdiction was influential in England until the Arbitration Act of 1889.²⁹ That act provided that a submission, unless it expressed a contrary intention, was irrevocable and had the same effect as if made by court order. It also made the first stab at rules of law which would facilitate the conduct of an arbitration, such as the appointment of arbitrators when the parties failed to do so, empowering arbitrators to summon witnesses and examine them under oath, making awards final, and empowering arbitrators to award costs. In England, then, the eighteenth and nineteenth centuries saw judicial hostility to arbitration agreements, but it had largely evaporated by the turn of the twentieth century.

The history in England had a large effect on nineteenth century judicial attitudes toward arbitration in the United States. Before 1920, the United States courts tended to enforce arbitral *awards* rendered before a judicial proceeding was commenced unless the arbitration was a product of collusion to defraud a third party.³⁰ Agreements to arbitrate, however, were another matter. Nineteenth century courts “simply assumed that such

²⁷ *Id.* at 81b-82a. (Coke’s reports at 302-304).

²⁸ Kill v. Hollister, 18 Geo. 2, 1 Wils 129 (quoted in Robert B. von Mehren, *From Vynior’s Case to Mitsubishi: The Future of Arbitration and Public Law*, 477 PRAC. L. INST./COM. 177, 182 (1988)).

²⁹ von Mehren, *supra* note 28, at 183 (referring to the Arbitration Act of 1889, 52 and 53 Vict., ch. 49.).

³⁰ *Id.* at 185 (citing *Karthus v. Yllas y Ferrer*, 26 U.S. (1 Pet.) 222, 228 (1828); *Houseman v. Cargo of the Schooner N.C.*, 40 U.S. (15 Pet.) 40 (1841)).

clauses were revocable and non-enforceable.”³¹ Thus, in 1874, the Supreme Court announced a principle of the non-enforceability of agreements to arbitrate future disputes. “Every citizen,” the Court wrote, “is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him.”³² In a civil case, a party “may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge,” but a party “cannot . . . bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions.”³³ The precedents, the Court reasoned, show that “agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”³⁴

C. Advent of the Policy Favoring Arbitration

Statutory reforms, first in New York and then at the federal level, radically changed the law governing the enforceability of arbitration agreements. In New York, a group of reformers sought to ease the judiciary’s burden by fostering arbitration. In 1923, a leader of the reform movement stated its goals as follows:

- a. To reduce the cost to the consumer, without taking it out of the producer.
- b. To reduce the law’s delay and consequently what amounts virtually to a denial of justice.
- c. To save time, trouble and money to disputants, the law office, and the state.
- d. To preserve business friendships.

³¹ *Id.* at 185-86; see *Tobey v. County of Blistol*, 23 Fed. Cas. 1313, 1321-23 (C.C.D. Mass. 1845) (Story, J.).

³² *Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874).

³³ *Id.* at 451.

³⁴ *Id.* at 452.

- e. [Arbitration] is voluntary. No one need agree to arbitrate unless it is his wish.³⁵

To accomplish these goals, the reformers sought foremost to reverse the rule holding arbitration agreements “revocable.” The 1920 New York arbitration statute provided that a written contract to settle an existing or future dispute was “valid enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³⁶ Courts were authorized to make orders directing arbitration to proceed as provided in the contract or submission³⁷ and to appoint arbitrators if the parties failed to do so.³⁸ Moreover, the courts could stay litigation that was inconsistent with an arbitration agreement.³⁹

The reformers proceeded to campaign for reform on the federal level. In 1925, Congress enacted the FAA.⁴⁰ Like the New York statute, the FAA mandates the enforceability of pre-dispute arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴¹ Courts can stay judicial proceedings and compel arbitration.⁴² Courts can appoint arbitrators when necessary.⁴³

³⁵ IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 29-30 (1992) (citing Charles Bernheimer’s introduction to Appendix B of the A.B.A. Committee on Commerce, Trade, and Commercial Law’s 1924 report).

³⁶ New York Arbitration Act, ch. 275, § 2, 1920 N.Y. Laws 803, 804.

³⁷ *Id.* § 3.

³⁸ § 4, 1920 N.Y. Laws at 805.

³⁹ *Id.* § 5.

⁴⁰ Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2000)).

⁴¹ *Id.* § 2.

⁴² §§ 3-4, 43 Stat. at 883-84.

Motions for stays or to compel litigation are made and heard as motions,⁴⁴ obviating the need for complaints or other court filings. Arbitrators are empowered to issue subpoenas for evidence from parties and nonparties alike.⁴⁵ Courts were empowered to confirm valid awards or vacate awards that were infirm by the statutory criteria.⁴⁶

Even so, the old judicial hostility persisted. In *Wilko v. Swan*,⁴⁷ in 1953, the Supreme Court found that arbitration was substantive in its implications because it was an inferior form of dispute resolution for important substantive claims. *Wilko* was overruled in this regard in 1989.⁴⁸

The beginning of the Supreme Court's shift was in 1967. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁴⁹ the Court eliminated any powerful judicial role in supervising arbitration agreements. The claim was one of fraud in the inducement of a contract containing an agreement to arbitrate disputes that arose out of or related to the contract or a breach thereof. The issue before the Court was whether a claim of fraud in the inducement of the entire contract is to be resolved by the court in which a stay of litigation is sought, or, rather, should be referred to the arbitrators.

⁴³ § 5, 43 Stat. at 884.

⁴⁴ *Id.* § 6.

⁴⁵ *Id.* § 7.

⁴⁶ §§ 9-10, 43 Stat. at 885.

⁴⁷ 346 U.S. 427 (1953).

⁴⁸ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479-83 (1989).

⁴⁹ 388 U.S. 395 (1967).

The Court of Appeals for the Second Circuit had taken the view that, as a matter of federal substantive law, arbitration clauses are “separable” from the contracts in which they are embedded; hence, when no claim was made that fraud was directed to the arbitration clause itself, a broad arbitration clause would commit the question of fraud in the container contract to the arbitrators.⁵⁰ The Court of Appeals for the First Circuit, by contrast, had taken the view that the question of “severability” should be decided as a matter of state law; where a state regards arbitration clauses as inseparable from the remainder of the agreement, the question of fraud would be for the courts.⁵¹ The Second Circuit’s view was upheld. The FAA, as interpreted, deprived the courts of a device that otherwise could be used to keep cases away from arbitrators.

Any doubt that the Supreme Court’s attitude had changed became difficult to maintain after three decisions in the 1980s. In *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*,⁵² the Court announced that there was a federal policy favoring arbitration. The issue involved arbitrability, this time a claim that one party to an arbitration agreement had “lost any right to arbitration under the contract due to waiver, laches, estoppel, and failure to make a timely demand for arbitration.”⁵³ First, the Court read *Prima Paint* to manifest a policy of the FAA to require “a liberal reading of

⁵⁰ *Id.* at 402.

⁵¹ *Id.* at 402-03 (citing *Lummas Co. v. Commonwealth Oil Ref. Co.*, 280 F.2d 915, 923-24 (1st Cir. 1960)).

⁵² 460 U.S. 1 (1983).

⁵³ *Id.* at 7.

arbitration agreements” so that, for example, “some issues that might be thought relevant to arbitrability are themselves arbitrable.”⁵⁴ Second, it announced that

[q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.⁵⁵

Then, in *Southland Corp. v. Keating*,⁵⁶ the Court wrote that, in enacting FAA § 2, “Congress declared a national policy favoring arbitration [for disputes within the Commerce Clause] 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.”⁵⁷ In 1985, the court decided *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁵⁸ which involved the arbitrability of antitrust claims advanced under the Sherman Act and within a valid arbitration clause in an international contract. The court of appeals had reasoned that “the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration.”⁵⁹ The Court found no “explicit” support for such an

⁵⁴ *Id.* at 22 n.27.

⁵⁵ 460 U.S. at 24-25.

⁵⁶ 465 U.S. 1 (1984).

⁵⁷ *Id.* at 10.

⁵⁸ 473 U.S. 614 (1985).

⁵⁹ *Id.* at 629 (citing *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827-28 (2d Cir. 1968)).

exception in either the Sherman Act or the FAA.⁶⁰ It held that antitrust claims were arbitrable, at least when arising from an international transaction. Since *Mitsubishi*, a series of decisions has expanded the realm of arbitrable disputes to encompass such statutory claims as those arising under the federal securities law,⁶¹ RICO,⁶² the Age Discrimination in Employment Act,⁶³ and Title VII employment disputes.⁶⁴ Following *Mitsubishi*, the Court appears to assume that, if Congress intended a statute's substantive protection to include protection from waiving a judicial forum, "that intention will be deducible from text or legislative history."⁶⁵

The policy favoring arbitration should be taken seriously. This policy reaches by far the lion's share of contractual transactions within the United States, so long as they

⁶⁰ *Id.* at 628-29.

⁶¹ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

⁶² *Id.* at 242; *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

⁶³ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). An arbitration agreement between an employer and an employee does not, however, bar the Equal Employment Opportunity Commission from proceeding in court. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 287-88 (2002). According to the Supreme Court, moreover, an agreement that prevents the effective vindication of statutory rights may be unenforceable. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-92 (2000); *see also Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482-83 (D.C. Cir. 1997).

⁶⁴ *E.g.*, *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998). *Contra Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1190 (9th Cir. 1998).

⁶⁵ *Mitsubishi Motors Corp.*, 473 U.S. at 628. Congress has made pre-dispute arbitration agreements in motor vehicle franchise agreements unenforceable. 15 U.S.C. § 1226(a)(2) (2002).

affect interstate commerce.⁶⁶ The policy pre-empts inconsistent state laws.⁶⁷ Through the FAA § 2, it is applicable in state courts.⁶⁸ In light of the burgeoning number of cases brought to arbitration, arbitration might be in the process of replacing litigation as the primary method of compulsory dispute settlement for contract and related civil cases.

II. Justifications for the Policy Favoring Arbitration

A. Justifications

That the Supreme Court adheres to a strong policy favoring arbitration does not mean that there should be such a policy. One normative reason, however, supports such a conclusion.⁶⁹ It is freedom of contract, premised on the value of party autonomy. Moreover, the parties may wish to enter an arbitration agreement for three reasons. First, the parties themselves may wish to balance accuracy of results, procedural fairness, and

⁶⁶ *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Perry v. Thomas*, 482 U.S. 482, 489 (1987). Contracts of employment for transportation workers are excluded by the FAA, 9 U.S.C. § 1 (2000).

⁶⁷ *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 F. Ct. 1212 (1995); *Allied-Bruce Terminix Cos.*, 513 U.S. at 281; *Perry*, 482 U.S. at 490-91; *Southland Corp. v. Keating*, 465 U.S. at 16 (1984); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 425 (2004).

⁶⁸ *Southland Corp.*, 465 U.S. at 12.

⁶⁹ Supporters of arbitration often tout the privacy of arbitration proceedings and the secrecy of most awards, which in domestic cases generally do not give reasons anyway, as a virtue of arbitration. Surely many parties prefer privacy, and for them this is an advantage when choosing whether to agree to arbitrate. Privacy is not, however, a reason supporting the policy favoring arbitration. Privacy and the secrecy of awards hampers the further development of the law because arbitration sets no precedents. *See Owen M. Fiss, Against Settlement*, 93 YALE L.J. 1073, 1085-89 (1984). The general secrecy of awards is a drawback to the policy favoring arbitration, especially in arbitration of statutory claims, such as employment discrimination claims.

adjudicative efficiency differently from the way the courts do it in civil litigation. The second is arbitration's capacity to serve as an alternative to a slow and sometimes terrifying civil litigation system. The third is the value of allowing parties to balance accuracy of results against the finality of decisions, also doing it differently from the way the courts do it. On the whole, it should be concluded, the Supreme Court's policy is reasonable.

1. Freedom of Contract: Party Autonomy

In principle, allowing contract parties to agree to settle disputes by arbitration enhances party autonomy. It expands freedom of contract by allowing parties to contract out of civil litigation, making litigation a default method of settling disputes.⁷⁰ With an arbitration alternative, parties are not faced with a choice between litigation and nothing (insofar as compulsory methods of dispute resolution are concerned). They have the alternatives of litigation, arbitration or nothing. By contrast with litigation, arbitration is highly flexible. The parties can fashion the procedure as best suits their needs. Hence, arbitration empowers people to better control their own destinies.

Most of the cases reviewed for this Article involve adhesion contracts containing arbitration clauses. Adhesion contracts are standard form contracts drafted and "imposed" by a strong party on another with less bargaining power. Negotiations over the pre-printed terms – those that are not added to the form, such as the price term – are not

⁷⁰ Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999).

allowed. The weaker party rarely reads or understands the pre-printed terms.⁷¹ Sometimes, important terms are in fine print or obscure language that discourages understanding.⁷² Adhesion contracts are ubiquitous in the American economy. One scholar suggests that ninety-nine percent of contracts entered into in the United States are adhesion contracts.⁷³

It has been argued that the party autonomy rationale does not reach adhesion contracts.⁷⁴ The weaker party cannot negotiate the pre-printed terms. Assent to the arbitration clause is not subjectively present because that party normally does not read or understand those terms.⁷⁵ For practical purposes, however, the general scholarly debate on adhesion contracts is beside the point. Under the Supreme Court's arbitration decisions, adhesion contracts containing arbitration clauses cannot be treated differently from adhesion contracts generally.⁷⁶ Because adhesion contracts, including the fine print,

⁷¹ Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983).

⁷² I E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.26, at 534 (2nd ed. 1998).

⁷³ W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

⁷⁴ Rakoff, *supra* note 71, at 1180, 1183-90.

⁷⁵ See, e.g., Carrington & Castle, *supra* note 11, at 218-220; Linda J. Demaine & Deborah R. Hensler, "Volunteering" To Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 73-74(2004). See generally Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233 (2002).

⁷⁶ *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

generally are enforced,⁷⁷ the arbitration clauses must be enforced unless they are unenforceable for other reasons.

As a normative matter, moreover, it can be argued that adhesion contracts generally should be enforced. One reason is that, it has been suggested, the relevant subjective assent is present because the weaker party signs the form contract normally knowing that there are terms in that they do not understand. Those parties nonetheless intend to be bound by all of the terms of the contract.⁷⁸ Indeed, it would be unreasonable and unworkable to require that each party subjectively assent to each term in a form contract. In part for the same reason, moreover, a reasonable person in the stronger party's position would understand that the weaker party assented to the contract and that all of the terms bind both parties. According to the objective theory of contract, the weaker party therefore is bound.⁷⁹

There are three further reasons supporting the objective theory in this context. First, the objective theory generally is employed for other contract formation issues and for purposes of interpretation.⁸⁰ It would be incoherent to employ the subjective theory only for adhesion contracts or adhesion contracts containing arbitration agreements.

⁷⁷ X-ref

⁷⁸ See *Merit Music Serv., Inc. v. Sonneborn*, 225 A.2d 470, 474 (Md. 1967) (“[T]he law presumes that a person knows the contents of a document that he executes and understands at least the literal meaning of its terms.”).

⁷⁹ Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627 (2002); Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *FORDHAM L. REV.* 427 (2000).

Second, the objective theory protects the stronger party's reliance interest, as does modern contract law.⁸¹ Third, as has long been understood, there are many good reasons for the stronger party to employ form contracts and to refuse to negotiate the pre-printed terms. Form contracts are, in a word, efficient.⁸² There is reason to believe that arbitration clauses lower the contract price of the goods, services or money, or provide weaker parties with more advantageous terms, because arbitration reduces the parties' joint costs of contracting.⁸³

2. Procedural Fairness, Efficiency and Accuracy

In a throwback to *Wilko v. Swan*,⁸⁴ the principal concern of contemporary courts seems to be that a weaker party's contract or related rights may not be effectively vindicated in an arbitration proceeding.⁸⁵ (We should assume that this attitude does not reflect a pro-employee, pro-consumer–pro-claimant–bias because that would be indefensible when structuring procedures.) There is, however, no evidence that

⁸⁰ RESTATEMENT (SECOND) OF CONTRACTS R2 definition of a promise; §§ 20, 24, 201(2); definition of acceptance.

⁸¹ *Id.* §§ 87(1), 90 (1981); Fuller & Perdue.

⁸² Llewellyn. Summarize (see Farnsworth). Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1208-1225 (2003).

⁸³ Korobkin, *supra* note 82, at 1275-76; Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89. *But see* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 93 (2004) (criticizing Ware).

⁸⁴ X-ref

arbitration is worse than litigation at achieving accuracy of results. What little empirical work we have suggests that arbitrators decide cases much as judges do, and with less cognitive distortion than juries suffer from.⁸⁶ Juries in some parts of the country might be more pro-employee and pro-consumer than arbitrators, but this is speculative and irrelevant.⁸⁷ Arbitration might in fact be more effective than litigation at achieving accuracy of results. There are normally no pre-trial substantive motions, discovery wars, antiquated rules of evidence or juries allowing clever advocates to skew the results. In addition, even when operating at its best, the civil litigation system must be assumed to reach inaccurate results in some cases.

Even if there is not better accuracy of results in arbitration, the parties should be empowered to trade off their interests in procedural fairness and efficiency, on one hand, and accuracy of results, on the other, by streamlining and tailoring their procedure to the needs of the case. Typically, there is no practice involving delays due to motions to

⁸⁵ The Supreme Court limits the relevant rights to “statutory rights” involving a public interest. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991). For the California Supreme Court’s similar view, see *Boghos v. Certain Underwriters at Lloyd’s of London*, 30 Cal. Rptr. 3d 787, 793 (2005).

⁸⁶ Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 107 (2004). It is a popular conjecture that arbitrators often make compromise awards rather than determining the parties’ rights and duties, but there is no empirical support for this. *Id.* at 115-16.

⁸⁷ See *id.* at 116-18. After reviewing the available empirical data, Professors Sherwyn, Estreicher, and Heise concluded that “plaintiffs do not fare significantly better in litigation, that arbitration provides a quicker resolution than litigation, and that available data do not indicate whether damages are fairer under either system.” Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1564 (2005). In one recent study, for example, female employees prevailed in arbitration much more often than similarly-situated women in litigation, though the amounts of the awards were lower. Michael H. LeRoy, *Getting Something for Nothing: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL’Y REV. 573 (2005).

dismiss, summary judgments, and directed verdicts. Rather, proceedings tend to go directly to a hearing on the merits. Consequently, arbitration is often quicker and cheaper for the parties than litigation, even after the costs and fees are taken into account. (Of course, an arbitration can go wrong and be even slower and more expensive than litigation.)

The civil litigation system has a one-size-fits-all procedure in each jurisdiction (except in small claims courts), embodied in generally applicable procedural rules. It balances these policies in one way, sacrificing procedural fairness and accuracy in some cases in the name of judicial efficiency. For example, consider the availability of a motion to dismiss for failure to state a claim.⁸⁸ At this stage, a court must balance a plaintiff's interest in his or her day in court against judicial efficiency. It is inefficient to spend resources on meritless claims. However, some dismissals will be mistakes, and everyone knows it. The litigation system is prepared to sacrifice some degree of accuracy in the interests of fairness to the defendant and judicial efficiency. The parties should be able to tailor their procedure to their case, balancing procedural fairness, efficiency and accuracy of results differently from the way the litigation system does it. Because there are no pre-hearing dismissals or extensive discovery, arbitration may be capable of doing a better job at balancing these values in the parties' interests.

Commercial parties very often find arbitration sufficiently fair, efficient and accurate. They commonly contract out of litigation by concluding arbitration

⁸⁸ FED. R. CIV. P. 12(b)(6).

agreements.⁸⁹ Almost no one criticizes the arbitration alternative for commercial cases.⁹⁰ By analogy and inference from the commercial practice, there is no reason to presume that arbitration practice is too unfair, inefficient or inaccurate for noncommercial parties.

3. Alternative to a Crippled Civil Litigation System

Not everyone thinks the American litigation system does a good job. Among the criticisms are those aimed at lengthy delays due to crowded dockets, discovery wars, arcane rules of evidence and the obsolescence of jury trials in civil cases.⁹¹ These features of American litigation, and others, raise the parties' costs so that many cases are not worth filing. Trials, moreover, are becoming far less prevalent as judges engage in managerial judging and helping the parties to negotiate settlements.⁹²

Arbitration generally dispenses with these troublesome features. In particular, hearings are almost always held; arbitrators do not mediate cases. Parties consequently may be more likely to get a "day in court." For those who want out of litigation, the arbitration alternative should be available. There will still be cases in which the costs of arbitration exceed the amount of a claim or otherwise discourage proceeding. There is

⁸⁹ L.rev. See Joseph T. McLaughlin & Karen M. Crupi-Fitzgerald, *Alternative Dispute Resolution in the Corporate Sector*, Civil Practice and Litigation Techniques in Federal and State Courts: Feb. 28, 2001, A.L.I.-A.B.A. Course of Study Materials American Law Institute – American Bar Association Continuing Legal Education A.L.I.-A.B.A.; Thomas J. Brewer, *The Arbitrability of Antitrust Disputes: Freedom To Contract for an Alternative Forum*, 66 Antitrust L.J. 91, 92 (1991).

⁹⁰ For the exception, see Carrington & Castle, *supra* note 11.

⁹¹ L. rev.

⁹² See generally Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

every reason to believe that this happens less in arbitration than in civil litigation, especially for consumer and employment claims.⁹³

Arbitration is especially important in international commercial cases. Foreign recognition of United States judgments is difficult, reflecting other countries' disdain for the American civil litigation system. Their courts and commentators object to the very same features of litigation that arbitration typically dispenses with. It is therefore reasonable for American parties, like so many foreigners, to find litigation unappealing. Because this is reasonable, courts should not insist that employees and consumers resort to litigation as their sole process.

5. Finality of Awards

In practice, courts vacate few arbitral awards. Judicial scrutiny here falls well short of that involved in judicial appellate practice.⁹⁴ But the absence of a robust appeal in arbitration is one of its attractions to many parties. Arbitration law balances the finality of awards against the greater accuracy appeals might generate. It finds finality to be of greater value.

The civil litigation system, too, balances finality against accuracy. It sometimes finds finality of greater value. Consider, for example, the courts' refusal to relitigate a

⁹³ See Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843 (2004).

⁹⁴ The parties, however, might agree to expand the scope of an appeal, and at least one court will implement their agreement. *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888-90 (9th Cir. 1997) *vacated*, *Kyocera Corp. v. Prudential-Bache Trade Serv., Inc.*, 341 F.3d 987 (9th Cir. 2003)).

case when asked to recognize or enforce a foreign judgment.⁹⁵ The parties should be able to bring themselves under arbitration law's balance by agreeing to do so. The balance of finality and accuracy in arbitration is reasonable even if different from that of the civil litigation system. There is nothing sacred about a right to a robust appeal.

B. Scope of the Policy Favoring Arbitration

Consider the FAA § 2, the source of the federal policy favoring arbitration:

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.⁹⁶

The Supreme Court has held that the savings clause of this statute requires that arbitration agreements in transactions affecting interstate commerce be enforced on an equal footing with other contracts under state contract law.⁹⁷

In five cases, the Court has struck down state laws that discriminated against arbitration.⁹⁸ In *Allied-Bruce Terminix Cos. v. Dobson*,⁹⁹ for example, the Alabama legislature had enacted a statute making written, pre-dispute arbitration agreements

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⁹⁶ 9 U.S.C. § 2 (2000).

⁹⁷ *Sherk v. Alberto-Culver Co.*, 104 S. Ct. 2449, 2453 (1974).

⁹⁸ In addition to the two cases summarized in the above paragraph, see *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995); *Perry v. Thomas*, 107 S. Ct. 2520 (1987); *Southland Corp. v. Keating*, 103 S. Ct. 927 (1984). See also *Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d 76, 87-95 (S.Ct. 2005).

⁹⁹ 115 S. Ct. 834 (1995).

invalid and unenforceable.¹⁰⁰ The Court held it unconstitutional because pre-empted by the FAA § 2. In *Doctor's Associates v. Casarotto*,¹⁰¹ the Montana legislature had enacted a statute requiring arbitration clauses to be underlined and on the first page of a contract. Montana's contract law did not require contract clauses generally to be written this way.¹⁰² The legislation, therefore, treated arbitration agreements less favorably than general contract law would. The Supreme Court held that the Montana statute was unconstitutional because pre-empted by the FAA § 2.¹⁰³

The question raised by this Article is whether courts are free, under these cases and general principle, to find an arbitration agreement unconscionable when the court's reasons for such a finding disfavor arbitration. On the one hand, the justification for such a finding is based in general contract law – the unconscionability doctrine. On the other, however, the reasons and consequences may be incompatible with the federal policy favoring arbitration. Existing case law does not resolve this tension. The courts should hold that the FAA § 2 pre-empts judicial holdings that disfavor arbitration even if the legal basis for the decision is the unconscionability doctrine.

In *dicta* the Supreme Court has given conflicting, if not confusing, guidance. In *Perry v. Thomas*,¹⁰⁴ the Court said:

¹⁰⁰ Ala. Code § 8-1-41(3) (1993).

¹⁰¹ 517 U.S. at 683; *see* *First Options of Chi. v. Kaplan*, 514 U.S. 938, 944 (1995).

¹⁰² Mont. Code Ann. § 27-5-114(4) (1995).

¹⁰³ For a California statute that might be similarly pre-empted, see CAL. BUS. & PROF. CODE § 7191 (West) (applicable to residential construction contracts). For an argument that residential construction contracts do not affect interstate commerce, see *Woolls v. Super. Ct.*, 25 Cal. Rptr. 3d 426, 437-39 (Ct. App. 2005).

¹⁰⁴ 107 S. Ct. 2520 (1987).

Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of [FAA § 2]. [citation omitted] 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.¹⁰⁵

This passage makes it clear that FAA § 2 can pre-empt a judicial “holding.” Moreover, the last sentence of the passage would seem to say that, even if the legal basis of the judicial holding is the unconscionability doctrine, FAA § 2 nonetheless may pre-empt a judicial holding if it disfavors arbitration.

Further Supreme Court *dictum* is more confusing. In *Allied-Bruce Terminix*, the court wrote:

In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause “upon such grounds as exist at law or in equity for the revocation of *any* contract.” . . . What States may not do is to decide that a contract is fair enough to enforce all of its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place

¹⁰⁵ *Id.* at 2527 n.9 (emphasis original).

arbitration clauses on an unequal “footing,” directly contrary to the Act’s language and Congress’ intent.¹⁰⁶

The first two sentences of this passage say that states may hold arbitration agreements unconscionable under generally applicable state contract law. The last two sentences, however, qualify this position significantly. The penultimate sentence says in effect that the arbitration clause should be evaluated in the context of the whole contract. The contract, including its arbitration clause, rises or falls on the basis of fairness as a unity. This contradicts the second sentence, which says that states may regulate arbitration *clauses*, seemingly singling them out for analysis under the unconscionability doctrine.

Because support can be found for both positions in Supreme Court *dicta* we should consider what, given existing law, the Court should hold if an appropriate case were before them. Consider a hypothetical case: A state supreme court holds that all written, pre-dispute agreements to arbitrate are unenforceable because unconscionable. There is a similarity to and two distinctions between this case and *Allied-Bruce Terminix*. First, the substance of the hypothetical holding is identical to that of the Alabama statute in *Allied-Bruce Terminix*. Second, the decision was made by a court, not a legislature. *Perry* is clearly correct that a court should not be able to do what a legislature cannot. A court can undermine the relevant federal policy as effectively as does a legislature because the consequences are the same. The fact that the hypothetical case involves state law “of judicial origin” makes no difference. Third, the hypothetical state court based its decision on a doctrine of general contract law. For the same reason, this should make no difference. The consequences undermine the relevant federal policy as effectively as

¹⁰⁶ 115 S.Ct. at 843.

would legislation without a contract law basis. The hypothetical case cannot be distinguished meaningfully from *Allied-Bruce Terminix*.

It might be argued that the basis of the hypothetical holding makes a significant difference. The unconscionability doctrine is a doctrine of general contract law and, it might be argued, falls within the savings clause of FAA § 2: “save upon such *grounds* as exist at law or in equity for the revocation of any contract.”¹⁰⁷ Unconscionability, it might be argued, is a “ground” for the revocation of any contract. Such a conceptual argument, however, is not persuasive. The statute should not be read to manifest a “strong” federal policy favoring arbitration, which pre-empts contrary state laws, but to allow contrary state laws that rest on a doctrine of contract law. State laws and judicial holdings with contrary consequences for the federal policy should be pre-empted whatever their legal garb. The holding in the hypothetical case puts arbitration agreements on an unequal footing with other contracts and should be pre-empted.

No court has made such a broad holding as that in the above hypothetical case. Rather, as will be seen in the next Part of this Article, the courts proceed in a piecemeal fashion, striking arbitration agreements down one case at a time due to “unconscionable” features of each particular clause. The courts should not be able to do piecemeal what they could not do in one stroke.

III. Unconscionability and Arbitration Agreements

¹⁰⁷ (emphasis added).

A synthesis of the cases reviewed for this Article indicates that, since 2000, many courts have been refusing to enforce arbitration agreements.¹⁰⁸ The usual ground for such refusals is unconscionability.¹⁰⁹ These decisions, however, often misuse the unconscionability doctrine, qualified by the policy favoring arbitration as required by federal law.¹¹⁰ They focus on reasonableness or fairness standards. These are not the unconscionability standards in general contract law. Using these vague standards results in treating arbitration agreements less favorably than other contracts, a result that is preempted by the FAA.¹¹¹ In addition, the relevant courts use the civil litigation system as the standard, striking arbitration agreements that are not equal to it procedurally.¹¹² This favors litigation over arbitration, depriving parties of the advantages of arbitration and violating the federal policy favoring arbitration. It is hard to resist the conclusion that there is a new judicial hostility to arbitration in noncommercial cases.¹¹³

A. Unconscionability

¹⁰⁸ See also Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004).

¹⁰⁹ Outside the reported decisions, there is no empirical basis for believing that abuse by the stronger party is widespread. One empirical study found, to the contrary, that egregious self-dealing was unusual. Demaine & Hensler, *supra* note 75, at 72. See Drahozal, *supra* note 2.

¹¹⁰ X-ref.

¹¹¹ X-ref.

¹¹² E.g., *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88 (Ct. App. 2004).

¹¹³ See *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) (“The cry of ‘unconscionable!’ just repackages the tired assertion that arbitration should be disparaged as second-class adjudication.”) (Easterbrook, J.).

Courts may strike down arbitration agreements when they are unconscionable under general contract law. As a matter of contract law, however, the unconscionability doctrine is not a license for courts to police agreements for reasonableness or fairness. To find a contract or contract provision unconscionable, a court must find that it is both procedurally and substantively *unconscionable*.¹¹⁴ Procedural unconscionability consists in an absence of meaningful choice on the part of a party with grossly weaker bargaining power.¹¹⁵ Substantive unconscionability consists of a “gross disparity in the values exchanged.”¹¹⁶ Note that the tests require *gross* disparities in the making of the contract and in its substantive terms. It is sometimes said that the contract or term must be “harsh,” “oppressive,” and “shock the conscience” to justify a finding of unconscionability.¹¹⁷

The phrases "harsh," "oppressive," and "shock the conscience" are not synonymous with "unreasonable." Basing an unconscionability determination on the reasonableness of a contract provision would inject an inappropriate level of judicial subjectivity into the analysis. With a concept as nebulous as “unconscionability” it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely

¹¹⁴ *Contra* Owner-Operator Indep. Drivers Ass’n v. C.R. Eng., Inc., 325 F. Supp. 2d 1252 (D. Utah 2004)(alone, substantive unconscionability suffices); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574 (1998)(same). See generally Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

¹¹⁵ RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

¹¹⁶ *Id.* cmt. c.i

¹¹⁷ *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145 (Ct. App. 1997).

because the court believes the terms are unreasonable. The terms must shock the conscience.¹¹⁸

The doctrine, moreover, allows the stronger party to show that the contract or term, even if grossly unfair, is justified by business needs. If so, the term is upheld.¹¹⁹ In addition, an unconscionable term can be severed from the remainder of the contract if the unconscionability does not pervade the contract.¹²⁰ Apart from the cases involving arbitration agreements, the courts do not often strike down an agreement or term for being unconscionable.

Finding arbitration agreements unconscionable consequently does not violate the FAA § 2 or its policy favoring arbitration per se. An arbitration agreement that appears not to allow the effective vindication of a claimant's (or respondent's) rights might appear to be unconscionable per se. But, as indicated above, it should be up to the parties to decide whether and how to trade off accuracy, on the one hand, and procedural fairness, finality and efficiency, on the other.¹²¹ The courts often ignore the latter side of the balance. Moreover, the cases do not present themselves in such terms. Rather, an arbitration agreement may have a particular feature or combination of features that contribute(s) to a court's conclusion that the agreement is unconscionable and

¹¹⁸ *Morris v. Redwood Empire Bancorp*, 27 Cal. Rptr. 3d 797, 809 (Ct. App. 2005) (internal quotation marks omitted).

¹¹⁹ *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1046 (2001); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 99 Cal. Rptr. 2d 745, 770 (2000); *see also* UNIF. COMMERCIAL CODE § 2-302(2)(2004); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); Perillo, *supra*, at 386

¹²⁰ *Armendariz*, 99 Cal. Rptr. 2d at 773.

¹²¹ X-ref.

unenforceable. For example, it may be an adhesion contract, limit discovery, or allow the employer to litigate while the employee must arbitrate. Not every feature that disadvantages a claimant, however, is a valid reason to hold that the agreement is unconscionable.¹²² That depends on a closer examination of the court's reasoning in the case.

There are three major additional reasons for closely scrutinizing judicial reasoning in this context. First, as indicated by *Doctor's Associates*, a finding of unconscionability must not single out arbitration for different treatment than that afforded by contract law generally. In contract law, it is rare for a court to declare an agreement unconscionable simply because of perceived unreasonableness or unfairness. The policy of contractual freedom requires deference to the parties' value judgments, even when they are not the judgments the judge would make or approve of. Second, the unconscionability doctrine requires the courts to consider whether there is a special business need that justifies the questioned provision.¹²³ When there is, the agreement is not unconscionable. Third, a court should take into account the policy favoring arbitration when deciding the unconscionability question. More important, the mere fact that an arbitration proceeding will differ from litigation is not a legitimate reason for striking down an arbitration agreement. It is one of the great advantages of arbitration generally that the parties may simplify and tailor the arbitration proceeding to their case. The policy favoring arbitration should be given the effect of requiring due respect for such advantages over litigation.

¹²² Of course, a pro-claimant bias would be inappropriate.

¹²³ UNIF. COMMERCIAL CODE § 2-302(2) (2004); *Armendariz*, 99 Cal. Rptr. 2d at 773.

Consider a case holding that an arbitration clause is unconscionable because it lacks “mutuality.”¹²⁴ The employee must arbitrate while the employer may litigate.¹²⁵ Such a holding fails for all three reasons. First, it singles out arbitration for special treatment. If there is consideration, there is no requirement of “mutuality” in contract law generally.¹²⁶ If there were, it would view the contract as a whole when deciding the question, not the arbitration provision in isolation.¹²⁷ Second, there may be a special business need that justifies the provision. In employment relationships, for example, the employer may need access to the courts to obtain a quick preliminary injunction to prevent an employee from divulging trade secrets or competing in violation of a covenant

¹²⁴ *Armendariz* requires a “modicum of bilaterality” within the arbitration clause, which amounts to a requirement of mutuality. 99 Cal. Rptr. 2d at _____. See *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862, 871 (D. Or. 2002).

¹²⁵ E.g., *Armendariz*, 99 Cal. Rptr. 2d at ____; *Martinez v. Master Prot. Corp.*, 12 Cal. Rptr. 3d 663, 669-70 (Ct. App. 2004); *O’Hare v. Mun. Res. Consultants*, 132 Cal. Rptr. 2d 116, 121-25 (Ct. App. 2003); *Mercuro v. Super. Ct.*, 116 Cal. Rptr. 2d 671, 676-77 (Ct. App. 2002); see *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778 (9th Cir. 2002). For consumer cases with similar effect, see *Palm Beach Motor Cars Ltd. v. Jeffries*, 885 So. 2d 990 (Fla. Dist. Ct. App. 2004); *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004).

¹²⁶ *Bischoff v. DirecTV*, 180 F. Supp. 2d 1097, 1110 (C.D. Cal. 2002); *Gray v. Conseco, Inc.*, No. SA CV 00-322DOC(EEX), 2000 WL 1480273 (C.D. Cal. 2000); RESTATEMENT (SECOND) OF CONTRACTS § 79(c) (1981).

¹²⁷ *Glazer v. Lehman Bros.*, 394 F.3d 444, 453 (6th Cir. 2005); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 143-44 (Me. 2005). But see *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656 (2003) (lack of mutuality affecting only the arbitration clause renders that clause unenforceable because it is separable under *Prima Paint*). *Cheek* mistakes *Prima Paint*. That case holds only that arbitration clauses are separable from container contracts for the purpose of allocating decisionmaking authority as between courts and arbitrators. Accordingly, it held that fraud in the inducement of a container contract presented a question for the arbitrators. X-ref. It did not hold that an arbitration clause is separable for purposes of determining whether it is enforceable.

not to compete.¹²⁸ Empanelling an arbitral tribunal would take too long, and the tribunal may not have the power to issue preliminary injunctions.¹²⁹ Third, the policy favoring arbitration argues against unconscionability in such cases. The inference is irresistible that such a holding is premised on a belief that the employee is disadvantaged by having to arbitrate while the employer is advantaged because it can litigate, irrespective of the particular features of the arbitration. Supposing that the employee is thus disadvantaged supposes that arbitration is inferior to litigation. Such a supposition violates the policy favoring arbitration.

B. *Armendariz* and the Effective Vindication of Statutory Claims

Before turning to an evaluation of judicial decisions finding arbitration agreements unconscionable, a different issue should be distinguished. In *Gilmer v. Interstate/Johnson Lane Corp.*,¹³⁰ the U.S. Supreme Court held that claims under the Age Discrimination in Employment Act¹³¹ are arbitrable, continuing its line of cases holding that claims under statutes are arbitrable.¹³² It did not hold, however, that wherever an employee has concluded an arbitration agreement such claims must be arbitrated

¹²⁸ See *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422 (Ct. App. 2004); *Pitts v. Watkins*, 905 So. 2d 553 (Miss. 2005).

¹²⁹ In contrast, the California arbitration statute empowers arbitrators to issue court injunctions. Cal. Code Civ. Proced.

¹³⁰ *Armendariz*, 500 U.S. 20 (1991).

¹³¹ 29 U.S.C. §§ 621-634 ().

¹³² X-ref.

regardless of the characteristics of the arbitration.¹³³ Recognizing the public interest in statutory claims, the court indicated that the arbitration agreement must provide for the “effective vindication of statutory rights.”¹³⁴ It did not state the minimum conditions under which statutory rights could be effectively vindicated in arbitration.

The California Supreme Court stated such conditions in the leading case of *Armendariz v. Foundation Health Psychcare Services, Inc.*¹³⁵ Two employees had brought an action against their employer under California’s Fair Employment and Housing Act.¹³⁶ Their contract of employment, however, contained an arbitration clause. The employer moved to compel arbitration. The court refused to enforce the “mandatory” arbitration agreement on both effective vindication and unconscionability grounds. With respect to effective vindication, the court stated four conditions: (1) the arbitrator must be neutral; (2) the arbitration agreement must provide for adequate discovery; (3) the arbitration agreement must require the arbitrator to make a written award to permit a limited form of judicial review; and (4) the employer must bear the costs of the arbitration insofar as they have no parallel in litigation (such as the arbitrator’s fee).

¹³³ See *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) (interpreting *Gilmer*).

¹³⁴ *Walker v. Ryan’s Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 923 (M.D. Tenn. 2003) (citing the Sixth Circuit’s interpretation of *Gilmer* in *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 313 (2000)).

¹³⁵ 99 Cal. Rptr. 2d 745 (2000).

¹³⁶ CAL. GOV’T CODE §§ 12900-12996 (West 2005).

Gilmer's and *Armendariz's* effective vindication rationale, it should be emphasized, is applicable only to arbitration of statutory claims.¹³⁷ It has its basis in the policy of the statute under which the claim is brought, not contract law.¹³⁸

Unconscionability is a matter of contract law and forms a separate basis for invalidating an arbitration agreement. This Article is concerned only with unconscionability.

Nonetheless, as in *Armendariz*, many courts employ the unconscionability doctrine to invalidate agreements to arbitrate statutory claims. This Article takes these cases into account in the following evaluation. Because of the separate effective vindication rationale for statutory cases, an agreement to arbitrate a statutory claim should be held unconscionable under contract law only if the same agreement to arbitrate a common law claim also would be unconscionable.

C. Judicial Treatment of Arbitration Agreements

As indicated, many courts are striking down pre-dispute arbitration agreements in noncommercial cases on the ground that they are unconscionable. They find these agreements procedurally unconscionable simply because they are parts of adhesion contracts: A stronger party presents them to a weaker party in a standard form contract on a take-it-or-leave-it basis, not allowing negotiations over the arbitration term. They find such agreements substantively unconscionable for a host of reasons. Few of these reasons, however, hold up under close scrutiny, though there are cases in which a finding of unconscionability is justified. From this, one may easily infer that there is a new

¹³⁷ *Boghos v. Certain Underwriters at Lloyd's of London*, 30 Cal. Rptr.3d 787, 795-96 (2005).

¹³⁸ *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482-83 (D.C. Cir. 1997).

hostility to arbitration.

1. Procedural Unconscionability

Many arbitration agreements contained in adhesion contracts will be found in contracts between stronger and weaker parties. Such contracts are generally enforceable.¹³⁹ “[T]here is a central theme that runs through the . . . law . . . : contracts of adhesion, like negotiated contracts, are *prima facie* enforceable as written.”¹⁴⁰ Respected scholars criticize this law. They advocate, for example, that contracts of adhesion be considered *prima facie* unenforceable and reviewable for fairness.¹⁴¹ Notably, many courts have adopted substantially the scholar’s view in recent cases involving arbitration agreements. These courts hold that adhesion contracts containing arbitration clauses are *per se* procedurally unconscionable, but usually that substantive unconscionability is also required to render the contract unenforceable.¹⁴² There is something audacious in asserting that perhaps 99% of the contracts made in the United States are procedurally unconscionable (or *prima facie* unenforceable).¹⁴³ Indeed, clearly, the courts are not so holding. A business, moreover, should be able to decide the terms on which it will do

¹³⁹ FARNSWORTH, *supra* note 72, at 534-35.

¹⁴⁰ Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1176 (1983).

¹⁴¹ *Id.*; W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971). *See also* Perillo; KARL LLEWELLYN, *THE COMMON LAW TRADITION* 370 (1960).

¹⁴² *E.g.*, *Martinez v. Master Prot. Corp.*, 12 Cal. Rptr. 3d 663, 669 (Ct. App. 2004); *Flores v. Transamerica Homefirst, Inc.*, 113 Cal. Rptr. 2d 376, 382 (Ct. App. 2001); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145-46 (Ct. App. 1997).

business – and they normally do in many respects.¹⁴⁴ Consider, for example, a firm that offers cars only with two-year limited warranties. It offers the warranty term on a take-it-or-leave-it basis with no negotiations allowed, and it does not make extended warranties available for an additional price. It would be absurd to find that the contract or the warranty term is procedurally unconscionable for this reason. If the salesman does not mention the limited warranty and the consumer does not ask, there is no subjective consent to the specific clause when the consumer signs the contract so providing. Again, however, it would be absurd to consider the contract procedurally unconscionable for this reason. Procedural unconscionability requires exceptional pressure by the stronger party against the weaker one.¹⁴⁵

Adhesion contracts containing arbitration clauses are being singled out from the general run of adhesion contracts cases decided in recent years.¹⁴⁶ This is a problem

¹⁴³ X-ref. Slawson, 84 HLR 529

¹⁴⁴ Employers typically set many conditions of employment, such as health insurance, life insurance, pension plans, noncompetition agreements, on a take-it-or-leave-it basis. David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail To Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 30 (2003); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 146-47 (1999).

¹⁴⁵ See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1264-65 (2003).

¹⁴⁶ Adhesion contracts are not enforced when they involve exclusions of remedies, exculpatory clauses, and indemnity clauses. Farnsworth Treatise. The recent cases considered in this Article strongly suggest that arbitration clauses in adhesion contracts are being treated similarly as a new subcategory of all adhesion contracts. The former clauses, however, relieve a party of all liability under a contract or for its torts. An

under *Doctor's Associates*:¹⁴⁷ The FAA § 2 requires that arbitration agreements be treated on the same footing as other contracts. Laws treating them differently are pre-empted.¹⁴⁸ Evidently, the courts are hostile to arbitration because they accord less respect to arbitration agreements in employment and consumer contracts than to contracts generally.¹⁴⁹ Such hostility is exactly what the FAA § 2 seeks to end.¹⁵⁰

Consider four cases. In one, the court may hold that an arbitration agreement in an adhesion contract was procedurally unconscionable (in part) because the arbitration clause was in fine print or otherwise inconspicuous.¹⁵¹ This holding is inconsistent with *Doctor's Associates*. Even terms in fine print generally are enforced.¹⁵² In a second, the court finds procedural unconscionability because the stronger party did not explain to the weaker party what rights it was forgoing.¹⁵³ Even when an employer gave an explanation,

arbitration clause, by contrast, provides an alternate procedure for vindicating rights. The analogy is inadequate to save the arbitration cases considered here.

¹⁴⁷ X-ref.

¹⁴⁸ X-ref

¹⁴⁹ For a court that clearly does this, see *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 (9th Cir. 2003).

¹⁵⁰ X-ref.

¹⁵¹ *Little v. Auto Stiegler, Inc.*, 30 Cal. Rptr. 2d 892 (2003); *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 276 (Ct. App. 2003); *Jaramillo v. JH Real Estate Partners, Inc.*, 3 Cal. Rptr. 3d 525, 535 (Ct. App. 2003); *Fittante v. Palm Springs Motors, Inc.*, 129 Cal. Rptr. 2d 659, 671 (Ct. App. 2003); *Palm Beach Motor Cars, Ltd. v. Jeffries*, 885 So. 2d 990, 992-93 (Fla. Dist. Ct. App. 2004); *E. Ford, Inc. v. Taylor*, 826 So. 2d 709, 715 (Miss. 2002); see *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 2004).

¹⁵² Exceptions are for warranty disclaimers under the Uniform Commercial Code. UNIF. COMMERCIAL CODE § 2-316 (2003).

¹⁵³ *Voyager Life Ins. Co. v. Caldwell*, 353 F. Supp. 2d 748, 788 (S.D. Miss. 2005); *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1164 (Nev. 2004).

one court held that there was procedural unconscionability.¹⁵⁴ Again, this is incompatible with general contract law, which imposes a duty on each party to read a contract and to seek legal advice if necessary.¹⁵⁵ Perhaps, even with an explanation, few consumers and employees would understand the implications of agreeing to arbitration, or care. In a fourth case, the court found procedural unconscionability despite the fact that it was a post-dispute agreement, was not a contract of adhesion, and the weaker party was represented by counsel. This decision is almost certainly unprecedented in contract and arbitration law. Even strong critics of arbitration would enforce post-dispute arbitration agreements, and the presence of a lawyer is significant.¹⁵⁶ The courts' hostility to arbitration is clear.¹⁵⁷

In addition, many cases find procedural unconscionability because there were no negotiations *on the arbitration clause*,¹⁵⁸ or that the weaker party had no alternative source for the employment or goods to be provided by the stronger party.¹⁵⁹ There is, however, no requirement in general contract law that there be give-and-take in the

¹⁵⁴ Alexander v. Anthony Int'l, 341 F.3d 256 (3d Cir. 2003).

¹⁵⁵ Norwest Fin. Miss., Inc. v. McDonald, 905 So. 2d 1187, 1194 (Miss. 2005); Perillo.

¹⁵⁶ Carrington & Castle, *supra* note 11, at 218.

¹⁵⁷ See Pardee Constr. Co. v. Super. Ct., 123 Cal. Rptr. 2d 288 (Ct. App. 2002); Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1179 (Ohio Ct. App. 2004) (adhesion contracts have a weaker presumption in favor of arbitration than other contracts).

¹⁵⁸ Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 669 (Ct. App. 2004); Abramson v. Juniper Networks, Inc., 9 Cal. Rptr. 3d 422, 441 (Ct. App. 2004); see Jenkins v. First Am. Cash Advance of Ga., LLC, 313 F. Supp. 2d 1370, 1374 (S.D. Ga. 2003); Villa Milano Homeowners Ass'n v. Il Davorge, 102 Cal. Rptr. 2d 1, 5-6 (Ct. App. 2000).

negotiation of a contract or each clause of a contract. Requiring such a negotiation defeats the value of form contracts, which require uniformity to serve their many purposes.¹⁶⁰ It appears that these requirements are being imposed only on arbitration agreements, in violation of *Doctor's Associates*. There is also no requirement in general contract law that a contract be held unenforceable because a weaker party had no alternative source of supply.¹⁶¹ Antitrust law is available to address the problem of monopolies. Otherwise, there are usually competitive alternatives. In any event, there is and should be no common law legal guarantee that an employee can get a job, much less a particular job, or that a consumer can buy a particular product. One case even held that an arbitration agreement was procedurally unconscionable because a consumer had no choice but to agree to arbitration if it was to borrow *from the lender*.¹⁶² The availability of other lenders was not even considered.

2. Substantive Unconscionability

Even if one were to accept that arbitration agreements in adhesion contracts are procedurally unconscionable *per se*, one must proceed to consider substantive unconscionability. In almost all jurisdictions, both procedural and substantive

¹⁵⁹ *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 566 (Ct. App. 1993). *But see* *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572-73 (App. Div. 1998).

¹⁶⁰ X-ref

¹⁶¹ *But see* *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86-87 (N.J. 1960), a case that has not been generally followed.

¹⁶² *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 861 (W. Va. 1998); *see* *Porpora v. Gatliff Bldg. Co.*, 828 N.E.2d 1081, 1084-85 (Ohio Ct. App. 2005).

unconscionability are required to justify finding that a contract is unenforceable.¹⁶³ In the recent cases examined for this Article, the courts have given over twenty different reasons for finding an arbitration agreement substantively unconscionable in an employment, consumer or similar case. For the reasons given below, it is hard to resist the conclusion that many of these cases manifest a new judicial hostility to arbitration.

a. Costs and Fees

In arbitration, one party bears or both parties share the costs of the arbitration, including the arbitrator's fee and any filing fee. It is possible to shift a winning party's lawyer's fees to the losing party. The arbitration agreement may address the question of costs and fees or, more often, the arbitrator may decide it.¹⁶⁴ Unlike civil litigation, there is no governmental revenue source to subsidize the proceeding. The lesser cost of arbitration on the whole is due mainly to the absence of pre-trial motions, extensive discovery and from lower lawyer's fees that result from a streamlined procedure. The U.S. Supreme Court has acknowledged that prohibitively expensive fees may be grounds for invalidating an arbitration agreement in a case involving a statute.¹⁶⁵ Some courts cite costs and fees as a reason to hold that an arbitration agreement is substantively unconscionable in nonstatutory cases, too.¹⁶⁶ One court focused on the agreement's

¹⁶³ The exceptions are noted above at note ____.

¹⁶⁴ Arb. Rules.

¹⁶⁵ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000); *see Boghos v. Certain Underwriters at Lloyd's of London*, 30 Cal. Rptr. 3d 787, 795-97 (2005) (limiting costs and fees rationale to statutory claims); *Little v. Auto Stiegler, Inc.*, 130 Cal. Rptr. 2d 892, 907 09 (2003).

¹⁶⁶ For scholarly criticism, *see Budnitz, supra* note 4. Merely requiring a claimant to pay a filing fee he or she cannot afford has been held to be substantively unconscionable. *Gutierrez v. Autowest, Inc.*, 7 Cal.

requirement that the parties bear their own lawyer's fees.¹⁶⁷ Another found that the costs and fees would be greater than the amount of a consumer's claim.¹⁶⁸ Others hold that sharing costs would discourage claimants from bringing claims.¹⁶⁹ A fourth wrote simply that arbitration would be expensive,¹⁷⁰ and four more that arbitration would be more expensive than a lawsuit.¹⁷¹ Yet others have disapproved of imposing lawyers' fees on the losing party,¹⁷² even when this is left up to the arbitrator.¹⁷³ And a seventh held that a consumer-claimant could not be required to pay any part of the arbitrator's fee.¹⁷⁴

Upon critical scrutiny, holding that these features render an arbitration agreement substantively unconscionable is inconsistent with the policy favoring arbitration. The high costs of litigating, notably attorney's fees and the costs of pre-trial motions and discovery, frequently discourage potential plaintiffs from bringing claims in court.¹⁷⁵

Rptr. 3d 267, 277-78 (Ct. App. 2003). Of course, there are filing fees in court that sometimes exceed a potential plaintiff's ability to pay. This holding favors litigation over arbitration, too.

¹⁶⁷ Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269, 278-79 (3d Cir. 2004).

¹⁶⁸ Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1176 (N.D. Cal. 2002); Leonard v. Terminix Int'l Co., 854 So. 2d 529, 539 (Ala. 2002); McNulty v. H&R Block, Inc., 843 A.2d 1267, 1273-74 (Pa. Super. Ct. 2004).

¹⁶⁹ See O'Hare v. Mun. Res. Consultants, 132 Cal. Rptr. 2d 116, 125-26 (Ct. App. 2003).

¹⁷⁰ Ting v. AT&T, 319 F.3d 1126, 1151 (9th Cir. 2003); Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 671 (Ct. App. 2004); Kloss v. Edward D. Jones & Co., 54 P.3d 1, 16 (Mont. 2002); Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 602 (Wash. Ct. App. 2002).

¹⁷¹ Irwin v. UBS Painewebber, Inc., 324 F. Supp. 2d 1103, 1108-09 (C.D. Cal. 2004); Lucas v. Cash N Advance, Inc. (*In re Lucas*), 312 B.R. 407, 412 (Bankr. D. Nev. 2004).

¹⁷² Small v. HCF of Perrysburg, Inc., 823 N.E.2d 19, 24 (Ohio Ct. App. 2004).

¹⁷³ Graham v. DaimlerChrysler Corp. 21 Cal. Rptr. 3d 331, 339 (2004).

¹⁷⁴ Torrance v. Aames Funding Corp., 242 F. Supp. 2d 862 (D.Or. 2002).

¹⁷⁵ Demaine & Hensler, *supra* note 75, at 69.

These costs generally are cheaper in arbitration though the parties must pay filing fees and the arbitrator's fee. There is no basis for finding that arbitration, on the whole, is more expensive than litigation. Accordingly, the costs rationale for finding unconscionability may be based on false premises. In any event, it fails to distinguish arbitration from litigation while preferring litigation as a standard for judging arbitration agreements. Consequently, it is incompatible with the policy favoring arbitration.

An agreement that imposes costs and/or fees on the losing party may be conscionable, even if not the best arrangement. Such an agreement does not deter an employee or consumer from bringing weak claims any more than it deters a respondent from defending (*i.e.*, not settling) on the basis of weak defenses. It is fair in this basic respect. Several statutes, moreover, allow a court to award costs and fees to the victorious party.¹⁷⁶ Foreign practice, as in England, routinely involves shifting lawyer's fees.¹⁷⁷ And respected scholars advocate fee shifting in the United States.¹⁷⁸ True, an employer or seller may be better able to afford the costs and fees; consequently, some weaker

¹⁷⁶ Civil rights and other public interest legislation often includes a fee-shifting provision in order to encourage legitimate assertion of the statutory rights. *E.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2000); Cal. Civ. Proc. Code § 1021.5 (West) ("Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest"); Cal. Gov't Code §§ 91003(a), 91012 (West) (allowing the award of attorney's fees in cases enforcing California's Political Reform Act).

¹⁷⁷ *E.g.*, Elaine A. Carlson, *The New Texas Offer-of-Settlement Practice—The Newest Steps in the Tort Reform Dance*, 46 S. TEX. L. REV. 733, 737 (2005); James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225, 225 (1995); Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives To Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1863 (1998).

¹⁷⁸ Hughes & Snyder, *supra* note 171; Sherman, *supra* note 171.

employee and consumer claims may be discouraged by the prospect. But, again, the costs of litigation discourage plaintiffs, too. The rationale does not distinguish arbitration from litigation while preferring litigation. Consequently, it violates the policy favoring arbitration.

O'Donoghue v. Smythe, Cramer Co.,¹⁷⁹ illustrates a case in which a court rightly found a costs provision unconscionable. The arbitration agreement limited the claimant's recovery to \$265. The minimum cost of the arbitration to the claimant would have been a \$500 arbitration filing fee.

In addition, it is easy to sever a provision providing for onerous costs and fees, leaving the remaining questions to the arbitrator and the arbitration obligation intact.¹⁸⁰ Most courts that rely on these reasons, however, do not consider severance. Yet severance of an unconscionable term is permitted explicitly under the standard formulations of the unconscionability doctrine.¹⁸¹ Moreover, it would seem to be required whenever possible by the policy favoring arbitration. This should be an additional, independent and sufficient reason to sever. By not severing when it is possible, the courts strike down entire arbitration agreements for inadequate reasons. The costs and fees seem a pretext for doing so. Hostility to arbitration may be inferred.

¹⁷⁹ No. 80453, 2002 WL 1454074, at *5 (Ohio Ct. App. July 3, 2002).

¹⁸⁰ *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212 (3d Cir. 2003); *Healy v. RBC Dain Rauscher*, No. C 04-4873MMC, 2005 WL 387140, at *2 (N.D. Cal. Feb. 17, 2005); *Little v. Auto Stiegler, Inc.*, 130 Cal. Rptr. 2d 892, 900-01 (Ct.App. 2003); *McManus v. CIBC World Mkts. Corp.*, 134 Cal. Rptr. 2d 446, 465 (Ct. App. 2003).

¹⁸¹ UNIF. COMMERCIAL CODE § 2-302(1) (2003); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 99 Cal. Rptr. 2d 745, 773 (2000).

b. *Procedural Limitations: Venue, Limitation Periods, Class Actions, Consolidation, and Discovery*

Many courts strike arbitration agreements because the procedure specified in the agreement appears to them to be unfair to the employee or consumer, often because arbitration would be less favorable than litigation. Again, when designing a procedure, the defendant/respondent's interests also should be taken into account. Accuracy of results – not plaintiff/claimant's victories – should be the goal. Five procedural elements stand out in the cases. The rationales offered here, too, mostly are questionable in light of the policy favoring arbitration.

First, some cases hold that it is substantively unconscionable for an agreement to require that the arbitration be located far from the employee's or consumer's home.¹⁸² Presumably, this discourages the weaker parties from bringing claims. The same thing, however, is true in the litigation context. Parties normally are free to select their litigation forum by agreement, even in adhesion contracts.¹⁸³ There is no apparent reason why they should not be similarly free in arbitration. Moreover, on this issue it is again permissible to sever an offending clause from the remainder of the agreement.¹⁸⁴ A location provision

¹⁸² *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1176-77 (N.D. Cal. 2002); *Bolter v. Super. Ct.*, 104 Cal. Rptr. 2d 888, 894-95 (Ct. App. 2001). *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 566 (Ct. App. 1993). *But see Jones v. Genus Credit Mgmt. Corp.*, 353 F. Supp. 2d 598, 602 (D. Md. 2005).

¹⁸³ *Shute v. Carnival Cruise Lines*, [cite]; *Vega-Perez v. Carnival Cruise Lines*, 361 F. Supp. 2d 1 (D.P.R. 2005); *Intershop Commc'ns v. Super. Ct.*, 127 Cal. Rptr. 2d 847, 850 (Ct. App. 2002); William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 19 (1998).

¹⁸⁴ *Bolter v. Super. Ct.*, 104 Cal. Rptr. 2d 888, 896 (Ct. App. 2001); *Armendariz*, 99 Cal. Rptr. 2d 745; UNIF. COMMERCIAL CODE § 2-302(1) (2000); RESTATEMENT (SECOND) OF CONTRACTS § 208(1) (1981).

seems easy to excise.¹⁸⁵ But some of these courts did not sever the location provision; rather, they refused to enforce the entire arbitration agreement.¹⁸⁶ The courts might be manifesting a pro-plaintiff bias, but (yet again) this in itself would be unjustified. The location rationale, absent severance, would seem questionable enough to be inconsistent with the policy favoring arbitration.

Second, some litigated arbitration agreements set short deadlines for filing claims in arbitration – shorter than the applicable statute of limitations. Courts have held arbitration agreements containing such deadlines to be substantively unconscionable.¹⁸⁷ The problem with these clauses is real, but they should not be held unconscionable so as to destroy the entire arbitration agreement. The refusal to enforce them should be based on the public policy underlying the relevant statute of limitations. The offending deadline should be severed.¹⁸⁸ As with the costs and location cases, impermissible limitations provisions do not make the entire arbitration agreement unconscionable. The policy favoring arbitration would seem in such a case to mandate severance.

Third, classwide arbitration generally is permissible.¹⁸⁹ Some arbitration

¹⁸⁵ *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003); *see* *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878, 890-91 (6th Cir. 2002). These cases put severability on the ground that it was the parties' intentions that the clause could be severed.

¹⁸⁶ *Comb*, 218 F. Supp. 2d 1165; *Patterson*, 18 Cal. Rptr. 2d 563.

¹⁸⁷ *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 266-67 (3d Cir. 2003). A ten day notice-of-claim-requirement was struck down in *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1046-47 (9th Cir. 2001).

¹⁸⁸ *See Swain*, 128 S.W.3d 103.

¹⁸⁹ *See Green Tree Fin. Corp. v. Bazzle*, 1539 U.S. 444 (2003). *See generally* Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration*

agreements, however, prohibit it and are, for this reason, held unconscionable.¹⁹⁰ This prohibition works to the disadvantage of very small claimants, whose claims are not viable for arbitration unless combined with many others. In this respect, arbitration within such an agreement would seem to be inferior to the litigation alternative, especially when the claim may be brought in small claims court.¹⁹¹ But, again, such a comparison is beside the point due to the policy favoring arbitration. Litigation does not set the standard. Rather, the question is whether the prohibition makes out a “gross disparity in the values exchanged”¹⁹² – a contractual analysis of substantive unconscionability as permitted by the FAA § 2. The parties should be free to trade off any discouragement of claims with the advantages of arbitration.

Moreover, the basis for striking down this clause is the statute or procedural rule allowing class actions. The clause therefore may violate public policy. Again, the clause can be severed because its unconscionability, if any, does not pervade the arbitration

Agreements and Class Action Lawsuits, 57 STAN. L. REV. 1677 (2005); Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

¹⁹⁰ *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003); *Discover Bank v. Super. Ct.*, 30 Cal. Rptr. 3d 76, 87 (S.Ct. 2005); *Whitney v. Alltel Commc’ns, Inc.*, No. WD 64196, 2005 WL 1544777, at *8-9 (Mo. Ct. App. July 5, 2005). *But see* *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868, 877-78 (Ga. 2005); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1109 (C.D. Cal. 2002); *Strand v. U.S. Bank Nat’l Ass’n ND*, 693 N.W.2d 918, 926-27 (N.D. 2005).

¹⁹¹ *See generally* Sternlight & Jensen, *supra* note 83. In AAA arbitration under its consumer rules, the arbitration agreement cannot preclude recourse to a small claims court. Am. Arbitration Ass’n, *Supplementary Procedures for Consumer-Related Disputes*, Rule C-1(d) (effective Sept. 15, 2005), Rule C-1(d), <http://www.adr.org/sp.asp?id=22014>.

¹⁹² X-ref.

agreement.¹⁹³ Failing to sever it, as some courts have, may seize on a pretext to disfavor arbitration.

Fourth, at least one court has refused to enforce an arbitration agreement in part due to a prohibition on consolidating claims.¹⁹⁴ In litigation, joinder may be permissible or even mandatory.¹⁹⁵ Again, there is a difference between arbitration and litigation. But the comparison again is beside the point of a sound unconscionability analysis; litigation does not set the standard. In addition, consolidation generally is not allowed in arbitration unless all parties agree to the same arbitration.¹⁹⁶ By prohibiting consolidation in an arbitration agreement, the stronger party simply signals that it will not agree to a consolidated arbitration.¹⁹⁷ The clause in effect exercises a right under the law. It does not

¹⁹³ *Gatton v. T-Mobile USA, Inc.*, No. SACV 03-130 DOC, 2003 WL 21530185, at *13 (C.D. Cal. Apr. 18, 2003).

¹⁹⁴ *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1175-76 (N.D. Cal. 2002).

¹⁹⁵ FED. R. CIV. P. 19-20 (mandatory and permissive joinder, respectively).

¹⁹⁶ *See Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co. of Can.*, 210 F.3d 771, 774 (7 th Cir. 2000); *Cavalier Mfg., Inc. v. Clarke*, 862 So. 2d 634, 642 (Ala. 2003). *But see* Jonathan R. Waldron, Note, *Resolving a Split: May Courts Order Consolidation of Arbitration Proceedings Absent Express Agreement by the Parties?*, 2005 J. DISP. RESOL. 177 (2005).

¹⁹⁷ If the consolidation provision of California's arbitration statute, CAL. CIV. PROC. CODE § 1281.3 (1982), is permissive, as it has been traditionally interpreted to be, the parties should be able to ban consolidation in the arbitration agreement due to the state's policy manifested in the statute. *See Parker v. McCaw*, 24 Cal. Rptr. 3d 55, 63 (Ct. App. 2005) ("A party may not avoid the terms of separately negotiated unambiguous contracts and rewrite them under the authority of California state arbitration procedures contained in section 1281.3.") (internal quotations omitted). In *Yuen v. Super. Ct.*, 18 Cal. Rptr. 3d 127, the court judged consolidation to be an arbitrable issue of contract interpretation. *But see* *Indep. Ass'n of Mailbox Center Owners, Inc. v. Super. Ct.*, No. D045354, 2005 WL 2249918 (Sept. 16, 2005) (ban on group arbitration in a contract of adhesion held to be unconscionable, and therefore, unenforceable under § 1281.3).

disadvantage the weaker party. Using a prohibition on consolidation to refuse enforcement of an arbitration agreement seems like a thin pretext to hide an anti-arbitration bias. Again, such a provision could be severed.

Fifth, some arbitration agreements limit discovery; for example, they may allow each party no more than two depositions.¹⁹⁸ The absence of discovery or limited discovery can be one of arbitration's virtues because it streamlines the proceeding, reducing delay and costs. If enforced, however, a discovery limitation can work, for example, to the disadvantage of an employee asserting a claim of discrimination under a civil rights statute. Consider such a claim based on a statistical argument.¹⁹⁹ The employer will have possession of the relevant data. For a claim of harassment, by contrast, the testimony of the employee may suffice. Under *Gilmer v. Interstate/Johnson Lane Corp.*,²⁰⁰ the discovery limit probably need not be enforced when it denies an avenue for the effective vindication of statutory rights.²⁰¹ In a nonstatutory case, such as one for breach of contract by discharging an employee without cause, effective vindication may not be so hampered, if it is relevant.²⁰² No public policy underlying a statute is in play; the right in question is a private right.²⁰³ Nonetheless, ideally, the extent

¹⁹⁸ *Fitz v. NCR Corp.*, 13 Cal. Rptr.3d 88, 97 (Ct. App. 2004).

¹⁹⁹ See generally DAVID BALDUS, STATISTICAL PROOF OF DISCRIMINATION (1980).

²⁰⁰ 500 U.S. 20 (1991).

²⁰¹ In *Gilmer*, discovery more limited than that allowed in federal courts was held not to preclude arbitration of statutory rights. 500 U.S. at 31. See *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88 (2004).

²⁰² X-ref.

²⁰³ See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1476 (D.C. Cir. 1997) (distinguishing public and private rights subject to arbitration).

of discovery should be decided by the arbitrator in light of the shape of the case and the parties' arguments in order to provide a fair hearing – not in the arbitration agreement *ex ante*. In some – but not all – cases, a limit on discovery may be substantively unconscionable.²⁰⁴ Yet again, it can be severed.

c. Unilateral Rights for the Stronger Party

Some cases strike down arbitration clauses because they allow the stronger party to change the terms unilaterally. For example, a stronger party may be given a right to modify the arbitration agreement.²⁰⁵ Similarly, it may provide for the arbitrator to be selected by one party or from a list provided by one party.²⁰⁶ Some of these limitations are substantively unconscionable. In particular, the arbitrator surely should be a neutral. Allowing the stronger party to name the arbitrator in the arbitration agreement, or to provide a list from which the arbitrator must be chosen, so destroys the integrity of the arbitral proceeding as to “shock the conscience.”

A unilateral right to modify the arbitration agreement is subject to the legal

²⁰⁴ In *Fitz*, the limitation on discovery to two depositions was subject to the power of the arbitrator to allow more if it would otherwise be impossible to conduct a fair hearing. The court found this inadequate to save the arbitration clause. By contrast, in *Martinez v. Master Protection Corp.*, the arbitration agreement limited discovery to one deposition and one document request. The court held that this was not unconscionable. 12 Cal. Rptr. 3d 663, 672 (Ct. App. 2004).

²⁰⁵ *Ramsdell v. Lenscrafters, Inc.*, 135 F. App'x 130, 131 (9th Cir. 2005); *Aguillard v. Auction Mgmt. Corp.*, 884 So. 2d 1257, 1261 (La. Ct. App. 2004).

²⁰⁶ *McMullen v. Meijer, Inc.*, 355 F.3d 485, 493-94 (6th Cir. 2004); *Murray v. United Food and Commercial Workers Int'l Union*, 289 F.3d 297, 302 (4th Cir. 2002); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999); *Graham v. Scissor-Tail, Inc.*, 171 Cal. Rptr. 604, 611 (1981); *Burch v. Second Jud. Dist. Ct.*, 49 P.3d 647, 650-51 (Nev. 2002).

limitation that it must be exercised in good faith.²⁰⁷ The arbitration agreement confers discretion on the stronger party. This discretion must be exercised for a reason that was reasonably expectable by the weaker party at the time of contract formation.²⁰⁸ The good faith limitation on discretion probably does what unconscionability cannot do: It requires the stronger party with a unilateral right to modify to establish and maintain fair arbitral procedures.²⁰⁹ Under this law, however, the question cannot be decided on the basis of the initial arbitration agreement – the one containing the right to modify. It should be decided on the basis of the agreement as modified by the stronger party. Only then can it be determined whether the modification was made in good faith. On the whole, however, though these decisions ignore the good faith check, it cannot be said that they exhibit hostility to arbitration.

d. Substantive Limitations

Some courts have seized upon substantive limitations on the arbitrators, contained in the arbitration clause, as reasons to strike down the arbitration agreement. In some cases, the arbitration agreement limited the remedy the arbitrator could award, excluding consequential or punitive damages.²¹⁰ In one, the agreement imposed a penalty on the

²⁰⁷ *Hooters*, 173 F.3d at 938; *see Battels v. Sears Nat'l Bank*, 365 F.Supp.2d 1205 (M.D. Ala. 2005); *see also Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 284-85 (Ct. App. 1998).

²⁰⁸ *See generally* STEVEN J. BURTON & ERIC G. ANDERSEN, *CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH AND ENFORCEMENT* (1995).

²⁰⁹ *Hooters* case.

²¹⁰ *Leonard v. Terminix Int'l. Co.*, 854 So. 2d 529, 538 (Ala. 2002); *Pardee Constr. Co. v. Super. Ct.*, 123 Cal. Rptr. 2d 288, 295-96 (Ct. App. 2002); *W. Va. ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 275-76 (W.Va. 2002); *see Harper v. Ultimo*, 7 Cal. Rptr. 3d 418, 423 (Ct. App. 2003).

weaker party for failing to arbitrate a claim.²¹¹ These are substantive matters. They have nothing to do with the arbitration procedure. Limiting a remedy is allowable under contract law because the law of contract remedies generally consists of default rules. It is even permissible under statutes such as RICO.²¹² The substantive question may turn on whether the remedy as limited fails of its essential purpose or is an unconscionable term.²¹³ Unless it does, the limitation is effective in litigation as well as arbitration.²¹⁴ It therefore is not a valid reason to strike an arbitration agreement.

A disallowed limitation on the remedy should result in striking the limitation from the contract, as in litigation, not in refusing to enforce the entire arbitration agreement, as the courts did in these cases. A penalty for not arbitrating is unenforceable under general contract law principles prohibiting agreed damages that are penalties.²¹⁵ Again, it is not enforceable in court, either. It therefore is not a valid reason to strike an arbitration agreement. In the penalty cases in courts, moreover, the penalty clause is stricken from the contract, which is otherwise enforceable.²¹⁶ Striking down an entire arbitration clause due to the inclusion of such a clause is not justified under general contract law. It, too, is a pretext.

e. Miscellaneous Reasons

²¹¹ D.R. Horton v. Green, 96 P.3d 1159, 1165 (Nev. 2004).

²¹² PacifiCare Health Sys, Inc. v. Book, 538 U.S. 401, 405-06 (2003).

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²¹⁵ Farnsworth Treatise.

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There are other reasons courts have given that do not fall into one of the above categories. Several, nonetheless, are suspect.

In one case, the arbitration agreement provided that an employee was required to submit its case to the employer as a condition precedent to arbitrating. The court held that this gave the employer an unfair “peek” and rendered the arbitration agreement substantively unconscionable.²¹⁷ The court could have severed the condition precedent without upsetting the balance in the arbitration agreement, but it did not. More important, the employer may have had a legitimate business need for such a condition. Making the case to the employer before starting an adversarial proceeding permits the employer (a) to concede and take corrective or compensatory action, (b) to propose noncompulsory methods of alternative dispute settlement, such as mediation,²¹⁸ or (c) to enter into direct settlement negotiations. Any of these events could maintain the relationship between the two parties, which might save the employee from finding another job and the employer from finding another employee. By not examining the plausible justifications for the condition, the court may be reaching its conclusion without due regard for contract law and the policy favoring arbitration.

A few other courts have been more straightforward about their prejudice. Thus, one announced that negligence claims covered by the arbitration agreement were better decided by a jury.²¹⁹ Another held that arbitration agreements in employment contracts

²¹⁷ *Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 307-08 (Ct. App. 2004).

²¹⁸ However, one court has held that a requirement of mediation before arbitration is substantively unconscionable. *Garrett v. Hooters-Toledo*, 295 F. Supp. 2d 774, 782-83 (N.D. Ohio 2003).

²¹⁹ *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004).

are presumptively substantively unconscionable.²²⁰ And a third will not find an arbitration agreement enforceable unless it was concluded in a “clear and unmistakable manner,”²²¹ another limitation not found in general contract law and inconsistent with *Allied-Bruce*.

f. Cumulative Effects

Most cases examined for this study do not find unconscionability for one and only one of the above reasons. Two or more reasons are usually given. Consequently, it should be considered whether the cumulative effect of several of the above reasons can make an arbitration agreement substantively unconscionable when any one of the reasons does not suffice. The short answer is that, logically, the whole cannot be greater than its parts. Cumulating a number of *invalid* reasons cannot make out a *valid* reason.

It is a different question, however, whether a court can cumulate a number of valid reasons, each of which alone may have inadequate weight to tip the scales in favor of a finding of unconscionability. The above discussion distinguishes valid from invalid reasons, not weightier from less weighty reasons. Consequently, it would seem, many of the decisions cited were erroneous under the law and established policy.

Conclusion

²²⁰ *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 (9th Cir. 2003). This decision may be inconsistent with *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105 (2001) (FAA and its policy favoring arbitration applies to employment contracts involving commerce except for those of transportation workers).

²²¹ *Quiles v. Fin. Exch. Co.*, 879 A.2d 281, 287 (Pa. Super. Ct. 2005).

There is a new judicial hostility to arbitration in noncommercial cases. Many courts, when asked to enforce an arbitration agreement, seize upon the unconscionability doctrine as a pretext to refuse enforcement. The dispute then goes to litigation despite the parties' agreement to arbitrate. By refusing to compel arbitration under a valid agreement, the courts manifestly prefer litigation to arbitration. This violates the policy favoring arbitration, which is based in the FAA § 2 and several Supreme Court precedents.